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Witkin California Procedure, Fifth Edition

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CHAPTER VII - Proceedings Without Trial

Witkin Summary of California Law

I. MOTIONS

A. In General.

1. Application for Order.

6 Witkin Cal. Proc. PWT § 1

[§ 1] Application for Order.

A direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. An application for an order is a motion. (*C.C.P. 1003*; see *C.C.P. 1064* [same definition applies to application in special proceeding]; *C.E.B.*, 1 Civil Proc. Before Trial 4th, §12.2 et seq.; *Cal. Civil Practice*, 2 Procedure, §14:1; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §6.1 et seq.; *Rutter Group*, 2 Civil Proc. Before Trial §9:2; *Rutter Group*, Civil Proc. Before Trial, Forms, Chap. 9A; *56 Am.Jur.2d (2000 ed.)*, *Motions, Rules, and Orders* §1 et seq.; on federal procedure, see *F.R. Civ. P.*, *Rule 7(b)*; *5 Federal Practice & Procedure (Wright & Miller)* §1190 et seq.; *27A Federal Procedure*, L.Ed., §62:382; *Rutter Group*, 3 Federal Civil Proc. Before Trial, Chap. 12; on nature of order, see *infra*, §44; on rendition and entry, see *7 Cal. Proc. (5th)*, *Judgment*, §44 et seq.)

Most applications for orders are made on notice (*infra*, §7 et seq.), though some are made *ex parte* (*infra*, §58 et seq.), and some dealing with evidence or other matters arising in the course of the trial are made orally in court and determined at that time, unless submitted for future decision. The motion is deemed made when the notice is duly served and filed. (See *infra*, §38.)

An *ex parte* application for an order to show cause is an alternative method of seeking an order that has long been recognized by California courts as the functional equivalent of a notice of motion, and is customary in some proceedings (*infra*, §60 et seq.).

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I. MOTIONS

A. In General.

2. Types of Motions.

6 *Witkin Cal. Proc. PWT* § 2

[§ 2] Types of Motions.

In general, motion procedure is governed by *C.C.P. 1003* et seq. and by the Civil Law and Motion Rules (C.R.C., Rules 3.1100 et seq.). Local court rules and policies also control motion practice to a great extent. (See Rutter Group, 2 Civil Proc. Before Trial §9:7 et seq.) However, because of the large number of motions, many of which have their own procedure prescribed by statute, much of motion practice has developed in connection with particular motions rather than as a general body of rules. (See C.R.C., Rules 3.1320 et seq.; C.E.B., 1 Civil Proc. Before Trial 4th, Chap. 12; Rutter Group, Civil Proc. Before Trial, Forms, Chap. 9A; 18 Am.Jur. P.P. Forms (2005 ed.), Motions, Rules, and Orders, Form 1 et seq.)

The principal motions covered in this work or in *California Evidence* include the following:

- (1) Pleading motions. (See 4 *Cal. Proc.* (5th), *Pleading*, §6; on motion for judgment on the pleadings, see *infra*, §185 et seq.)
- (2) Motion to quash summons. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §217 et seq.)
- (3) Motion for relief from default. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.)
- (4) Motion for injunction. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §368 et seq.)
- (5) Motion for change of venue. (See 3 *Cal. Proc.* (5th), *Actions*, §905 et seq.)
- (6) Motion to peremptorily challenge judge. (See 2 *Cal. Proc.* (5th), *Courts*, §133.)
- (7) Attorney's motion to withdraw. (See 1 *Cal. Proc.* (5th), *Attorneys*, §70.)
- (8) Motion to disqualify counsel. (See 1 *Cal. Proc.* (5th), *Attorneys*, §105.)
- (9) Discovery motions. (See 2 *Cal. Evidence* (4th), *Discovery*, §28.)

- (10) Motions to dismiss for lack of prosecution. (See *infra*, §315 et seq.)
- (11) Motion for summary judgment. (See *infra*, §201 et seq.)
- (12) Motions concerning arbitration. (See *infra*, §499 et seq.)
- (13) Motions concerning trial dates. (See 7 *Cal. Proc.* (5th), *Trial*, §§32 et seq., 76.)
- (14) Motion for jury trial. (See 7 *Cal. Proc.* (5th), *Trial*, §110.)
- (15) Motion in limine to exclude evidence at trial. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §368 et seq.)
- (16) Motion for prior trial of certain issues. (See 7 *Cal. Proc.* (5th), *Trial*, §154 et seq.)
- (17) Motion for nonsuit. (See 7 *Cal. Proc.* (5th), *Trial*, §412 et seq.)
- (18) Motion for judgment. (See 7 *Cal. Proc.* (5th), *Trial*, §430 et seq.)
- (19) Motion for judgment notwithstanding verdict. (See 7 *Cal. Proc.* (5th), *Trial*, §436 et seq.)
- (20) Motion for new trial. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §18 et seq.)
- (21) Motion for correction and amendment of judgment. (See 7 *Cal. Proc.* (5th), *Judgment*, §74 et seq.)
- (22) Motion to vacate and enter different judgment. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §139 et seq.)
- (23) Motion for equitable relief against judgment. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §219 et seq.)
- (24) Motion for enforcement of settlement. (See *infra*, §115 et seq.)
- (25) Motion for writ of possession. (See 7 *Cal. Proc.* (5th) *Provisional Remedies*, §255 et seq.)
- (26) Motion to recover costs of enforcing judgment. (See 6 *Cal. Proc.* (5th), *Enforcement of Judgment*, §48.)
- (27) Motions and applications in reviewing court. (See 9 *Cal. Proc.* (5th), *Appeal*, §727 et seq.)

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I. MOTIONS

A. In General.

3. Main Action of Proceeding.

6 *Witkin Cal. Proc. PWT* § 3

[§ 3] Main Action of Proceeding.

A motion may be made only in a pending main action or proceeding. "A motion is not an independent right or remedy; it is confined to incidental matters in the progress of a cause. A motion relates to some question that is collateral to the main object of the action and is connected with and dependent upon the principal remedy. ... It is not consonant with regular procedure to raise in a motion wholly distinct and independent matters which generally should be the subject of a formal petition or complaint." (*Donald J. v. Evna M.* (1978) 81 C.A.3d 929, 934, 147 C.R. 15 [proceeding for clarification of visitation rights; improper to seek paternity declaration and change of child's name]; *Killian v. Millard* (1991) 228 C.A.3d 1601, 1606, 279 C.R. 877 [breach of contract action; defendant could not move to void contracts between plaintiffs and third parties funding action]; see *People v. Sparks* (1952) 112 C.A.2d 120, 121, 246 P.2d 64 [motion could not be brought after termination of action].)

Except as provided in C.C.P. 166, "motions must be made in the court in which the action is pending." (C.C.P. 1004; on C.C.P. 166, governing power of judge to hear and determine certain motions in chambers, see 2 *Cal. Proc.* (5th), *Courts*, §23.)

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I. MOTIONS

A. In General.

4. Party to Proceeding.

6 *Witkin Cal. Proc. PWT* § 4

[§ 4] Party to Proceeding.

Ordinarily, only a party to the proceeding may make a motion. (See *Chase v. Superior Court* (1962) 210 C.A.2d 872, 876, 27 C.R. 383 [discharged attorney cannot move for order to pay fee or costs out of proceeds of action; order is in excess of jurisdiction]; *Beshara v. Goldberg* (1963) 221 C.A.2d 392, 395, 34 C.R. 501 [third-party claimant could not move to quash writ of attachment]; but see 9 *Cal. Proc.* (5th), *Appeal*, §26 [nonparty aggrieved by judgment may move to vacate and make self party to record in order to appeal].)

In *Difani v. Riverside County Oil Co.* (1927) 201 C. 210, 214, 256 P. 210, after default judgment was rendered against defendant corporation, a creditor and a shareholder obtained an order to show cause why the default should not be vacated. *Held*, the order was properly stricken from the files.

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I. MOTIONS

A. In General.

5. Time of Motion.

6 *Witkin Cal. Proc. PWT* § 5

[§ 5] Time of Motion.

There are no general rules governing the time when a motion must be made. The periods within or beyond which various relief may be sought by motion are specified by statute, and these are controlling in the particular situations. The following are illustrative:

- (1) Motion to quash summons. (*C.C.P. 418.10*, 2 *Cal. Proc.* (5th), *Jurisdiction*, §217 et seq.)
- (2) Motion to strike complaint. (*C.C.P. 435*, 5 *Cal. Proc.* (5th), *Pleading*, §1014.)
- (3) Motion for summary judgment. (*C.C.P. 437c(a)*, *infra*, §213 et seq.)
- (4) Motion for relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect. (*C.C.P. 473(b)*, 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.)
- (5) Motion for new trial. (*C.C.P. 659*, 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §53 et seq.)

C.C.P. 1005(b) provides time requirements for serving and filing notice of a motion (*infra*, §15); *C.C.P. 1054* and *1054.1* govern extension of time to take procedural steps, including giving notice of a motion (*infra*, §18); *C.C.P. 1005.5* governs the time when a motion is deemed made (*infra*, §38).

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I. MOTIONS

A. In General.

6. Required Papers and Elements.

6 *Witkin Cal. Proc. PWT* § 6

[§ 6] Required Papers and Elements.

(1) *Papers Supporting Motion.* Papers filed in support of a motion must consist of at least the following items: (a) the motion itself; (b) a notice of hearing (*infra*, §7 et seq.); and (c) a memorandum in support of the motion. (C.R.C., Rule 3.1112(a).) Other papers may be filed in support of the motion, including declarations, exhibits, appendices, and pleadings. (C.R.C., Rule 3.112(b).)

(2) *Content of Motion.* A motion must do all of the following: (a) identify the moving party or parties; (b) name the parties to whom the motion is addressed; (c) briefly state the basis for the motion and the relief sought; and (d) if applicable, state the specific portion of the pleading being challenged. (C.R.C., Rule 3.1112(d).)

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I. MOTIONS

B. Notice of Motion.

1. Necessity and Waiver.

a. General Requirement of Notice.

6 *Witkin Cal. Proc. PWT* § 7

[§ 7] General Requirement of Notice.

(1) *Where Statute Requires Notice.* Some statutes expressly call for a notice of motion, or, by providing that an order can only be made on notice, impliedly require a notice of motion or order to show cause. (See, e.g., *C.C.P.* 435 [motion to strike complaint]; *C.C.P.* 418.10 [motion to quash summons]; *C.R.C.*, Rule 3.1112(a) [papers filed in support of motion must include notice of hearing]; *C.C.P.* 485.240 [motion to discharge attachment]; *O'Brien v. Cseh* (1983) 148 *C.A.3d* 957, 961, 196 *C.R.* 409 [motion for sanctions under *C.C.P.* 128.5].)

(2) *Where Rights Are Affected.* Even if no statute makes notice a condition, notice is usually considered essential in any application affecting the rights of the adverse party, unless there is pressing necessity for dispensing with it. In *McDonald v. Severy* (1936) 6 *C.2d* 629, 59 *P.2d* 98, where a dismissal was vacated on an ex parte showing of fraud, the court noted that *C.C.P.* 473 expressly requires notice, but added in dictum: "The general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse party." (6 *C.2d* 631.) (See *Beyerbach v. Juno Oil Co.* (1954) 42 *C.2d* 11, 28, 265 *P.2d* 1 [notice is required for motion to amend prior judicial order regularly made]; *Caledonian Ins. Co. v. Superior Court* (1956) 140 *C.A.2d* 458, 461, 295 *P.2d* 49, 2 *Cal. Proc.* (5th), *Jurisdiction*, §114, citing the text and *McDonald*; *People v. Hadley* (1967) 257 *C.A.2d* Supp. 871, 875, 64 *C.R.* 777, citing the text; *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 156 *C.A.3d* 82, 85, 202 *C.R.* 571, citing the text [ex parte orders barring depositions under discovery statute; statute's use of term "motion" was interpreted as imposing usual notice and hearing requirements]; *Carabini v. Superior Court* (1994) 26 *C.A.4th* 239, 243, 31 *C.R.2d* 520 [notice is required for motion to certify class action, due to significance of impact on viability of case].)

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B. Notice of Motion.

1. Necessity and Waiver.

b. Waiver of Notice.

6 *Witkin Cal. Proc. PWT § 8*

[§ 8] Waiver of Notice.

Just as noncompliance with the jurisdictional requirement of service of process may be cured by a party's general appearance in the action (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §198), the less serious defect of failure to serve proper notice of a motion may be cured by the appearance of counsel and participation in the hearing without objection. (*Lacey v. Bertone* (1949) 33 C.2d 649, 651, 203 P.2d 755; *Mann v. Cracchiolo* (1985) 38 C.3d 18, 27, 210 C.R. 762, 694 P.2d 1134; *Simmons v. Simmons* (1941) 45 C.A.2d 695, 696, 114 P.2d 659 [reopening on court's own motion of order to show cause hearing; voluntary participation by counsel was waiver]; *Estate of Pailhe* (1952) 114 C.A.2d 658, 661, 251 P.2d 76; *Harabedian v. Superior Court* (1961) 195 C.A.2d 26, 33, 15 C.R. 420, quoting the text; *Farrar v. McCormick* (1972) 25 C.A.3d 701, 705, 102 C.R. 190, citing the text; *Tate v. Superior Court* (1975) 45 C.A.3d 925, 930, 119 C.R. 835 [rule applies even if there was complete absence of notice]; *Adams v. Roses* (1986) 183 C.A.3d 498, 507, 228 C.R. 339 [following *Tate*]; *Vlahovich v. Cruz* (1989) 213 C.A.3d 317, 320, 261 C.R. 565; *Carlton v. Quint* (2000) 77 C.A.4th 690, 697, 91 C.R.2d 844 [plaintiff waived claim of inadequate notice by filing opposition to defendant's motion for summary judgment, appearing and arguing at hearing, failing to request continuance, and failing to claim prejudice due to insufficient notice]; *Reedy v. Bussell* (2007) 148 C.A.4th 1272, 1288, 56 C.R.3d 216 [party waived issue of improper notice period by responding to motion with written opposition and by appearing at commencement of trial where trial court took motion under submission].)

However, the doctrine of "special appearance" also applies to motion procedure. Hence, if counsel appears not to argue the merits but solely to object to the sufficiency of the notice, the defect is not waived. (*Bohn v. Bohn* (1913) 164 C. 532, 539, 129 P. 981 ["Where the appearance in opposition to a motion is for this limited purpose, it does not constitute a waiver"].) (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §205.)

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I. MOTIONS

B. Notice of Motion.

2. Form and Content.

a. Formal Requisites.

6 *Witkin Cal. Proc. PWT* § 9

[§ 9] Formal Requisites.

(1) *Writing*. "Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based." (*C.C.P. 1010*; see Cal. Civil Practice, 2A Procedure, §14:8; C.E.B., 1 Civil Proc. Before Trial 4th, §12.9 et seq.; C.E.B., Civ. Lit. Forms, §10.1; Rutter Group, 2 Civil Proc. Before Trial §9:19 et seq.; 18 Am.Jur. P.P. Forms (2005 ed.), Motions, Rules, and Orders, Form 1 et seq.; on federal procedure, see *F.R. Civ. P., Rule 7(b)(1)*; 5 Federal Practice & Procedure (Wright & Miller) §1191 et seq.; 27A Federal Procedure, L.Ed., §62:387 et seq.)

(2) *Format*. Format requirements, such as size of paper, pagination and title, are the same for motions as for other papers presented for filing and are governed by C.R.C., Rules 2.100 et seq. (See 4 *Cal. Proc. (5th), Pleading*, §13 et seq.)

(3) *Time and Place of Hearing and Trial Date*. "The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable" must appear immediately below the case number on the first page. If the trial has been set, the notice must also state the trial date. (C.R.C., Rule 3.1110(b); see C.E.B., 1 Civil Proc. Before Trial 4th, §12.18 et seq.; Rutter Group, 2 Civil Proc. Before Trial §9:30 et seq.) Failure to specify the time of the hearing is a ground for denying the motion. (*Bohn v. Bohn* (1913) 164 C. 532, 536, 129 P. 981 [opposing party's appearance to object to sufficiency of notice held analogous to special appearance, so that defect was not waived].)

(4) *Relief Sought and Grounds*. "A notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order." (C.R.C., Rule 3.1110(a); see *infra*, §10.)

(5) *Accompanying Papers*. The notice must identify the papers on which the motion is based, and if those papers have not previously been served on the party to be notified and were not filed by that party, a copy of the paper must accompany the notice. (*C.C.P. 1010*; see *Alvak Enterprises v. Phillips* (1959) 167 C.A.2d 69, 74, 334 P.2d 148; C.E.B., 1 Civil Proc. Before Trial 4th, §12.27.) Attached papers other than exhibits must be specified below the case number on the first page; documents bound together must be consecutively paginated. A previously filed paper must be referred to by date and title. (C.R.C., Rule 3.1110.) (On memorandum in support of motion, see *infra*, §11; on documentary

evidence, see *infra*, §§41, 42.)

(6) *Proposed Order*. A proposed order may be submitted, and may be required by local rule. (See C.R.C., Rule 3.1113(n); Cal. Civil Practice, 2 Procedure, §14:63; C.E.B., 1 Civil Proc. Before Trial 4th, §12.106; Rutter Group, 2 Civil Proc. Before Trial §9:81.2 et seq.)

(7) *Signature*. A notice of motion must be signed by at least one attorney of record, or if the party is unrepresented, by the party. (C.C.P. 128.7(a).) Even in the absence of statute or rule, it is the general practice for the attorney, not the party, to sign notices required in legal proceedings. (See *Jansson v. National Steamship Co.* (1917) 34 C.A. 483, 486, 168 P. 151; *Harris v. Minnesota Inv. Co.* (1928) 89 C.A. 396, 401, 265 P. 306; C.E.B., 1 Civil Proc. Before Trial 4th, §12.28; Rutter Group, 2 Civil Proc. Before Trial §9:42.2.)

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B. Notice of Motion.

2. Form and Content.

b. Statement of Grounds.

6 Witkin Cal. Proc. PWT § 10

[§ 10] Statement of Grounds.

(1) *Requirement.* The notice must state, in the opening paragraph, the ground on which the motion is made. (C.C.P. 1010; C.R.C., Rule 3.110(a).)

A total failure to state the grounds for the motion is a fatal defect. (*Traders Credit Corp. v. Superior Court* (1931) 111 C.A. 663, 665, 296 P. 99.) Cases taking a restrictive view have held that only the grounds specified in the notice of motion may be considered by the court. (See *Westphal v. Westphal* (1943) 61 C.A.2d 544, 550, 143 P.2d 405; *Castagnoli v. Castagnoli* (1954) 124 C.A.2d 39, 41, 268 P.2d 37; *Taliaferro v. Riddle* (1959) 167 C.A.2d 567, 570, 334 P.2d 950; *Gonzales v. Superior Court* (1987) 189 C.A.3d 1542, 1545, 235 C.R. 106.)

(2) *Liberal Construction of Notice.* A number of decisions have held the notice sufficient even though the grounds are not specified in the notice itself, where they appear in documents that are referred to by the notice, and attached to it or included in the record. (See *Savage v. Smith* (1915) 170 C. 472, 474, 150 P. 353; *Shields v. Shields* (1942) 55 C.A.2d 579, 583, 130 P.2d 982; *Ramey v. Myers* (1958) 159 C.A.2d 82, 85, 323 P.2d 805; *Bergloff v. Reynolds* (1960) 181 C.A.2d 349, 357, 5 C.R. 461; *Tarman v. Sherwin* (1961) 189 C.A.2d 49, 52, 10 C.R. 787, citing the text ["a notice should be deemed adequate to meet the code requirements if it fairly advises opposing counsel of the issues to be raised"]; *Estate of Parks* (1962) 206 C.A.2d 623, 630, 24 C.R. 250.)

"Even though the notice of motion fails to state a particular ground for the motion, where the notice states, as here, that the motion is being made upon the notice of motion and accompanying papers and the record, and these papers and the record support that particular ground, the matter is properly before the court and the defect in the notice of motion should be disregarded." (*Carrasco v. Craft* (1985) 164 C.A.3d 796, 808, 210 C.R. 599; see 366-386 Geary St., *L.P. v. Superior Court* (1990) 219 C.A.3d 1186, 1200, 268 C.R. 678 [quoting *Carrasco*].)

(3) *Limitation Applied To Preserve Special Appearance.* The theory that neither an affidavit nor oral argument may enlarge the grounds for a motion has been applied in favor of the moving party in cases where the party appeared specially to object to a lack of personal jurisdiction, but also raised arguments attacking subject matter jurisdiction. (*Hernandez v. National Dairy Products Co.* (1954) 126 C.A.2d 490, 493, 272 P.2d 799; *Josephson v. Superior Court*

(1963) 219 C.A.2d 354, 362, 33 C.R. 196; see 2 Cal. Proc. (5th), *Jurisdiction*, §206.)

(4) *Waiver of Defect*. A defect in the notice of motion may, of course, be waived by an adverse party who participates in the hearing on the motion without objection. (See *Hecq v. Conner* (1928) 203 C. 504, 506, 265 P. 180; *Fredrickson v. Superior Court* (1952) 38 C.2d 593, 598, 241 P.2d 541; *Hammond Lumber Co. v. Bloodgood* (1929) 101 C.A. 561, 563, 281 P. 1101; *Perez v. Perez* (1952) 111 C.A.2d 827, 828, 245 P.2d 344; *supra*, §8.)

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I. MOTIONS

B. Notice of Motion.

2. Form and Content.

c. Supporting Memorandum.

6 *Witkin Cal. Proc. PWT* § 11

[§ 11] Supporting Memorandum.

(1) *Requirement.* The moving party must serve and file a supporting memorandum (formerly "points and authorities") with a notice of motion, except for a motion listed in C.R.C., Rule 3.1114 (specified motions on Judicial Council forms). (C.R.C., Rule 3.1113(a); see C.E.B., 1 Civil Proc. Before Trial 4th, §12.30 et seq.; Rutter Group, 2 Civil Proc. Before Trial §9:64 et seq.; on requirement for new trial motions, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §66.) The trial court "may construe the absence of a memorandum as an admission that the motion ... is not meritorious and cause for its denial." (C.R.C., Rule 3.1113(a); see *Jermstad v. McNelis* (1989) 210 C.A.3d 528, 538, 258 C.R. 519 [failure to file memorandum supporting demurrer was deemed waiver].) However, the trial judge may consider the merits of a motion notwithstanding the lack of a supporting memorandum. (See *Proulx v. De Moti* (1951) 106 C.A.2d 265, 270, 234 P.2d 1009 [motion granted].)

(2) *Contents.* The memorandum must contain "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (C.R.C., Rule 3.1113(b).) (See *Hope Int. University v. Superior Court* (2004) 119 C.A.4th 719, 731, 14 C.R.3d 643 [rule does not require that supporting memorandum be organized by cause of action; thus, trial judge erred in refusing to consider summary adjudication on ground that defendant failed to organize memorandum in that way].)

Official case citations are required. (C.R.C., Rule 3.1113(c).) If an authority is cited other than California cases, statutes, and constitutional provisions, or state or local rules, a copy must be attached to the papers in which the authority is cited and tabbed as an exhibit. These requirements also apply to a California case cited before publication in the advance sheets of the Official Reports. (C.R.C., Rule 3.1113(j).)

(3) *Length.* Except with court permission, an opening or responding memorandum may not exceed 15 pages and a reply or closing memorandum may not exceed 10 pages. These page limits do not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service. (C.R.C., Rule 3.1113(d).) A memorandum exceeding 10 pages must include a table of contents and table of authorities. A memorandum exceeding 15 pages must include an opening summary. (C.R.C., Rule 3.1113(f).)

A party may apply to the court for permission to file a longer memorandum. The application must be made at least 24 hours before the memorandum is due and must state reasons why the argument cannot be made within the statutory limit. It may be made *ex parte*, but written notice to the other party is required. (C.R.C., Rule 3.1113(e).)

A memorandum that exceeds these page limits must be filed and considered in the same manner as a late-filed paper. (C.R.C., Rule 3.1113(g).)

(4) *Pagination.* Where a memorandum includes a table of contents and a table of authorities, the caption page or pages must not be numbered. The pages of the tables must be numbered consecutively using lower case Roman numerals starting on the first page of the tables. The pages of the text must be numbered consecutively using Arabic numerals starting on the first page of the text. (C.R.C., Rule 3.1113(h).)

(5) *References.* References to exhibits or declarations in supporting or opposing papers must reference the number or letter of the exhibit, the specific page, and the paragraph or line number. (C.R.C., Rule 3.1113(k).)

(6) *Judicial Notice.* A request for judicial notice must comply with C.R.C., Rule 3.1306(c) (see *infra*, §43). (C.R.C., Rule 3.1113(l).)

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a. Nature of Requirement.

1. In General.

6 *Witkin Cal. Proc. PWT* § 12

[§ 12] In General.

(1) *Requirement.* The notice of motion is both served and filed. (*C.C.P. 1005(b)*; C.R.C., Rule 3.1300(a); see C.R.C., Rule 1.21(b), *infra*, §20 [defining "serve and file"]; C.R.C., Rule 3.254 [duty of first plaintiff, where more than two parties have appeared, to maintain current list of parties and addresses for service of notice]; C.E.B., 1 Civil Proc. Before Trial 4th, §12.69 et seq.; Rutter Group, 2 Civil Proc. Before Trial §9:82 et seq.; on filing requirements, see *infra*, §33.)

(2) *Waiver.* Defects in the manner or proof of service are waived by contesting the motion on the merits without objection. (*Otsuka v. Balangue* (1949) 92 C.A.2d 788, 792, 208 P.2d 65.)

(3) *Effect of Failure To Appear.* A notice or paper need not be served on a party "whose default has been duly entered or who has not appeared in the action or proceeding." (*C.C.P. 1010*; *Lilienkamp v. Superior Court* (1939) 14 C.2d 293, 302, 93 P.2d 1008; *Hanson v. Hanson* (1960) 178 C.A.2d 756, 757, 3 C.R. 179, citing the text; on federal procedure, see *F.R. Civ. P., Rule 5(a)*; 4B Federal Practice & Procedure (Wright & Miller) §1144.) *C.C.P. 1014* contains a similar proviso: "Where a defendant has not appeared, service of notice or papers need not be made upon the defendant." (See *Miller v. Hale* (1961) 193 C.A.2d 567, 571, 14 C.R. 472; cf. *McDonald v. Severy* (1936) 6 C.2d 629, 631, 59 P.2d 98, *supra*, §7 [proviso held inapplicable to more serious steps such as motion to set aside dismissal with prejudice].)

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a. Nature of Requirement.

2. Service on Attorney.

aa. General Rule.

6 *Witkin Cal. Proc. PWT* § 13

[§ 13] General Rule.

A summons, writ, subpoena, or other process necessary for personal jurisdiction or intended as the basis of a contempt adjudication must be served as provided in *C.C.P. 413.10* et seq. (3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.). However, if a party has appeared in the action and has an attorney, an ordinary procedural paper or notice must be served on the attorney and not the party. (*C.C.P. 1015*; *C.R.C.*, Rule 1.21(a); *Widener v. Hartnett* (1938) 30 *C.A.2d* 165, 168, 85 *P.2d* 925; *Lyydikainen v. Industrial Acc. Com.* (1939) 36 *C.A.2d* 298, 301, 97 *P.2d* 993; *Reynolds v. Reynolds* (1943) 21 *C.2d* 580, 583, 134 *P.2d* 251; *Russ v. Russ* (1945) 68 *C.A.2d* 400, 405, 156 *P.2d* 767; *Gortner v. Gortner* (1976) 60 *C.A.3d* 996, 999, 131 *C.R.* 919, citing the text; on federal procedure, see *F.R. Civ. P.*, Rule 5(b); 4B *Federal Practice & Procedure* (Wright & Miller) §1145; 26 *Federal Procedure*, L.Ed., §65:220.)

In *Conae v. Conae* (1952) 109 *C.A.2d* 696, 241 *P.2d* 266, the judge issued an order to show cause why temporary alimony and suit money should not be granted and, following local practice, ordered it personally served on the husband at least 5 days before the hearing. *Held*, service on the husband's attorney was proper; the local rule, in conflict with *C.C.P. 1015*, was not controlling. (109 *C.A.2d* 697.)

In *Kottemann v. Kottemann* (1957) 150 *C.A.2d* 483, 310 *P.2d* 49, defendant husband's attorneys of record took an appeal from an interlocutory divorce decree. But, in response to service of orders to show cause after failure to pay alimony and attorneys' fees, they notified plaintiff's counsel that they had withdrawn as the husband's attorneys except as to matters pending on appeal. *Held*, service on them was proper. Having appeared generally, their later attempt to limit their authority in this informal manner was ineffective. (150 *C.A.2d* 486.)

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2. Service on Attorney.

bb. Exceptions.

6 *Witkin Cal. Proc. PWT* § 14

[§ 14] Exceptions.

Service is not made on the attorney in the following situations:

(1) *Nonresident Party Has No Attorney*. When the party is a nonresident and has no attorney. Service may be made on the clerk. "If the sole attorney for a party is removed or suspended from practice, then the party has no attorney" for this purpose. (*C.C.P. 1015*.)

(2) *Attorney's Address Is Unknown*. When the party's sole attorney has no known office in the state and has not filed an address for service of notices and papers. Service may be made on the clerk. If the attorney has filed an address, service at that place is permissible. (*C.C.P. 1015*.)

(3) *Attorney No Longer Represents Party*. When a former attorney has ceased to represent the party. (*Spencer v. Barnes* (1935) 6 *C.A.2d* 35, 37, 43 *P.2d* 847.)

(4) *Judgment Has Been Entered in Family Law Matter*. In family law matters, after entry of judgment. Thus, modifications or other orders are not valid unless the required notice is given "in the same manner as the notice is otherwise permitted by law to be served, upon the party." Service on the attorney of record "is not sufficient." (*Family C. 215*; see *In re Marriage of Gabriel* (1975) 50 *C.A.3d* 556, 558, 123 *C.R. 454* [statute is not limited to motions seeking modification of decree; it applies to proceeding to determine spousal support arrearages]; *Gortner v. Gortner* (1976) 60 *C.A.3d* 996, 1000, 131 *C.R. 919* [statute applies to motion to vacate child support order]; *In re Marriage of Kreiss* (1990) 224 *C.A.3d* 1033, 1038, 274 *C.R. 226* [motion to terminate spousal support and determine pension rights; service of notice on attorney is insufficient]; cf. *Ruszovan v. Ruszovan* (1969) 268 *C.A.2d* 902, 906, 74 *C.R. 507* [statutory requirement was waived where attorney accepted service and obtained stipulation for continuance].) (On notice requirements of attorney following withdrawal in family law matter after final judgment, see *C.C.P. 285.1*; 1 *Cal. Proc.*(5th), *Attorneys*, §71.)

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b. Time of Service.

1. Required Period Before Hearing.

6 *Witkin Cal. Proc. PWT § 15*

[§ 15] Required Period Before Hearing.

(1) *General Requirement.* *C.C.P. 1005(b)* sets the following time requirements for motion papers, which apply "[u]nless otherwise ordered or specifically provided by law":

- (a) Moving and supporting papers must be served and filed at least 16 court days before the hearing.
- (b) Opposing papers must be filed with the court and served on each party at least 9 court days before the hearing.
- (c) Reply papers must be filed with the court and served on each party at least 5 court days before the hearing.
- (d) The court or judge may prescribe a shorter time.

(2) *Special Requirements.* The following motions have special requirements:

(a) Motion to quash summons, to stay or dismiss action on ground of inconvenient forum, or to dismiss action for delay in prosecution: notice must designate date for making motion no more than 30 days after filing of notice. (*C.C.P. 418.10(b)*, 2 *Cal. Proc.* (5th), *Jurisdiction*, §218.)

(b) Motion for summary judgment; service must be at least 75 days before hearing. (*C.C.P. 437c(a)*, *infra*, §215.)

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2. Shortening Time.

6 *Witkin Cal. Proc. PWT* § 16

[§ 16] Shortening Time.

The notice period before the hearing on a motion may be shortened by stipulation of the parties, or by obtaining an order shortening time, usually on an ex parte application. (*C.C.P. 1005(b)* [court may "prescribe a shorter time"]; on ex parte applications, see *infra*, §58 et seq.) Local rules and policies often affect procedures to shorten time. (See *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, §12.63 et seq.; *Cal. Civil Practice*, 2A Procedure, §14:29.)

An application for an order shortening time must be supported by a declaration showing good cause. (*C.R.C.*, Rule 3.1300(b); for forms, see *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, §§12.144, 12.145; *Cal. Civil Practice*, 2A Procedure, §14:53 et seq.)

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3. Extending Time.

aa. Statutory Extension Based on Manner of Service.

6 *Witkin Cal. Proc. PWT § 17*

[§ 17] Statutory Extension Based on Manner of Service.

(1) *Regular Mail*. If the notice of motion is served by regular mail, the statutory 16-day period before the hearing (*supra*, §15) is extended by 5 *calendar* days if both the place of mailing and the place of address are within the state, 10 calendar days if either place is elsewhere within the United States, and 20 calendar days if either place is outside the United States. (*C.C.P. 1005(b)*.)

(2) *Express Delivery or Fax Transmission*. If the notice is served by Express Mail or another overnight delivery method (*infra*, §21 et seq.), or by fax transmission (*infra*, §24 et seq.), the prescribed period is extended by 2 calendar days. (*C.C.P. 1005(b)*.)

(3) *C.C.P. 1013 Is Inapplicable*. The provisions of *C.C.P. 1013* for extension of time (*infra*, §30 et seq.) do not apply to notices governed by *C.C.P. 1005*. (*C.C.P. 1005(b)*.)

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3. Extending Time.

bb. Extension by Stipulation or Court Order.

6 *Witkin Cal. Proc. PWT § 18*

[§ 18] Extension by Stipulation or Court Order.

(1) *Discretionary Extension by Judge.* Time "may be extended, upon good cause shown," by the judge of the court in which the action is pending, or by the judge who presided at the trial. (*C.C.P. 1054(a)*; see *C.R.C.*, Rule 1.10(c) [court's discretion to extend time]; *C.R.C.*, Rule 2.20 [authorizing extensions of time under rules]; *C.R.C.*, Rule 3.1103(b) [Rules 1.10 and 2.20 apply in law and motion proceedings]; for forms, see *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, §§12.151, 12. 152; *Cal. Civil Practice*, 2A *Procedure*, §14:53 et seq.)

(2) *Mandatory Extension on Stipulation.* In all cases in which the judge is authorized to extend time, an extension "shall be granted when all attorneys of record of parties who have appeared in the action agree in writing to the extension." (*C.C.P. 1054(b)*; see *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, §12.146.)

(3) *Limitations on Authority To Extend.* Discretionary and mandatory extensions under *C.C.P. 1054* are subject to the following limitations:

(a) Statutory provisions may govern particular situations. (*C.C.P. 1054(a)*.)

(b) The jurisdictional time to serve notice of appeal or notice of intention to move for a new trial may not be extended. (*C.C.P. 1054(a)*; see 9 *Cal. Proc.* (5th), *Appeal*, §614; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §54.)

(c) A discretionary extension by the judge may not exceed 30 days without the consent of the adverse party (*C.C.P. 1054(a)*); but previous extensions by stipulation are not included in computing the 30-day limitation (*C.C.P. 1054(b)*).

(4) *Mandatory Extension to Attorney-Legislator.* Time must be extended when the attorney of record for the applicant is a member of the Legislature, the Legislature is in session or in a recess of not over 40 days, or the attorney is a member of a legislative committee that is meeting. (*C.C.P. 1054.1(a)*.) An extension is mandatory unless the court

determines that it would defeat or abridge a right to one of the following: (a) pendente lite relief in a paternity or domestic relations proceeding; (b) attachment and sale of perishable goods; (c) receivership of a failing business; or (d) a temporary restraining order or preliminary injunction. (*C.C.P. 1054.1(b)*); for a similar provision regarding continuances, see *C.C.P. 595, 7 Cal. Proc. (5th), Trial, §26 et seq.*)

Extensions under *C.C.P. 1054.1* are subject to the following limitations:

(a) Statutory provisions may govern particular situations. (*C.C.P. 1054.1(a)*.)

(b) The jurisdictional time to serve notice of appeal, notice of intention to move for a new trial, or notice of intention to move to vacate a judgment may not be extended. (*C.C.P. 1054.1(a)*); see 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court, §141.*)

(c) The time to serve a motion for judgment notwithstanding the verdict may not be extended. (*C.C.P. 1054.1(a)*); see 7 *Cal. Proc. (5th), Trial, §439 et seq.*)

(5) *Procedure.* The procedure for obtaining an order extending time is as follows:

(a) Written application is made to the judge before whom the matter is pending. In the event of that judge's inability, death, or absence, the application may be heard by another judge of the same court. (*C.R.C., Rule 2.20(a).*)

(b) The application must disclose the nature of the case and all previous extensions by order or stipulation. (*C.R.C., Rule 2.20(b).*)

(c) An order extending time must be filed immediately and a copy must be served within 24 hours after the order is issued or within a time fixed by the court. (*C.R.C., Rule 2.20(c).*)

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1. Personal and Constructive Service.

aa. On Attorney or Party.

6 *Witkin Cal. Proc. PWT* § 19

[§ 19] On Attorney or Party.

(1) *Service on Attorney*. Service may be *personal*, by delivery to the attorney. (*C.C.P. 1011*; on federal procedure, see *F.R. Civ. P., Rule 5(b)*; 4B Federal Practice & Procedure (Wright & Miller) §1147; 28 Federal Procedure, L.Ed., §65:220.) If the attorney is absent from the office, the notice may be left as follows:

(a) With a receptionist or other person in charge of the office, in an envelope or package clearly labeled to identify the attorney being served. (*C.C.P. 1011(a)*; see *King v. Wilson* (1950) 101 C.A.2d 242, 244, 225 P.2d 270 [receptionist for suite of attorneys' offices was proper person to receive notice, despite lack of authorization by attorney being served]; *National Advertising Co. v. Rohnert Park* (1984) 160 C.A.3d 614, 619, 206 C.R. 696 [service on person apparently in charge; no showing of agency was required].)

(b) If no one is in the office, in a conspicuous place at the office between 9 a.m. and 5 p.m. (*C.C.P. 1011(a)*.)

(c) If the office is not open, at the attorney's residence with a person at least 18 years old, where the residence is in the same county as the office. If the residence is not known or is not in the same county, or if no suitable person is found, the notice may be mailed to the office or residence, whichever is known. If neither is known, the notice may be delivered to the clerk, or to the address of the attorney or party of record as designated on the court papers. (*C.C.P. 1011(a)*.)

(2) *Service on Party*. If the party is to be served (see *supra*, §§12, 13), service may be *personal*, or the notice may be left at the party's residence between 8 a.m. and 6 p.m. with a person at least 18 years old. If no person is found, service may be made by mail. If the party's residence is unknown, service may be made by delivering the notice to the clerk. (*C.C.P. 1011(b)*.)

C.R.C., Rule 3.252 provides that, when service is made under *C.C.P. 1011(b)* and the notice is delivered to the clerk, the notice must be enclosed in an envelope addressed to the party in care of the clerk, with the following

information on the back of the envelope:

(a) "Service is being made under *Code of Civil Procedure section 1011(b)* on a party whose residence address is unknown."

(b) The name of the party whose residence address is unknown.

(c) The case name and number.

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1. Personal and Constructive Service.

bb. Proof of Service.

6 Witkin Cal. Proc. PWT § 20

[§ 20] Proof of Service.

To "serve and file" a document requires that a copy of the document be served on counsel for each party who is represented by separate counsel and on each self-represented party, and that the document and a proof of service of the document be filed with the court. (C.R.C., Rule 1.21(b).)

"Proof of service" is a declaration stating that service has been made as required under C.R.C., Rule 1.21 (C.R.C., Rule 1.21(c)), and must be filed no later than 5 court days before the scheduled hearing date (C.R.C., Rule 3.1300(c)). A proof of service that names attorneys for separately represented parties must state which party or parties each of the attorneys is representing. (C.R.C., Rule 1.21(c).) (See C.E.B., 1 Civil Proc. Before Trial 4th, 12:69 et seq.; Cal. Civil Practice, 1 Procedure, §6:59; Rutter Group, 2 Civil Proc. Before Trial §9:85.1.)

The following Judicial Council forms relate to proof of service:

Judicial Council Form No. POS-020 [Proof of Personal Service--Civil].

Judicial Council Form No. POS-020(D) [Attachment to Proof of Personal Service--Civil (Documents Served)].

Judicial Council Form No. POS-020(P) [Attachment to Proof of Personal Service--Civil (Persons Served)].

Judicial Council Form No. POS-040 [Proof of Service--Civil (multipurpose form that includes proof of service by mail, messenger, fax, electronic transmission, or overnight delivery)].

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2. Service by Mail.

aa. When Permitted.

6 *Witkin Cal. Proc. PWT § 21*

[§ 21] When Permitted.

Service by mail is authorized by *C.C.P. 1012* in the following situations:

(1) Where the person to be served resides or has an office at a place where there is mail delivery service.

(2) Where the person making the service and the person to be served reside or have their offices in different places between which there is regular mail service.

The second situation deals with service where the attorneys are in different cities or counties; but under the first situation, service by mail is permissible even though the attorneys for the respective parties are in the same county or city. (*Marsden v. Collins* (1937) 23 C.A.2d 148, 149, 72 P.2d 247; *Leplat v. Raley Wiles Auto Sales* (1944) 62 C.A.2d 628, 635, 145 P.2d 350; on federal procedure, see *F.R. Civ. P., Rule 5(b)*; 4B Federal Practice & Procedure (Wright & Miller) §1148; 28 Federal Procedure, L.Ed., §65:222.)

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2. Service by Mail.

bb. Mechanics of Service.

6 *Witkin Cal. Proc. PWT* § 22

[§ 22] Mechanics of Service.

(1) *Deposit in Mail.* The notice, in a sealed envelope, must be deposited in a post office, mailbox, or chute, with postage paid, and properly addressed (to the office address on the last document filed by the recipient, otherwise to a residence). (*C.C.P. 1013(a)*; see *Westervelt v. Robertson* (1981) 122 C.A.3d Supp. 1, 8, 176 C.R. 94 [party to be served has burden of notifying court of change of address for purposes of service by mail].)

(2) *Express Mail or Other Overnight Delivery Method.* Service may also be made by Express Mail or another method of overnight delivery. If service is by Express Mail, the notice must be deposited as provided for regular mail. If service is by another method of overnight delivery, the notice must be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to a courier authorized by the carrier to receive documents, in a properly addressed envelope or package designed by the carrier, with delivery fees paid or provided for. (*C.C.P. 1013(c)*.)

(3) *Service Is Complete on Deposit.* Service of a notice is complete at the time of deposit in the mail. (*C.C.P. 1013(a)* [regular mail]; *C.C.P. 1013(c)* [overnight delivery]; *Douglas v. Janis* (1974) 43 C.A.3d 931, 936, 118 C.R. 280; on presumption of receipt, see *infra*, §23; on federal procedure, see *F.R. Civ. P., Rule 5(b)*; 4B Federal Practice & Procedure (Wright & Miller) §1148; 28 Federal Procedure, L.Ed., §65:222.)

(4) *Notation of Date and Place of Mailing.* In order to inform the person served of the effective date of the mailing, the copy of a notice served by regular mail or overnight delivery must bear a notation of the date and place of mailing, or be accompanied by an unsigned copy of the affidavit or by the certificate of mailing. (*C.C.P. 1013(b)* [regular mail]; *C.C.P. 1013(d)* [overnight delivery].) However, this requirement is directory only and does not affect the validity of the notice. (*C.C.P. 1013(g)*.)

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2. Service by Mail.

cc. Proof of Service.

6 *Witkin Cal. Proc. PWT* § 23

[§ 23] Proof of Service.

(1) *Alternative Methods.* Proof of service by mail is required. (See C.R.C., Rules 1.21(c), 1.21(d), 3.1300(c) [proof of service of moving papers must be filed at least 5 court days before scheduled hearing date]; *supra*, §20.) *C.C.P. 1013a* specifies the following methods for proof of service:

(a) *Service by Process Server.* There are two types of affidavits for establishing proof of service by a process server. Each must set forth the exact title of the document served and the essential facts regarding the process server (name and address, residence or employment in county, age over 18 years, status as nonparty).

(1) Proof of personal knowledge of the mailing requires an affidavit showing the date and place of deposit in the mail, the name and address of the person served, and that the envelope was sealed and deposited with postage prepaid. (*C.C.P. 1013a(1)*; see *Cal. Civil Practice*, 1 Procedure, §6:84 [form].)

(2) Proof of mailing in the ordinary course of business requires an affidavit showing that the process server is familiar with the collection of correspondence for mailing at the server's place of business, that correspondence is deposited with the postal service on the same day in the ordinary course of business, the name and address of the person being served, the date and place of business where the envelope was mailed, and that the envelope was placed for collection and mailing "on that date following ordinary business practices." Service of this kind is presumed invalid, on motion of the party served, if the postage meter or cancellation date is more than 1 day after the date of deposit for mailing stated in the affidavit. (*C.C.P. 1013a(3)*; see *Tobin v. Oris* (1992) 3 C.A.4th 814, 826, 4 C.R.2d 736 [presumption of invalidity applies only to proof made under *C.C.P. 1013a(3)*, and does not arise where service is admitted]; *Katellaris v. Orange* (2001) 92 C.A.4th 1211, 1214, 112 C.R.2d 556 [proof of service does not require personal knowledge but may be shown by declaration regarding business practice followed for collecting and processing outgoing mail]; *Cal. Civil Practice*, 1 Procedure, §6:93 [form].)

(b) *Service by Attorney.* An unsworn certificate of an active member of the State Bar, stating the facts of proper

service, is sufficient. (*C.C.P. 1013a(2)*; see Cal. Civil Practice, 1 Procedure, §6:94 [form].)

(c) *Service by Clerk of Court*. An unsworn certificate of the clerk of the court, stating the facts of proper service, is sufficient. (*C.C.P. 1013a(4)*; see *Westervelt v. Robertson* (1981) 122 C.A.3d Supp. 1, 6, 176 C.R. 94 [certificate as evidence of clerk's service in unlawful detainer action].)

(2) *Necessity of Strict Compliance*. Strict compliance with the requirements of *C.C.P. 1012* (supra, §21) and *C.C.P. 1013* (supra, §22) is a jurisdictional prerequisite. (*Forslund v. Forslund* (1964) 225 C.A.2d 476, 486, 37 C.R. 489; *West v. West* (1979) 92 C.A.3d 120, 124, 154 C.R. 667 [complete absence of affidavit was fatal]; *Lee v. Placer Title Co.* (1994) 28 C.A.4th 503, 509, 33 C.R.2d 572 [service was ineffective where address was erroneous]; see also *Carlton v. Gray* (1935) 10 C.A.2d 658, 664, 52 P.2d 966 [failure to state addresses of server and recipient was fatal]; *Moghaddam v. Bone* (2006) 142 C.A.4th 283, 288, 47 C.R.3d 602 [absent proof that notice was actually received, notice of order setting aside default and default judgment that was sent to incorrect zip code was insufficient to constitute legal notice].) However, this requirement "is satisfied by substantial, without literal, compliance." (*Douglas v. Janis* (1974) 43 C.A.3d 931, 937, 118 C.R. 280; *Conservatorship of Wyatt* (1987) 195 C.A.3d 391, 397, 240 C.R. 632; *Tobin v. Oris*, supra.) Hence, proof of service has been deemed adequate where it included the recipient's street address only (*Douglas v. Janis*, supra [building name and room number omitted]; *Jackson v. Bank of America* (1983) 141 C.A.3d 55, 58, 190 C.R. 78 [floor or suite number in large office building omitted]), and where only the name of a city was given as the "place of deposit in the mail" (*Douglas v. Janis*, supra; *Forslund v. Forslund*, supra).

(3) *Presumption of Receipt*. When proof of service by mail is properly made, it creates a rebuttable presumption that the notice was actually received, under *Ev.C. 641* (see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §78). (See *Otsuka v. Balangue* (1949) 92 C.A.2d 788, 791, 208 P.2d 65 [proof under *C.C.P. 1013a(1)*; presumption upheld]; *Forslund v. Forslund*, supra [proof under *C.C.P. 1013a(2)*; presumption upheld]; *Westervelt v. Robertson*, supra [proof under former *C.C.P. 1013a(3)* (now *C.C.P. 1013a(4)*); presumption rebutted by declaration asserting nonreceipt, but inference of receipt nevertheless drawn]; *Bonzer v. Huntington Park* (1993) 20 C.A.4th 1474, 1479, 25 C.R.2d 278 [proof under *C.C.P. 1013a(3)*; presumption rebutted by declarations establishing absence of actual notice].)

(4) *Judicial Council Forms*. The following Judicial Council Forms have been approved for optional use:

Judicial Council Form No. POS-030 [Proof of Service By First-Class Mail--Civil].

Judicial Council Form No. POS-030(D) [Attachment to Proof of Service By First-Class Mail--Civil (Documents Served)].

Judicial Council Form No. POS-030(P) [Attachment to Proof of Service By First-Class Mail--Civil (Persons Served)].

Judicial Council Form No. POS-040 [Proof of Service--Civil (multipurpose form that includes proof of service by mail, messenger, fax, electronic transmission, or overnight delivery)].

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aa. When Permitted.

6 *Witkin Cal. Proc. PWT* § 24

[§ 24] When Permitted.

As authorized by *C.C.P. 1013(e)*, the Judicial Council has adopted rules for the implementation of service by fax (C.R.C., Rules 2.300 et seq.), which apply to civil, probate, and family law proceedings in all trial courts (C.R.C., Rule 2.300(a)). (For standards that fax machine must meet to be used for fax service and filing, see C.R.C., Rule 2.301(3); on filing by fax, see *infra*, §34.)

Service by fax is permitted only where the parties so agree and a written confirmation of that agreement is made. (*C.C.P. 1013(e)*; C.R.C., Rule 2.306(a); see *Hofer v. Young* (1995) 38 C.A.4th 52, 55, 45 C.R.2d 27, *infra*, §98 [faxing limitations of *C.C.P. 1013* relate to service, and are not applicable to faxing acceptance of offer to compromise under *C.C.P. 998* because service of acceptance is not required]; Rutter Group, 2 Civil Proc. Before Trial §9:86.10 et seq.) A court may serve a notice by fax in the same manner as the parties may serve papers by fax. (C.R.C., Rule 2.306(c).)

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6 *Witkin Cal. Proc. PWT* § 25

[§ 25] Mechanics of Service.

(1) *Service Lists*. Where the parties have agreed to service by fax, the plaintiff or petitioner named first in the complaint or petition must maintain a current list of the parties with their fax numbers and furnish a copy of the list to other parties or the court when requested. Each party in turn must furnish the first-named plaintiff or petitioner with the current fax number and, if serving a paper on a new party, serve that party with a copy of the service list. (C.R.C., Rule 2.306(b).)

(2) *Fax Transmission*. The notice or other paper being served must be transmitted to a fax machine maintained by the person on whom it is served at the fax telephone number as last given on a document filed by that person and served on the party making service. (C.C.P. 1013(e); C.R.C., Rule 2.306(a)(2).) A party or attorney agreeing to accept service by fax must make a fax machine generally available for receipt of the documents between 9 a.m. and 5 p.m. on days that are not court holidays. This does not preclude use of the machine during these hours for sending documents or for normal repair and maintenance. (C.R.C., Rule 2.306(f).) (On nonmandatory notation of date and place of transmission, see C.C.P. 1013(f), (g).)

(3) *Service Is Complete on Receipt*. Service by fax is complete on receipt of the entire document by the receiving party's fax machine. Service after 5 p.m. is deemed to have occurred on the next court day. (C.R.C., Rule 2.306(g).) Service by fax is effective only if the transmission fully conforms to the provisions of C.R.C., Rule 2.306. (C.R.C., Rule 2.306(h)(5).)

(4) *Signatures*. A party who serves or files a signed document by fax "represents that the original signed document is in the party's possession or control." (C.R.C., Rule 2.305(a).) A party may serve on all other parties, but not file, a demand for production of the original document, and a meeting must be arranged for that purpose. (C.R.C., Rule 2.305(b), (c).) A signature produced by fax transmission is deemed an original. (C.R.C., Rule 2.305(d).)

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cc. Proof of Service.

6 *Witkin Cal. Proc. PWT* § 26

[§ 26] Proof of Service.

C.R.C., Rule 2.306(h) provides that proof of service by fax may be made by any of the methods provided in *C.C.P. 1013a* (supra, §23), with the following substitutions and additions:

(1) The time, date, and sending fax machine telephone number are used instead of the date and place of deposit in the mail. (C.R.C., Rule 2.306(h)(1).)

(2) The name and fax machine telephone number of the person served are used instead of the name and address shown on the mailed envelope. (C.R.C., Rule 2.306(h)(2).)

(3) A statement that the document was transmitted by fax and that the transmission was reported as complete and without error is used instead of a statement that the envelope was sealed and deposited in the mail with postage prepaid. (C.R.C., Rule 2.306(h)(3).)

(4) A copy of the transmission report must be attached to the proof of service, and the proof must state that the report was properly issued by the transmitting machine. (C.R.C., Rule 2.306(h)(4).)

Proof of service of the moving papers, if filed separately, must be filed at least 5 court days before the scheduled hearing date. (C.R.C., Rule 3.1300(c); see Judicial Council Form No. POS-040 [Proof of Service--Civil (multipurpose form that includes proof of service by mail, messenger, fax, electronic transmission, or overnight delivery)].)

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aa. When Permitted.

6 *Witkin Cal. Proc. PWT* § 27

[§ 27] When Permitted.

Electronic service is authorized by *C.C.P. 1010.6* and implemented through C.R.C., Rule 2.260. (On electronic filing of documents generally, see *C.C.P. 1010.6*; C.R.C., Rule 2.250 et seq.; 4 *Cal. Proc. (5th), Pleading*, §21 et seq.)

When a notice may be served by mail, express mail, overnight delivery, or fax transmission, electronic service of the notice is permitted if a party has agreed to accept service electronically. (*C.C.P. 1010.6(a)(6)*; C.R.C., Rule 2.260(a)(1).) A party accepts electronic service by (1) filing and serving a notice, which includes an electronic notification address, to that effect, or (2) electronically filing a document with the court. (C.R.C., Rule 2.260(a)(2).)

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

The Judicial Council has approved the following forms for electronic use:

Judicial Council Form No. EFS-005 [Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service)].

Judicial Council Form No. EFS-010 [Notice of Change of Electronic Notification Address (Electronic Filing and Service)].



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bb. Mechanics of Service.

6 *Witkin Cal. Proc. PWT § 28*

[§ 28] Mechanics of Service.

(1) *Electronic Transmission.* "Electronic service" is the electronic transmission of a document to a party's electronic notification address, either directly or through an electronic filing service provider. (C.R.C., Rule 2.250(6).) Service is complete at the time of transmission, but the time required to act or respond in a specified period is extended by 2 court days. (C.C.P. 1010.6(6); C.R.C., Rule 2.260(b)(2).) (On exceptions to extension of time, see C.R.C., Rule 2.260(b)(3).) Service occurring after close of business is considered to have occurred on the next court day. (C.R.C., Rule 2.260(b)(4).)

(2) *Signatures.* A document filed electronically that requires a sworn signature is deemed to have been signed by the declarant if, before filing, the declarant has signed a printed form of the document. (C.R.C., Rule 2.257(a)(1).) By electronically filing, the filer indicates that he or she has complied with this rule and that the original, signed document is available for review and copying. (C.R.C., Rule 2.257(a)(2).) Another party may serve a demand for production of the original signed document, which must be served on all other parties but need not be filed with the court. (C.R.C., Rule 2.257(a)(3).) Within 5 days of the demand, the filer must make the original document available for review and copying. (C.R.C., Rule 2.257(a)(4).)

(3) *Change of Electronic Address.* If a party's electronic notification address changes while the action is pending, the party must promptly file a notice of change of address electronically with the court and serve notice on all parties or their attorneys. (C.R.C., Rule 2.260(d).)

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

(1) *Electronic Transmission.* C.R.C., Rule 2.260(b)(2) and (b)(3), and (b)(4) were relettered C.R.C., Rule 2.260(e)(2), (e)(3), and (e)(4), respectively, in 2008.

C.R.C., Rule 2.260(c) was added in 2008 to provide that all parties are responsible for electronic service on all other parties in a case. A party may serve documents electronically directly, through an agent, or through a designated

electronic filing service provider.

(4) *(New) Maintenance of Electronic Service Lists.* C.R.C., Rule 2.260(b) was added in 2008 to provide that a court that permits electronic filing must maintain and make available electronically a service list that contains the current electronic notification addresses of the parties that have filed electronically in a case.

Correction Page 450, line 6 of section, " *C.C.P. 1010.6(6)*" should be " *C.C.P. 1010.6(a)(6)*".



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cc. Proof of Service.

6 *Witkin Cal. Proc. PWT § 29*

[§ 29] Proof of Service.

Proof of electronic service may be made by any of the methods provided in *C.C.P. 1013(a)*. However, the proof of service must state the following:

(1) "The electronic notification address of the person making the service, in place of that person's residence or business address." (C.R.C., Rule 2.260(f)(1)(A).)

(2) "The date and time of the electronic service, instead of the date and place of deposit in the mail." (C.R.C., Rule 2.260(f)(1)(B).)

(3) "The name and electronic notification address of the person served, in place of that person's name and address as shown on the envelope." (C.R.C., Rule 2.260(f)(1)(C).)

(4) "That the document was served electronically and the transmission was reported as complete and without error, in place of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid." (C.R.C., Rule 2.260(f)(1)(D).)

Proof of electronic service may be in electronic form and may be filed electronically with the court. (C.R.C., Rule 2.260(f)(2).) Proof of service of the moving papers must be filed at least 5 calendar days before the hearing. (C.R.C., Rule 2.260(f)(3).) The party filing the proof of service must maintain the printed form of the document bearing the declarant's original signature and must make the document available for review and copying on the request of the court or another party. (C.R.C., Rule 2.260(f)(4).) (See Judicial Council Form No. POS-040 [Proof of Service--Civil]; Judicial Council Form No. POS-040(D) [Attachment to Proof of Service--Civil (Documents Served)]; Judicial Council Form No. POS-040(P) [Attachment to Proof of Service--Civil (Persons Served)].)

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

C.R.C., Rule 2.260(f)(1) was amended in 2009 to refer to *C.C.P. 1013a*, rather than *C.C.P. 1013(a)*.

(1) C.R.C., Rule 2.260(f)(1)(A) was amended in 2008 to read as follows: "The electronic notification address of the person making the service, in addition to that person's residence or business address."

(4) C.R.C., Rule 2.260(f)(1)(D) was amended in 2009 to read as follows: "That the document was served electronically in place of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid." C.R.C., Rule 2.260(f)(4) was amended in 2009 to apply to filing proof of "electronic" service.

Proof of electronic service: In 2009, the following Judicial Council Forms were approved for optional use:

Judicial Council Form No. EFS-050 [Proof of Electronic Service (Proof of Service/Electronic Filing and Service)].

Judicial Council Form No. EFS-050(D) [Attachment to Proof of Electronic Service (Documents Served) (Proof of Service/Electronic Filing and Service)].

Judicial Council Form No. EFS-050(P) [Attachment to Proof of Electronic Service (Persons Served) (Proof of Service/Electronic Filing and Service)].



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aa. Statutory Extension.

6 *Witkin Cal. Proc. PWT § 30*

[§ 30] Statutory Extension.

(1) *Service by Regular Mail.* When service of a notice or other paper by mail starts a period of notice or time within which the served party may exercise a "right or duty to do any act or make any response," which period is prescribed by statute or court rule, the time for the served party to act is extended 5 calendar days if the place of address is within California, 10 calendar days if it is elsewhere within the United States, and 20 calendar days if it is outside the United States. (*C.C.P. 1013(a)*.) (See *Montgomery v. Norman* (1953) 120 C.A.2d 855, 857, 262 P.2d 360 [holiday extension (see 2 Cal. Proc. (5th), Courts, §50) may be added to extension under C.C.P. 1013(a)].)

(2) *Service by Other Means.* Time is extended 2 court days when notice is served by express mail or another overnight delivery method (*C.C.P. 1013(c)*), by fax (*C.C.P. 1013(e)*), or by electronic service (*C.C.P. 1010.6(a)(6)*).

(3) *Scope of Statute.* *C.C.P. 1013* applies in the absence of a specific exception provided by statute or rule. (*C.C.P. 1013(a)*.) "Section 1013 is a procedural statute of general application ... and it is not limited only to rules or statutes which expressly incorporate its terms. ... In the absence of an exception expressly created by statute or rules, section 1013 applies to extend any prescribed time period following service by mail." (*Citicorp North America v. Superior Court* (1989) 213 C.A.3d 563, 567, 261 C.R. 668.) This judicial description of the scope of *C.C.P. 1013* is somewhat overbroad, given the variety of implicit limitations recognized by the courts (*infra*, §32).

(4) *Illustrations.* The statute's provisions for extension of time have been applied in a wide variety of procedural contexts, including the following:

(a) Administrative proceedings before the Alcoholic Beverage Control Board. (See *Pesce v. Department of Alcoholic Beverage Control* (1958) 51 C.2d 310, 312, 333 P.2d 15.)

(b) Time to compel further answers when answers to interrogatories have been mailed. (See *California Accounts v. Superior Court* (1975) 50 C.A.3d 483, 487, 123 C.R. 304.)

(c) Period for filing writ to challenge denial of motion to quash. (See *Shearer v. Superior Court* (1977) 70 C.A.3d 424, 428, 138 C.R. 824.)

(d) Time for challenging coordination trial judge. (See *Citicorp North America v. Superior Court*, *supra*; *Cal. Proc.* (5th), *Pleading*, §355.)

(e) Period for accepting statutory offer of compromise. (See *Poster v. Southern Calif. Rapid Transit Dist.* (1990) 52 C.3d 266, 273, 276 C.R. 321, 801 P.2d 1072.)

(f) Period for filing amendment after judgment on the pleadings. (See *People v. \$ 20,000 United States Currency* (1991) 235 C.A.3d 682, 687, 286 C.R. 746.)

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bb. Express Limitations.

6 *Witkin Cal. Proc. PWT § 31*

[§ 31] Express Limitations.

(1) *Notices of Motion. C.C.P. 1005(b)* (supra, §17) specifies that notices of motion governed by *C.C.P. 1005* are not subject to the extension provisions of *C.C.P. 1013*. However, *C.C.P. 1005(b)* itself provides the same extended time periods before the hearing of a motion where notice is served by mail, overnight delivery, or fax.

(2) *Other Statutory Limitations.* By statute or rule, the extension provisions of *C.C.P. 1013(a)*, (c), (e) are not applicable to the following:

- (a) Notice of intention to move for a new trial. (*C.C.P. 1013(a)*, (c), (e).)
- (b) Notice of appeal. (*C.C.P. 1013(a)*, (c), (e).)
- (c) Notice of intention to move to vacate judgment under *C.C.P. 663a*. (*C.C.P. 1013(a)*, (c), (e).)
- (d) Small claims actions. (*C.C.P. 116.140(a)*.)
- (e) Service of summons by mail. (*C.C.P. 413.20*.)
- (f) Summary judgment motions. (*C.C.P. 437c(b)*.)
- (g) Notice of trial in unlawful detainer actions. (*C.C.P. 594(b)*.)
- (h) Time for filing petition for administrative mandamus. (*C.C.P. 1094.6*.)
- (i) Time for preparing or responding to proposed order after motion. (C.R.C., Rule 3.1312.)

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6 *Witkin Cal. Proc. PWT* § 32

[§ 32] Implied Limitations.

Courts have applied a number of limitations found to be implicit in the language or intent of *C.C.P. 1013*.

(1) *Period Must Be Triggered by Service.* *C.C.P. 1013(a)*, (c), (e) refer to "any period" or "date certain after the service of the document." Hence, *C.C.P. 1013* operates to extend only prescribed periods and deadlines initiated by service of a notice or other paper, as opposed to filing or simply mailing. (*Camper v. Work. Comp. App. Bd.* (1992) 3 *C.4th* 679, 684, 12 *C.R.2d* 101, 836 *P.2d* 888 [time to seek review of Workers' Compensation Appeals Board decision after "filing" of order (see *Lab.C. 5950*) is not extended]; *Simpson v. Williams* (1987) 192 *C.A.3d* 285, 288, 238 *C.R.* 566 [period for filing action to challenge arbitration award after "mailing of notice" (*B. & P.C. 6204*) is not extended]; *Citicorp North America v. Superior Court* (1989) 213 *C.A.3d* 563, 567, 261 *C.R.* 668 [stating rule, and citing cases applying *C.C.P. 1013* where period ran from service and cases refusing to apply statute where period was not triggered by service]; *San Mateo Federation of Teachers v. Public Emp. Relations Bd.* (1994) 28 *C.A.4th* 150, 153, 33 *C.R.2d* 387 [period commencing with "issuance" of order is not extended].)

(2) *Action Must Be Pending.* In view of the reference in *C.C.P. 1013* to service at the office address as last given by the opposing party on any document filed "in the cause," it has been held that the statute's provisions for extension of time apply to service of documents in pending actions only, and not to notices which, though prerequisite to a civil proceeding, are independent of any judicial or administrative action. (*Highland Plastics v. Enders* (1980) 109 *C.A.3d* Supp. 1, 8, 167 *C.R.* 353 [citing cases in support of rule, and holding that 30-day notice period for termination of tenancy under *C.C. 1946* is not extended]; *Walters v. Meyers* (1990) 226 *C.A.3d* Supp. 15, 18, 277 *C.R.* 316 [analyzing supporting cases and refusing to extend 3-day notice to pay rent or quit (see *C.C.P. 1161*); following *Highland Plastics*].)

(3) *Exercise of Right Must Be at Issue.* The extension provisions apply to "any right or duty to do any act or make any response within any period or on a date certain after the service." (*C.C.P. 1013(a)*.) Hence, a few cases have held that the extension is unavailable unless the adverse party is called on to do some act or exercise some right beyond the

mere right to be present at a proceeding. (*Welden v. Davis Auto Exchange* (1957) 153 C.A.2d 515, 521, 315 P.2d 33 [no extension of notice before hearing of motion to dismiss action for lack of prosecution]; *Taylor v. Jones* (1981) 121 C.A.3d 885, 889, 175 C.R. 678 [no extension of notice before hearing on summary judgment motion].)

(4) *Jurisdictional Limits*. By analogy to the express exclusion of notices of appeal from the extension provisions of C.C.P. 1013, courts have refused to extend other time periods that are jurisdictional in nature. (See *Poster v. Southern Calif. Rapid Transit Dist.* (1990) 52 C.3d 266, 274, 276 C.R. 321, 801 P.2d 1072 [stating rule and holding that period for accepting statutory offer of compromise is not jurisdictional]; *Camper v. Work. Comp. App. Bd.*, *supra*, 3 C.4th 686 [time limitation of Lab.C. 5950 is jurisdictional and cannot be extended]; *Los Angeles v. Surety Ins. Co.* (1984) 162 C.A.3d 58, 64, 208 C.R. 263 [refusing to extend jurisdictional limits applicable to bail forfeiture]; *Citicorp North America v. Superior Court*, *supra*, 213 C.A.3d 568, footnote 8 [stating rule and citing cases]; *San Mateo Federation of Teachers v. Public Emp. Relations Bd.*, *supra*, 28 C.A.4th 155 [stating rule, and holding that time for challenging PERB decision is jurisdictional]; *Department of Industrial Relations, Div. of Labor Standards Enforcement v. Atlantic Baking Co.* (2001) 89 C.A.4th 891, 894, 108 C.R.2d 44 [45-day period in which to petition for writ of mandamus under Lab.C. 3725 is jurisdictional, and reference to *mailing* and not *service* must be construed as specific exception to C.C.P. 1013].)

However, C.C.P. 1013 was amended in 1995 to expressly provide that the extension applies "in the absence of a specific exception provided for by this section or other statute or rule of court." (C.C.P. 1013(a).)

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d. Filing.

1. General Requirements.

6 *Witkin Cal. Proc. PWT* § 33

[§ 33] General Requirements.

(1) *Time for Filing.* The time limits for filing moving, supporting, opposition, and reply papers are the same as for serving those papers. (*C.C.P. 1005(b)*; *C.R.C.*, Rule 3.1300(a); see *supra*, §15.) Proof of service of the moving papers must be filed at least 5 court days before the scheduled hearing date. (*C.R.C.*, Rule 3.1300(c).) A paper submitted on the day it is due before the clerk's office closes to the public is deemed timely filed. (*C.R.C.*, Rule 3.1300(e).) The court, on its own motion or for good cause shown, may prescribe shorter times for filing. (*C.R.C.*, Rule 3.1300(b).)

(2) *Late Papers.* Papers may not be rejected for filing on the ground that they were untimely submitted, but the court in its discretion may refuse to consider a later-filed paper. If so, the minutes or order must so indicate. (*C.R.C.*, Rule 3.1300(d).) Judges frequently do consider late-filed papers, consistent with the policy favoring disposition on the merits and the burdens entailed in subsequent *C.C.P. 473* motions (relief from mistake, inadvertence, surprise, or excusable neglect). If consideration is given, the judge must exercise discretion and consider the factors relevant to relief under *C.C.P. 473* (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.). (*Kapitanski v. Von's Grocery Co.* (1983) 146 *C.A.3d* 29, 32, 193 *C.R.* 839; see *Mann v. Cracchiolo* (1985) 38 *C.3d* 18, 29, 210 *C.R.* 762, 694 *P.2d* 1134 [approving *Kapitanski*, and holding that it was error for judge to consider late filing, then grant motion based on absence of timely opposition].)

(3) *Place of Filing.* Unless otherwise provided by local rule, law and motion papers are filed in the clerk's office. (*C.R.C.*, Rule 3.1302(a).)

(4) *Filing Fees.* Filing fees are governed by *Govt.C. 70600* et seq. *Govt.C. 70617* imposes the following fees for motions:

(a) \$ 40 for a motion or any other paper requiring a hearing subsequent to the first paper. (*Govt.C. 70617(a)*.)

(b) \$ 200 for filing a notice of a motion for summary judgment. (*Govt.C. 70617(d)*.)

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

Correction: Page 454, line 7 of section, "C.R.C., Rule 31300(e)" should be "C.R.C., Rule 3.1300(e)".



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3. Service and Filing.

d. Filing.

2. Filing by Fax.

6 *Witkin Cal. Proc. PWT* § 34

[§ 34] Filing by Fax.

(1) *In General.* Fax filing is authorized by *C.C.P. 1010.5* and implemented by C.R.C., Rule 2.300 et seq. C.R.C., Rule 2.301 et seq. apply to civil, probate, and family law proceedings in all trial courts, and permit the fax filing of all documents except wills, codicils, bonds, and undertakings. (C.R.C., Rule 2.300.)

Filing may be accomplished through a fax filing agency (C.R.C., Rule 2.203) or, where provided by local rule, by faxing directly to the court (C.R.C., Rule 2.304).

Original documents used for fax transmission must comply with the usual format requirements. Exhibits larger than 8 1/2 by 11 inches must be reduced at least to that size before transmission, and the court may require the original exhibit to be filed. (C.R.C., Rule 2.302.)

Every document filed by fax must include the notation "By fax" immediately below its title. (C.R.C., Rules 2.303(f), 2.304(c).) (On signatures in fax filed documents, see C.R.C., Rule 2.305, *supra*, §25.)

(2) *Fax Filing Agencies.* A fax filing agency acts as the agent of the filing party, not the court. (C.R.C., Rule 2.303(a).) Advance arrangements for payment of filing fees and service charges must be made with the agency; otherwise, it may discard faxed documents without notice to the sending party. (C.R.C., Rule 2.303(c).) When arrangements are in place, the agency must prepare the faxed document in compliance with filing requirements, take it to court, and file it, paying all applicable filing fees. (C.R.C., Rule 2.303(b).) The agency must keep the documents it receives confidential, except as provided by rule. (C.R.C., Rule 2.303(d).)

By filing a document with the court, a fax filing agency certifies that it has complied with Rules 2.300 et seq., and that the filed document is the full and unaltered document it received by fax; no other certification may be required. (C.R.C., Rule 2.303(e).)

(3) *Direct Fax Filing.* A local rule permitting direct fax filing must incorporate C.R.C., Rules 2.300 et seq., and

provide fax telephone numbers for filings. A court accepting fax filing must also accept agency filings under C.R.C., Rule 2.303. (C.R.C., Rule 2.304(a).) Direct fax filings must be prefaced by the cover sheet provided by Judicial Council Form No. MC-005 and any special handling instructions necessary for compliance with local rules. Neither the cover sheet nor the instructions are filed. (C.R.C., Rule 2.304(b).)

A party filing directly by fax must obtain a transmission record from the transmitting machine. If the filing is not accomplished due to an error in transmission unknown to the sending party, or a failure to process the filing when received by the court, the sending party may move the court for an order filing the document nunc pro tunc. The motion must be accompanied by the transmission record and a proof of transmission in prescribed form. (C.R.C., Rule 2.304(d); see Cal. Civil Practice, 2 Procedure, §§14:44, 14:49.) (On payment of fees by credit card, see C.R.C., Rule 2.304(e); on establishment of fax filing fee accounts, see C.R.C., Rule 2.304(f).)

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



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d. Filing.

3. Electronic Filing.

6 *Witkin Cal. Proc. PWT* § 35

[§ 35] Electronic Filing.

(1) *In General.* Electronic filing is authorized by *C.C.P. 1010.6* and implemented by C.R.C., Rule 2.250 et seq. " 'Electronic filing' is the electronic transmission to a court of a document in electronic form." (C.R.C., Rule 2.250(4).) Thus, whenever the filing of an original document is required, a filer may file a scanned copy of the document and must then file the original with the court within 10 calendar days. (C.R.C., Rule 2.252(b).) Electronic filing does not alter filing deadlines. (C.R.C., Rule 2.252(e)(2).) (On format requirements, see C.R.C., Rule 2.256(b); on signature requirements, see C.R.C., Rule 2.257; on electronic filing of documents generally, see 4 *Cal. Proc.* (5th), *Pleading*, §21 et seq.; Rutter Group, 2 *Civil Proc. Before Trial* §9:90.25 et seq.)

(2) *Electronic Filing Service Providers.* If a court contracts with an electronic filing service provider, the court may require that documents be transmitted to the provider, and the provider must in turn promptly transmit the electronic filing, including the filing fee, to the court. (C.R.C., Rule 2.255.)

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C. Hearing.

1. Nature of Hearing.

6 *Witkin Cal. Proc. PWT* § 36

[§ 36] Nature of Hearing.

(1) *Time and Place.* A motion is usually heard in a law and motion session of the court, on a day and time fixed by local rules. (See, e.g., San Francisco Uniform Local Rules, Rule 8.2 [9:30 am, Monday--Friday; designated department]; Los Angeles Rules of Superior Court, Rule 9.0 [8:30 am, "each day"; respective departments].) The court clerk must post a general schedule showing the days and departments for law and motion hearings. (C.R.C., Rule 3.1304(a).) If a matter will not be heard on the scheduled date, the moving party must notify the court. (C.R.C., Rule 3.1304(b).) If the judge is unable to hear the matter on the day noticed, it may be transferred to another judge before whom it might originally have been brought. (C.C.P. 1006.)

Some motions, including those for a new trial and to vacate judgment, may be heard and determined in chambers. (C.C.P. 166(a), 2 *Cal. Proc.* (5th), *Courts*, §23; on hearings conducted by telephone, see *infra*, §39.)

(2) *Oral Argument Is Discretionary.* The judge is not required to listen to oral argument on a motion, but has discretion to decide the matter solely on the basis of supporting affidavits. (*Ensher, Alexander & Barsom v. Ensher* (1964) 225 C.A.2d 318, 325, 37 C.R. 327; *Wilburn v. Oakland Hosp.* (1989) 213 C.A.3d 1107, 1111, 262 C.R. 155; cf. *Cal-Amer. Income Property Fund VII v. Brown Dev. Corp.* (1982) 138 C.A.3d 268, 273, footnote 3, 187 C.R. 703 [due process may require expanded oral argument "in those complex law and motion cases where the decision has an immediate and dramatic impact upon the parties"]; on federal practice, see *F.R. Civ. P.*, Rule 78 [court may provide by rule or order for determination of motion on papers only]; 27 *Federal Procedure*, L.Ed., §62:395.)

(3) *Report of Proceeding.* If a court does not regularly provide for reporting or electronic recording of motion hearings, the local rules must give notice of this practice, and also provide a procedure by which a party may obtain a reporter or a recording in order to create an official transcript. (C.R.C., Rule 3.1310; on necessity of transcript for appellate review, see *Lemelle v. Superior Court* (1978) 77 C.A.3d 148, 156, 143 C.R. 450, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §177 [petitioner has burden of providing adequate record]; *GT v. Superior Court* (1984) 151 C.A.3d 748, 756, 198 C.R. 892 [incomplete record compelled presumption that trial court's order was correct and that petitioner had failed to object]; *Snell v. Superior Court* (1984) 158 C.A.3d 44, 49, 204 C.R. 200 [without transcript, no abuse of discretion could be found].)

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



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C. Hearing.

2. Tentative Ruling.

6 *Witkin Cal. Proc. PWT* § 37

[§ 37] Tentative Ruling.

(1) *Procedures.* A trial court that offers a tentative ruling procedure in civil law and motion matters must use one of the following procedures:

(a) *Where Notice of Intent To Appear Is Required.* The court must make its tentative ruling available by telephone, or by another method at the court's option, by no later than 3 p.m. on the court day before the scheduled hearing. If the court desires oral argument, the ruling must so direct and may also note issues requiring further argument. Lacking court-ordered argument, oral argument is only permitted if a party notifies all other parties and the court by 4 p.m. on the court day before the hearing of the party's intention to appear. Notification may be by telephone or in person. The court must accept notice by telephone but may also designate alternative methods for notifying the court. If the court has not directed oral argument and notice of intent to appear has not been given, the tentative ruling becomes the ruling of the court. (C.R.C., Rule 3.1308(a)(1).)

(b) *Where Notice of Intent To Appear Is Not Required.* The court must make its tentative ruling available by telephone, or by another method at the court's option, by a specified time before the hearing. The ruling may note issues on which the court requires further argument. However, this procedure cannot require the parties to give notice of intent to appear, and the ruling does not automatically become the ruling of the court in the absence of that notice. The ruling only becomes final after the hearing. (C.R.C., Rule 3.1308(a)(2).)

(c) *Notice of Procedure.* A court that follows one of the procedures under C.R.C., Rule 3.1308(a) must so state in its local rules, and the local rule must specify the telephone number and time for obtaining tentative rulings. (C.R.C., Rule 3.1308(c).) If a court or branch adopts a tentative ruling procedure, that procedure must be used by all judges in the court or branch. (C.R.C., Rule 3.1308(d).) However, C.R.C., Rule 3.1308 does not require judges to issue tentative rulings. (C.R.C., Rule 3.1308(e).)

(d) *Other Authorized Procedures.* Other than following the procedures under C.R.C., Rule 3.1308(a), courts may only issue tentative rulings by either (1) posting a calendar note containing tentative rulings on the day of the hearing, or (2) announcing the tentative ruling at the time of oral argument. (C.R.C., Rule 3.1308(b).)

(2) *Failure To Respond to Tentative Ruling.* In *M & R Properties v. Thomson* (1992) 11 C.A.4th 899, 14 C.R.2d 579, the tentative ruling stated the court's intention to grant defendants' motion to dismiss, and provided that the ruling would be determinative unless plaintiffs acted to obtain a hearing. Under the order and the local rules, plaintiffs had until 4:30 p.m. on the day of the ruling to act, but failed to do so. *Held*, the tentative ruling became the ruling of the court as of 4:30 p.m. (11 C.A.4th 901.)

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3. Appearance by Counsel.

a. Making of Motion.

6 Witkin Cal. Proc. PWT § 38

[§ 38] Making of Motion.

(1) *Former Procedure.* The general theory formerly governing motion procedure in California was that a motion consisted of an oral application to the court or judge. The notice of motion was regarded as distinct from the motion itself, and counsel had to be present to actually make the motion. (See *Colthurst v. Harris* (1929) 97 C.A. 430, 432, 275 P. 868; *Milstein v. Sartain* (1943) 56 C.A.2d 924, 930, 133 P.2d 836; *Carnation Co. v. El Rey Cheese Co.* (1949) 92 C.A.2d 726, 729, 208 P.2d 63.)

(2) *Statutory Revision.* Under C.C.P. 1005.5, a motion on all the grounds stated in the notice "is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion, but this shall not deprive a party of a hearing of the motion" to which the party is otherwise entitled.

The statute abolishes the requirement of a court appearance, but protects the right of either party to appear and be heard. (See *Ensher, Alexander & Barsoom v. Ensher* (1964) 225 C.A.2d 318, 325, 37 C.R. 327, quoting the text; on restricted nature of "hearing" that may be allowed, see *supra*, §36 and *infra*, §40.) C.C.P. 1005.5 allows a party to meet restrictive deadlines by deeming a motion "made" at the time of filing even if the hearing is scheduled after the deadline, but it does not deprive a party of the right to a hearing on a motion that must be made after a certain date but was filed prematurely. (*Sadlier v. Superior Court* (1986) 184 C.A.3d 1050, 1054, 229 C.R. 374, *infra*, §214 [summary judgment motion filed before expiration of statutory 60-day period was properly heard after 60 days elapsed].)

(3) *Submission Without Appearance.* A party may give notice that an appearance will not be made at a law and motion hearing, and the matter will be submitted for a ruling as if the party had appeared, unless the court orders otherwise. (C.R.C., Rule 3.1304(c).)

(4) *Failure To Appear.* If neither party gives notice of nonappearance and there is no appearance at the hearing, the court has two options: It may drop the matter from the calendar, to be reset only on motion, or it may rule on the matter. (C.R.C., Rule 3.1304(d).)

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3. Appearance by Counsel.

b. Appearance by Telephone.

6 *Witkin Cal. Proc. PWT* § 39

[§ 39] Appearance by Telephone.

(1) *In General.* Unless the court determines that a personal appearance would materially assist in the proceedings or resolution of a case (*C.C.P. 367.5(c)*) a party that has provided notice may appear by telephone at the following proceedings:

(a) A case management conference, if the party has made a good faith effort to meet and confer before the conference and has timely served and filed a case management statement. (*C.C.P. 367.5(b)(1)*.)

(b) A trial setting conference. (*C.C.P. 367.5(b)(2)*.)

(c) A law and motion hearing, except motions in limine. (*C.C.P. 367.5(b)(3)*.)

(d) A hearing on a discovery motion. (*C.C.P. 367.5(b)(4)*.)

(e) A conference to review the status of an arbitration or mediation. (*C.C.P. 367.5(b)(5)*.)

(f) A hearing to review a dismissal of an action. (*C.C.P. 367.5(b)(6)*.)

A party may also appear by telephone at any other proceeding if the court determines that a telephone appearance is appropriate. (*C.C.P. 367.5(b)(7)*.)

C.R.C., Rule 3.670 governs telephone appearances, and is applicable to all general civil cases, as defined, and to unlawful detainer and probate proceedings. (C.R.C., Rule 3.670(b).)

(2) *When Personal Appearance Is Required.* Unless the court permits appearance by telephone (C.R.C., Rule 3.670(e)), a personal appearance is required for the following:

(a) Trials and hearings where witnesses are expected to testify. (C.R.C., Rule 3.670(d)(1).)

(b) Hearings on temporary restraining orders. (C.R.C., Rule 3.670(d)(2).)

(c) Settlement conferences. (C.R.C., Rule 3.670(d)(3).)

(d) Trial management conferences. (C.R.C., Rule 3.670(d)(4).)

(e) Hearings on motions in limine. (C.R.C., Rule 3.670(d)(5).)

(f) Hearings on petitions to confirm the sale of property under the Probate Code. (C.R.C., Rule 3.670(d)(6).)

(g) An applicant seeking an ex parte order, except where the parties stipulate otherwise or the order is for any of the following: (1) permission to file a memorandum in excess of the permissible page limit, (2) an extension of time to serve pleadings, (3) to set hearing dates on alternative writs and orders to show cause. (C.R.C., Rule 3.670(d)(7).)

(h) Under an order to show cause why sanctions should not be imposed for violating a court order or rule. (C.R.C., Rule 3.670(d)(8).)

(i) Under an order to appear by citation issued under the Probate Code. (C.R.C., Rule 3.670(d)(9).)

The trial court retains full discretion to require a personal appearance at any time where a personal appearance would materially assist in the proceedings or in the management or resolution of a case. In addition, the trial court may permit a party to appear by telephone if such an appearance is appropriate. (C.R.C., Rule 3.670(e).)

(3) *Notice.* A party choosing to appear by telephone must either (a) place the phrase "Telephone Appearance" below the title of the moving or opposing papers, or (b) at least 3 court days prior to the appearance, notify the court and other parties of the intent to appear by telephone. If the notice is written, a "Notice of Intent to Appear by Telephone" must be filed with the court at least 3 court days before the appearance, and served on all parties. If the party subsequently chooses to appear in person, the party must, at least 2 court days before the hearing, notify the court and parties by phone. (C.R.C., Rule 3.670(g).) If the court requires the requesting party's personal appearance, the court must give reasonable notice to all parties before the hearing and may continue the hearing if necessary to accommodate the personal appearance. In courts using a telephonic tentative ruling system for law and motion matters, notification to parties to appear may be given as part of the court's tentative ruling on a specific law and motion matter if given 1 court day before the hearing. (C.R.C., Rule 3.670(h).)

(4) *Conduct of Hearing.* The court must ensure that all participants are audible to each other and that statements made by a participant are identified to that participant. (C.R.C., Rule 3.670(j).) Moreover, telephone appearances must be recorded to the same extent and manner as in-person appearances. (C.R.C., Rule 3.670(k).)

(5) *Teleconferencing Vendor.* The court may contract with a private vendor for teleconferencing, and the contract may permit the vendor to charge counsel for services. (C.R.C., Rule 3.670(i).)

(6) *Standard of Judicial Administration.* Standard 3.1 of the Standards of Judicial Administration provides general recommendations on telephone appearances, including criteria for telephone equipment (Standard 3.1(a) and (b)). Each court is encouraged to adopt a local rule or policy that specifies (a) the responsibility for initiating the telephone call, (b) whether the court sets a specified time or a time range for a telephone appearance, and (c) how the parties are notified of the time for the appearance. (Standard 3.1(d).)

In considering an award of attorneys' fees under any applicable law, the court should consider whether the fees sought are claimed for a personal appearance that could have been accomplished by telephone. (Standard 3.1(c).)

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

(3) *Notice.* See Judicial Council Form No. CIV-020 [Notice of Intent to Appear by Telephone].



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4. Evidence.

a. Restrictions on Oral Testimony.

6 *Witkin Cal. Proc. PWT* § 40

[§ 40] Restrictions on Oral Testimony.

(1) *Permission Required for Introduction of Oral Testimony.* "Evidence received at a law and motion hearing must be by declaration or by request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown." (C.R.C., Rule 3.1306(a).) A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file, no later than 3 court days before the hearing, "a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing." When the statement is filed less than 5 court days before the hearing, the filing party must serve a copy on the other parties "in a manner to assure delivery to the other parties no later than two days before the hearing." (C.R.C., Rule 3.1306(b); see *Rohrbasser v. Lederer* (1986) 179 C.A.3d 290, 299, 224 C.R. 791 [noting that requests to introduce oral testimony are rarely granted in certain courts]; C.E.B., 1 Civil Proc. Before Trial 4th, §12.103; Rutter Group, 2 Civil Proc. Before Trial §9:45; for form of request, see Cal. Civil Practice, 2 Procedure, §14:68.)

(2) *Court Must Exercise Discretion.* In *Reifler v. Superior Court* (1974) 39 C.A.3d 479, 114 C.R. 356, a hearing was held on an order to show cause involving support provisions of a dissolution decree. A local "policy" of the court limited evidence to affidavits or declarations when a hearing on a family law matter would exceed 1 day's time. *Held*, the judge had discretion to exclude oral testimony, but erroneously refused to exercise that discretion in reliance on the local policy. *C.C.P. 2009* (infra, §41) empowers the court to determine motions and orders to show cause on declarations alone, and allows the court discretion to exclude oral testimony, except in contempt proceedings. (39 C.A.3d 483, 484.) "That, however, is not the end of the matter. The trial court, while empowered to exclude oral testimony, also is vested with discretion to receive it. ... There are situations in which the trial judge, in the exercise of that discretion, properly should hear testimony or permit cross-examination of a declarant. ... Here, the trial court ... relied upon a 'policy' purportedly precluding the use of oral testimony. ... The 'policy' must be viewed as a general but flexible standard which reminds judges of a large court of the existence of a valuable discretion which they should exercise in the interest of uniformity of procedure, expedition of court business, and justice to the parties. It is not to be treated as a substitute for the discretion vested by law in the individual trial judge." (39 C.A.3d 485.) (See *Eddy v. Temkin* (1985) 167 C.A.3d 1115, 1121, 213 C.R. 597 [upholding decision to exclude oral testimony].)

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



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4. Evidence.

b. Affidavits and Declarations.

6 *Witkin Cal. Proc. PWT § 41*

[§ 41] Affidavits and Declarations.

(1) *Authorization and Practice.* The parties may make their showings by affidavits and counteraffidavits. (C.R.C., Rule 3.1306(a), *supra*, §40; C.C.P. 2009 [affidavits may be used "upon a motion"]; *Fuller v. Lindenbaum* (1938) 29 C.A.2d 227, 230, 84 P.2d 155; *In re Marriage of Doud* (1986) 181 C.A.3d 510, 524, 226 C.R. 423, citing the text; see Rutter Group, 2 Civil Proc. Before Trial §9:46; 18 Am.Jur. P.P. Forms (2005 ed.), Motions, Rules, and Orders, Form 8 et seq.) *Declarations* executed under penalty of perjury may be used in lieu of affidavits (C.C.P. 2015.5, 6 Cal. Proc. (5th), *Provisional Remedies*, §3), and this is common practice.

(2) *Service and Filing.* Affidavits and counteraffidavits must be served and filed along with the moving or opposing papers. (C.C.P. 1005(b), C.R.C., Rule 3.1300(a), *supra*, §12; C.C.P. 1010, *supra*, §9.)

(3) *Additional Affidavits.* Affidavits filed late, without notice to the other party, may not be considered. However, just as a trial court may reopen a case after submission (see 7 Cal. Proc. (5th), *Trial*, §166), the court may set aside the submission of a motion and allow further affidavits. The proper procedure is to request permission to file additional affidavits on notice and motion; affidavits filed without permission may be disregarded. (*Alvak Enterprises v. Phillips* (1959) 167 C.A.2d 69, 74, 334 P.2d 148 [stating rule, but finding no prejudice in failure to obtain prior permission by noticed motion, where copies of affidavits were filed and served on opposing counsel, who did not object or file reply affidavits].)

(4) *Admissibility.* Affidavits filed with and referred to in the notice of motion may be considered by the judge without the necessity of formal introduction into evidence. (*Waller v. Waller* (1970) 3 C.A.3d 456, 465, 83 C.R. 533.) The sufficiency of affidavits is tested by the same rules as oral testimony. (*McLellan v. McLellan* (1972) 23 C.A.3d 343, 359, 100 C.R. 258.) Ordinarily, affidavits are presumed to state matters personally known to the affiant, and lack evidentiary value when based on information and belief. However, affidavits on information and belief have been held sufficient in a variety of contexts where the facts would otherwise be difficult or impossible to establish. Affidavits on information and belief are also authorized by statute in some contexts, though in others their use is expressly precluded (e.g., summary judgment; see *infra*, §225). (See *Santa Cruz v. Municipal Court* (1989) 49 C.3d 74, 87, 260 C.R. 520, 776 P.2d 222 [e.g., motions for disqualification of trial judge, change of venue, or to quash service]; see Rutter Group, 2

Civil Proc. Before Trial §9:60.)

The usual rule of evidence that hearsay or conclusions admitted without objection may support a judgment or order (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §393 et seq.) applies to affidavits. (*Waller v. Waller*, *supra*, 3 *C.A.3d* 464.)

(4) *Affidavit by Attorney*. There is no requirement that the party, rather than the attorney, make the affidavit; any person with personal knowledge of the matters stated is qualified to make an affidavit in support of a motion. (*McLellan v. McLellan*, *supra*, 23 *C.A.3d* 359 [motion by plaintiff seeking attorneys' fees and costs on appeal; affidavit by her attorney was sufficient]; cf. *Star Motor Imports v. Superior Court* (1979) 88 *C.A.3d* 201, 203, 151 *C.R.* 721, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §172 [affidavit by attorney supporting petition for mandamus was insufficient where based on information and belief].)

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4. Evidence.

c. Other Documentary Evidence.

6 *Witkin Cal. Proc. PWT* § 42

[§ 42] Other Documentary Evidence.

(1) *Products of Discovery*. The results of discovery are available as evidence at the hearing of a motion. (See *C.C.P.* 2025.620 [deposition], *C.C.P.* 2030.410 [answers to interrogatories], *C.C.P.* 2033.410 [responses to request for admissions]; Rutter Group, 2 Civil Proc. Before Trial §9:50.) Discovery documents are not filed unless filing is ordered by the court. (*C.C.P.* 2025.550, 2025.560, 2030.280, 2033.270.) Local rules typically provide for "lodging" the originals with the court clerk, with copies attached to the moving papers. An addressed and stamped envelope must be given to the clerk for the return of the material after the matter is decided. (*C.R.C.*, Rule 3.1302.)

(2) *Record in Action*. Admissions made in the opposing party's pleadings may be relied on (see 4 *Cal. Proc.* (5th), *Pleading*, §452 et seq.), but factual matters in the pleadings are generally alleged as "ultimate facts" and do not constitute *evidence*. (See 4 *Cal. Proc.* (5th), *Pleading*, §378 et seq.; *C.E.B.*, 1 Civil Proc. Before Trial 4th, §12.103; Rutter Group, 2 Civil Proc. Before Trial §9:49.)

Some motions (e.g., to dismiss for lack of prosecution) may be properly presented on the record alone, without affidavits or oral evidence, where the file is a sufficient showing. (*Simonini v. Jay Dee Leather Products Co.* (1948) 85 *C.A.2d* 265, 267, 193 *P.2d* 53.)

(3) *Other Documents*. Other relevant documentary evidence may be presented at a motion hearing if it is properly authenticated (see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §3 et seq.), and meets the usual standards for admissibility, such as the best evidence rule (see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §27 et seq.) and the hearsay rule (see 1 *Cal. Evidence* (4th), *Hearsay*, §1 et seq.).

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CHAPTER VII - Proceedings Without Trial

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I. MOTIONS

C. Hearing.

4. Evidence.

d. Judicial Notice.

6 *Witkin Cal. Proc. PWT* § 43

[§ 43] Judicial Notice.

(1) *In General.* At the hearing on a motion, the court may take judicial notice of undisputed facts. (C.R.C., Rule 3.1306(a); see C.E.B., 1 Civil Proc. Before Trial 4th, §12.103; Cal. Civil Practice, 2 Procedure, §14:60; Rutter Group, 2 Civil Proc. Before Trial §9:54.) Matters subject to compulsory judicial notice are stated in *Ev.C. 451* (see 1 *Cal. Evidence (4th)*, *Judicial Notice*, §7 et seq.); matters subject to optional judicial notice are stated in *Ev.C. 452* (see 1 *Cal. Evidence (4th)*, *Judicial Notice*, §16 et seq.).

(2) *Request for Judicial Notice.* A party seeking optional judicial notice of a matter specified in *Ev.C. 452* must (a) request judicial notice, (b) give each adverse party sufficient notice to prepare a response, and (c) give the court sufficient information for taking judicial notice. (*Ev.C. 453*; see 1 *Cal. Evidence (4th)*, *Judicial Notice*, §36 et seq.) In addition, the requesting party must provide the court and each party with a copy of the material, and, if the matter is part of a file in the court where the motion is being heard, the requesting party must specify in writing the part of the file sought to be judicially noticed, and arrange with the clerk to have the file in the courtroom when the hearing is held. (C.R.C., Rule 3.1306(c); for form of request for judicial notice, see Cal. Civil Practice, 2 Procedure, §14:67.)

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I. MOTIONS

D. Order.

1. How Order Is Made.

6 *Witkin Cal. Proc. PWT* § 44

[§ 44] How Order Is Made.

(1) *In General.* An order is a "direction of a court or judge, made or entered in writing," other than a judgment. (C.C.P. 1003; see *Passavanti v. Williams* (1990) 225 C.A.3d 1602, 1605, 275 C.R. 887 ["another way of defining an order is the court's written ruling on a motion"; orders distinguished from judgments]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §6.53 et seq.) Findings of fact are not ordinarily required for an order made after ruling on a motion. (*Beckett v. Kaynar Mfg. Co.* (1958) 49 C.2d 695, 699, 321 P.2d 749; *Perez v. Perez* (1952) 111 C.A.2d 827, 830, 245 P.2d 344.) Special statutes expressly provide for the method of entering certain kinds of orders. (See 7 Cal. Proc. (5th), *Judgment*, §52 et seq.)

(2) *Proposed Order.* Ordinarily, a proposed written order is included with the moving papers; this is required under some local rules. (See C.E.B., 1 Civil Proc. Before Trial 4th, §12:105; Cal. Civil Practice, 2 Procedure, §14:63; Rutter Group, 2 Civil Proc. Before Trial §9:81.2 et seq.)

(3) *Formal Written Order.* Unless the parties waive notice or the court orders otherwise, the party prevailing on a motion must, within 5 days of the ruling, mail or deliver a proposed order to the other party for approval as conforming to the court's order. The other party has 5 days after mailing or delivery to notify the prevailing party whether the proposed order is approved, stating reasons for disapproval. Failure to notify the prevailing party within the time required is deemed an approval. The provisions of C.C.P. 1013 for extension of time (*supra*, §30 et seq.) do not apply. (C.R.C., Rule 3.1312(a).)

On expiration of the 5-day approval period, the prevailing party must promptly transmit the proposed order to the court together with either a summary of responses or a statement that no responses were received. (C.R.C., Rule 3.1312(b).) If the prevailing party fails to prepare and submit the proposed order, any other party may do so. (C.R.C., Rule 3.1312(c).)

C.R.C., Rule 3.1312 does not apply if the motion was unopposed and a proposed order was submitted with the moving papers, unless the court orders otherwise. (C.R.C., Rule 3.1312(d).)

(4) *Signature and Filing.* A written order must be signed by the judge, and becomes effective when filed. (*Badella*

v. Miller (1955) 44 C.2d 81, 84, 279 P.2d 729; *Maxwell v. Perkins* (1953) 116 C.A.2d 752, 756, 255 P.2d 10; 7 Cal. Proc. (5th), *Judgment*, §54; see C.R.C., Rule 8.104(d)(3) [entry of written order for purposes of appeal], 9 Cal. Proc. (5th), *Appeal*, §610; Rutter Group, 3 Civil Proc. Before Trial §9:294 et seq.; 56 Am.Jur.2d (2000 ed.), *Motions, Rules, and Orders*, §43 et seq.; 18 Am.Jur. P.P. Forms (2005 Rev.), *Motions, Rules, and Orders*, Form 54 et seq.)

In the *Perez* case, supra, Judge S heard the motion and granted it, and later Judge T signed the formal order. *Held*, this was not improper, for Judge S had disposed of all the issues and the signing of the formal order was a more or less perfunctory act. (111 C.A.2d 830.)

(5) *Minute Order*. C.R.C., Rule 3.1312(a) authorizes the court to order "otherwise" than preparation of a formal written order. The usual procedure is for the judge to make an oral order, which becomes effective when entered in the minutes by the clerk. (C.C.P. 1003 ["entered" in writing]; see *Simmons v. Superior Court* (1959) 52 C.2d 373, 378, 341 P.2d 13 [entry in minutes is equivalent of signing and filing formal order]; *McHale v. California* (1981) 125 C.A.3d 396, 399, 178 C.R. 83 [minute order that does not call for preparation and filing of formal order is final]; *People v. Surety Ins. Co.* (1983) 148 C.A.3d 351, 357, 195 C.R. 876 [oral orders are subject to change until entered in permanent minutes]; C.R.C., Rule 8.104(d)(2) [entry of minute order for purposes of appeal], 9 Cal. Proc. (5th), *Appeal*, §610 et seq.)

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D. Order.

2. Notification and Notice.

6 *Witkin Cal. Proc. PWT* § 45

[§ 45] Notification and Notice.

(1) *Notification by Clerk.* When the judge rules on a motion after taking it under submission, the clerk must "immediately" notify the parties of the ruling or order. This notification constitutes service of notice only if it is required by *C.C.P.* 664.5 (appealable orders), and the clerk's failure to give notice does not extend the time for performing an act, except the time to appeal. (C.R.C., Rule 3.1109; see C.R.C., Rule 8.104(a) [time to appeal], C.R.C., Rule 8.751(a) [time of filing notice of appeal]; 9 *Cal. Proc.* (5th), *Appeal*, §576 et seq.)

(2) *Notice by Prevailing Party.* After a motion is granted or denied, the prevailing party must give notice of the court's decision or order to all other parties or their attorneys in the manner provided by *C.C.P.* 1010 et seq., unless (a) the court orders otherwise or (b) notice is waived by all parties in open court and entered in the minutes. (*C.C.P.* 1019.5(a); see *Parris v. Cave* (1985) 174 C.A.3d 292, 294, 219 C.R. 871 [under similar provision of *C.C.P.* 472b (notice of decision on demurrer) no particular form of notice is required, and service of file-stamped copy of order is sufficient]; for forms, see C.E.B., 1 Civil Proc. Before Trial 4th, §12.149; Cal. Civil Practice, 2 Procedure, §14:74.)

(3) *Notice by Court.* Where a motion is granted or denied on the court's own motion, the court must give the required notice, unless notice is waived by all parties in open court and entered in the minutes. (*C.C.P.* 1019.5(b).)

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I. MOTIONS

E. Reconsideration or Renewal of Motion.

1. In General.

6 *Witkin Cal. Proc. PWT* § 46

[§ 46] In General.

(1) *Application by Party*. *C.C.P. 1008* provides two distinct remedies as follows:

(a) *Reconsideration of Order*. A party affected by an order may, within 10 days after service of written notice of the entry of the order, apply for reconsideration "based upon new or different facts, circumstances, or law." The application is made to the same judge or court that made the order. (*C.C.P. 1008(a)*.)

(b) *Subsequent Application for Same Order*. A party who originally applied for an order that was refused may apply for the same order on "new or different facts, circumstances, or law." (*C.C.P. 1008(b)*.)

C.C.P. 1008 specifies the court's jurisdiction for applications for reconsideration of orders and renewals of previous motions, and "applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final." (*C.C.P. 1008(e)*.) Although the remedies are distinct, the grounds for both are identical (*infra*, §47). The requirements of *C.C.P. 1008* are jurisdictional (*infra*, §§49, 50), and its provisions are applicable to applications for interim orders. (*C.C.P. 1008(g)*.) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §6.82 et seq.)

(2) *Reconsideration on Court's Own Motion*. "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." (*C.C.P. 1008(c)*; see *Blake v. Ecker* (2001) 93 C.A.4th 728, 738, 113 C.R.2d 422, *infra*, §520 [trial court had jurisdiction and should have considered plaintiff's motion to vacate; motion should have been treated as motion for reconsideration of original motion to compel arbitration]; *Malek v. Blue Cross of Calif.* (2004) 121 C.A.4th 44, 59, 16 C.R.3d 687 [trial court properly reconsidered motion to compel arbitration in light of recent decision that cast doubt on propriety of arbitration provision; following *Blake*]; *Valdez v. Himmelfarb* (2006) 144 C.A.4th 1261, 1275, 51 C.R.3d 195 [decision in this case on statute of limitations undercut trial court's sanction order and constituted change of law for purposes of *C.C.P. 1008(c)*; thus, it would be abuse of discretion for trial court, after remand, not to reconsider its sanction order].)

(3) *Nonparty Seeking To Vacate Sealing Order*. A person who is not a party to the proceeding but who seeks to vacate a sealing order that is no longer subject to direct review may do so under *C.C.P. 1008(a)*, and must show some

new or different fact, circumstance, or law that justifies vacating the order. The motion must be heard by the trial judge who entered the sealing order, and the moving party must explain any delay in supplying the information. (*Wilson v. Science Applications Int. Corp.* (1997) 52 C.A.4th 1025, 1032, 60 C.R.2d 883 [press corporation sought order to unseal file 6 years after sealing order was entered].)

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E. Reconsideration or Renewal of Motion.

2. Grounds for Relief.

a. Requirements.

6 *Witkin Cal. Proc. PWT* § 47

[§ 47] Requirements.

(1) *New or Different Facts, Circumstances, or Law.* Applications for either reconsideration or for renewal of an order must be based on "new or different facts, circumstances, or law." Thus, the moving party must state by affidavit what application was made before, when and to what judge, what order or decision was made, and what new or different facts, circumstances, or law are claimed. (*C.C.P. 1008(a), (b).*) The following cases are instructive:

Lucas v. Santa Maria Public Airport Dist. (1995) 39 C.A.4th 1017, 1027, 46 C.R.2d 177 [plaintiff's motion for reconsideration of orders sustaining demurrers to first and second amended complaints was not based upon "new or different facts, circumstances or law" where statements in declaration supporting motion were either dated before initial complaint was filed or legally insufficient].

Kalivas v. Barry Controls Corp. (1996) 49 C.A.4th 1152, 1161, 57 C.R.2d 200 [plaintiff counsel's declaration that local rule misled him to believe that hearing on summary judgment was cancelled and thus to omit required filings constituted adequate showing of new or different facts and satisfactory explanation of why plaintiff did not produce evidence at earlier time].

Baldwin v. Home Savings of America (1997) 59 C.A.4th 1192, 1200, 69 C.R.2d 592 [diligence requirement applicable to motion to reconsider on basis of different facts is also applicable to motion on basis of different law].

Pazderka v. Caballeros Dimas Alang (1998) 62 C.A.4th 658, 670, 73 C.R.2d 242 [mistake based on ignorance of law or imprecision in drafting settlement offer is not proper basis for reconsideration].

International Ins. Co. v. Superior Court (1998) 62 C.A.4th 784, 787, 72 C.R.2d 849 [recent cases constituted "change of law" within meaning of statute].

Hollister v. Benzl (1999) 71 C.A.4th 582, 585, 83 C.R.2d 903 [discovery documents establishing relationship between defendant physician and health care provider that were produced at time motion for reconsideration was heard constituted new evidence and were proper basis for reconsidering order compelling arbitration].

Kollander Const. v. Superior Court (2002) 98 C.A.4th 304, 314, 119 C.R.2d 614 [defendant's lengthy response to plaintiff's motion to set aside dismissal, which resulted in denial of plaintiff's motion, constituted grounds for reconsideration to permit plaintiff opportunity to brief new issues].

Johnston v. Corrigan (2005) 127 C.A.4th 553, 556, 25 C.R.3d 657 [cross-defendants' evidence that trial court had failed to consider timely filed points and authorities in support of special motion to strike constituted new circumstances sufficient to permit reconsideration].

Ovitz v. Schulman (2005) 133 C.A.4th 830, 846, 35 C.R.3d 117 [reconsideration was properly denied where Ninth Circuit case, relying on earlier decisions from other circuits, did not constitute "new law" within meaning of C.C.P. 1008(a)].

New York Times Co. v. Superior Court (2005) 135 C.A.4th 206, 212, 37 C.R.3d 338 [granting defendant's motion for reconsideration was abuse of discretion where motion was based solely on deposition testimony available and discoverable for trial and thus not on new or different facts].

Forrest v. Department of Corps. (2007) 150 C.A.4th 183, 203, 58 C.R.3d 466 [where trial court dismissed plaintiff's action for failure to retain counsel after several continuances, plaintiff's postdismissal retention of counsel was not "the type of new fact" to support reconsideration].

(2) *Explanation for Failure To Produce Evidence at Earlier Time.* A party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time. 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 seeking to foreclose on the community property residence of a couple who were in dissolution proceedings in the family law court. The family law court issued a stay of the foreclosure proceedings 2 days before the trustee's summary judgment motion was set to be heard. The trust's attorney promised to bring a copy of the stay order to the summary judgment hearing so that the wife's attorney could present it to the court. However, the wife's attorney arrived 5 minutes late, apparently due to construction work that concealed the courthouse, and the trust's attorney failed to tell the trial judge of the stay order. When the presence of the wife's attorney was called to the judge's attention just as the matter was being submitted, the judge did not permit the attorney to speak. The trial judge then granted summary judgment for the trust in the foreclosure action, and denied the wife's motion for reconsideration. *Held*, reversed. Here, there was a reasonable and credible explanation for the wife's failure to tell the judge of the stay. Because the wife properly showed new or different facts, the trial judge should have reached the merits of her motion for reconsideration. Given that the family law court's stay order was proper, this error prejudiced the wife. (38 C.A.4th 1457.) (See *Kalivas v. Barry Controls Corp.*, *supra*, 49 C.A.4th 1161 [plaintiff counsel's declaration that local rule misled him to believe that hearing on summary judgment was cancelled was satisfactory explanation of why plaintiff did not produce evidence at earlier time]; *Garcia v. Hejmadi* (1997) 58 C.A.4th 674, 690, 68 C.R.2d 228 [plaintiff's motion consisting of his own declared knowledge previously available but not submitted and previously omitted citation of specific paragraph number were not considered new or different facts and plaintiff supplied no satisfactory explanation for not providing these matters earlier]; *Golden Eagle Refinery Co. v. Associated Int. Ins. Co.* (2001) 85 C.A.4th 1300, 1318, 102 C.R.2d 834 [declaration accompanying plaintiff's motion merely catalogued declarant's review of material and presented neither new evidence nor satisfactory explanation for failure to produce evidence earlier].)

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

(2) *Explanation for Failure To Produce Evidence at Earlier Time.* See *Jones v. P.S. Dev. Co.* (2008) 166 C.A.4th 707, 725, 82 C.R.3d 882 [following summary judgment for defendant in action for negligence and products liability, motion for reconsideration was properly denied; plaintiff did not provide adequate explanation for his earlier failure to depose defendant's project supervisor, whose importance was known and who was available before hearing on defendant's motion for summary judgment].



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2. Grounds for Relief.

b. What Are Not Grounds for Relief.

6 *Witkin Cal. Proc. PWT* § 48

[§ 48] What Are Not Grounds for Relief.

(1) *Nonretroactive Statute*. For purposes of *C.C.P. 1008*, an alleged new or different law does not include a later enacted statute without retroactive application. (*C.C.P. 1008(f)*.)

(2) *Reinterpretation of Law*. The jurisdictional prerequisite that the motion be based on "new or different facts, circumstances, or law" is not satisfied by allegations that the trial court misinterpreted California law and, therefore, the moving party relies on "different" law when it reiterates its prior reasoning and authorities. In almost all instances the losing party will believe that the trial judge's "different" interpretation of the law or facts was erroneous. To so interpret the statute "would be contrary to the clear legislative intent to restrict motions to reconsider or renew to circumstances where a party offers the court some fact or authority that was not previously considered by it." (*Gilberd v. AC Transit* (1995) 32 *C.A.4th* 1494, 1500, 38 *C.R.2d* 626 [defense motion for reconsideration of order in action under Tort Claims Act on ground that court misinterpreted law in granting plaintiff relief from claim-filing requirements].)

(3) *Fact Collateral to Merits*. A fact or circumstance "wholly collateral to the merits of the initial motion" is insufficient to warrant reconsideration. (*Gilberd v. AC Transit, supra*, 32 *C.A.4th* 1500 [fact that defendant did not intend to waive oral argument on initial motion].) (See *Garcia v. Hejmadi* (1997) 58 *C.A.4th* 674, 690, 68 *C.R.2d* 228 [plaintiff's concern over lack of chance for oral argument was clearly collateral to merits; citing *Gilberd v. AC Transit*].)

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E. Reconsideration or Renewal of Motion.

3. Statutory Requirements Are Jurisdictional.

a. In General.

6 *Witkin Cal. Proc. PWT* § 49

[§ 49] In General.

(1) *Statutory Declaration. C.C.P. 1008* "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to" *C.C.P. 1008. (C.C.P. 1008(e).)*

In *Morite of Calif. v. Superior Court* (1993) 19 C.A.4th 485, 23 C.R.2d 666, Judge O granted defendants' motion to stay a declaratory relief action concerning insurance coverage, pending disposition of the underlying tort action. Subsequently, Judge K set the declaratory relief action for trial, stating on the record that he was not reconsidering any prior motions, but merely conducting "calendar management." *Held*, this was error. The court circumvented the jurisdictional limits of *C.C.P. 1008(e)* "by consciously ignoring the stay order which had been entered by a predecessor judge of the same court. ... [I]f courts may simply ignore interim orders instead of modifying, amending or revoking them after due consideration, then the procedural, substantive and jurisdictional requirements of section 1008 are meaningless. By making section 1008 expressly jurisdictional, the Legislature clearly intended to prevent courts from modifying, amending or revoking prior orders without due reconsideration." (19 C.A.4th 492; on reconsideration by different judge, see *infra*, §53.)

The following cases are also instructive:

Andrus v. Estrada (1995) 39 C.A.4th 1030, 1042, 46 C.R.2d 300 [second motion for imposition of sanctions for continuous course of misconduct in action was not motion for reconsideration of ruling denying earlier motion for sanctions, and thus moving party was not required to comply with jurisdictional requirements governing reconsideration motions].

In re Marriage of Hobdy (2004) 123 C.A.4th 360, 370, 20 C.R.3d 104 [*C.C.P. 1008* does not apply to attorneys' fees order in family law cases; family law statutes take precedence over reconsideration statute].

Farber v. Bay View Terrace Homeowners Assn. (2006) 141 C.A.4th 1007, 1015, 46 C.R.3d 425 [after denying without prejudice defendant's first fee motion for insufficient evidence, trial court properly granted defendant's second fee motion supported by detailed and itemized fee bill; because trial court indicated that it wished to reconsider fee issue when it denied first motion without prejudice, *C.C.P. 1008* was inapplicable].

(2) *Distinction: Summary Adjudication Is Not Reconsideration of Motion Overruling Demurrer.* In *Community Memorial Hosp. of San Buena Ventura v. Ventura (1996) 50 C.A.4th 199, 56 C.R.2d 732*, the trial judge overruled defendant's demurrer but subsequently granted defendant's motion for summary adjudication. Plaintiff contended that the court lacked jurisdiction to grant summary adjudication because issues adjudicated were essentially those defendant argued and lost on demurrer, and that under *C.C.P. 1008* the court had no jurisdiction to revisit those issues. *Held*, granting summary adjudication was proper. *C.C.P. 1008* limits the trial court's jurisdiction to reconsider, modify, amend, or revoke a prior order. "But a motion for summary judgment or adjudication is not a reconsideration of a motion overruling a demurrer. They are two different motions. To hold that a trial court is prevented in a motion for summary judgment or adjudication from revisiting issues of law raised on demurrer is to condemn the parties to trial even where the trial court's decision on demurrer was patently wrong." (50 C.A.4th 205.)

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3. Statutory Requirements Are Jurisdictional.

b. Inherent Judicial Authority.

6 *Witkin Cal. Proc. PWT* § 50

[§ 50] Inherent Judicial Authority.

The Courts of Appeal were formerly in disagreement over whether *C.C.P. 1008* limits the trial court's power to reconsider motions by the parties. However, *Le Francois v. Goel* (2005) 35 C.4th 1094, 29 C.R.3d 249, 112 P.3d 636, resolved the jurisdictional conflict and reconciled many of the cases by holding that *C.C.P. 1008* and *C.C.P. 437c* (infra, §§275, 276) limit only the *parties'* power to file repetitive motions unless the statutory requirements are met. Neither statute impairs the trial court's inherent authority to reconsider interim rulings on its own motion. (35 C.4th 1107.)

Defendants filed a new motion for summary judgment over a year after the trial court had denied their previous motion. Without objection from the parties, a different judge heard the second motion and granted it, even though it was based on the same grounds as the first. The Court of Appeal affirmed, concluding that, although the second motion violated *C.C.P. 437c(f)(2)* and *1008*, the second judge had inherent power to reconsider the prior interim ruling. *Held*, reversed. The second judge did not reconsider an interim ruling on his own motion, but rather on motion of defendants, and the statutes validly control motions by the parties. (35 C.4th 1104.) "Unless the requirements of [the statutes] are satisfied, any action to reconsider a prior interim order must formally begin with the court *on its own motion*." If a court decides to initiate the action, it should inform the parties, solicit briefing, and hold a hearing. "Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling. This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." (35 C.4th 1108.)

In reaching its conclusion, the court adopted the reasoning of a line of cases that included the following: *Darling, Hall & Rae v. Kritt* (1999) 75 C.A.4th 1148, 89 C.R.2d 676; *Case v. Lazben Financial Co.* (2002) 99 C.A.4th 172, 121 C.R.2d 405; *Kerns v. CSE Ins. Group* (2003) 106 C.A.4th 368, 130 C.R.2d 754; *Abassi v. Welke* (2004) 118 C.A.4th 1353, 14 C.R.3d 336. (35 C.4th 1103.) (See *Clark v. First Union Sec.* (2007) 153 C.A.4th 1595, 1608, 64 C.R.3d 313 [after arbitrators decided that representative and class claims were not arbitrable, trial court had inherent authority to reconsider its prior ruling that plaintiffs' claims must be resolved by arbitration; arbitrators' decision did not preclude reconsideration of prior order; following *Le Francois*].)

To the extent they were inconsistent with the opinion, the court disapproved the following cases: *Remsen v. Lavacot* (2001) 87 C.A.4th 421, 426, 104 C.R.2d 612; *Blake v. Ecker* (2001) 93 C.A.4th 728, 113 C.R.2d 422, *infra*, §520; *Kollander Const. v. Superior Court* (2002) 98 C.A.4th 304, 311, 119 C.R.2d 614; *Wozniak v. Lucutz* (2002) 102 C.A.4th 1031, 1041, 126 C.R.2d 310; *Scott Co. of Calif. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 C.A.4th 197, 132 C.R.2d 89. (35 C.4th 1107, footnote 5.)

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

A trial court's inherent authority to correct its errors applies even when the trial court is prompted to reconsider its prior ruling by a motion filed in violation of *C.C.P. 1008*. This authority extends to final as well as interim orders. *In re Marriage of Barthold* (2008) 158 C.A.4th 1301, 70 C.R.3d 691, involved a marital dissolution in which the trial judge originally denied a postjudgment motion filed by the wife. The trial judge later determined that the wife's motion for reconsideration did not meet the requirements of *C.C.P. 1008*, but also stated that when he originally ruled on the postjudgment order he had misunderstood the true nature of the situation and in rereading the husband's opposition to the original motion realized his error and determined that he should have ruled in favor of the wife. The trial judge then granted the motion for reconsideration. *Held*, affirmed.

(a) *Le Francois v. Goel* (2005) 35 C.4th 1094, 29 C.R.3d 249, 112 P.3d 636, text, p. 473, declared that, even if *C.C.P. 1008* precludes a party from seeking reconsideration, a trial court has authority to reconsider an order on its own motion. That is what the trial court did here. And although the reconsideration was not the result of "an unprovoked flash of understanding" in the language of *Le Francois*, the trial judge made clear his intention to correct an order that he realized was erroneous. That is all that *Le Francois* requires. (158 C.A.4th 1308.)

(b) Although *Le Francois* dealt with an interim order, its holding extends to final orders as well. This conclusion is supported by the legislative history to *C.C.P. 1008*, and *C.C.P. 1008(e)*, which provides that the statute is applicable to both interim and final orders. "Thus, the fact that the order in this case was issued after judgment, and in that sense was 'final,' does not take it outside the ambit either of [*C.C.P. 1008*], or the construction given to that statute by the Supreme Court in *Le Francois*." (158 C.A.4th 1313.)

(c) Unwarranted motions for reconsideration filed merely to spark a trial court to change rulings on its own initiative might arise but are not condoned, and sanctions for this practice are provided by *C.C.P. 1008(d)*. Moreover, "in order to grant reconsideration on its own motion, the trial court must conclude that its earlier ruling was wrong, and change that ruling *based on the evidence originally submitted*." Thus, parties are not permitted "to obtain reconsideration relying on evidence that could and should have been, but was not, presented to the court" in the first instance. (158 C.A.4th 1314.)

See *Montegani v. Johnson* (2008) 162 C.A.4th 1231, 1238, 76 C.R.3d 621 [after receiving Court of Appeal decision that party had violated no contest clause in irrevocable trust, trial court properly determined that it should reconsider its earlier order that action would not violate clause, informed parties of its concern, and requested briefing; following *Le Francois*].

In re Marriage of Herr (2009) 174 C.A.4th 1463, 1470, 95 C.R.3d 464, involved a child support order in which the husband submitted an untimely motion for reconsideration. The trial court granted reconsideration on its own motion and set the matter for further hearing, for which the parties were ordered to submit new declarations of income and expenses and to offer other "competent evidence" on all issues. *Held*, order reversed; this order was for a new trial, not reconsideration. The trial court's action was not the type that was approved by *In re Marriage of Barthold*. Here, the trial court did not intend to grant reconsideration based on evidence previously submitted. It expressly rejected that evidence and ordered a full hearing that involved a reexamination of issues of fact, which amounted to a new trial. Because petitioner had not complied with the applicable statute for a new trial, the trial court was without authority to grant one. (174 C.A.4th 1470.)



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4. Time Limits on Seeking Relief.

a. In General.

6 *Witkin Cal. Proc. PWT § 51*

[§ 51] In General.

(1) *Statutory Limits for Reconsideration.* Reconsideration must be sought within 10 days after service of written notice of entry of the order. (*C.C.P. 1008(a)*; see *Wilson v. Science Applications Int. Corp.* (1997) 52 C.A.4th 1025, 1033, 60 C.R.2d 883 [third party could bring motion under *C.C.P. 1008(a)* to vacate order sealing record 6 years after entry; 10-day time limit was not applicable where movant was not party to original proceeding and thus was not served with copy of sealing order]; *Liberty Mut. Ins. Co. v. Superior Court* (1997) 58 C.A.4th 617, 623, 68 C.R.2d 219 [insurer's motion to terminate earlier adjudicated duty to defend by arguing applicability of New York law (no duty to indemnify) was not motion for reconsideration; thus, *C.C.P. 1008* time limitations did not apply]; *Wiz Technology v. Coopers & Lybrand* (2003) 106 C.A.4th 1, 16, 130 C.R.2d 263 [trial court did not abuse discretion in denying motion for reconsideration filed 1 day beyond limitations period]; on appealability of ruling on motion for reconsideration, see 9 *Cal. Proc.* (5th), *Appeal*, §165; on effect of motion for reconsideration on time to appeal from underlying order, see 9 *Cal. Proc.* (5th), *Appeal*, §600 et seq.)

(2) *No Statutory Limit for Renewal.* No statutory time limit is imposed for seeking renewal. (See *Graham v. Hansen* (1982) 128 C.A.3d 965, 971, 180 C.R. 604 [arguing against any time limit on renewed motions]; cf. *Stephen v. Enterprise Rent-A-Car* (1991) 235 C.A.3d 806, 818, 1 C.R.2d 130 [arguing that jurisdictional time limits on renewed motions are necessary in some cases].)

(3) *No Postjudgment Motion.* After the entry of a judgment, or an order having the effect of a judgment because it finally determines the parties' rights, a motion for reconsideration or renewal as to matters included in the judgment or order is improper. (*Eddy v. Sharp* (1988) 199 C.A.3d 858, 863, footnote 3, 245 C.R. 211 [motion for reconsideration after entry of summary judgment was improper]; *Ten Eyck v. Industrial Forklifts* (1989) 216 C.A.3d 540, 545, 265 C.R. 29 [same]; *Passavanti v. Williams* (1990) 225 C.A.3d 1602, 1605, 275 C.R. 887 [same]; *Betz v. Pankow* (1993) 16 C.A.4th 931, 937, 20 C.R.2d 841, 2 *Cal. Proc.* (5th), *Courts*, §96 [no jurisdiction under *C.C.P. 1008(b)* to vacate judgment confirming arbitration award]; *Ramon v. Aerospace Corp.* (1996) 50 C.A.4th 1233, 1237, 58 C.R.2d 217 [trial court loses power to rule on reconsideration motion once judgment is entered]; cf. *Ikerd v. Warren T. Merrill & Sons* (1992) 9 C.A.4th 1833, 1845, 12 C.R.2d 398 [orders that ultimately result in judgments may be reconsidered prior to entry of judgment; reconsideration of order confirming arbitration award was proper].)

In *APRI Ins. Co. v. Superior Court* (1999) 76 C.A.4th 176, 90 C.R.2d 171, the trial judge signed an order granting defendant's motion to quash and plaintiff filed for reconsideration. After judgment was entered and defendant was dismissed from the action, the trial judge then granted reconsideration, vacated and set aside its order quashing service and dismissing defendant, and denied the motion to quash. *Held*, mandamus issued directing the trial judge to vacate the order granting the motion for reconsideration and denying the motion to quash. A trial court that enters judgment before the time for reconsideration has run does not retain jurisdiction to grant a motion for reconsideration. The fact that a motion for reconsideration may have been pending when judgment was entered does not restore power to the trial court to grant the motion after judgment has been entered. (76 C.A.4th 180.)

(4) *Reconsideration of Motion for New Trial*. In *Jones v. Sieve* (1988) 203 C.A.3d 359, 249 C.R. 821, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §75, the court held that the jurisdictional 60-day period for ruling on a motion for new trial may not be extended by moving under C.C.P. 1008 for reconsideration of the ruling. "Instead, the onus is on the party seeking reconsideration ... to do so within the 60-day jurisdictional time frame. We recognize that the requirement of making a motion to reconsider under section 1008 within that time constraint presents inherent procedural problems. For example, no motion for reconsideration may be possible where the court does not rule on the motion for a new trial until the 60th day. Moreover, orders shortening time ... would be necessary when the motion could not be calendared for hearing in the normal course. ... On the other hand, the aggrieved party is not without a remedy. Relief is available by means of appeal from an order granting a new trial ... or on appeal from the judgment with regard to an order denying a motion for a new trial." (203 C.A.3d 370, 371.)

(5) *Renewal of Motion for Class Certification*. In *Stephen v. Enterprise Rent-A-Car* (1991) 235 C.A.3d 806, 1 C.R.2d 130, 4 Cal. Proc. (5th), *Pleading*, §314, the court held that a renewed motion for class certification is untimely once the appealable order denying certification becomes final. Assuming that such a motion could be brought at all, the expansion of the right to appeal would be "intolerable," because "[n]ew appealable orders could result each time new facts were offered." (235 C.A.3d 817.) "If jurisdictional considerations compel implying time limits on motions under subdivision (a) of section 1008, they must in some cases also limit subdivision (b). An open-ended time for 'renewed' motions is incompatible with California law deeming death-knell certification denials final and binding when not timely appealed. The onus is thus on a plaintiff to bring such a motion within whatever time limit ... applies for fixing the finality of the order." (235 C.A.3d 818, citing *Jones v. Sieve*.)

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b. Distinction: Court's Authority To Construe as Different Motion.

6 *Witkin Cal. Proc. PWT* § 52

[§ 52] Distinction: Court's Authority To Construe as Different Motion.

In *20th Century Ins. Co. v. Superior Court* (2001) 90 C.A.4th 1247, 109 C.R.2d 611, plaintiff sued defendant insurer for breach of contract, bad faith, and fraud arising from defendant's denial of her claim for earthquake damage to her home and her discovery 4 years later of structural damage that defendant's adjuster had failed to discover. The trial judge sustained defendant's demurrer, finding the action time-barred, and entered judgment of dismissal. The trial judge later granted plaintiff's motion to reconsider based on the enactment of C.C.P. 340.9, which revived time-barred claims arising out of the Northridge earthquake. *Held*, affirmed. Although the trial judge could not consider a motion for reconsideration because judgment had been entered, in this case plaintiff's motion could properly be construed as a motion for a new trial, which she could have brought from a judgment of dismissal resulting from the sustaining of a demurrer. Good cause existed to do so because, in ruling that plaintiff's action was time-barred, the trial judge had stated that, should the Governor sign the bill leading to the enactment of C.C.P. 340.9, that would be a ground for reconsideration under C.C.P. 1008. Fairness dictates that plaintiff be permitted to pursue her claim in light of the trial judge's attitude and comments. (90 C.A.4th 1259, 1261.)

In *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 C.A.4th 187, 26 C.R.3d 790, plaintiff filed a motion for reconsideration of the trial court's order granting defendant's summary judgment motion on the same day the trial court entered judgment for defendant. In response to defendant's opposition to the motion, in part based on lack of jurisdiction, plaintiff requested that the trial court construe the motion for reconsideration as a motion for a new trial to avoid loss of jurisdiction. The trial court did so, treated defendant's previous motion for summary judgment as a motion for judgment on the pleadings, and ordered that plaintiff be permitted to amend the complaint to reflect proper standing. *Held*, affirmed. The trial court was free to consider plaintiff's motion regardless of its label. "The principle that a trial court may consider a motion regardless of the label placed on it by a party is consistent with the court's inherent authority to manage and control its docket." (128 C.A.4th 193.)

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5. Reconsideration by Different Judge.

6 *Witkin Cal. Proc. PWT* § 53

[§ 53] Reconsideration by Different Judge.

C.C.P. 1008(a) authorizes a party seeking reconsideration of an order to apply to "the same judge or court that made the order." The trial court's jurisdiction to reconsider a prior ruling, or to entertain a renewal of a previous motion, is subject to the general rule that one trial court judge may not reconsider and overrule another judge's ruling. (See *Morite of Calif. v. Superior Court* (1993) 19 C.A.4th 485, 493, 23 C.R.2d 666, supra, §49.) However, "where the judge who made the initial ruling is unavailable to reconsider the motion, a different judge may entertain the reconsideration motion. ... The proper procedure upon a motion for reconsideration or a renewed motion is for the second judge to direct the moving party to the judge who ruled on the first motion. If the original judge is unavailable ... the second judge may hear the reconsideration motion." (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 C.A.3d 1222, 1232, 254 C.R. 410, 2 Cal. Proc. (5th), *Jurisdiction*, §221.)

In any event, a second judge cannot undo prior judicial action. In *Markwell v. Sykes* (1959) 173 C.A.2d 642, 343 P.2d 769, the first judge ordered S, a witness, to answer certain questions despite her claim of public officer privilege. The second judge disagreed, and sustained the claim of privilege. *Held*, this was error. S, without challenging the first judge's ruling, had fully testified on deposition and thereby waived the privilege. (See 2 Cal. Evidence (4th), *Witnesses*, §269.) In other words, the second judge may reconsider a prior order, but may not "undo what has been done pursuant to it." (173 C.A.2d 650.)

In *Deauville Restaurant v. Superior Court* (2001) 90 C.A.4th 843, 108 C.R.2d 863, plaintiff was denied a writ of attachment and later filed a second application in which plaintiff noted the unsuccessful first application. The second application neither challenged the court's ruling on the first application, nor asked the court to reconsider, revoke, or modify it. The second application presented distinct arguments based on additional evidence and new circumstances not presented with the first application. Because the second application was to be heard by the commissioner who denied the first application, plaintiff filed a peremptory challenge under *C.C.P. 170.6*. The challenge was rejected on the ground that the application involved a motion for reconsideration, which, under *C.C.P. 1008*, must be heard by the original judicial officer. *Held*, it was error to deny the peremptory challenge.

(a) The second application neither referred to *C.C.P. 1008*, nor was it worded in terms of a motion for reconsideration. It "was more akin to a renewed motion." (90 C.A.4th 848.) Moreover, plaintiff's request for the same

relief in the second application did not transform it into a motion for reconsideration. (90 C.A.4th 849.)

(b) Although a motion for reconsideration under *C.C.P. 1008(a)* expressly requires the same judge to hear the motion, a renewed motion under *C.C.P. 1008(b)* omits the "same judge" requirement, which "appears to indicate an intent not to impose the requirement in the context of renewed motions." (90 C.A.4th 850; characterizing as dicta contrary language in *Ziller*.)

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6. Sanctions.

6 *Witkin Cal. Proc. PWT* § 54

[§ 54] Sanctions.

A violation of *C.C.P. 1008* may be punished as a contempt and with sanctions under *C.C.P. 128.7* (infra, §55). (*C.C.P. 1008(d)*); see *Fegles v. Kraft* (1985) 168 C.A.3d 812, 814, 817, 214 C.R. 380 [renewed motion to change venue; claim that motion was in good faith was weakened by failure to comply with requirements of *C.C.P. 1008(b)*]; *Appl v. Lee Swett Livestock Co.* (1987) 192 C.A.3d 466, 475, 237 C.R. 433 [belated and frivolous motion to reconsider ruling on demurrer]; *Young v. Rosenthal* (1989) 212 C.A.3d 96, 121, 260 C.R. 369 [groundless motion to reconsider imposition of discovery sanctions]; *In re Marriage of Green* (1989) 213 C.A.3d 14, 25, 261 C.R. 294 [totally meritless motion to reconsider denial of new trial]; cf. *Tutor-Saliba-Perini Joint Venture v. Superior Court* (1991) 233 C.A.3d 736, 745, 285 C.R.1, infra, §57 [sanctions were erroneously imposed for filing meritorious motion for reconsideration].)

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1. Statutory Authorization.

6 *Witkin Cal. Proc. PWT* § 55

[§ 55] Statutory Authorization.

(1) *Statutory Development.* *C.C.P. 128.5* authorized sanctions for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," including making or opposing motions, arising from complaints filed, or proceedings initiated, before January 1, 1995. (On sanctions under *C.C.P. 128.5* generally, see 7 *Cal. Proc. (5th), Trial*, §226 et seq.; Rutter Group, 2 Civil Proc. Before Trial §9:1010 et seq.) *C.C.P. 128.7* provides sanctions on various grounds for complaints, petitions, written notices of motion, "or other similar paper," in actions filed after January 1, 1995. (*C.C.P. 128.7(i)*.) (On sanctions under *C.C.P. 128.7* generally, see 7 *Cal. Proc. (5th), Trial*, §237 et seq.; Rutter Group, 2 Civil Proc. Before Trial §9:1135 et seq.) (See *Lucas v. Santa Maria Public Airport Dist. (1995) 39 C.A.4th 1017, 1028, 46 C.R.2d 177* [trial judge improperly imposed *C.C.P. 128.5* sanctions in denying plaintiff's reconsideration motion, even though motion was in violation of *C.C.P. 1008*, where judge made no finding that plaintiff engaged in bad faith or that motion was frivolous or intended solely to cause unnecessary delay, and did not provide detailed explanation of conduct justifying sanctions].)

(2) *Sanctions Under C.C.P. 128.7.* Written motion notices, pleadings, petitions, and other similar papers must be signed by the attorney of record, or if the party is unrepresented, by the party. (*C.C.P. 128.7(a)*.) Presenting the notice to the court, "whether by signing, filing, submitting, or later advocating" it, certifies that to the best of the signer's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," (a) the motion is not being submitted for an improper purpose such as harassment, delay, or creating needless expense; (b) the legal contentions are warranted by existing law or by a nonfrivolous argument for a change in the law; (c) the factual contentions have evidentiary support or are specified as being likely to have evidentiary support after a reasonable opportunity for further investigation; and (d) the denials of factual contentions are similarly supported. (*C.C.P. 128.7(b)*.)

Sanctions for violation of the statute may be imposed on motion by a party or on the court's own motion, but the respondent has 21 days (or a different period if prescribed by the court) to withdraw the challenged matter and avoid sanctions. (*C.C.P. 128.7(c)*.) The sanctions imposed are "limited to what is sufficient to deter repetition" of the conduct under similar circumstances and may be either monetary or nonmonetary directive orders. (*C.C.P. 128.7(d)*.)

(3) *Other Statutes and Rules.* Sanctions in connection with motion proceedings may also be authorized under the

following:

- (a) *C.C.P. 177.5* (money sanctions for violation of court order; see 2 *Cal. Proc.* (5th), *Courts*, §177).
- (b) *C.C.P. 396b(b)* (expenses and fees of prevailing party on motion for change of venue; see 3 *Cal. Proc.* (5th), *Actions*, §937).
- (c) *C.C.P. 437c(i)* (penalty for affidavits presented in bad faith or solely for delay in summary judgment proceeding; see *infra*, §228).
- (d) *C.C.P. 1008(d)* (sanctions for failure to comply with statutory requirements for reconsideration or renewal of motion; see *supra*, §54).
- (e) *C.C.P. 575.2* (penalty for violation of local rules; see 7 *Cal. Proc.* (5th), *Trial*, §60 et seq.).
- (f) *C.C.P. 2023.010* et seq. (sanctions for discovery abuses; see 2 *Cal. Evidence* (4th), *Discovery*, §265).
- (g) C.R.C., Rule 2.30 (sanctions for violation of rules or orders in civil cases); (see 7 *Cal. Proc.* (5th), *Trial*, §59).

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2. Sanction Warranted.

6 *Witkin Cal. Proc. PWT* § 56

[§ 56] Sanction Warranted.

(1) *Motion Totally Lacking Merit.* A frequent ground for imposing sanctions in motion proceedings has been bringing a motion that is utterly devoid of merit. The following cases are illustrative:

Karwasky v. Zachay (1983) 146 C.A.3d 679, 681, 194 C.R. 292 [motion to disqualify opposing counsel, with no citation to supporting statutory or case law].

Rains v. Superior Court (1984) 150 C.A.3d 933, 945, 198 C.R. 249 [inappropriate motion for new trial after demurrer was sustained; sanctions limited to expenses incurred in opposition].

M.E. Gray Co. v. Gray (1985) 163 C.A.3d 1025, 1034, 210 C.R. 285 [motion to dismiss made despite waiver of 5-year statute].

Lavine v. Hospital of the Good Samaritan (1985) 169 C.A.3d 1019, 1027, 215 C.R. 708 [motion to produce hospital records, despite hospital's amenable response to numerous prior demands].

Lieppman v. Lieber (1986) 180 C.A.3d 914, 919, 225 C.R. 845 [change of venue motion based on hearsay, generalities, conclusions, and unsupported allegations].

Young v. Rosenthal (1989) 212 C.A.3d 96, 121, 260 C.R. 369 [motion to vacate stipulation based on false allegations].

Monex Int., Ltd. v. Peinado (1990) 224 C.A.3d 1619, 1626, 274 C.R. 667 [summary judgment motion based on contentions clearly contradicted by evidence].

Olson Partnership v. Gaylord Plating Lab (1990) 226 C.A.3d 235, 242, 276 C.R. 493 [summary judgment motion based on interrogatory answer that counsel knew was erroneous and would be corrected].

(2) *Belated Motion.* In *Zimmerman v. Drexel Burnham Lambert* (1988) 205 C.A.3d 153, 252 C.R. 115, defendant filed a motion to compel arbitration after 6 years of actively litigating plaintiffs' action for fraudulent mismanagement of

their securities accounts, and shortly before the fourth continued trial date. The trial judge denied the motion and imposed sanctions, finding that the motion was brought in bad faith and for the purpose of delay. *Held*, the sanctions were appropriate; defense counsel gave inadequate and conflicting explanations for failing to find the agreements containing arbitration clauses earlier. (205 C.A.3d 159.) (See *Bank of California v. Varakin* (1990) 216 C.A.3d 1630, 1637, 265 C.R. 666 ["unconscionably belated" motion to nullify award of attorneys' fees to receiver].)

(3) *Unjustified Opposition to Motion*. In *Park Magnolia v. Fields* (1987) 191 C.A.3d Supp. 1, 236 C.R. 900, an unlawful detainer action, plaintiff used a void default judgment to obtain a writ of possession, then opposed defendant's motion to vacate the default and default judgment and to quash the writ, and insisted on a deposit of rent with the court as a condition of relief (which was granted by the municipal court, and overturned by the superior court). *Held*, defendant's request for sanctions was erroneously denied. Unlike the attorneys in *Luke v. Baldwin-United Corp.* (1985) 167 C.A.3d 664, 213 C.R. 654, "who withdrew their motion once they realized that it lacked merit, plaintiff's attorneys pursued an obviously defective default, default judgment and writ of possession through the hearing on defendant's motion to vacate and then required defendant to obtain a writ of mandate in the superior court by arguing for a condition of relief which has no basis in law. Defendant was put to expense by these frivolous actions and should be compensated for his expenses." (191 C.A.3d Supp. 5.) (See *De Vera v. Long Beach Public Trans. Co.* (1986) 180 C.A.3d 782, 798, 225 C.R. 789 [plaintiff opposed motion to quash, despite evidence that defendant was entitled to immunity]; 580 *Folsom Associates v. Prometheus Dev. Co.* (1990) 223 C.A.3d 1, 26, 272 C.R. 227 [response to motion for summary adjudication of issues, consisting of indiscriminate assemblage of mass of documents with little or no bearing on issues, was "a deliberate, patent effort at obfuscation intended to overwhelm the trial judge"].)

(4) *Failure To Appear at Hearing*. In *Wong v. Davidian* (1988) 206 C.A.3d 264, 253 C.R. 675, plaintiff moved to specially set the case for trial. He failed to appear at the hearing; subsequently, the case was dismissed and sanctions were imposed against counsel for failing to give notice of his inability to appear. *Held*, affirmed. Counsel claimed that he believed his client had obtained another attorney for the hearing, but his failure to notify opposing counsel that he would be out of town, and to adequately arrange for substitute counsel, caused defendant's counsel a needless commute. (206 C.A.3d 272.)

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3. Sanctions Not Warranted.

6 *Witkin Cal. Proc. PWT* § 57

[§ 57] Sanctions Not Warranted.

(1) *Meritorious Motion*. In *Tutor-Saliba-Perini Joint Venture v. Superior Court* (1991) 233 C.A.3d 736, 745, 285 C.R. 1, cross-complainant filed a timely motion for reconsideration of an order granting cross-defendants' motion for a change of venue. The trial judge denied the motion for reconsideration and imposed monetary sanctions for filing a "frivolous motion." *Held*, it was error to grant the change of venue, and the motion for reconsideration was well founded. "The motion was in fact another attempt ... to persuade respondent court that its ruling was erroneous, which it was. Under these circumstances, respondent court's conclusion that the motion was frivolous and brought solely for the purpose of delay was clearly an abuse of discretion." (233 C.A.3d 745.) (See *Optical Surplus v. Superior Court* (1991) 228 C.A.3d 776, 785, 279 C.R. 194 [reversing sanctions imposed for filing motion to quash service of summons that should have been granted as matter of law].)

(2) *Arguably Meritorious Motion*. In *Weisman v. Bower* (1987) 193 C.A.3d 1231, 238 C.R. 756, the trial judge imposed sanctions on defendant for filing a frivolous motion for a protective order to prevent her deposition. *Held*, reversed.

(a) The facts of this case did not make a compelling argument for a protective order, but it would not necessarily have been an abuse of discretion to grant the order; hence, it could not be said that the motion was "totally and completely without merit." (193 C.A.3d 1239.)

(b) The fact that an action is arguably meritorious does not compel the conclusion that it was taken for meritorious motives. But there was no evidence in the record that defendant's motion was filed solely for purposes of harassment or delay. Although *objectively* it might not have been reasonable for defense counsel to think that his client was being harassed, this was clearly what he believed *subjectively* when he moved for the protective order. "Thus, the requisite evidence of improper motive is lacking." (193 C.A.3d 1239.)

Other decisions have also denied sanctions where the motion was arguably meritorious. (See *Luke v. Baldwin-United Corp.* (1985) 167 C.A.3d 664, 670, 213 C.R. 654 [reversing imposition of sanctions; insufficient evidence of improper motive, motion was not utterly without merit when filed, and motion was withdrawn when lack of merit was realized]; *Garcia v. Sterling* (1985) 176 C.A.3d 17, 22, 221 C.R. 349 [motion based on cases misconstruing

law on judicial notice was not in bad faith or frivolous]; *Betz v. Pankow* (1993) 16 C.A.4th 931, 934, 20 C.R.2d 841 [sanctions inappropriate due to lack of uniformity in case law on relevant issue].)

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G. Ex Parte Application.

1. In General.

6 *Witkin Cal. Proc. PWT* § 58

[§ 58] In General.

(1) *Limited Availability.* An ex parte application for relief, being an exception to the general requirement of notice to other parties (*supra*, §7), is permitted only in limited circumstances. As the court remarked in *Consolidated Const. Co. v. Pacific Elec. Ry. Co.* (1920) 184 C. 244, 246, 193 P. 238, where an order of dismissal was made on an ex parte application by a judge acting under mistake of fact: "[T]he case is a good illustration of the complications and difficulties, with their incidents of delay, expense, tribulation, and not infrequently injustice, which are fairly certain to ensue upon the courts tolerating the practice of obtaining *ex parte* orders in any but the plainest and most certain of cases." (See *Rutter Group*, 2 Civil Proc. Before Trial §9:345 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §6.62 et seq.) Where constitutional rights are at issue, orders granted ex parte have been held to violate due process. (See, e.g., *United Farm Workers of America v. Superior Court* (1975) 14 C.3d 902, 912, 122 C.R. 877, 537 P.2d 1237 [ex parte temporary restraining order limiting picketing]; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §363.) (On notice requirements and formal requisites for application, see *infra*, §59.)

(2) *When Permitted.* Applications without notice are permitted chiefly in two situations:

(a) Where the order is one on which the adverse party does not have a right to be heard in opposition. This applies to some preliminary matters such as appointment of a guardian ad litem (see 4 *Cal. Proc.* (5th), *Pleading*, §76), or amendment of pleadings to substitute the true name of a previously fictitiously named defendant (see 4 *Cal. Proc.* (5th), *Pleading*, §489). It also applies where the court may act on its own motion; thus, if the plaintiff fails to amend after a demurrer is sustained, the order or judgment of dismissal under C.C.P. 581(f)(2) may be entered on the defendant's ex parte application. (*Oppenheimer v. Deutschman* (1955) 132 C.A.2d Supp. 875, 879, 281 P.2d 650.)

(b) Where there is pressing necessity for immediate relief, as in applications for orders shortening or extending time to serve notice (*supra*, §15 et seq.) or schedule a deposition (see 2 *Cal. Evidence* (4th), *Discovery*, §47), and in temporary restraining order and receivership cases (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§363, 445). (See *Black Historical Soc. v. San Diego* (2005) 134 C.A.4th 670, 676, 36 C.R.3d 378 [construction deadline that would result in lost incentives for defendant if missed presented sufficient urgency to support defendant's ex parte application for dismissal]; see also C.C.P. 765.010 (expedited action by public officer to remove encumbrance recorded with intent to harass or influence).)

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CHAPTER VII - Proceedings Without Trial

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I. MOTIONS

G. Ex Parte Application.

2. Formal Requisites.

6 *Witkin Cal. Proc. PWT* § 59

[§ 59] Formal Requisites.

C.R.C., Rule 3.1200 et seq. govern the formal requirements for ex parte applications as follows:

(1) *Notice*. Lacking exceptional circumstances (supra, §58), the party seeking an ex parte order must notify all parties no later than 10 a.m. the court day before the ex parte appearance. (C.R.C., Rule 3.1203(a).) However, if an applicant fails to comply with these requirements, the clerk may not reject the application and must promptly present it to the appropriate judicial officer for consideration. (C.R.C., Rule 3.1205.) (See *Datig v. Dove Books* (1999) 73 C.A.4th 964, 976, 87 C.R.2d 719 [trial judge erred in granting defendant's ex parte application to dismiss for plaintiff's alleged failure to amend within specified time where defendant failed to (a) give plaintiff required notice and (b) serve application on plaintiff].)

The notice must specify the nature of the relief requested, and the date, time, and place for presentation of the application. The notice must also inquire if the opposing party or counsel will appear to oppose the application. (C.R.C., Rule 3.1204(a).)

The ex parte application must contain a declaration that states one of the following with regard to notice:

(a) That within the applicable time period, as specified, the applicant informed the opposing party of the time and place of the application. (C.R.C., Rule 3.1204(b)(1).)

(b) That the applicant attempted in good faith to inform the opposing party but failed, and specifying the efforts made. (C.R.C., Rule 3.1204(b)(2).)

(c) That for reasons specified, the applicant should be exempted from informing the opposing party. (C.R.C., Rule 3.1204(b)(3).)

If notice was provided later than required by C.R.C., Rule 3.1203(a), the declaration regarding notice must explain the exceptional circumstances that justify the shorter notice. (C.R.C., Rule 3.1204(c).)

(2) *Papers Required*. A request for ex parte relief must include the following: (a) a written application containing

the case caption and a statement of the relief requested; (b) a supporting declaration making the required factual showing; (c) a competent declaration regarding notice under C.R.C., Rule 3.1204(b) based on personal knowledge; (d) a supporting memorandum; and (e) a proposed order. (C.R.C., Rule 3.1201.) In addition, the application must specify the name, address, and telephone number of any known attorney for a party or parties or, if no attorney is known, the same information for the party or parties. (C.R.C., Rule 3.1202(a).)

(3) *Affirmative Factual Showing.* An applicant must make an affirmative factual showing in a declaration based on personal knowledge of irreparable harm, immediate danger, or other statutory basis for granting ex parte relief. (C.R.C., Rule 3.1202(c).)

(4) *Disclosure of Prior Applications.* An application must include a full disclosure of any prior application of the same character and relief, even if made on different facts, where the prior application has been refused in whole or part. (C.R.C., Rule 3.1202(b).)

(5) *Service of Papers.* Parties appearing at the hearing must serve the application or written opposition on all other appearing parties at the first reasonable opportunity. Lacking exceptional circumstances, a hearing may not proceed unless service has been made. (C.R.C., Rule 3.1206.)

(6) *Personal Appearance.* An ex parte application may be considered without the personal appearance of the applicant in the following cases only: (a) applications to file a memorandum in excess of the page limit; (b) applications for extensions of time to serve pleadings; (c) setting hearing dates on alternative writs and orders to show cause; and (d) stipulations by the parties for an order. (C.R.C., Rule 3.1207.)

Other requirements may be imposed by local rules. (See C.E.B., 1 Civil Proc. Before Trial 4th, §13.2; Rutter Group, 2 Civil Proc. Before Trial §9:350; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §6.62.)

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I. MOTIONS

G. Ex Parte Application.

3. Order To Show Cause.

a. Nature and Purpose.

6 *Witkin Cal. Proc. PWT* § 60

[§ 60] Nature and Purpose.

An order to show cause is an order, issued by a court on an ex parte application and served on the party to whom it is directed, requiring the party to appear at a specified time and show cause why the relief requested by the applicant should not be granted. A hearing follows in the same manner as if the time were specified in a notice of motion. (*Difani v. Riverside County Oil Co.* (1927) 201 C. 210, 213, 256 P. 210, supra, §4; *Reifler v. Superior Court* (1974) 39 C.A.3d 479, 483, 114 C.R. 356; *Eddy v. Temkin* (1985) 167 C.A.3d 1115, 1120, 213 C.R. 597.)

Thus, the ex parte application and order to show cause have much the same purpose and effect as a notice of motion. In *McAuliffe v. Coughlin* (1894) 105 C. 268, 38 P. 730, the court said: "It does not appear that plaintiff moved for the order to show cause, but upon his motion for an order that execution issue it was proper and regular practice for the court, of its own motion, to order the defendant to show cause why plaintiff's motion should not be granted; thus giving the defendant an opportunity to be heard in answer to that motion. The order to show cause was simply a notice of the motion, and a citation of the defendant to appear at a stated time and place and show cause why plaintiff's motion should not be granted. Such orders are frequently made, especially on applications for injunctions and writs of mandate." (105 C. 270.) (See *In re Dahnke* (1923) 64 C.A. 555, 562, 222 P. 381; *Chichester v. Chichester* (1964) 228 C.A.2d 491, 497, 39 C.R. 553; *Donald J. v. Evna M.* (1978) 81 C.A.3d 929, 933, 147 C.R. 15, supra, §3; C.E.B., 1 Civil Proc. Before Trial 4th, §14.15; Cal. Civil Practice, 2 Procedure, §14:30; 18 Am.Jur. P.P. Forms (2005 ed.), Motions, Rules, and Orders, Forms 63, 64.)

The Federal Rules do not provide for orders to show cause, and it has been suggested that the motion procedure should be followed in all federal cases. (See 5 Federal Practice & Procedure (Wright & Miller) §1195; 27A Federal Procedure, L.Ed., §62:386.)

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3. Order To Show Cause.

b. When Order Is Used.

6 *Witkin Cal. Proc. PWT* § 61

[§ 61] When Order Is Used.

An order to show cause is principally used in the following areas:

(1) *Marital Litigation*. Marital litigation, where temporary relief is sought. (See C.E.B., Practice Under the *California Family Code*, §11:16; Cal. Civil Practice, 2 Family Law Litigation, §11:42 et seq.; Rutter Group, 1 Family Law §5:13; 11 *Summary* (10th), *Husband and Wife*, §198.)

(2) *Contempt*. Contempt proceedings, which are commenced by an ex parte application without a summons or other prescribed process. (See *C.C.P. 1212*; Rutter Group, 2 Civil Proc. Before Trial §9:713 et seq.; 7 Am.Jur. P.P. Forms (2002 ed.), Contempt, §68 et seq.; 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §340 et seq.)

(3) *Provisional Remedies*. Where the provisional remedies of injunction or receivership are sought under circumstances calling for immediate temporary relief. (See 6 *Cal. Proc. (5th)*, *Provisional Remedies*, §§363, 445.)

(4) *Extraordinary Writs*. In extraordinary writ proceedings, instead of an alternative writ. (See 8 *Cal. Proc. (5th)*, *Extraordinary Writs*, §188 et seq.)

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3. Order To Show Cause.

c. Procedure.

6 *Witkin Cal. Proc. PWT* § 62

[§ 62] Procedure.

(1) *Jurisdiction and Service Requirements.* If the adverse party has not appeared, the order serves not only as a notice of motion for relief but as a citation or summons, giving personal jurisdiction over the defendant or respondent. (*Sarracino v. Superior Court* (1974) 13 C.3d 1, 8, footnote 6, 118 C.R. 21, 529 P.2d 53; *In re Morelli* (1970) 11 C.A.3d 819, 838, 91 C.R. 72; see 3 *Cal. Proc.* (5th), *Actions*, §962.) In such a case, the order to show cause must be served in the same manner as a summons. (*In re Morelli*, *supra*, 11 C.A.3d 835; on service of summons, see 3 *Cal. Proc.* (5th), *Actions*, §1000 et seq.) However, if the party has appeared and the order is merely the equivalent of a notice of motion, it is properly served on the party's attorney (*supra*, §§13, 14). (*Reynolds v. Reynolds* (1943) 21 C.2d 580, 583, 134 P.2d 251; *Conae v. Conae* (1952) 109 C.A.2d 696, 697, 241 P.2d 266; *In re Morelli*, *supra*, 11 C.A.3d 838.)

(2) *Application and Accompanying Documents.* The application for an order to show cause is written, usually in the form of a declaration by counsel stating the grounds for the requested relief. (See C.E.B., 1 Civil Proc. Before Trial 4th, §13.20 [form].) Because the application itself provides notice to the opposing party, the advance notification generally required for ex parte applications (*supra*, §59) is usually not required. (See C.E.B., 1 Civil Proc. Before Trial 4th, §13.16.)

The application may be accompanied by a supporting memorandum (*supra*, §11) and other supporting documents, where needed, and a proposed order (*supra*, §9). After it is signed by the judge, the order to show cause must be served and filed with proof of service (*supra*, §§33, 34). If the court issues an order after the hearing, it is served and filed in the same way as an order after noticed motion. (See *supra*, §§44, 45.)

(3) *Judicial Council Forms.* The Judicial Council has adopted the following mandatory forms:

Judicial Council Form No. FL-300 [Order To Show Cause].

Judicial Council Form No. FL-410 [Order To Show Cause and Affidavit For Contempt].

Judicial Council Form No. WV-120 [Order To Show Cause and Temporary Restraining Order (CLETS)]

(Workplace Violence)].

(4) *Evidence*. Except in contempt proceedings, the court is empowered to decide issues raised by an order to show cause on declarations, without oral testimony. But the court also has discretion to receive oral testimony. (*Eddy v. Temkin* (1985) 167 C.A.3d 1115, 1120, 1121, 213 C.R. 597; see *Reifler v. Superior Court* (1974) 39 C.A.3d 479, 114 C.R. 356, *supra*, §40; on other evidentiary considerations common to noticed motions and orders to show cause, see *supra*, §41 et seq.)

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II. REFERENCE

A. In General.

1. Nature and Purpose.

6 *Witkin Cal. Proc. PWT* § 63

[§ 63] Nature and Purpose.

A reference is the sending of a pending action or proceeding, or some issue involved in the matter, to a referee for hearing, determination, and report back to the court. The procedure is commonly employed where complicated accounts can more conveniently be examined or taken outside of court, and to resolve discovery disputes and certain child support matters. (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §3.70 et seq.; 66 *Am.Jur.2d* (2001 ed.), *References* §1 et seq.; 1 *Am.Jur. P.P. Forms* (2003 ed.), *Accounts and Accounting*, Form 171 et seq.; 21A *Am.Jur. P.P. Forms* (1992 ed.), *References*, Form 1 et seq.; 85 *A.L.R.2d* 801 [reference to fix amount of alimony]; *Cal. Civil Practice*, 3 Procedure, §26:12 et seq.; Rutter Group, *Alternative Dispute Resolution* §5:106 et seq.; on referees, see 2 *Cal. Proc.* (5th), *Courts*, §§346, 347; on reference in appellate courts, see 9 *Cal. Proc.* (5th), *Appeal*, §767.) It is also used as a method of alternative dispute resolution. (See *infra*, §496.)

The principal coverage of reference is in *C.C.P.* 638 et seq., and *C.R.C.*, Rule 3.900 et seq. Various other provisions authorize the procedure, including the following:

- (a) Reference in default proceeding. (See *C.C.P.* 585(b), *infra*, §169.)
- (b) Reference in partition proceedings. (See *C.C.P.* 873.010 et seq., 12 *Summary* (10th), *Real Property*, §76 et seq.)
- (c) Reference in water cases. (See *Water C.* 2000; *Fleming v. Bennett* (1941) 18 *C.2d* 518, 522, 116 *P.2d* 442; *Pasadena v. Alhambra* (1949) 33 *C.2d* 908, 919, 207 *P.2d* 17; 12 *Summary* (10th), *Real Property*, §926.)

A reference may be either voluntary (i.e., ordered by the court based on the parties' agreement or stipulation) or compulsory (i.e., ordered by the court on motion of either party or on court's own motion). (See *C.C.P.* 638 [voluntary]; *C.C.P.* 639 [compulsory]; *Cal. Civil Practice*, 3 Procedure, §26:14.)

A voluntary reference may be general (to try any and all issues) or special (to ascertain a fact). (See *infra*, §64.) A compulsory reference must be special. (See *infra*, §65 et seq.)

The referee's powers are, in any event, limited to those set forth in the order of reference. (See *C.C.P.* 638, 639.) Moreover, given the circumscribed powers of a referee in a general reference, the referee is not a temporary judge and

thus is not required to take the oath of a temporary judge. (*Kajima Engineering & Const. v. Pacific Bell* (2002) 103 C.A.4th 1397, 1400, 127 C.R.2d 464 [judgment was properly entered by superior court following general reference].)

The Federal Rules provide for reference to "special masters." (See *F.R. Civ. P.*, Rule 53; 9A Federal Practice & Procedure (Wright & Miller) §2601 et seq.; Federal Procedure, L.Ed., §68:1 et seq.)

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II. REFERENCE

A. In General.

2. Voluntary Reference.

6 Witkin Cal. Proc. PWT § 64

[§ 64] Voluntary Reference.

A reference may be ordered by the agreement of the parties or on the motion of a party to a written contract or lease that requires controversies to be heard by a referee. (C.C.P. 638; on procedure, see *infra*, §68 et seq.) Voluntary reference is often used as a method of alternative dispute resolution. (See *infra*, §496.) However, the court may not use the procedures authorized by C.C.P. 638 to appoint a mediator. (C.R.C., Rule 3.900.)

A voluntary reference may be a *special reference*, simply to ascertain some fact (C.C.P. 638(b)), or a *general reference* to determine all issues of fact or law (C.C.P. 638(a)). The distinction is significant: All parties must consent to a general reference, and the referee's factual and legal determinations are binding, but a special reference may be compulsory as well as voluntary (see *infra*, §65 et seq.), and the referee's findings of fact are advisory only, not binding on the trial court. (*Holt v. Kelly* (1978) 20 C.3d 560, 562, 143 C.R. 625, 574 P.2d 441; *Estate of Bassi* (1965) 234 C.A.2d 529, 536, 44 C.R. 541; *Estate of Johnston* (1970) 12 C.A.3d 855, 860, 91 C.R. 116; *Dynair Electronics v. Video Cable* (1976) 55 C.A.3d 11, 20, 127 C.R. 268; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 C.A.3d 431, 436, 227 C.R. 460, citing the text; see 21A Am.Jur. P.P. Forms (2001 ed.), References, Form 1 et seq.)

Unless it clearly appears from the parties' agreement or the court's order that a general reference is intended, the reference is presumed to be special. (*Estate of Bassi, supra*, 234 C.A.3d 539 [order construed as special reference]; *Estate of Johnston, supra*, 12 C.A.3d 855 [same].)

The following cases are also instructive:

Murphy v. Padilla (1996) 42 C.A.4th 707, 713, 49 C.R.2d 722, *infra*, §123 [settlement reached in voluntary reference is enforceable under C.C.P. 664.6 as made "before the court" where reference is general, but not where reference is special].

National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Nationwide Ins. Co. (1999) 69 C.A.4th 709, 714, 82 C.R.2d 16 [parties' agreement to submit dispute to binding arbitration while retaining right to appeal was in substance voluntary reference].

Housing Group v. United Nat. Ins. Co. (2001) 90 C.A.4th 1106, 1113, 109 C.R.2d 497, infra, §123 [circumstances permitting reference under *C.C.P.* 638 are defined by statute and require proceeding over which court has jurisdiction; thus, statute did not permit parties in private mediation to petition for appointment of referee when they had no action pending].

Woodside Homes of Calif. v. Superior Court (2006) 142 C.A.4th 99, 104, 47 C.R.3d 683 [real estate purchase agreement's reference provision was valid; authorization of predispute agreements in *C.C.P.* 638 unambiguously permits predispute waiver of jury trial and thus conforms with *Grafton Partners L.P. v. Superior Court (2005) 36 C.4th 944, 32 C.R.3d 5, 116 P.3d 479, 7 Cal. Proc. (5th), Trial, §103*].

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See *Treo Kettner Homeowners Assn. v. Superior Court (2008) 166 C.A.4th 1055, 1067, 83 C.R.3d 318*

[developer-written requirement in homeowners association's covenants, conditions, and restrictions (CC&Rs) that all disputes between owners and developer and between association and developer be decided by general judicial reference was not written contract as contemplated by *C.C.P.* 638; CC&Rs are adhesive by nature, are created years before many owners buy, and often may not be modified by association or future buyers, thus rendering them insufficient to effectively and permanently waive right to jury trial].



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II. REFERENCE

A. In General.

3. Compulsory Reference.

a. In General.

6 *Witkin Cal. Proc. PWT* § 65

[§ 65] In General.

When the parties do not consent, a reference may be ordered by the court, either on application of a party or on its own motion, in prescribed circumstances and pursuant to *C.C.P. 640(b)* (infra, §69). (*C.C.P. 639(a)*; see 66 *Am.Jur.2d* (2001 ed.), *References* §5 et seq.; 21A *Am.Jur. P.P. Forms* (2001 ed.), *References*, Form 16 et seq.; on procedure, see infra, §68 et seq.)

A compulsory reference may not be a general reference; i.e., the court may not refer the entire case to a referee without the consent of the parties. (See infra, §67.) In addition, where the court orders a reference under *C.C.P. 639*, the referee is not empowered to make binding factual findings or judicial determinations; "the court itself must make these determinations, usually upon the receipt of a report containing findings and recommendations ... which the court may either adopt as its own or modify as appropriate." (*In re Marriage of Olson* (1993) 14 *C.A.4th* 1, 8, 17 *C.R.2d* 480 [reference to accountant for monthly determination of spousal support was unlawful delegation of judicial authority]; on authority of commissioner acting as referee under *C.C.P. 259*, see 2 *Cal. Proc.* (5th), *Courts*, §347.)

The court may order the appointment of a referee only for the purposes specified in *C.C.P. 639* (infra, §66), and may not use the procedures to appoint a mediator. (*C.R.C.*, Rule 3.920.)

Referee appointments under *C.C.P. 639* must be by written order and must include (a) the reasons or circumstances for the appointment and the subject matter, (b) the referee's name, address, and phone number, and (c) the referee's hourly rate and, on request, the maximum hours for which the referee may charge. In addition, the order must include findings of the parties' ability or inability to pay a pro rata share of the referee's fee. Ability to pay must be based on the ability of a party, not the party's counsel. (*C.C.P. 639(d)*.)

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II. REFERENCE

A. In General.

3. Compulsory Reference.

b. Proper Reference.

6 Witkin Cal. Proc. PWT § 66

[§ 66] Proper Reference.

C.C.P. 639 authorizes compulsory reference in the following circumstances:

(1) *Long account*. When the trial requires examination of a long account, a referee "may be directed to hear and decide the whole issue." (C.C.P. 639(a)(1).) The "whole issue" refers to the account, and does not include other issues lacking a direct connection with the account. (*Barker Bros. v. Coates* (1931) 211 C. 756, 758, 297 P. 8; *Fredenhall v. Shrader* (1920) 45 C.A. 719, 723, 188 P. 580; see *Fooshe v. Sunshine* (1950) 96 C.A.2d 336, 345, 215 P.2d 66 [referee properly considered partnership agreement, termination of partnership operations, and misappropriations by party in taking account of partnership affairs]; *United States Fidelity & Guaranty Co. v. Superior Court* (1988) 204 C.A.3d 1513, 1527, 252 C.R. 320 [referee properly determined reasonableness of fees on reference of long account for attorneys' fees]; *De Guere v. Universal City Studios* (1997) 56 C.A.4th 482, 500, 65 C.R.2d 438 [scope of reference for long account is set by constitutional limitation on delegation of judicial power; thus, although referee may determine and apply appropriate accounting principles, trial judge must resolve other issues such as intent of parties or nature of agreement]; *Jones v. Wagner* (2001) 90 C.A.4th 466, 474, 108 C.R.2d. 669 [in reference for long account, referee was not required to disclose records relied on where reference did not contemplate holding hearing or taking evidence].)

(2) *Taking account necessary*. When taking an account is necessary, either to inform the court before judgment or to carry the judgment into effect. (C.C.P. 639(a)(2); see *Baumann v. Harrison* (1941) 46 C.A.2d 84, 91, 115 P.2d 530 [better practice is to first determine whether accounting is necessary, but timing of reference depends on order of proof in particular case].)

(3) *Question of fact*. When a question of fact, other than on the pleadings, arises on motion or otherwise, at any stage of the action. (C.C.P. 639(a)(3); see *Ruisi v. Thieriot* (1997) 53 C.A.4th 1197, 1211, 62 C.R.2d 766 [scope of nonconsensual reference under C.C.P. 639(c) (now C.C.P. 639(a)(3)) must be limited to factual questions on existing controversies]; *Estate of Beard* (1999) 71 C.A.4th 753, 777, 84 C.R.2d 276 [probate court's special reference to determine factual questions of whether and why party had disobeyed court order was proper]; *In re Marriage of Petropoulos* (2001) 91 C.A.4th 161, 175, 110 C.R.2d 111 [trial court's order to special master to assess parties' credibility was proper in reference to determine parties' income and assets for purposes of spousal support modification]

motions].)

(4) *Special proceeding*. When the reference is necessary for the information of the court in a special proceeding. (C.C.P. 639(a)(4); see *Holt v. Kelly* (1978) 20 C.3d 560, 562, 143 C.R. 625, 574 P.2d 441 [reference in mandamus proceeding]; *People v. Superior Court (Laff)* (2001) 25 C.4th 703, 729, 107 C.R.2d 323, 23 P.3d 563 [appointment of special master to review seized documents in criminal proceeding to determine claims of privilege was not "special proceeding" within meaning of statute; however, appointment was proper exercise of court's inherent authority]; on nature of special proceedings, see 3 Cal. Proc. (5th), Actions, §64 et seq.)

(5) *Discovery*. When the court determines in its discretion that it is necessary to appoint a referee to hear and determine discovery motions and disputes relevant to discovery, and to report findings and make a recommendation. (C.C.P. 639(a)(5); see *Sauer v. Superior Court* (1987) 195 C.A.3d 213, 225, 240 C.R. 489 [sanctions ordered by discovery referee were properly imposed after independent review by trial judge]; *Solorzano v. Superior Court* (1993) 18 C.A.4th 603, 22 C.R.2d 401, *infra*, §78; *Lu v. Superior Court* (1997) 55 C.A.4th 1264, 1269, 64 C.R.2d 561 [case management order appointing discovery referee in complex construction defect case was appropriate under C.C.P. 639 even though there was no pending discovery dispute].)

A discovery referee may only be appointed if the exceptional circumstances of the case require it. (C.R.C., Rule 3.927.)

Unless the parties have agreed to a reference, the court should not make a blanket order directing all discovery motions to a discovery referee except in the unusual case where a majority of the following factors are present: (a) There are multiple issues to be resolved; (b) there are multiple motions to be heard simultaneously; (c) the present motion is only one in a continuum of many; and (d) the number of documents to be reviewed (especially in issues based on assertions of privilege) make the inquiry inordinately time-consuming. (*Taggares v. Superior Court* (1998) 62 C.A.4th 94, 105, 72 C.R.2d 387, *infra*, §78; see *Hood v. Superior Court* (1999) 72 C.A.4th 446, 449, 85 C.R.2d 114 [trial judged erred in appointing discovery referee where there was no necessity to do so; statute requires something extraordinary before referee is forced on nonconsenting party].)

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

(5) *Discovery*. C.R.C., Rule 3.927 was repealed in 2009.



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II. REFERENCE

A. In General.

3. Compulsory Reference.

c. Improper Reference.

6 *Witkin Cal. Proc. PWT* § 67

[§ 67] Improper Reference.

(1) *Statutory Authorization Is Required.* Unless the case comes within one of the statutory classifications (*supra*, §66), the court has no power to order a reference. (*Dunner v. Hoover* (1941) 43 C.A.2d 753, 758, 111 P.2d 737; *Bird v. Superior Court* (1980) 112 C.A.3d 595, 599, 169 C.R. 530.)

In re Marriage of Galis (1983) 149 C.A.3d 147, 196 C.R. 659, involved the wife's refusal in a marital dissolution case to stipulate to a hearing by the court commissioner sitting as a temporary judge (see C.C.P. 259; 2 *Cal. Proc.* (5th), *Courts*, §344). The commissioner then transferred the matter to a judge who, over the wife's objection, assigned the same commissioner to hear evidence and make findings and recommendations as a *referee*. He did so, and an interlocutory judgment of dissolution, incorporating the findings and recommendations, was granted by the judge. *Held*, reversed; a contested dissolution action does not come under any of the categories listed in C.C.P. 639. (149 C.A.3d 151, 152.) "We are mindful that the use of court commissioners and referees is an important tool in the economical and expeditious administration of justice. Although the parties have not supplied us any statistics on the matter, we believe that in the vast majority of dissolution cases stipulation to trial by a commissioner is a mere formality. Nevertheless, to force an unwilling litigant to try his or her case before someone other than a judge violates clearly announced legislative policy." (149 C.A.3d 154.)

In *Aetna Life Ins. Co. v. Superior Court* (1986) 182 C.A.3d 431, 436, 227 C.R. 460, the trial court assigned all law and motion summary judgment proceedings in the parties' insurance coverage dispute to a referee for hearing and determination, purportedly under former C.C.P. 639(d) (now C.C.P. 639(a)(4); *supra*, §66). The referee ruled for plaintiff, both on her motion for summary adjudication and on defendant's cross-motion for summary judgment or summary adjudication. Defendant requested a hearing on the referee's findings and asked that they be rejected by the court. The court denied a hearing, and made an order accepting the referee's report. *Held*, the referee had no authority to decide the motions.

(a) As admitted by both parties, the statute applies to special proceedings and not to ordinary civil law and motion proceedings. Although the parties apparently did not object to the reference, they did not agree to it in writing and therefore did not meet the statutory conditions for a consensual general reference under C.C.P. 638 (*supra*, §64). (182

C.A.3d 435.)

(b) "The superior court has no power to assign matters to a referee for decision without explicit statutory authorization." (182 *C.A.3d 435*, citing *In re Marriage of Galis, Bird v. Superior Court*, and the text.) "Particularly, the court has no power to make an unconsented-to general reference, which conclusively decides all or part of a matter." A general reference is not authorized except by explicit agreement of the parties, and Cal. Const., Art. VI, §22 (see 2 *Cal. Proc.* (5th), *Courts*, §343 et seq.) prevents delegation of judicial power except for the performance of "subordinate judicial duties." (182 *C.A.3d 435*.) "Deciding a major legal issue in a case, which probably will determine liability, is not a subordinate judicial duty." (182 *C.A.3d 436*.)

(c) "The statutes carefully preserve the distinction of special and general reference to comply with the constitutional mandate; a general reference has binding effect, but must be consensual, whereas a special reference may be ordered without consent but is merely advisory, not binding on the superior court." (182 *C.A.3d 436*, citing *C.C.P. 644, 645*, *infra*, §§74, 75.) Here, although the reference was purportedly special, the superior court treated the referee's findings and conclusions of law as binding and determinative, without providing a rehearing. "We view this action as an abdication of judicial responsibility not authorized by law and contravening the constitutional restrictions upon the exercise of judicial power." (182 *C.A.3d 436*.) (See *Ruisi v. Thieriot* (1997) 53 *C.A.4th 1197, 1209*, 62 *C.R.2d 766* [trial judge erred in making compulsory reference to special master of issues pertaining to implementation of child custody orders where issues were not covered by *C.C.P. 639*]; *Jovine v. FHP* (1998) 64 *C.A.4th 1506, 1523, 1525*, 76 *C.R.2d 322* [reference for purpose of hearing and determining discovery issues and summary judgment motions was beyond trial judge's authority; following *Aetna Life Ins. Co.*]; *Settemire v. Superior Court* (2003) 105 *C.A.4th 666, 668, 669*, 129 *C.R.2d 560* [trial court's reference to commissioner in family law matter for hearing and findings on "any matter of fact upon which information is required by the Court" was too broad and imprecise].)

(2) *Waiver*. Participation in a hearing before a referee without objection may be held to waive any error in ordering the reference. (*Joshua Hendy Machine Works v. Pacific Cable Const. Co.* (1893) 99 C. 421, 423, 33 P. 1084; *Estate of Hart* (1938) 11 *C.2d 89, 92*, 77 P.2d 1082; *Estate of Johnston* (1970) 12 *C.A.3d 855, 859*, 91 C.R. 116.)

In *Aetna Life Ins. Co. v. Superior Court*, *supra*, the court acknowledged this principle but held that there was no waiver where defendant, although not objecting to the referee hearing the matter as a special referee, did object to the court's treating the reference as general and the referee's findings as binding. "Also, there is authority that the record must contain some indication of a reference order in accordance with statutory requirements, otherwise nonwaivable jurisdictional error results." (182 *C.A.3d 436*.) (See *Thompson v. Municipal Court* (1958) 162 *C.A.2d 676, 328 P.2d 514* [no waiver where order for reference was improperly made by absent judge over telephone].)

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



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II. REFERENCE

B. Procedure.

1. Motion.

6 *Witkin Cal. Proc. PWT* § 68

[§ 68] Motion.

(1) *Voluntary Reference.* A voluntary reference may be ordered (a) on the parties' agreement, filed or entered in the minutes, or (b) on motion by a party to a written contract or lease providing that any controversy is to be heard by a referee, if the court finds that a reference agreement exists. (*C.C.P.* 638; see *Murphy v. Padilla* (1996) 42 *C.A.4th* 707, 713, 49 *C.R.2d* 722, *infra*, §123 [reference pursuant to *C.C.P.* 638 requires parties' written consent]; Judicial Council Form No. ADR-109 [Stipulation or Motion for Order Appointing Referee].) A written agreement for an order directing a reference must be presented with a proposed order to the judge to which the case is assigned, or to the presiding judge or law and motion department if the case has not been assigned. (*C.R.C.*, Rule 3.901(a).) The proposed order must state the following:

(a) The scope of the reference and whether it includes all issues or is limited to specific issues. (*C.R.C.*, Rule 3.901(b)(1).)

(b) Whether the referee will be privately compensated. (*C.R.C.*, Rule 3.901(b)(2).)

(c) A description of the court facilities or personnel requested and why this would "further the interests of justice." (*C.R.C.*, Rule 3.901(b)(3).)

If a particular referee is requested or stipulated to, the stipulation or motion must be accompanied by the referee's certification as required by *C.R.C.*, Rule 3.904(a) (certification and disclosures). (*C.R.C.*, Rule 3.901(b)(4).)

The proposed order must be filed with the clerk or entered in the minutes and must state the referee's name, business address, telephone number, and state bar number, if any. The order must also specify the scope of the reference and whether court facilities and personnel are authorized. (*C.R.C.*, Rule 3.902.) (See Judicial Council Form No. ADR-110 [Order Appointing Referee].)

(2) *Compulsory Reference.* A compulsory reference may be directed by the court on motion of a party or on the court's own motion. (*C.C.P.* 639(a).) A motion by a party must be served and filed, and must specify the scope of the requested reference. (*C.R.C.*, Rule 3.921(a).) It is heard by the judge to whom the case is assigned, or, if not assigned,

by the presiding judge or in the law and motion department. (C.R.C., Rule 3.921(b); for form of notice of motion, see Rutter Group, Alternative Dispute Resolution, Form 130.)

An order appointing a referee under *C.C.P.* 639 must be in writing and must address all matters required by *C.C.P.* 639. The order must contain specified information about the referee, state the subject matter and scope of the reference, and address fees. (C.R.C., Rule 3.922; on further requirements governing order for discovery reference under *C.C.P.* 639(a)(5), see C.R.C., Rule 3.922(e); for forms of order, see Rutter Group, Alternative Dispute Resolution, Forms 131 et seq.; 21A Am.Jur. P.P. Forms (2001 ed.), References, Form 28 et seq.)

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



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B. Procedure.

2. Appointment of Referee.

6 *Witkin Cal. Proc. PWT* § 69

[§ 69] Appointment of Referee.

(1) *Discretionary Ruling.* The statutes authorizing appointment of referees make the appointment discretionary. (See *C.C.P.* 638, 639.) Accordingly, a court's refusal to appoint a referee is reviewable on appeal only for abuse of discretion. (*Reed v. Reed* (1953) 118 *C.A.2d* 399, 400, 257 *P.2d* 1002.)

(2) *Order Made in Open Court.* The power to order a reference is in the court, not the judge; hence, the order should normally be made in open court with entry in the minutes. (*Thompson v. Municipal Court* (1958) 162 *C.A.2d* 676, 678, 328 *P.2d* 514 [absent judge could not order reference by telephone].)

(3) *Selection of Referee.* *C.C.P.* 640 provides for the selection of a referee as follows:

(a) The court appoints up to three referees agreed on by the parties. (*C.C.P.* 640(a); see *C.C.P.* 1053 [if three are appointed, all must meet but two may act].)

(b) Parties who disagree on the selection must each submit to the court up to three nominees. The court appoints up to three referees from among the nominees against whom there is no legal objection. If no nominees are submitted, the court either (1) appoints up to three referees free from legal objection, or (2) appoints as a referee a court commissioner of the county where the cause is pending. (*C.C.P.* 640(b).)

(c) Participation in the referee selection procedure under *C.C.P.* 640 does not constitute a waiver of grounds for objection to the appointment of a referee. (*C.C.P.* 640(c).) (On objection, see *C.C.P.* 641, 641.2, *infra*, §70.)

The court must appoint the referee as provided in *C.C.P.* 640. If the referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar. (*C.R.C.*, Rule 3.923.) Before an order issues, the proposed referee must certify awareness and compliance with applicable provisions of Canon 6 of the Code of Judicial Ethics (see 2 *Cal. Proc.* (5th), *Courts*, §60), and the Rules of Court. (*C.R.C.*, Rule 3.924(b).)

(4) *No Cost to Parties Without Finding of Ability To Pay.* A referee may not be appointed at a cost to the parties unless the court makes a finding of economic ability to pay. (*C.R.C.*, Rule 3.922(f); see *McDonald v. Superior Court* (1994) 22 *C.A.4th* 364, 370, 27 *C.R.2d* 310 [in discovery reference, trial court erred in failing to determine fair and

reasonable apportionment of reference costs before issuing order].)

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B. Procedure.

3. Objection to Referee.

6 *Witkin Cal. Proc. PWT* § 70

[§ 70] Objection to Referee.

(1) *In General.* A party may object to the appointment of a person as a referee on the following grounds:

(a) The person lacks the statutory qualifications required of a juror, except a requirement of residence within a particular county. (*C.C.P. 641(a).*)

(b) The person is related by consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation that is a party, or to a judge of the court in which the appointment will be made. (*C.C.P. 641(b).*)

(c) The person stands in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent to either party; or the person is a family member of either party, a business partner of either party, or security on a bond or obligation for either party. (*C.C.P. 641(c).*)

(d) The person has served as a juror or been a witness in a trial between the parties. (*C.C.P. 641(d).*)

(e) The person has an interest in the action, or in the main question involved in the action. (*C.C.P. 641(e).*)

(f) The person has formed or expressed an unqualified opinion or belief about the merits of the action. (*C.C.P. 641(f).*)

(g) The person evinces enmity against or bias toward either party. (*C.C.P. 641(g).*)

A special provision governs technical qualifications in environmental actions. (See *C.C.P. 641.2*, 4 *Cal. Proc.* (5th), *Pleading*, §161.)

In addition, a party may raise grounds for disqualification similar to those available against a judge. (See *C.C.P. 170* et seq.; 2 *Cal. Proc.* (5th), *Courts*, §93 et seq.; 21A Am.Jur. P.P. Forms (2001 ed.), References, Form 44 et seq.) A party may also exercise a peremptory challenge under *C.C.P. 170.6* (see 2 *Cal. Proc.* (5th), *Courts*, §129 et seq.) as to a court-appointed referee. (*Autoland v. Superior Court* (1988) 205 C.A.3d 857, 860, 252 C.R. 662 [disqualification grounds specified in *C.C.P. 641* do not displace *C.C.P. 170.6* procedure; both statutes may be effectuated without

violating either].)

A stipulation or agreement for an order appointing a referee does not constitute a waiver of the grounds for objection under *C.C.P.* 641 to the appointment of a particular person as a referee. However, an objection must be made with reasonable diligence and in writing, served on all parties and the referee, and filed with the court. (*C.C.P.* 642; *C.R.C.*, Rule 3.905.) (See *Jovine v. FHP* (1998) 64 *C.A.4th* 1506, 1527, 76 *C.R.2d* 322 [plaintiff's off-the-record consent to have referee hear defendants' summary judgment motion did not operate as waiver of plaintiff's right to object to general reference or as basis for estoppel to assert that right].)

(2) *Discovery Matter*. In a discovery matter, a motion by a party to disqualify the referee under *C.C.P.* 170.6 must be made either (a) within 10 days after notice of the appointment of the referee, or 10 days after the first appearance of a party in the action, or (b) within at least 5 days before the date set for hearing if the assigned referee is known at least 10 days before the date of the hearing and the referee is assigned only for limited discovery purposes. (*C.C.P.* 639(b).) (See *Pedus Services v. Superior Court* (1999) 72 *C.A.4th* 140, 144, 84 *C.R.2d* 771 [discovery referee is not functional equivalent of all purpose judge; thus, applicable timeline under *C.C.P.* 170.6(2) for exercising peremptory challenge is 10-day/5-day rule that requires motion within 5 days before trial or hearing date when referee is known at least 10 days before that date].) (On 10-day/5-day rule, see 2 *Cal. Proc.* (5th), *Courts*, §142; on all purpose assignment, see 2 *Cal. Proc.* (5th), *Courts*, §144 et seq.)

(3) *Disclosures*. A referee must disclose to the parties matters subject to disclosure under Canon 6D(5)(a) and 6D(5)(b) of the Code of Judicial Ethics and significant present or past personal or professional relationships with a party, attorney, or law firm in the case, including the number and nature of other proceedings in the past 24 months in which the referee has been privately compensated for specified services by a party, attorney, law firm, or insurance company in the case. The disclosures must be made no later than 5 days prior to the deadline for parties to file a motion for disqualification under *C.C.P.* 170.6 or, if the referee is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable. (*C.R.C.*, Rule 3.904(b).)

(4) *Hearing*. A hearing must be had on objections to a referee, which must be held by the judge to whom the case is assigned, or by the presiding judge or law and motion judge if the case has not been assigned. (*C.C.P.* 642; *C.R.C.*, Rule 3.905.)

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

Correction: Page 499, line 10 of paragraph titled (2) *Discovery Matter*, " *C.C.P.* 170.6(2)" should be " *C.C.P.* 170.6(a)(2)".



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B. Procedure.

4. Withdrawal of Stipulation for Reference.

6 Witkin Cal. Proc. PWT § 71

[§ 71] Withdrawal of Stipulation for Reference.

A motion to withdraw a stipulation for the appointment of a referee must be supported by a declaration of facts establishing good cause for permitting the withdrawal. Neither a declaration that a ruling is based on an error of fact or law, nor the issuance of an order for an appropriate hearing site, constitutes good cause. Notice of the motion must be served on all parties and the referee and filed with the court. The motion must be heard by the judge to whom the case is assigned or by the presiding judge or law and motion judge. If the motion is granted, the case must be transferred to the trial court docket. (C.R.C., Rule 3.906.)

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



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5. Intervention.

6 *Witkin Cal. Proc. PWT* § 72

[§ 72] Intervention.

A motion to file a complaint for intervention in a case pending before a referee must be served on all parties and the referee and filed with the court. The motion must be heard by the judge to whom the case is assigned or by the presiding judge or law and motion judge. If intervention is permitted, the case must be returned to the trial court docket unless all parties stipulate to proceed before the referee. (C.R.C., Rule 3.908; on fees of referees, see *infra*, §§77, 78; on intervention generally, see 4 *Cal. Proc.* (5th), *Pleading*, §212 et seq.)

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

C.R.C., Rule 3.908 was repealed in 2009 and replaced with C.R.C., Rule 3.932. A motion for leave to file a complaint for intervention in a case pending before a referee must be filed with the court and served on all parties and the referee. The motion must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. If intervention is permitted, the case must be returned to the trial court docket unless all parties stipulate to proceed before the referee. (C.R.C., Rule 3.932(b).)



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B. Procedure.

6. Hearing.

6 *Witkin Cal. Proc. PWT* § 73

[§ 73] Hearing.

(1) *Conduct of Proceeding.* The rules of evidence apply in a referee's hearing (*Ev.C. 300*), and it has been held that the proceeding is quasi-judicial and must be conducted generally in the same manner as if it were before a court. (*In re McNamee* (1933) 131 C.A. 30, 31, 20 P.2d 722; *Rice v. Brown* (1951) 104 C.A.2d 100, 103, 231 P.2d 65 [failure to hold hearing and determination based on inadmissible matters was reversible error]; see 70 A.L.R.3d 889 [power of successor referee to render decision on testimony heard by predecessor]; on filing of papers and handling of exhibits in proceedings before referees and temporary judges, see *infra*, §498.)

(2) *Use of Court Facilities and Personnel.* A compulsory reference entitles the parties to the use of court facilities and personnel to the extent provided in the order of reference. The proceedings may be held in a private facility, but the facility must be open to the public at the request of any person. (C.R.C., Rule 3.926.)

A party who has elected to use the services of a privately compensated referee for *voluntary reference* is deemed to have elected to proceed outside the courthouse; therefore, court facilities and court personnel may not be used, except on a finding by the presiding judge that the use would further the interests of justice. However, for all matters pending before these referees, the clerk must post a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. (C.R.C., Rule 3.909.)

(3) *Order for Appropriate Hearing Site.* The court, on request of any person or on the court's own motion, may order that a case before a referee be heard at a site easily accessible to the public and appropriate for seating those who have made known their intention to attend hearings. The request must state the reasons, be served on all parties and the referee, and be filed with the court. The order may require that notice of trial or of other proceedings be given to the requesting person directly. (C.R.C., Rule 3.910.)

(4) *Motion To Seal Records.* A motion or application to seal records in a case before a referee must be served on all parties, on the referee, and on any person or organization that has made known an intention to attend the hearing, and filed with the court. The matter must be heard by the judge to whom the case is assigned or by the presiding judge or law and motion judge. (C.R.C., Rule 3.907.)

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

(1) *Conduct of Proceeding.*

(*New*) *Open proceedings:* All proceedings before a referee that would be open to the public if held before a judge must be open to the public, regardless of where they are conducted. (C.R.C., Rule 3.931(a), added in 2009.)

(*New*) *Statement by referee:* The referee must file a statement that provides the name, telephone number, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings scheduled in matters before the referee that would be open to the public if held before a judge. The statement may also provide the address of a publicly accessible website that contains information regarding the hearings. The clerk must post the statement in the court facility. (C.R.C., Rule 3.931(b), added in 2009.)

(2) *Use of Court Facilities and Personnel.* C.R.C., Rule 3.926 was amended in 2009 to provide that proceedings at private facilities must be open to the public as provided in C.R.C., Rule 3.931. C.R.C., Rule 3.909 was renumbered C.R.C., Rule 3.907 in 2009 and amended to provide that a party who has elected to use the services of a referee for a *voluntary reference* is deemed to have elected to proceed outside court facilities. Court facilities, court personnel, and summoned jurors may not be used in the proceedings except on a finding by the presiding judge or his or her designee that the use would further the interest of justice. The portion of the rule regarding the clerk's notice was deleted.

(3) *Order for Appropriate Hearing Site.* C.R.C., Rule 3.910 was repealed in 2009 and C.R.C., Rule 3.931 was added. The presiding judge or his or her designee, on application of any person or on the judge's own motion, may order that a case before a referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend. The application must state facts showing good cause, must be served on all parties and the referee, and must be filed with the court. The proceedings are not stayed while the application is pending unless the presiding judge or his or her designee so orders. The issuance of an order for an accessible and appropriate hearing site is not grounds for withdrawal of a stipulation for the appointment of a referee. If a court staff mediator or evaluator is required to attend a hearing, unless otherwise ordered by the presiding judge or his or her designee, the hearing must take place at a location requiring no more than 15 minutes' travel time from the work site of the mediator or evaluator. (C.R.C., Rule 3.931(c).)

(4) *Motion To Seal Records.* C.R.C., Rule 3.907 was repealed in 2009, and C.R.C., Rule 3.932 was added. A motion or application to seal records in a case pending before a referee must be filed with the court and served on the referee and on all parties that have appeared in the case. The matter must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. (C.R.C., Rule 3.932(a).)



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B. Procedure.

7. Report.

6 *Witkin Cal. Proc. PWT* § 74

[§ 74] Report.

(1) *In General.* Unless the court directs otherwise, the referee must submit a written statement of decision to the court within 20 days after the hearing has been concluded and the matter submitted. (*C.C.P.* 643(a); see Judicial Council Form, No. ADR-111 [Report Of Referee]; 21A Am.Jur. P.P. Forms (2001 ed.), References, Form 78 et seq.) The time limit, however, is directory only. (*Keller v. Sutrick* (1863) 22 C. 471, 473 [construing former statute]; see *In re Marriage of Michaely* (2007) 150 C.A.4th 802, 808, 59 C.R.3d 56 [in protracted marital dissolution, referee's failure to timely file report that detailed husband's evasive conduct during discovery and recommended that various facts be established was not reversible per se and husband failed to establish prejudice]; 71 A.L.R.4th 889 [effect of belated report]; Rutter Group, Alternative Dispute Resolution §6.224.5 et seq.)

(2) *Voluntary Reference.* A referee appointed under *C.C.P.* 638 must report as agreed by the parties and approved by the court. (*C.C.P.* 643(b).)

(3) *Compulsory Reference.* A referee appointed under *C.C.P.* 639 must submit a report that includes (a) a recommendation on the merits of a disputed issue, (b) a statement of total hours and fees involved, and (c) a recommended payment allocation. Parties may object to the report within 10 days after the referee serves and files it, and responses to objections must be served on all parties and on the referee within 10 days after the objection is served. The court then reviews the objections and responses and enters appropriate orders. (*C.C.P.* 643(c).)

(4) *General or Special Reference.* The distinction between a general and a special reference (*supra*, §64) is important with respect to the effect of the referee's report:

(a) In the case of a consensual, general reference under *C.C.P.* 638, the referee's decision on the whole issue stands as the decision of the court and judgment may be entered on it as if the action had been tried by the court. (*C.C.P.* 644(a); see *Estate of Johnston* (1970) 12 C.A.3d 855, 859, 91 C.R. 116; on entry, see 7 *Cal. Proc.* (5th), *Judgment*, §49 et seq.)

(b) In the case of all other references, the decision of the referee is only advisory. Thus, the court may adopt all or part of the recommendations after independently considering the findings together with objections and responses by the

parties. (C.C.P. 644(b).)

(c) If a voluntary reference is special, the decision has the effect of a *special verdict*. (C.C.P. 645; see *Jackson v. Allen* (1921) 55 C.A. 257, 258, 203 P. 411 [no conclusions of law are necessary]; *National Brass Works v. Weeks* (1928) 92 C.A. 318, 321, 268 P. 412 [judgment entered after special reference is not dependent on referee's report, but is based on court's ultimate determination of facts and law]; on special verdicts, see 7 Cal. Proc. (5th), *Trial*, §342 et seq.) "[B]efore a special reference is accorded the status of a special finding of fact, the trial court must have accepted it as such; otherwise the report, if admitted into evidence, is treated as any other evidence." (*Dynair Electronics v. Video Cable* (1976) 55 C.A.3d 11, 20, 127 C.R. 268.)

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B. Procedure.

8. Review of General Reference.

6 *Witkin Cal. Proc. PWT* § 75

[§ 75] Review of General Reference.

Because the report of a general referee becomes the judgment of the court (*C.C.P. 644(a)*, supra, §74), it may be attacked by a motion for new trial. (*Clark v. Rancho Santa Fe Assn. (1989) 216 C.A.3d 606, 265 C.R. 41.*) (See *C.C.P. 645* [referee's decision "may be excepted to and reviewed in like manner as if made by the court"].)

In *Clark*, plaintiff filed a petition for mandamus, challenging a decision of defendant association turning down his application to subdivide property. Pursuant to a stipulation of general reference, the trial was conducted by Referee F, who issued a statement of decision finding no abuse of discretion on the part of the association, and the superior court entered judgment accordingly. Plaintiff then moved for a new trial in the superior court. The court referred the motion to Referee F, who denied it. Plaintiff appealed, contending that the referee lacked jurisdiction to hear and determine the motion. *Held*, affirmed.

(a) Under *C.C.P. 644*, the judgment is entered on the decision of the referee, just as if the action had been tried by the court. (*216 C.A.3d 623.*) *C.C.P. 1092* provides that a motion for new trial must be made in the court in which the issue of fact is tried; *C.C.P. 656* states that a new trial is a reexamination of an issue of fact in the same court after a trial and decision "by a jury, court, or referee"; and *C.C.P. 661* provides that the motion must be heard and determined by the same judge who presided at trial, if available. (*216 C.A.3d 623, 624*; see *8 Cal. Proc. (5th), Attack on Judgment in Trial Court*, §70.)

(b) "Reading all the above rules together with the broad language of the stipulation, we conclude the referee had the power and was the appropriate decision maker to determine the merits of the motion for new trial. He was most familiar with the facts and as well qualified as a sitting superior court judge to draw legal conclusions from those facts, such as the timeliness of the notice of intention to move for new trial, the grounds stated for new trial, and the proper standard of decision upon the petition. His assignment under the stipulation included reaching a 'complete and final adjudication' of the matter, which in our view included the determination of any posttrial motions." (*216 C.A.3d 625.*)

(c) A "final judgment" is not final so long as an appeal or motion for new trial is pending. "Thus, this stipulation appears to contemplate a final resolution of the case to the point of exhaustion of all opportunities to attack the judgment in the trial court." (*216 C.A.3d 625, footnote 20.*)

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B. Procedure.

9. Review of Special Reference.

6 Witkin Cal. Proc. PWT § 76

[§ 76] Review of Special Reference.

(1) *In General.* The report of a special referee, unlike that of a general referee (*supra*, §75), does not become the decision of the court without further action by the trial judge, and until it is adopted by the court it may be set aside without the necessity of granting a new trial. (*Ellsworth v. Ellsworth* (1954) 42 C.2d 719, 723, 269 P.2d 3; see *Yeboah v. Progeny Ventures* (2005) 128 C.A.4th 443, 450, 27 C.R.3d 150, citing the text [appointment of special master was special reference; master's report, approved and adopted by trial court but not entered as judgment, did not constitute court's decision].)

(2) *Written Objection or Motion To Set Aside.* A party dissatisfied with the report of a special referee may (a) file written objections to the report as soon as possible, so that the referee may rectify any errors or note the objection in the report, or (b) move to set the report aside promptly after it is filed with the court, by noticed motion accompanied by supporting papers stating the grounds for the motion. (*Martino v. Denevi* (1986) 182 C.A.3d 553, 557, 227 C.R. 354.) (See C.C.P. 645 [referee's decision "may be excepted to and reviewed in like manner as if made by the court"]; 21A Am.Jur. P.P. Forms (2001 ed.), References, Form 84 et seq.; Form 99 et seq.)

(3) *Failure To Object as Waiver.* "The failure to file a written objection to the contents of the referee's report or to properly move to set aside the report results in the waiver of the right to object to the referee's findings." (*Martino v. Denevi, supra*, 182 C.A.3d 557 [oral objection in response to opponent's motion for adoption of report, without specification of grounds, was insufficient to avoid waiver]; see *Estate of Zucker* (1990) 218 C.A.3d 1198, 1206, 268 C.R. 4 [following *Martino*].)

(4) *Hearing on Objection Is Discretionary.* "[T]he trial court must independently consider the referee's findings before acting upon the referee's recommendations. One way to do this is to hold a hearing but a hearing is not required as a matter of law. In an exercise of its discretion, the trial court may consider the matter as the circumstances dictate. ... [W]here, as here, the trial court's orders demonstrate a considered and careful review not only of the referee's report but also of the transcript of the proceedings held before the referee, and of the stacks of objections, responses, replies and other papers filed after the referee's report was submitted, we are able to say with confidence that the trial court did not abdicate its judicial responsibilities." (*Marathon Nat. Bank v. Superior Court* (1993) 19 C.A.4th 1256, 1261, 24 C.R.2d 40 [upholding adoption of discovery referee's report without hearing, despite defendant's request for hearing].)

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B. Procedure.

10. Fees and Costs.

a. In General.

6 *Witkin Cal. Proc. PWT* § 77

[§ 77] In General.

The fees of the referee are fixed by the court at a "reasonable sum," unless the parties agree on a different rate of compensation. (*C.C.P. 1023*.)

Where the reference is voluntary, the fee is ordinarily negotiated by the parties. If the parties do not agree on payment and so request, the court may resolve the issue and order the parties to pay according to what is fair and reasonable, which may include apportionment of the fees. (*C.C.P. 645.1(a)*.)

Where the reference is compulsory, the fee is usually determined by the court, which may order the parties to pay the fee of a referee who is not an employee or officer of the court at the time of appointment "in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties." (*C.C.P. 645.1(b)*); *C.R.C.*, Rule 3.922(f), *infra*, §78; see *Utemark v. Samuel* (1953) 118 *C.A.2d* 313, 317, 257 *P.2d* 656 [error to charge plaintiffs with half of referee's fee where reference was ordered on mistaken legal theory and solely for defendants' benefit]; *Marathon Nat. Bank v. Superior Court* (1993) 19 *C.A.4th* 1256, 1261, 1262, 24 *C.R.2d* 40 [defendant was properly ordered to pay entire fee of discovery referee, where expenses would not have been incurred but for defendant's "hardball discovery tactics"].)

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Voluntary reference: See *Carr Business Enterprises v. Chowchilla* (2008) 166 *C.A.4th* 25, 30, 82 *C.R.3d* 135 [parties' stipulation to split referee's fees equally prevailed over costs statute; thus, trial court erred in awarding referee's fees as costs].



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II. REFERENCE

B. Procedure.

10. Fees and Costs.

b. Consideration of Economic Hardship.

6 *Witkin Cal. Proc. PWT* § 78

[§ 78] Consideration of Economic Hardship.

If a party asserts economic hardship before the reference proceedings begin, the court must determine a fair and reasonable apportionment of the costs. (C.R.C., Rule 3.922(f)(3).)

In *Solorzano v. Superior Court* (1993) 18 C.A.4th 603, 615, 22 C.R.2d 401, the court held that parties proceeding in pro. per. could not be ordered to pay the fees of a discovery referee under C.C.P. 645.1 (supra, §77), no matter how the fees were allocated. "Fees of \$ 200 to \$ 300 per hour charged by privately compensated discovery referees allow affluent litigants to avoid discovery compliance by pricing enforcement of legitimate discovery demands beyond the means of indigent plaintiffs. This advantage based on wealth flows directly from the trial court's order imposing equal division of fees between indigent plaintiffs and an adverse litigant of far superior financial means." (18 C.A.4th 614.) Appropriate options for resolving discovery disputes in such cases include a pro bono referee, a retired superior court judge sitting by assignment, or retention of the matter by the trial court. (18 C.A.4th 616.) (See *McDonald v. Superior Court* (1994) 22 C.A.4th 364, 370, 27 C.R.2d 310 ["[W]henver the issue of economic hardship is raised before the commencement of the referee's work, the referring court must determine a fair and reasonable apportionment of reference costs before issuing its order"]; *Hood v. Superior Court* (1999) 72 C.A.4th 446, 449, 85 C.R.2d 114 [declaration of 71-year-old attorney appearing in pro. per. offered as proof of inability to pay referee's fees was sufficient to establish financial hardship].)

DeBlase v. Superior Court (1996) 41 C.A.4th 1279, 1283, 49 C.R.2d 229, sets forth the following factors the trial judge should consider in determining a claim of economic hardship:

- (a) Be prepared to devote more of the judge's own time studying the merits of a discovery dispute than otherwise would be spent.
- (b) Consider whether factors apart from the merits, e.g., the pendency of a similar discovery motion, may simplify the task of deciding the motion properly.
- (c) Consider the extent to which the indigent litigant's expenses are being advanced by counsel.

- (d) Not order "waiver" of a referee's fee, even in favor of a litigant granted leave to proceed in forma pauperis.
- (e) Consider, based on the limited information available to the judge at the time, the extent to which an unequal tentative allocation of the referee's fee is just or unjust.
- (f) Before ordering the nonindigent party provisionally to bear more than half of a referee's fee, consider the inappropriateness of requiring one litigant to subsidize another merely because the latter needs a subsidy.
- (g) Not defer facing the allocation problem until after the referee has made a recommendation, because by that time a fee has been earned and must be paid.
- (h) Consider, in addition to other cost-free alternatives, making arrangements to transfer appropriate discovery disputes to another amenable judicial officer.

In *Taggares v. Superior Court* (1998) 62 C.A.4th 94, 72 C.R.2d 387, the trial judge sua sponte appointed a privately compensated discovery referee to resolve an uncomplicated discovery dispute, including future disputes, and ordered defendants to pay all fees because plaintiff was indigent. *Held*, mandamus issued to vacate the order.

- (a) Requiring defendant to subsidize the cost of routine discovery by financing the entire reference was not shown to be "fair and reasonable" as required by C.C.P. 645.1. (62 C.A.4th 105.)
- (b) Most importantly, if only one party pays for the reference, there is a chilling effect on the exercise of that party's discovery rights and a corresponding disincentive on the opposing party to cooperate in mutually resolving disputes with limited outside intervention. (62 C.A.4th 105.)

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III. SUBMISSION OF CONTROVERSY WITHOUT ACTION

A. Agreed Case.

6 *Witkin Cal. Proc. PWT* § 79

[§ 79] Agreed Case.

(1) *Nature of Proceeding.* "Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending." (*C.C.P. 1138*; see *C.E.B.*, 3 Civil Proc. Before Trial 4th, §48.1 et seq.; *Cal. Civil Practice*, 3 Procedure, §19:1 et seq.; 3 *Am.Jur.2d* (2002 ed.), *Agreed Case* §1 et seq.; 1C *Am.Jur. P.P. Forms* (2003 ed.), *Agreed Case*, §1 et seq.)

The court may consider only the facts agreed on; judgment may not be based on any other facts a party might have established. (*Green v. Fresno* (1892) 95 C. 329, 334, 30 P. 544.) However, the parties' agreement may not limit the court's consideration of any question of law. (*San Francisco Lumber Co. v. Bibb* (1903) 139 C. 325, 326, 73 P. 864.) Judgment is entered as in other cases, but no costs may be awarded "for any proceeding prior to the trial." (*C.C.P. 1139*.) The judgment is enforceable and appealable as in ordinary actions. (*C.C.P. 1140*.)

(2) *Justiciable Controversy.* The case must be one that could have been the subject of a civil action; the only difference is in the agreement on the facts. So a statement that fails to show a real controversy is insufficient. (See *Johnson v. Malloy* (1887) 74 C. 430, 431, 16 P. 228 [moot question; judgment was reversed with directions to dismiss proceedings]; *White v. Clarke* (1896) 111 C. 425, 427, 44 P. 164 [conclusory statements in affidavit were insufficient; judgment was reversed with directions to dismiss proceedings]; cf. *Collier v. Lindley* (1928) 203 C. 641, 644, 266 P. 526, 3 *Cal. Proc.* (5th), *Actions*, §29 [lack of controversy condemned, but case decided in order to resolve questions of public interest]; *Colusa v. Strain* (1963) 215 C.A.2d 472, 477, 30 C.R. 415, 7 *Cal. Proc.* (5th), *Actions*, §28 [requirement of "question in difference" is same as "actual controversy" requirement for declaratory relief].)

(3) *Submission to Trial Court.* The controversy may only be submitted to a court "which would have jurisdiction if an action had been brought." Hence, an ordinary cause of action should be submitted to a trial court; the statute cannot be used to present the controversy in the first instance to an appellate court. (*Northridge Park County Water Dist. v. McDonell* (1958) 158 C.A.2d 123, 125, 322 P.2d 25.)

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III. SUBMISSION OF CONTROVERSY WITHOUT ACTION

B. Stipulation of Facts After Action Is Brought.

6 *Witkin Cal. Proc. PWT* § 80

[§ 80] Stipulation of Facts After Action Is Brought.

Similar in object to the agreed case (*supra*, §79), but different in procedure, is the nonstatutory practice of trying an action on an agreed or stipulated statement of facts. In this situation, the action is brought and the issues framed by pleadings in the usual manner, but the parties stipulate to all or a portion of the facts in controversy, thus avoiding in whole or in part the necessity of evidence, jury, or findings. (*Faust v. San Diego* (1931) 115 C.A. 277, 278, 1 P.2d 543; *Robinson v. El Centro Grain Co.* (1933) 133 C.A. 567, 572, 24 P.2d 554; see *Towle v. Sweeney* (1905) 2 C.A. 29, 31, 83 P. 74 ["An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an 'agreed case,' which ... may be submitted for decision without any pleadings"]; *Division of Labor Law Enforcement v. Brooks* (1964) 226 C.A.2d 631, 633, 38 C.R. 284 [inadequate statement; judgment was reversed to permit parties to amplify record by further stipulation or evidence]; C.E.B., 3 Civil Proc. Before Trial 4th, §48.11 et seq.; Cal. Civil Practice, 3 Procedure, §19:10; 3 *Am.Jur.2d* (2002 ed.), *Agreed Case* §4; 1C *Am.Jur.* P.P. Forms (2003 ed.), *Agreed Case*, §33 et seq.)

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IV. OFFER TO COMPROMISE

A. Defendant's Offer Before Action Commenced.

6 Witkin Cal. Proc. PWT § 81

[§ 81] Defendant's Offer Before Action Commenced.

Under *C.C.P. 1025*, the defendant in an action "for the recovery of money only," may obtain a favorable cost award by taking the following steps:

- (1) Tender to the plaintiff, before commencement of the action, the full amount to which the plaintiff is entitled.
- (2) Allege the tender in the answer.
- (3) Deposit in court, for the plaintiff, the amount so tendered.

If the allegation is found to be true, the plaintiff cannot recover costs and must pay the defendant's costs.

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IV. OFFER TO COMPROMISE

B. Offer Before Trial.

1. In General.

6 *Witkin Cal. Proc. PWT* § 82

[§ 82] In General.

(1) *Nature and Purpose of Statute.* Costs allowed to a prevailing party under *C.C.P. 1031* or *1032* (see 7 *Cal. Proc.* (5th), *Judgment*, §88 et seq.) may be withheld or augmented depending on whether the party receives a judgment more favorable than a rejected offer to compromise made pursuant to *C.C.P. 998*. Hence, the purpose of *C.C.P. 998* is to encourage the settlement of lawsuits prior to trial. (*T.M. Cobb Co. v. Superior Court* (1984) 36 *C.3d* 273, 280, 204 *C.R.* 143, 682 *P.2d* 338, *infra*, §92.) The statute also applies to some disputes to be resolved by arbitration. (*C.C.P. 998(b)*; *infra*, §§83, 84.) (See *C.E.B.*, 3 *Civil Proc. Before Trial* 4th, Chap. 47; *Cal. Civil Practice*, 3 *Procedure*, §27:19 et seq.; *Rutter Group*, 2 *Civil Proc. Before Trial* §12:590 et seq.; 112 *A.L.R.5th* 47 [timing provisions in state offer of judgment statutes].)

(2) *Offer.* At least 10 days before trial or arbitration, any party (plaintiff, cross-complainant, defendant, or cross-defendant) may serve a written offer on any other party "to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." The offer must contain (a) a statement that specifies the terms and conditions of the judgment or award and (b) a provision that permits the accepting party to accept the offer by signing a statement of acceptance. (*C.C.P. 998(b)*; see *infra*, §85 et seq.) For purposes of *C.C.P. 998(b)*, a trial or arbitration is deemed to have commenced at either (a) the beginning of the plaintiff's opening statement, or if none, then when the oath or affirmation is administered to the first witness, or (b) the introduction of evidence. (*C.C.P. 998(b)(3)*.)

(3) *Acceptance.* An acceptance, whether made on the document containing the offer or on a separate document, must be in writing and must be signed by counsel for the accepting party, or by the accepting party if not represented by counsel. (*C.C.P. 998(b)*.) If accepted, the offer and proof of acceptance are filed, and the clerk or judge must enter judgment accordingly. For arbitrations, the offer and proof of acceptance are filed with the arbitrator who must "promptly render an award accordingly." (*C.C.P. 998(b)(1)*; see *infra*, §§98, 99.)

(4) *Deemed Withdrawal.* If the offer is not accepted before trial or arbitration or within 30 days after the offer is made, whichever occurs first, it is deemed withdrawn and may not be given in evidence at the trial or the arbitration. (*C.C.P. 998(b)(2)*; on revocation of offer, see *infra*, §92.)

(5) *Failure To Accept Defendant's Offer.* A plaintiff who does not obtain "a more favorable judgment or award"

(see *infra*, §100 et seq.) may not recover costs and must pay the defendant's costs from the time the offer was made, and the court or arbitrator has discretion to allow the defendant to recover expert witness fees and costs. (*C.C.P.* 998(c)(1); see *infra*, §110 et seq.) The defendant's costs under *C.C.P.* 998 are deducted from any damages awarded to the plaintiff; if the costs exceed the damages awarded, judgment for the defendant is entered for the net amount. (*C.C.P.* 998(e).) In determining whether the plaintiff obtains a more favorable judgment or award, the court or arbitrator must exclude the *postoffer costs and attorneys' fees*. (*C.C.P.* 998(c)(2)(A); see *infra*, §100 et seq.)

(6) *Failure To Accept Plaintiff's Offer*. A defendant who fails to obtain "a more favorable judgment or award" (see *infra*, §100 et seq.) may be required, in the discretion of the court or arbitrator, to pay the plaintiff's postoffer expert witness fees in addition to the plaintiff's costs. (*C.C.P.* 998(d); see *infra*, §112.) In personal injury cases, the defendant also becomes liable for *prejudgment interest* under *C.C.* 3291. (See 6 *Summary* (10th), *Torts*, §1646 et seq.; *infra*, §107.)

(7) *Motion To Determine Good Faith Settlement Offer and Dismissal*. A motion or application for determination of a good faith settlement may include a request to dismiss all or part of a pleading. The noticed motion or application must list each party and pleading affected by the settlement and the date the pleading was filed. (*C.R.C.*, Rule 3.1382; on good faith requirement, see *infra*, §91.)

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

(1) *Nature and Purpose of Statute*. See 34 *A.L.R.6th* 431 [recoverable costs under state offer of judgment rule]. (2) *Offer*. See *Westamerica Bank v. MBG Industries* (2007) 158 *C.A.4th* 109, 135, 70 *C.R.3d* 125 [defendant's pretrial offer to settle plaintiff's amended complaint but not defendant's cross-complaint was valid under *C.C.P.* 998(b); acceptance by plaintiff would have allowed judgment to be taken in that action as required by statute].



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IV. OFFER TO COMPROMISE

B. Offer Before Trial.

2. Scope of Statute.

6 *Witkin Cal. Proc. PWT* § 83

[§ 83] Scope of Statute.

(1) *Eminent Domain Proceedings Excluded.* C.C.P. 998 is not applicable to an offer made by a *plaintiff* in an eminent domain action. (C.C.P. 998(g)(1).) (On inverse condemnation actions distinguished, see *infra*, §84.)

(2) *Enforcement Actions Excluded.* C.C.P. 998 is not applicable to enforcement actions. (C.C.P. 998(g)(2).)

(3) *Family Law Proceedings Excluded.* In view of the broad discretion vested in the trial court under the Family Code to award attorneys' fees and costs, based either on need and ability to pay or on the conduct of a party or attorney, C.C.P. 998 does not apply in family law cases. (*In re Marriage of Green* (1989) 213 C.A.3d 14, 24, 261 C.R. 294.)

(4) *Public Employee Labor Arbitrations Excluded.* C.C.P. 998 is not applicable to labor arbitrations filed pursuant to memoranda of understanding under Govt.C. 3512 et seq. (state employer-employee relations; see 3 *Summary* (10th), *Agency and Employment*, §604 et seq.). (C.C.P. 998(i).)

(5) *Contractual and Medical Malpractice Arbitrations Included.* C.C.P. 998 is applicable to settlement offers made in disputes to be resolved by arbitration under C.C.P. 1281 (contractual arbitration, *infra*, §499 et seq.) or C.C.P. 1295 (arbitration of medical malpractice, *infra*, §504). (C.C.P. 998(b); see *Caro v. Smith* (1997) 59 C.A.4th 725, 736, 69 C.R.2d 306, *infra*, §575 [prejudgment interest was properly imposed in contract arbitration on plaintiff's recovery of more favorable award than defendant's statutory offer]; *Weinberg v. Safeco Ins. Co. of America* (2004) 114 C.A.4th 1075, 1084, 8 C.R.3d 224 [prejudgment interest and costs were proper where defendant had rejected plaintiff's prearbitration offer and trial court confirmed more favorable insurance arbitration award in favor of plaintiff; following *Caro*].)

(6) *Judicial Arbitrations Included.* C.C.P. 998 is applicable in judicial arbitration proceedings. (*Joyce v. Black* (1990) 217 C.A.3d 318, 322, 266 C.R. 8; *Parker v. Babcock* (1995) 37 C.A.4th 1682, 1687, 44 C.R.2d 602.)

(7) *Uninsured Motorist Arbitrations Included.* C.C.P. 998 applies to arbitrations conducted under Ins.C. 11580.2 (uninsured motorists; see 2 *Summary* (10th), *Insurance*, §180 et seq.). (*Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 C.4th 133, 140, 45 C.R.3d 760, 137 P.3d 939 [C.C.P. 998 costs are available even when their inclusion causes award to

exceed policy limits].)

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IV. OFFER TO COMPROMISE

B. Offer Before Trial.

3. Distinction: Inverse Condemnation Actions.

6 Witkin Cal. Proc. PWT § 84

[§ 84] Distinction: Inverse Condemnation Actions.

In *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 C.A.3d 863, 146 C.R. 5, the court held that C.C.P. 998 did not authorize an award of costs against an inverse condemnation plaintiff that obtained a judgment less favorable than the defendant public entity's pretrial offer. *Goebel v. Santa Barbara* (2001) 92 C.A.4th 549, 111 C.R.2d 901, disagreed with *Orpheum* to the extent that *Orpheum* can be read to exclude C.C.P. 998 costs in all inverse condemnation proceedings, regardless of outcome. (92 C.A.4th 560.)

In *Goebel*, plaintiff owned hillside property that had been condemned due to landslide conditions. Plaintiff sued defendant city on an inverse condemnation claim and rejected defendant's pretrial offer of \$ 25,000. The jury found for defendant and the trial court awarded defendant costs, including expert witness fees under C.C.P. 998(c)(1). Plaintiff argued that the award was unauthorized under the statute. *Held*, affirmed.

(a) Because C.C.P. 998(c)(1) expressly excludes eminent domain actions from its scope, the validity of the award depends on whether "eminent domain," as used in the statute, should be read to include "inverse condemnation." Although inverse condemnation and eminent domain both implement the constitutional rule that private property may not be taken or damaged for public use without just compensation, the proceedings are not synonymous and the terms are not interchangeable. An eminent domain proceeding involves a public entity suing to condemn private property necessary for public use. An inverse condemnation action involves a property owner seeking compensation from a public entity that has taken or damaged property for a public purpose. Had the Legislature intended to restrict C.C.P. 998 offers in all inverse condemnation actions, it would have explicitly done so. (92 C.A.4th 558.)

(b) *Orpheum* is distinguishable. There, the governmental entity *had* interfered with plaintiff's use of its property. An award of costs against a party whose property has been taken or damaged by a governmental entity would reduce the just compensation mandated by California's Constitution. Here, however, plaintiff did not prevail on the inverse condemnation claim. Thus, the full compensation doctrine underlying the award of costs is inapplicable, and there is no bar to assessing costs against an unsuccessful inverse condemnation plaintiff and no policy reason to excuse plaintiff from paying expert fees under C.C.P. 998. The *Orpheum* court's restriction of costs should be limited to cases in which the property owner has proved taking or damage under the *Constitution*. (92 C.A.4th 559.)

The California Supreme Court agreed with and adopted the reasoning of *Goebel* in *Regency Outdoor Advertising v. Los Angeles* (2006) 39 C.4th 507, 46 C.R.3d 742, 139 P.3d 119. Plaintiff, an outdoor advertiser, brought an inverse condemnation action, claiming damage from defendant city's landscaping that obscured plaintiff's billboard advertising. Plaintiff rejected defendant's pretrial offer that included payment of \$ 1,000 and removal of one of the offending trees. After ruling in defendant's favor, the trial court also awarded defendant costs and fees under C.C.P. 998(c)(1). *Held*, affirmed. As *Goebel* recognized, inverse condemnation and eminent domain proceedings are not identical. The Law Revision Commission Comments to the Eminent Domain Law acknowledge this difference by limiting C.C.P. 1230.010 et seq. to eminent domain proceedings and leaving the law of inverse condemnation "for determination by judicial development." Moreover, the Legislature is fully capable of referring to inverse condemnation actions by name, as it has done in C.C.P. 1036, which pertains expressly to the award of costs in inverse condemnation proceedings. Thus, it is clear that "the Legislature perceives a difference between eminent domain and inverse condemnation" and did not intend the reference to eminent domain in C.C.P. 998(c)(1) to include inverse condemnation proceedings. (39 C.4th 530.)

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4. Offer.

a. Formal Requirements.

6 *Witkin Cal. Proc. PWT § 85*

[§ 85] Formal Requirements.

(1) *Service*. A written offer of compromise must be served on the other party at least 10 days before the trial or arbitration commences (*supra*, §82). (*C.C.P. 998(b)*); see *Berg v. Darden* (2004) 120 C.A.4th 721, 731, 15 C.R.3d 829 [offer faxed to opposing counsel followed by mailed copy was properly served without formal proof of service]; for forms of offer, see Judicial Council Form No. CIV-090 [Offer to Compromise and Acceptance Under *C.C.P. 998*]; *C.E.B.*, 3 Civil Proc. Before Trial 3d, §47:31; *Cal. Civil Practice*, 3 Procedure, §27:65.)

(2) *Writing*. The offer must be in writing. (*C.C.P. 998(b)*.) (See *Saba v. Crater* (1998) 62 C.A.4th 150, 153, 72 C.R.2d 401 [oral statement placed on record does not satisfy writing requirement of *C.C.P. 998*].) In addition, the writing must contain the terms and conditions of the judgment or award and a provision that permits the accepting party to indicate acceptance by signing a statement that the offer is accepted (*infra*, §98). (*C.C.P. 998(b)*.)

(3) *Time Extended for Service by Mail*. When the offer is mailed in California, the 10-day notice period is extended under *C.C.P. 1013(a)*. In *Lecuyer v. Sunset Trails Apartments* (2004) 120 C.A.4th 920, 16 C.R.3d 169, a personal injury action, defendant mailed a *C.C.P. 998* offer to plaintiff 13 days before trial, which plaintiff did not accept. Finding plaintiff 90% at fault, the jury awarded less than defendant's *C.C.P. 998* offer, and plaintiff was ordered to pay defendant's costs. Plaintiff contended that the trial court erred in ordering her to pay costs under *C.C.P. 998* because defendant's offer was not served at least 15 days prior to trial. *Held*, defendant's offer was not timely. *C.C.P. 1013(a)* extends a period of notice for 5 days where service is by mail in California. The 10-day notice requirement of *C.C.P. 998* is a "period of notice" within the meaning of *C.C.P. 1013(a)*, and *Poster v. Southern Calif. Rapid Transit Dist.* (1990) 52 C.3d 266, 276 C.R. 321, 801 P.2d 1072, *infra*, §97, holds that for acceptance purposes, *C.C.P. 1013(a)* applies when an offer is served by mail or fax. (120 C.A.4th 927.)

(4) *Filing*. The offer is ordinarily not filed unless it is accepted (see *infra*, §§97, 98). However, it may be filed if "relevant to the determination of an issue in a law and motion proceeding or other hearing," or if ordered filed for good cause. (*C.R.C.*, Rule 3.250(a)(23).)

(5) *Reference to Statute*. Because the party to whom an offer is made under *C.C.P. 998* stands to bear additional

costs if the offer is not accepted, the offer must be made in such a way that the offeree can recognize that it is being made formally and pursuant to statute. Hence, an offer that does not explicitly refer to *C.C.P. 998* or otherwise put the offeree on notice that a cost award under the statute may result from nonacceptance will not support an award of costs. (*Stell v. Jay Hales Dev. Co. (1992) 11 C.A.4th 1214, 1231, 1232, 15 C.R.2d 220.*)

(6) *Request for Dismissal With Prejudice Is Sufficient.* *C.C.P. 998(b)* calls for an offer "to allow judgment to be taken in accordance with the terms and conditions stated." But the statute merely contemplates an offer that, if accepted, will result in the final disposition of the litigation; it does not limit the type of final disposition the offer may specify. Hence, an offer by a defendant requiring the plaintiff to enter a voluntary dismissal with prejudice is sufficient to meet the statutory requirements. (*Goodstein v. Bank of San Pedro (1994) 27 C.A.4th 899, 906, 32 C.R.2d 740.*)

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4. Offer.

b. Terms Must Be Certain.

6 *Witkin Cal. Proc. PWT* § 86

[§ 86] Terms Must Be Certain.

An offer under *C.C.P.* 998 is unenforceable if its terms and conditions make it so difficult to place a value on the offer that the court is unable to determine whether the judgment is more or less favorable than the offer. In *Valentino v. Elliott Sav-On Gas* (1988) 201 C.A.3d 692, 247 C.R. 483, the court reversed a cost award in favor of defendant, holding that the offer, which required plaintiff to release defendant, its attorneys, and its insurance carrier from all claims and causes of action arising from her personal injury claim, "introduced an imponderable which makes it impractical if not impossible to accurately and fairly evaluate the offer." (201 C.A.3d 699.) (See *Goodstein v. Bank of San Pedro* (1994) 27 C.A.4th 899, 907, 32 C.R.2d 740 [distinguishing *Valentino*; offer requiring execution of "general release" to effect "full settlement of this action" could not reasonably be construed to apply to other litigation].)

In *Hurlbut v. Sonora Community Hosp.* (1989) 207 C.A.3d 388, 254 C.R. 840, the court held that plaintiffs' structured settlement offer, including a lump sum payment and a monthly annuity for the life of one plaintiff, could not support a cost award in the absence of a "record from which it can be determined that the uncertain terms of the offer were made definite." (207 C.A.3d 408.) "Having failed to present evidence sufficient to establish the present value of the structured settlement offer, plaintiffs may not take advantage of the benefits" offered by *C.C.P.* 998. (207 C.A.3d 409, citing *Valentino*.) (See *Taing v. Johnson Scaffolding Co.* (1992) 9 C.A.4th 579, 585, 11 C.R.2d 820, *infra*, §90 ["The burden of assuring that the offer complies with section 998 falls on the offeror"]; *Barella v. Exchange Bank* (2000) 84 C.A.4th 793, 801, 101 C.R.2d 167 [confidentiality provision in defendant's settlement offer in defamation action was incapable of valuation and rendered offer ineffective under *C.C.P.* 998]; *Deocampo v. Ahn* (2002) 101 C.A.4th 758, 779, 125 C.R.2d 79 [in medical malpractice action, plaintiff's settlement offer to physician defendant for greater of \$ 1 million or combined limits of defendant's liability coverage was clear and capable of valuation; actual total of insurance was fact within defendant's knowledge]; *Berg v. Darden* (2004) 120 C.A.4th 721, 732, 15 C.R.3d 829 [settlement offer contained in last paragraph of multi-issue letter was specific as to amount and referred to *C.C.P.* 998, thus "minimally" satisfying statutory requirements]; 118 A.L.R.5th 91 [sufficiency of offer]; on problems arising in offer to multiple parties, see *infra*, §87 et seq.)

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See *Chen v. Interinsurance Exchange of the Auto. Club* (2008) 164 C.A.4th 117, 122, 78 C.R.3d 755 [in action for breach of insurance policy and bad faith, insurer's C.C.P. 998 offer that was conditioned on plaintiff releasing "all claims" was ambiguous and thus invalid because phrase might encompass plaintiff's pending claim with insurer that was not part of present action; distinguishing *Goodstein v. Bank of San Pedro* (1994) 27 C.A.4th 899, 32 C.R.2d 740, text, p. 514]; *Linthicum v. Butterfield* (2009) 175 C.A.4th 259, 272, 95 C.R.3d 538 [defendant's offer was valid where release terms "costs," "fees," and "mutual dismissal" were not ambiguous and were clearly limited to present action; following *Goodstein*].



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c. Offers by Multiple Plaintiffs.

6 *Witkin Cal. Proc. PWT* § 87

[§ 87] Offers by Multiple Plaintiffs.

A joint offer by several plaintiffs will not support a cost award under *C.C.P. 998* if it is impossible to determine whether each plaintiff received a judgment more favorable than the offer. (*Hurlbut v. Sonora Community Hosp.* (1989) 207 *C.A.3d* 388, 410, 254 *C.R.* 840 [joint offer by three plaintiffs deprived defendant of opportunity to evaluate each party's chance of more favorable verdict, and made it impossible to make that determination after verdict]; *Gilman v. Beverly Calif. Corp.* (1991) 231 *C.A.3d* 121, 124, 283 *C.R.* 17 [joint offer by plaintiffs in wrongful death action; following *Hurlbut*].)

However, where it can be clearly determined whether plaintiffs received a more favorable judgment, a joint offer does not bar recovery of costs under the statute. In *Fortman v. Hemco* (1989) 211 *C.A.3d* 241, 259 *C.R.* 311, the court distinguished *Hurlbut* on this basis, affirming a cost award under *C.C.P. 998* where one plaintiff dismissed her action after the joint offer was made, and the remaining plaintiff recovered damages so far in excess of the offer that there could be no doubt about its sufficiency to support the cost award. (211 *C.A.3d* 263.) (See *Stallman v. Bell* (1991) 235 *C.A.3d* 740, 741, 286 *C.R.* 755 [following *Fortman*; wrongful death plaintiffs' joint offer could be compared to single verdict providing unitary award of damages]; *Johnson v. Pratt & Whitney Canada* (1994) 28 *C.A.4th* 613, 630, 34 *C.R.2d* 26 [following *Stallman* and disagreeing with *Gilman*].)

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d. Offer by Multiple Defendants.

6 *Witkin Cal. Proc. PWT § 88*

[§ 88] Offer by Multiple Defendants.

If two or more defendants are sued on a theory of joint and several liability, each is potentially liable for the full amount of any judgment, and a joint offer by the defendants under *C.C.P. 998* is effective, being properly read as an offer by each defendant that judgment may be taken against each of them. (*Brown v. Nolan* (1979) 98 C.A.3d 445, 451, 159 C.R. 469.) The following cases are instructive:

Winston Square Homeowners' Assn. v. Centex West (1989) 213 C.A.3d 282, 294, 261 C.R. 605 [even though defendants making joint offer were not united in interest, award to one defendant under *C.C.P. 998* was proper where that defendant was completely absolved of liability; citing *Brown*].

Taing v. Johnson Scaffolding Co. (1992) 9 C.A.4th 579, 584, 11 C.R.2d 820, *infra*, §90 [dictum; validity of offer by multiple defendants is "questionable" in cases subject to C.C. 1431.2 (5 *Summary* (10th), *Torts*, §53) "where each defendant is only jointly liable for noneconomic damages in proportion to that defendant's degree of wrongdoing"].

Santantonio v. Westinghouse Broadcasting Co. (1994) 25 C.A.4th 102, 114, 30 C.R.2d 486 [offer made by defendants in wrongful discharge action was invalid; following *Brown*].

Persson v. Smart Inventions (2005) 125 C.A.4th 1141, 1170, 23 C.R.3d 335 [offer made by multiple defendants to single plaintiff to allow judgment to be taken against them jointly and severally was valid even though both defendants were not jointly and severally liable on all of plaintiff's claims; distinguishing *Burch v. Children's Hosp. of Orange County Thrift Stores* (2003) 109 C.A.4th 537, 135 C.R.2d 404, *infra*, §90].

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e. Offers to Multiple Plaintiffs.

6 *Witkin Cal. Proc. PWT* § 89

[§ 89] Offers to Multiple Plaintiffs.

An offer made jointly to several plaintiffs, without designating how the amount should be divided between them, does not support a cost award, because it is impossible to say that any one plaintiff received a judgment less favorable than what would have been received under the offer. (*Randles v. Lowry* (1970) 4 C.A.3d 68, 74, 84 C.R. 321 [applying former C.C.P. 997].) An offer that allocates sums to each plaintiff, but imposes the condition that all must accept, is also defective because C.C.P. 998 calls for an unconditional offer. (*Hutchins v. Waters* (1975) 51 C.A.3d 69, 73, 123 C.R. 819; cf. *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 C.A.4th 102, 113, 30 C.R.2d 486 [holding offer valid, and distinguishing *Hutchins* on ground that offer here was not expressly conditional].)

In *Meissner v. Paulson* (1989) 212 C.A.3d 785, 260 C.R. 826, defendants made a joint, unallocated offer to plaintiffs under C.C.P. 998. Plaintiffs did not accept, and failed to recover a more favorable judgment. The trial judge awarded defendants costs under the statute, finding that, while they failed to show that plaintiff M received a less favorable result, they did meet that burden as to plaintiff U. Plaintiffs argued that the offer was invalid, citing *Randles* and *Hutchins*. *Held*, award of costs reversed. "[A]lthough defendants did not apportion the compromise offer, a major portion of it *must* have been intended for [plaintiff]. However, neither party could accept without the consent of the other party. The offer inherently necessitated agreement between the parties as to apportionment between them. Although ... [plaintiff] received less than it would have under the offer, permitting such application of section 998 would introduce great uncertainty into this area of the law. Plaintiffs would be required to second-guess all joint offers to determine whether a failure to reach agreement with coplaintiffs would cause a risk of section 998 costs against them. ... [A]s a matter of law only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998." (212 C.A.3d 791.)

In *Deocampo v. Ahn* (2002) 101 C.A.4th 758, 125 C.R.2d 79, a medical malpractice action, plaintiff and his wife made a C.C.P. 998 offer to a physician defendant for the greater of \$ 1 million or the sum of defendant's liability policies applicable to plaintiff's claim. Defendant rejected the offer, and later argued that, under C.C.P. 998, the offer must be made by only one plaintiff so that defendant knows the sum being demanded by a plaintiff and so the court can determine whether plaintiff obtained a more favorable judgment. *Held*, the offer was valid. *Stallman v. Bell* (1991) 235 C.A.3d 740, 746, 286 C.R. 755, *infra*, §102, observed that "recent cases have declined to mechanically apply a rule that

renders void" a joint offer without first examining whether it can be determined that the party has in fact obtained a more favorable judgment. Here, plaintiff's wife's loss of consortium damages would have been limited to \$ 250,000 under C.C. 3333.2; thus, the bulk of plaintiff's offer was "obviously meant for plaintiff himself." Moreover, the trial court was not confused about whether plaintiff obtained a more favorable judgment because the jury awarded no damages to plaintiff's wife, and the several million dollars it did award clearly were greater than the amount requested by plaintiff's offer. (101 C.A.4th 777.)

In *Vick v. DaCorsi* (2003) 110 C.A.4th 206, 1 C.R.3d 626, plaintiff spouses sued defendants for breach of contract and fraud involving a residential sales agreement. Defendants made an unapportioned C.C.P. 998 offer, which plaintiffs rejected. Defendants prevailed and sought costs including witness fees based on plaintiffs' rejection of the offer. The trial court denied recovery of the expert witness fees on the ground that the offer was not apportioned. *Held*, reversed.

(a) The statutory offer was valid. The concerns addressed in *Meissner* are not present here. Plaintiffs are husband and wife, their action arose out of their purchase of community property, they sued on claims that are community property, and their recovery would be community property. Thus, defendants could not allocate the offer, because plaintiffs each had an equal, undivided half-interest in the claims for fraud and breach of contract. Moreover, there would be no need for a jury's award to be allocated between them to determine whether either or both obtained less than defendants' offer. (110 C.A.4th 212.)

(b) In addition, unlike offers expressly conditioned on acceptance by all plaintiffs, here the offer could have been accepted by either plaintiff on behalf of the community. (110 C.A.4th 212.)

A number of additional decisions are noteworthy. (See *Weinberg v. Safeco Ins. Co. of America* (2004) 114 C.A.4th 1075, 1087, 8 C.R.3d 224 [insurer's unapportioned joint offer to plaintiff spouses in bad faith action was invalid because wife had separate, not derivative claim; thus, plaintiffs did not have single, indivisible injury; distinguishing *Vick*]; *Menees v. Andrews* (2004) 122 C.A.4th 1540, 1546, 19 C.R.3d 664 [where plaintiff spouses had separate claims for medical malpractice and negligence, defendant physician's unapportioned offer that was contained in single document, referred to plaintiffs in conjunctive, and included one signature line, created inference that offer was conditional on acceptance by both and could not support cost award to defendant]; *Peterson v. John Crane* (2007) 154 C.A.4th 498, 513, 65 C.R.3d 185 [where plaintiff brought action in individual capacity, as successor to her husband's claims, and as her husband's legal heir, she was but one plaintiff and capable of deciding whether dismissal of all claims in exchange for defendant's C.C.P. 998 offer of mutual waiver of costs was acceptable resolution; thus, defendant's offer to plaintiff as single party with no apportionment was valid; distinguishing *Menees*]; 125 A.L.R.5th 193 [apportionment in multiple-party offers].)

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f. Offers to Multiple Defendants.

6 Witkin Cal. Proc. PWT § 90

[§ 90] Offers to Multiple Defendants.

A *C.C.P.* 998 offer to multiple defendants must be sufficiently specific to permit the individual defendants to determine the exact amount the plaintiff is seeking from each of them. In *Taing v. Johnson Scaffolding Co.* (1992) 9 C.A.4th 579, 11 C.R.2d 820, plaintiff sued a scaffolding subcontractor, the general contractor, and the building owner for injuries sustained in a fall from a scaffold. Plaintiff served an unapportioned offer to compromise on defendants jointly. The offer expired without acceptance, and plaintiff recovered judgment on a jury verdict finding the subcontractor 100% negligent, and awarding damages nearly twice as high as the settlement offer. The trial judge awarded plaintiff his expert witness fees under *C.C.P.* 998. *Held*, reversed.

(a) Concurrent defendant tortfeasors risk liability exposure to the plaintiff and are subject to comparative indemnity claims among themselves. Thus, an unapportioned offer by a single plaintiff requires a defendant who wants to accept to obtain the concurrence of codefendants. "This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (9 C.A.4th 584.)

(b) Plaintiff argued that by any calculation he had obtained a more favorable judgment against the subcontractor, who could have paid the entire amount of the offer and still fared better than under the judgment. However, at the time of the offer plaintiff's position was that all defendants were liable to an unspecified degree. Thus, it was questionable whether plaintiff could reasonably have expected the subcontractor to pay the entire amount and then litigate liability and damages with the codefendants. "[F]rom the perspective of the offeree, the offer must be sufficiently specific to permit the individual defendant to evaluate it and make a reasoned decision whether to accept without the additional burden of obtaining the acceptance of codefendants or suffering from their refusal to settle. ... This should not unduly burden plaintiffs making offers to multiple defendants. The plaintiff has already determined that the individual defendants are liable in some degree, and in our experience plaintiffs frequently make informal offers of settlement to individual defendants in multiple defendant cases." (9 C.A.4th 585.)

Taing was distinguished in *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 16 C.R.2d 787, an action alleging sexual harassment by a supervisor. Plaintiff made an unapportioned settlement offer under *C.C.P.* 998 to her employer, A, and several individual defendants. The offer was rejected, and plaintiff recovered damages far exceeding

it. The trial judge awarded plaintiff prejudgment interest under C.C. 3291 (see 6 *Summary* (10th), *Torts*, §1646), based on the rejected offer. On appeal, A sought to raise for the first time the issue of lack of apportionment in the settlement offer, relying on *Taing*, which had been filed while the appeal was pending. The court did not allow the argument, principally because the settlement offer did not put A in the untenable position of the defendants in *Taing*. (13 C.A.4th 1000.) "*Taing* dealt with the problem of an unapportioned settlement offer to defendants who were not jointly liable for the full amount of the plaintiff's damages. Here, [A] was jointly liable with its employees on a respondeat superior or vicarious liability theory for the full amount of damages on every cause of action in which [A] was named as a defendant. ... Thus, unlike the scaffolding company in *Taing*, [A]'s principal dilemma was liability vel non, not apportionment of damages." (13 C.A.4th 1001.)

The defendants' joint liability was also emphasized in *Hilliger v. Golden* (1980) 107 C.A.3d 394, 166 C.R. 33. Plaintiff, injured in an automobile accident, sued defendants F (driver) and M (owner). Plaintiff served an offer to compromise on F, which expired without being acted on; plaintiff then served a lesser offer on M, which was also not acted on. After trial, judgment was entered in plaintiff's favor for slightly more than the first offer. The trial judge ruled that the two offers should be combined, and because plaintiff's recovery was less than the combined amount, postoffer costs (expert witness fees) were denied. *Held*, reversed. As to each defendant, plaintiff had received judgment for a larger sum than her offer to compromise. (107 C.A.3d 399.) Because defendants were jointly and severally liable, it would have been improper to apportion the judgment (see 7 Cal. Proc. (5th), *Trial*, §356), and if either of plaintiff's offers to compromise had been accepted, the entire case would have been settled. (107 C.A.3d 400.) "[T]he offers made in this case were single, separate offers to both defendants, at different times. When the first offer was made and not acted upon, the plaintiff may be said to have reevaluated her case and submitted a different offer." (107 C.A.3d 401.)

The following cases are also instructive:

Steinfeld v. Foote-Goldman Proctologic Med. Group (1996) 50 C.A.4th 1542, 1550, 58 C.R.2d 371 [where singular theory of liability was alleged against two defendants for single injury, and where defendants would be jointly and severally liable, unapportioned settlement offer pursuant to C.C.P. 998 made to both defendants was valid].

Wickware v. Tanner (1997) 53 C.A.4th 570, 576, 61 C.R.2d 790 [offer that allocated sums to each defendant but was conditioned on acceptance by all defendants was invalid; following *Hutchins v. Waters* (1975) 51 C.A.3d 69, 123 C.R. 819, *supra*, §89].

Burch v. Children's Hosp. of Orange County Thrift Stores (2003) 109 C.A.4th 537, 544, 135 C.R.2d 404 [plaintiff's unapportioned offer to four defendants whose liability was not joint and several was invalid at time it was made even though defendants later stipulated to joint and several liability].

Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburg, Pennsylvania (2004) 118 C.A.4th 1061, 1076, 13 C.R.3d 586 [because plaintiff sought recovery against two defendants on different theories and different evidence, defendants' liability was not joint and several; thus, trial judge properly denied prevailing plaintiff recovery of expert witness fees where plaintiff's offer was unapportioned; following *Taing*].

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4. Offer.

g. Good Faith Requirement.

6 *Witkin Cal. Proc. PWT § 91*

[§ 91] Good Faith Requirement.

Although *C.C.P. 998* does not contain an express good faith requirement, the requirement has been read into it. "In other words, the pretrial offer of settlement required under section 998 must be realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement." (*Wear v. Calderon* (1981) 121 C.A.3d 818, 821, 175 C.R. 566; see *Pineda v. Los Angeles Turf Club* (1980) 112 C.A.3d 53, 63, 169 C.R. 66 [offer was not "realistic"].) However, the amount of the offer is only one factor for the trial judge to consider in determining reasonableness and good faith. A defendant who believes that he or she is fault free and has a significant likelihood of prevailing at trial may make a modest settlement offer, and if it is refused may recover from the plaintiff the costs of expert witnesses who assisted in establishing nonliability. (*Culbertson v. R.D. Werner Co.* (1987) 190 C.A.3d 704, 710, 235 C.R. 510; see *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 C.A.4th 102, 117, 30 C.R.2d 486 [offer to plaintiff was reasonable based on damages projected by defendants' experts and weaknesses of plaintiff's case]; 121 A.L.R.5th 325 [disallowing awards where good faith is lacking]; on motion or application for determination of good faith settlement offer, see *supra*, §82.)

In *Elrod v. Oregon Cummins Diesel* (1987) 195 C.A.3d 692, 241 C.R. 108, plaintiff, rendered a paraplegic in a logging-truck accident, sued O, the company that had repaired the truck's brake system, and G, the designer of the brakes. G in turn cross-complained against J, the brake manufacturer. O made a settlement offer of \$ 15,001, which expired without acceptance. Thereafter, plaintiff settled with G and J for a total of \$ 500,000. The case went to trial against O, the parties stipulating that O was entitled to an offset from any verdict against it for the \$ 500,000 and, should plaintiff's employer be found negligent, for an additional \$ 137,504.04 in workers' compensation benefits. The jury found that plaintiff suffered damages of \$ 1,183,350, and determined that he was 60% at fault, his employer 30% at fault, and defendant O 10% at fault. Thus, after the deduction for workers' compensation benefits and the credit for the settlement, the net judgment was that plaintiff take nothing from O. The trial judge ruled that defendant O's settlement offer was a token one that failed to qualify as a valid *C.C.P. 998* offer, denied O's motion to tax costs, and awarded plaintiff costs as the prevailing party. *Held*, affirmed.

(a) By its 1986 amendment and reenactment of *C.C.P. 998* without pertinent change, the Legislature is deemed to have approved *Wear's* interpretation that a good faith requirement must be read into the statute. The offer must be

realistically reasonable under the circumstances of the particular case, and must carry with it some reasonable prospect of acceptance. (195 C.A.3d 698.)

(b) "Whether a section 998 offer is reasonable must be determined by looking at the circumstances when the offer was made. ... [T]he reasonableness of a defendant's offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant. ... If an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable." (195 C.A.3d 699.)

(c) "If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant's information was known or reasonably should have been known to plaintiff. This second test is necessary because the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (195 C.A.3d 699.) Hence, a defendant may not reasonably make a low offer premised on its exclusive knowledge of important information, unless the plaintiff fails to meet the standard of whether a reasonable person would have discovered the information. (195 C.A.3d 700.)

(d) "Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The burden is therefore properly on plaintiff, as offeree, to prove otherwise." (195 C.A.3d 700.)

In *Arno v. Helinet Corp.* (2005) 130 C.A.4th 1019, 30 C.R.3d 669, plaintiff A, injured in the crash of a helicopter piloted by defendant K, brought an action against K and others and subsequently made a C.C.P. 998 offer to K alone, which K rejected. The jury awarded A an amount far in excess of the offer. K challenged the trial court's award of penalties, contending that A's offer to K was merely a ploy to achieve the benefit of C.C.P. 998 and that A knew that the offer had no reasonable prospect of acceptance because one insurer covered all defendants. According to K, if K settled, A would be free to pursue a judgment against K's codefendants for the full amount of the verdict, less setoff of the settlement amount. Thus, the insurer gained nothing if K settled, and therefore the insurer's interests should have been taken into consideration when assessing the reasonableness of the offer. *Held*, the offer was made in good faith. Insurance, like other factors, may be considered by the trial court, but an insurer's interest does not restrict a trial court's discretion in determining the reasonableness and good faith of an offer. Under C.C.P. 998, a valid offer to settle is one made to a party, not to a party's insurer. The purpose of C.C.P. 998 is to encourage settlement by imposing strong financial disincentives on a party that rejects the offer only to receive a less favorable result at trial. The trial court concluded that partial settlement and dismissal of K would have fulfilled the purpose of C.C.P. 998, and regardless of strategies that might be attributed to A, the trial court did not abuse its discretion in applying C.C.P. 998 sanctions. (130 C.A.4th 1027.)

The following cases are also instructive:

Regency Outdoor Advertising v. Los Angeles (2006) 39 C.4th 507, 531, 46 C.R.3d 742, 139 P.3d 119, *supra*, §84 [in inverse condemnation action by plaintiff outdoor advertiser claiming that defendant city's landscaping obscured plaintiff's billboards and resulted in lost advertising revenue, defendant's offer to pay \$ 1,000 and to remove offending tree had "genuine value" and was in good faith; it would restore visibility and stem plaintiff's alleged losses].

Jones v. Dumrichob (1998) 63 C.A.4th 1258, 1263, 74 C.R.2d 607 [absence of net monetary sum in pretrial settlement offer does not constitute per se violation of good faith requirement; defendant's offer to have judgment entered against him for waiver of costs was reasonable].

Nelson v. Anderson (1999) 72 C.A.4th 111, 133, 84 C.R.2d 753 [defendant failed to satisfy second part of

reasonableness test announced in *Elrod*, by not showing what plaintiff knew regarding likelihood of recovering damages, hence failing to establish that plaintiff had reason to know that defendant's offer was reasonable].

People v. Fremont General Corp. (2001) 89 C.A.4th 1260, 1267, 1270, 108 C.R.2d 127 [in unfair business practice and false advertising action by Attorney General seeking civil penalties, restitution, and injunctive relief, defendant's \$ 2 million pretrial offer, rejected by plaintiff, was not indefinite or uncertain for failure to designate allocation; "The People's professed uncertainty about what to do with the money is not the type of uncertainty that invalidates a section 998 offer"].

Carver v. Chevron U.S.A. (2002) 97 C.A.4th 132, 152, 118 C.R.2d 569 [defendant's offer of \$ 100 per plaintiff and waiver of costs and attorneys' fees was reasonable given known potential costs and fees at time offer was made].

Hartline v. Kaiser Foundation Hosp. (2005) 132 C.A.4th 458, 472, 33 C.R.3d 713 [defendant's offer to waive costs in exchange for entry of plaintiff's dismissal with prejudice was in good faith; it referred to plaintiff's remaining cause of action and did not involve waiver of plaintiff's right to appeal earlier claim that had been summarily adjudicated].

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

In *Barba v. Perez* (2008) 166 C.A.4th 444, 82 C.R.3d 715, plaintiff sustained a foot injury while assisting in moving a refrigerator at the request of defendant, incurred more than \$ 70,000 in medical expenses, and lost time from work. Plaintiff waited 8 months before filing suit, and in the interim informed defendant's agent by letter that his medical bills were "about" \$ 70,000 and requested that they be paid. There was no response. When plaintiff filed his personal injury complaint, he also served defendant with a C.C.P. 998 offer to settle for \$ 99,999.99, which defendant let lapse. Following entry of judgment for \$ 117,053.42, plaintiff filed a memorandum of costs, including prejudgment interest and expert witness fees under C.C.P. 998. Defendant filed a motion to tax these costs, which the trial court denied. *Held*, judgment and order denying defendant's motion affirmed.

(a) Plaintiff's offer was reasonable and made in good faith even though it was filed with the summons and complaint. Defendant's reliance on *Elrod v. Oregon Cummins Diesel* (1987) 195 C.A.3d 692, 241 C.R. 108, text, p. 521, to argue otherwise is misplaced. *Elrod* involved an unreasonably low offer by a defendant who possessed crucial information, which the plaintiff did not know, that limited the defendant's exposure. Here, plaintiff was not hiding information. Also, the parties had a close relationship in which there was a free flow of information that gave defendant ample preoffer knowledge of plaintiff's expenses and demands. (166 C.A.4th 450.)

(b) C.C.P. 998 permits serving an offer up to 10 days prior to trial, but does not impose a minimum period that must elapse following commencement of an action for the offer to be valid. Thus, nothing prohibited plaintiff from including his offer with the summons and complaint, particularly where defendant had been put on notice. And had defendant not known of plaintiff's injuries, defendant's counsel could have requested that plaintiff provide informal discovery on damages, or permit an extension of time to respond to the offer. If plaintiff had refused, the refusal and any other obstinacies would have been evidence the trial court could evaluate in determining whether the offer was reasonable or in good faith. (166 C.A.4th 451.)

One justice dissented, finding the service of the offer with the summons and complaint invalid, and argued that a defendant should be permitted to complete minimal discovery before being expected to evaluate and respond to a C.C.P. 998 offer, particularly under the facts here. (166 C.A.4th 452.)



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h. Offer Is Revocable During Statutory Period.

6 *Witkin Cal. Proc. PWT* § 92

[§ 92] Offer Is Revocable During Statutory Period.

In *T.M. Cobb Co. v. Superior Court* (1984) 36 C.3d 273, 204 C.R. 143, 682 P.2d 338, plaintiff homeowners sued defendant for negligent design and construction of their residence. Plaintiffs made a statutory offer of compromise, and defendant made a counteroffer that was rejected. In taking depositions, plaintiffs found evidence of greater culpability on the part of defendant, and wrote to defendant stating that they were revoking their offer. Defendant acknowledged receiving the purported revocation, but notified plaintiffs that it was nevertheless accepting the offer, and it filed its acceptance under C.C.P. 998. Plaintiffs' motion to strike the acceptance was granted, and defendant's motion for entry of judgment in accordance with the offer was denied. Defendant then sought mandamus. *Held*, writ denied; an offer of compromise under C.C.P. 998 may be revoked by the offeror prior to its acceptance.

(a) *Statute is silent on issue.* C.C.P. 998 provides for termination by operation of law (the offer is deemed withdrawn if not accepted within 30 days), but it is silent on whether the offeror may withdraw the offer before acceptance by the offeree. (36 C.3d 277.)

(b) *Contract law is controlling.* The rule is established that an offer may be revoked by the offeror at any time prior to acceptance. (36 C.3d 278.) If the Legislature had intended to make C.C.P. 998 offers irrevocable, it would have done so expressly, as it has in other statutes; e.g., *Govt.C. 66477.2(a)* (stating that the offer "shall remain open"). (36 C.3d 278.) Prior cases do not call for a different rule. In *Distefano v. Hall* (1968) 263 C.A.2d 380, 69 C.R. 691, *infra*, §96, and *Ward v. Superior Court* (1973) 35 C.A.3d 67, 69, 110 C.R. 501, contract principles were held to govern statutory offers of compromise. The reasoning in these cases is persuasive, and any inconsistent language in *Gallagher v. Heritage* (1983) 144 C.A.3d 546, 192 C.R. 614, *infra*, §96, is disapproved. (36 C.3d 279, 280, and footnote 8.) "Of course, general contract law principles should apply to section 998 offers and acceptances only where such principles neither conflict with the statute nor defeat its purpose." (36 C.3d 280.)

(c) *Policy favoring settlements is furthered by revocability.* Defendant contended that settlement is best encouraged by keeping the offer open for the entire statutory period, thereby giving the offeree a reasonable amount of time to consider the offer. This position was taken in *Lum v. Superior Court* (1983) 141 C.A.3d 952, 955, 190 C.R. 599, but it is unsound, and the holding is disapproved. (36 C.3d 280, 281, and footnote 9.)

(1) "A party is more likely to make an offer pursuant to section 998 if that party knows that the offer may be revised if circumstances change or new evidence develops. Conversely, a party who knows that he or she is strictly bound to the terms of the first offer made may be reluctant to make such an offer for fear of being locked into a position which becomes unfavorable upon the discovery of additional information." (36 C.3d 281.)

(2) The inhibitory effect on offers that would result if a rule of irrevocability were adopted is particularly evident in cases involving expert testimony. By statute, discovery of that testimony is subject to specific statutory time frames. A party that has already made an offer may discover new evidence that indicates the offeree is more culpable than first realized. In order to avoid this problem, a party might not make an offer until all the expert evidence has been discovered, but by that time it might be too late under C.C.P. 998 to make an offer. Thus, "to encourage parties to make offers pursuant to section 998, and to ensure that those offers are based on as complete an understanding of the facts as possible, such offers must be revocable." (36 C.3d 281.)

(3) The public policy of compensating injured parties would be frustrated by a rule of irrevocability. Newly discovered evidence may indicate greater culpability of the defendant or more serious injuries suffered by the plaintiff, and an irrevocable offer might bind the plaintiff to inadequate compensation for the wrong. If it is revocable, the offeror can either propose a new offer in light of the newly discovered evidence, or go to trial. (36 C.3d 281, 282.)

(d) *Offer is not an irrevocable option.* Defendant, and the dissenting opinion, contended that the statute confers a benefit on the offeror (entitlement to costs), and that this statutory consideration makes the offer an irrevocable option--a contract to keep the offer open. However, the essential element of mutual assent--an agreement to keep the offer open for a prescribed period--is lacking. (36 C.3d 282, 283, and footnote 10.)

Two justices dissented. (36 C.3d 284, 288.) (See *Ward v. Superior Court* (1973) 35 C.A.3d 67, 69, 110 C.R. 501 [purported revocation of C.C.P. 998 offer was ineffective, where it was directed to defendant's insurer and not to defendant]; *Nott v. Superior Court* (1988) 204 C.A.3d 1102, 1108, 251 C.R. 842 [arguments at judicial arbitration hearing did not operate to revoke outstanding offer]; *Marcey v. Romero* (2007) 148 C.A.4th 1211, 1216, 56 C.R.3d 402 [revoked offer forfeits cost benefit provisions of C.C.P. 998; applying *T.M. Cobb*]; 116 A.L.R.5th 433 [revocation and succession issues under pretrial offer statutes].)

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

See *Brown v. Labow* (2007) 157 C.A.4th 795, 817, 69 C.R.3d 417 [under general contract principles, C.C.P. 998 written offer to compromise may be revoked orally; applying *T.M. Cobb Co. v. Superior Court* (1984) 36 C.3d 273, 204 C.R. 143, 682 P.2d 338, text, p. 523]; *Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 C.A.4th 874, 880, 85 C.R.3d 800 [defendant's written offer, stating that acceptance must be within 5 days, was open well short of statutory period and was deemed revoked after expiration of 5 days; thus, after 5 days it was no longer offer for purposes of cost benefit provisions of C.C.P. 998].



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i. Offer Is Terminated by Death of Offeree.

6 *Witkin Cal. Proc. PWT* § 93

[§ 93] Offer Is Terminated by Death of Offeree.

In *Estate of Watts (1984)* 162 C.A.3d 1160, 208 C.R. 846, plaintiff died while defendant's offer of compromise was pending. Plaintiff's administrator filed a notice of acceptance within the 30-day period, and successfully moved for entry of judgment under C.C.P. 998. *Held*, reversed.

(a) Under *T.M. Cobb Co. v. Superior Court (1984)* 36 C.3d 273, 204 C.R. 143, 682 P.2d 338, *supra*, §92, an offer of compromise made under C.C.P. 998 is governed by general contract principles. Death of the offeree terminates a revocable offer so that a subsequent acceptance by the offeree's administrator is ineffective, even if made within the time permitted. (162 C.A.3d 1163, 1164; see 1 *Summary* (10th), *Contracts*, §158.) Here, as in *Cobb*, there was no mutual assent to the creation of an irrevocable option. (162 C.A.3d 1164.)

(b) The statutory purpose of encouraging pretrial settlements is best served by permitting contract law to govern so that death of a plaintiff offeree in a personal injury action serves to terminate the power to accept the offer. A living plaintiff can seek general as well as special damages. But by statute an estate in a surviving action may not recover for "pain, suffering or disfigurement." Defendants in personal injury actions are more likely to make C.C.P. 998 offers if those offers are deemed terminated by this change in circumstances materially reducing their potential exposure to damages in the surviving action. (162 C.A.3d 1164, 1165.)

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4. Offer.

j. Offer Is Not Revoked by Counteroffer.

6 Witkin Cal. Proc. PWT § 94

[§ 94] Offer Is Not Revoked by Counteroffer.

A counteroffer does not preclude acceptance of a settlement offer under *C.C.P. 998*. In *Poster v. Southern Calif. Rapid Transit Dist.* (1990) 52 C.3d 266, 276 C.R. 321, 801 P.2d 1072, defendants responded to plaintiff's offer to settle his personal injury claim by making two counteroffers, which plaintiff did not accept. Within the statutory period, which was extended under *C.C.P. 1013* (see *supra*, §30), defendants accepted plaintiff's offer. Plaintiff acknowledged the acceptance and agreed that the matter would be removed from the calendar. Notice of acceptance instructing the clerk to enter judgment was mailed to plaintiff. However, plaintiff's attorney subsequently refused to honor the settlement agreement. At the hearing on defendants' motion to enforce the agreement, plaintiff's counsel stated that he had received expert advice that his client's injuries might be more serious than they were first thought, and argued that defendant's counteroffers had effectively terminated the original offer. The trial judge found that the offer was properly accepted, and ordered judgment for plaintiff in that amount. *Held*, this was correct.

(a) *T.M. Cobb Co. v. Superior Court* (1984) 36 C.3d 273, 204 C.R. 143, 682 P.2d 338, *supra*, §92, held that a *C.C.P. 998* offer may be revoked by the offeror under general contract principles, and in *Glende Motor Co. v. Superior Court* (1984) 159 C.A.3d 389, 205 C.R. 682, the court applied those principles to hold that a nonstatutory counteroffer that deviates from the terms of a *C.C.P. 998* offer operates to revoke the offer. However, the *Cobb* opinion emphasized that contract principles should be applied to *C.C.P. 998* offers only if doing so would best promote the statutory policy of encouraging settlements, and the rule adopted in *Glende Motor Co.* would have a negative effect on settlement negotiations. (52 C.3d 271.)

(b) The *Glende Motor Co.* court, recognizing that *C.C.P. 998* was not intended to insulate the offeror from settlement negotiations during the operative period of the offer, attempted to avoid this problem by observing that a mere inquiry as to the possibility of different terms, a request for a better offer, or a comment on the terms of the offer, is ordinarily not a counteroffer. However, this introduces a significant uncertainty into the *C.C.P. 998* procedure, and would inevitably spawn numerous disputes over whether a communication is a "counteroffer" or a "mere inquiry." "The legislative purpose of section 998 is better served by the bright line rule ... under which a section 998 offer is not revoked by a counteroffer and may be accepted by the offeree during the statutory period unless the offer has been revoked by the offeror." (52 C.3d 272, disapproving *Glende Motor Co.* to the extent it is contrary to this conclusion.)

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k. Rejection of Offer.

6 *Witkin Cal. Proc. PWT* § 95

[§ 95] Rejection of Offer.

In the absence of an *unequivocal* rejection of a *C.C.P.* 998 offer, the offer may be accepted during the statutory period unless revoked. In *Guzman v. Visalia Community Bank* (1999) 71 *C.A.4th* 1370, 84 *C.R.2d* 581, when plaintiff's attorney characterized defendant's settlement offer as "insulting and demeaning," defendant's counsel assumed this was a rejection. The trial judge agreed, and denied plaintiff's motion to enforce the offer. *Held*, reversed. *Poster v. Southern Calif. Rapid Transit Dist.* (1990) 52 *C.3d* 266, 276 *C.R.* 321, 801 *P.2d* 1072, *supra*, §94, declined to adopt common law contract principles regarding counteroffers in the context of *C.C.P.* 998, holding that the statutory purpose of encouraging settlement is best served by a "bright line" rule under which a *C.C.P.* 998 offer is not revoked by a counteroffer and may be accepted during the statutory period unless revoked. (71 *C.A.4th* 1375.) Similarly, applying general contract law here to determine whether the offer was rejected does not further the statutory purpose. Negotiation during the statutory period is common, and "one would expect the conduct present here, i.e., criticism of the offer, to be a normal part of the negotiating strategy." Thus, construing disparaging comments as a rejection of the offer under the statute "would negatively impact settlement." (71 *C.A.4th* 1377.)

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k. Rejection of Offer.

6 *Witkin Cal. Proc. PWT* § 96

[§ 96] (l) Effect of Second Offer.

In *Gallagher v. Heritage* (1983) 144 C.A.3d 546, 192 C.R. 614, defendant served a statutory offer to compromise, which plaintiff did not accept. Shortly before trial defendant made a nonstatutory oral offer, which plaintiff also refused. The jury awarded plaintiff damages in an amount less than either offer. The trial judge awarded plaintiff costs, including those incurred after the first offer was rejected, and granted her motion to tax defendant's costs. *Held*, reversed; plaintiff was not entitled to recover costs from the time of the first offer, and was required to pay defendant's costs from that time.

(a) Plaintiff, relying on *Distefano v. Hall* (1968) 263 C.A.2d 380, 69 C.R. 691, *supra*, §92, a case decided under former C.C.P. 997, argued that under contract principles, a subsequent offer revokes a prior one. However, *Distefano* is limited to its peculiar facts, involving a larger offer made before trial and a smaller offer made after the verdict was reversed on appeal. In rejecting the defendants' claim that the plaintiff's rejection of the first offer insulated them from a cost award unless the verdict on *retrial* exceeded their first offer, the *Distefano* court furthered the legislative intent of encouraging settlement by holding that, where the parties have reappraised their positions after an appeal and reversal, an offer of compromise made before the second trial supersedes the original offer. (144 C.A.3d 549, 550.)

(b) A different rule is compelled by the facts of the instant case. "Once a statutory offer is made and the time for acceptance has expired, the offeror is cloaked with the protections provided in *Code of Civil Procedure* section 998. A subsequent oral offer will not diminish already vested benefits nor remove potential burdens from the offeree." (144 C.A.3d 550.)

(c) "A second section 998 offer compels no different conclusion. If unaccepted it would clothe the offeror with the benefits and expose the offeree to the burdens, triggered by a different verdict amount. Such a rule will give full effect to the clear legislative intent and purpose of *Code of Civil Procedure* section 998." (144 C.A.3d 550.)

However, in *Wilson v. Wal-Mart Stores* (1999) 72 C.A.4th 382, 85 C.R.2d 4, a personal injury action, plaintiff's statutory offer to compromise for \$ 150,000 was deemed rejected when defendant failed to respond within the 30-day period. Three months later, plaintiff made a second statutory offer for \$ 249,000. That offer was similarly rejected.

Following a jury verdict of \$ 175,000, plaintiff sought costs in an amount that included a claim for prejudgment interest calculated from the date of the first statutory offer to the date of judgment. Defendant moved to tax costs, and argued that plaintiff was precluded from recovering prejudgment interest or expert fees because plaintiff failed to obtain a judgment more favorable than the second statutory offer, which effectively superseded and extinguished plaintiff's first offer. The trial judge agreed. *Held*, affirmed.

(a) *C.C.P.* 998 is silent as to the effect of a subsequent statutory offer on a prior offer. However, a rule of general contract law that a subsequent offer extinguishes a prior offer may be applied here because the application does not conflict with the statute or defeat its purpose, which is to encourage pretrial settlements. (72 *C.A.4th* 389, relying on *Distefano*.) Moreover, that purpose is generally better served by a "bright line" rule where the parties know that a judgment will be measured against a single, valid statutory offer, i.e., the offer most recently rejected, regardless of earlier offers. (72 *C.A.4th* 391.)

(b) Cases finding second statutory offers invalid are inapposite. *Gallagher* held that once the time for accepting a statutory offer has expired, the offer is not superseded by a subsequent oral offer. However, the Supreme Court in *T.M. Cobb Co. v. Superior Court* (1984) 36 *C.3d* 273, 204 *C.R.* 143, 682 *P.2d* 338, supra, §92, expressly disapproved *Gallagher* to the extent *Gallagher* held that contract law has no applicability when there has been no *C.C.P.* 998 acceptance. And *Wickware v. Tanner* (1997) 53 *C.A.4th* 570, 61 *C.R.2d* 790, invalidated a second offer because it was conditioned on acceptance by multiple defendants. No procedural infirmity was applicable here. (72 *C.A.4th* 391.)

Palmer v. Schindler Elevator Corp. (2003) 108 *C.A.4th* 154, 133 *C.R.2d* 339, holds that a later offer under *C.C.P.* 998 extinguishes earlier offers, regardless of the validity of the offers. Plaintiff sued multiple defendants following her injuries in a malfunctioning high-rise office elevator. Plaintiff first served defendant S with a *C.C.P.* 998 offer for \$ 2 million, to which defendant did not respond. Plaintiff later served all defendants "jointly and severally" with an offer of \$ 1.6 million, to which no defendant responded. A jury returned a verdict for plaintiff for \$ 5.75 million. In post-trial motions, plaintiff argued that, because the verdict was larger than her second offer, she was entitled to enhanced costs and prejudgment interest from her first offer. Defendants filed a motion to tax costs and opposed plaintiff's motion for prejudgment interest, arguing that the second offer revoked the first, and that the second offer was ineffective because it was improperly directed to all defendants jointly and severally. The trial court granted defendants' motion to tax costs, striking plaintiff's expert witness fees and denying her motion for prejudgment interest. *Held*, affirmed.

(a) A *C.C.P.* 998 offer to multiple parties (supra, §§89, 90) must be explicitly apportioned so that each offeree may accept or reject individually. Thus, plaintiff's second offer to all defendants "jointly and severally" was ineffective. (108 *C.A.4th* 157.)

(b) Under *Wilson*, a prior settlement offer is extinguished by a subsequent settlement offer *to the same party*. Here, although plaintiff's second offer was to all defendants, S was included and thus the second offer extinguished the first offer to S. The rule adopted here "best serves the statutory purpose of encouraging settlement of lawsuits prior to trial ... by providing offerees with clear direction as to what offers must be accepted on pain of enhanced fees and prejudgment interest." (108 *C.A.4th* 158.)

In deciding which of plaintiff's two successive unaccepted offers applied in computing prejudgment interest under *C.C.* 3291 (6 *Summary* (10th), *Torts*, §1646), *Ray v. Goodman* (2006) 142 *C.A.4th* 83, 91, 47 *C.R.3d* 659, held that because *C.C.* 3291 expressly refers to a plaintiff's first offer under *C.C.P.* 998, that language dictates the rule for computing prejudgment interest in a personal injury case. However, "when the issue is whether the benefits of section 998 are available to a plaintiff, the 'bright line rule' of *Wilson* controls." (142 *C.A.4th* 91.)

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5. Acceptance.

a. Time.

6 *Witkin Cal. Proc. PWT* § 97

[§ 97] Time.

(1) *Time for Acceptance.* The offer, unless revoked, remains open for 30 days after it is made, or until the trial or arbitration begins, whichever is first, after which it is deemed withdrawn. (*C.C.P. 998(b)(2)*.) A trial or arbitration is deemed to begin with the opening statement of the plaintiff or counsel or, if none, the swearing of the first witness or the introduction of evidence. (*C.C.P. 998(b)(3)*.)

(2) *Extension of Time.* When a statutory offer of compromise is served by mail or fax, the provisions of *C.C.P. 1013* apply to extend the time for acceptance. (*Poster v. Southern Calif. Rapid Transit Dist. (1990) 52 C.3d 266, 274, 276 C.R. 321, 801 P.2d 1072*, citing the text [30-day limit is not "jurisdictional" in the fundamental sense]; on extension of time under *C.C.P. 1013*, see *supra*, §30 et seq.)

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5. Acceptance.

b. Formal Requirements.

6 Witkin Cal. Proc. PWT § 98

[§ 98] Formal Requirements.

(1) *Written Acceptance.* An acceptance must be in writing and signed by counsel for the accepting party or, if not represented, by the accepting party. The acceptance may be made on the document containing the offer (*supra*, §85), or in a separate document. (*C.C.P. 998(b)*.) (See Judicial Council Form No. CIV-090 [Offer To Compromise and Acceptance Under *C.C.P. 998*].)

(2) *Communication to Offeror.* To be effective, the acceptance must have been communicated to the offeror within the time allowed; merely filing a notice of acceptance is insufficient. (*Drouin v. Fleetwood Enterprises (1985) 163 C.A.3d 486, 491, 492, 209 C.R. 623.*)

(3) *Proof of Acceptance.* An accepted offer with proof of acceptance must be filed with the clerk or the judge. In the case of arbitration, the acceptance must be filed with the arbitrator. (*C.C.P. 998(b)(1)*; see *C.E.B., 3 Civil Proc. Before Trial 4th*, §47.26; *Cal. Civil Practice, 3 Procedure*, §27:26.)

(4) *Service Is Not Required.* In *Hofer v. Young (1995) 38 C.A.4th 52, 45 C.R.2d 27*, a personal injury action, plaintiff mailed a statutory offer of compromise, which defendant accepted by fax 33 days after service of the offer. Judgment was taken in accordance with the terms and conditions stated in the offer (*C.C.P. 998*). The trial judge granted plaintiff's motion to vacate the judgment on the grounds that service of an acceptance was required by *C.C.P. 998*, and that service by fax was not authorized by local rules of court. *Held*, reversed.

(a) *C.C.P. 998* does not require service of acceptance of an offer. Although the statute states that "any party may serve an offer," there is no requirement, within the plain language of the section, to serve the acceptance. Therefore, statutory (*C.C.P. 1013*) and local rule restraints on service by fax are not applicable. (*38 C.A.4th 55.*)

(b) The statutory offer, which was mailed, did not prescribe any mode of communicating acceptance. Therefore, according to general principles of contract law, defendant's communication of assent by fax, a reasonable and increasingly common means of modern communication, constituted acceptance of the offer. (*38 C.A.4th 56.*) This form of acceptance does not conflict with either the language or the purpose of *C.C.P. 998*. Moreover, it fosters the statutory

policy to encourage pretrial settlements of disputes. Because the offer was mailed, defendants had 35 days to accept (under *C.C.P. 1013*). Thus, defendant's acceptance by fax 33 days after the filing of the offer comported with the statutory requirements of *C.C.P. 998*. (38 *C.A.4th* 57.)

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6. Judgment on Compromise.

6 *Witkin Cal. Proc. PWT* § 99

[§ 99] Judgment on Compromise.

(1) *Entry and Effect.* When filed, an accepted offer (with proof of acceptance) must be accompanied by a written judgment for the court's signature and entry. In the case of arbitration, once the accepted offer is filed with the arbitrator, the arbitrator must promptly render an award accordingly. (*C.C.P. 998(b)(1)*; *C.R.C.*, Rule 3.250(a)(23).) A judgment entered under *C.C.P. 998* is deemed a compromise settlement; i.e., it cannot be used for collateral estoppel or be admitted in evidence. (*C.C.P. 998(f)*; see *Ev.C. 1152*, 1 *Cal. Evidence (4th)*, *Circumstantial Evidence*, §140 et seq.; *Milicevich v. Sacramento Med. Center* (1984) 155 *C.A.3d* 997, 1004, 202 *C.R. 484*; *Bias v. Wright* (2002) 103 *C.A.4th* 811, 821, 127 *C.R.2d* 137 [trial court may not enter judgment on offer when there is conflicting evidence on whether acceptance was unequivocal]; 120 *A.L.R.5th* 559 [effect of acceptance of pretrial offer and resulting judgment].)

(2) *Satisfaction Does Not Discharge Nonsettling Parties.* In *Milicevich v. Sacramento Med. Center*, plaintiffs, a husband and wife, sued to recover for injuries arising out of the husband's suicide attempt. The defendants were (a) S Medical Center, for releasing the husband in a dangerous condition, and (b) Dr. J and Kaiser Foundation, for medical malpractice. Dr. J and Kaiser made an offer to compromise for \$ 10,001, which plaintiffs accepted; judgment was entered accordingly and plaintiffs filed an acknowledgment of full satisfaction releasing these defendants. S Medical Center then successfully moved for summary judgment on the ground that this satisfaction discharged it. *Held*, reversed.

(a) An injured person is entitled to only one satisfaction of judgment for a single harm, and full payment of a judgment by one tortfeasor discharges all others who may be liable for the same injury. (155 *C.A.3d* 1002; see 5 *Summary* (10th), *Torts*, §69.) However, this rule is not based on the effect of the judgment itself; it is designed merely to prevent double recovery. (See 6 *Summary* (10th), *Torts*, §1550.) And whether there is in fact a double recovery cannot be determined unless the damages measuring the full recovery for the injury have been litigated on their merits. (155 *C.A.3d* 1003.)

(b) A judgment obtained under *C.C.P. 998* is not based on an adjudication of the amount of damages. It is a compromise settlement, adjudicating neither liability nor damages; it is conclusive only between the settling parties in accordance with the terms and conditions of the agreement. (155 *C.A.3d* 1004, citing the text.)

(c) In *Burton v. Gardner Motors* (1981) 117 *C.A.3d* 426, 431, 435, 172 *C.R. 647*, plaintiff, injured in an automobile

collision, accepted a settlement offer from the *bailee* of the other car, and after the judgment was satisfied the *owner* successfully moved for summary judgment. That decision should be limited to the special situation where the liability of the discharged defendant (owner) was derived from the liability of the settling party (bailee). In this case, the defendants were sued as independent concurrent tortfeasors. (155 C.A.3d 1005.)

(3) *Recovery of Usual Costs and Fees.* Unless the terms of a C.C.P. 998 settlement provide otherwise, the party in whose favor judgment is entered is entitled to the usual costs recoverable by a prevailing party under C.C.P. 1032 (see 7 Cal. Proc. (5th), *Judgment*, §88 et seq.). (*Rappenecker v. Sea-Land Service* (1979) 93 C.A.3d 256, 261, 155 C.R. 516.) Similarly, the prevailing party may recover attorneys' fees authorized by C.C. 1717 in an action on a contract (see 7 Cal. Proc. (5th), *Judgment*, §170 et seq.), if the compromise settlement is silent as to costs and fees. (*Lanyi v. Goldblum* (1986) 177 C.A.3d 181, 187, 223 C.R. 32, 7 Cal. Proc. (5th), *Judgment*, §205; see *Ritzenthaler v. Fireside Thrift Co.* (2001) 93 C.A.4th 986, 990, 113 C.R.2d 579 [in action by used car purchasers against finance company for breach of implied covenant of good faith and fair dealing, trial court properly awarded purchasers attorneys' fees under C.C. 1717 where C.C.P. 998 compromise did not contain waiver for fees and costs]; *On-Line Power v. Mazur* (2007) 149 C.A.4th 1079, 1085, 57 C.R.3d 698 [fact that action was settled and terms of defendant's C.C.P. 998 offer called for dismissal with prejudice rather than entry of judgment did not preclude award of attorneys' fees to plaintiff where settlement was silent on fees and costs; citing *Ritzenthaler*]; for effect of cost and fee awards on whether the judgment is "more favorable" than the offer, see *infra*, §100 et seq.)

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a. In General.

6 *Witkin Cal. Proc. PWT* § 100

[§ 100] In General.

C.C.P. 998 makes the award of costs to the offering party dependent on the other party's failure to obtain "a more favorable judgment." (*C.C.P.* 998(c), (d), (e).) In determining whether a *plaintiff* obtains a more favorable judgment, a court or arbitrator must exclude postoffer costs. (*C.C.P.* 998(c)(2)(A).) Other than this directive, the statute is silent on the method of determining whether a judgment is more favorable than the statutory offer of compromise. (See *C.E.B.*, 3 *Civil Proc. Before Trial* 4th, §47.8; *Cal. Civil Practice*, 3 *Procedure*, §27:28 et seq.; 2 *A.L.R.6th* 279 [determining when award is available].) However, a number of cases have considered the following issues:

(1) Costs incurred before and after offer by plaintiff. (See *Stallman v. Bell* (1991) 235 *C.A.3d* 740, 748, 286 *C.R.* 755 [where plaintiff makes statutory offer of compromise and defendant rejects it, rationale for limiting plaintiff to damages plus preoffer costs does not apply; thus, costs incurred both before and after offer are added to verdict to determine amount of judgment].)

(2) Punitive and treble damages. (See *Kelly v. Yee* (1989) 213 *C.A.3d* 336, 342, 343, 261 *C.R.* 568 [statutory punitive and treble damages are included in determining amount of judgment for purposes of *C.C.P.* 998].)

(3) Costs provision in offer. (See *infra*, §102.)

(4) Attorneys' fees. (See *infra*, §103.)

(5) Amount of liens against judgment. (See *infra*, §104.)

(6) Amount of settlement offset. (See *infra*, §105.)

(7) Value of periodic payments. (See *infra*, §106.)

(8) Prejudgment interest. (See *infra*, §107.)

(9) Defendant's postoffer payment. (See *infra*, §108.)

(10) Value of jury verdict. (See *infra*, §109.)

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b. Costs Incurred After Offer by Defendant.

6 *Witkin Cal. Proc. PWT* § 101

[§ 101] Costs Incurred After Offer by Defendant.

Where the plaintiff refuses an offer of compromise by the defendant, costs incurred by the plaintiff before the time of the offer are added to the award of damages for purposes of determining whether the judgment is "more favorable" than the offer, but costs incurred after the offer are excluded from the calculation. (*Shain v. Albany* (1980) 106 C.A.3d 294, 299, 165 C.R. 69; *Kelly v. Yee* (1989) 213 C.A.3d 336, 342, 261 C.R. 568.) The rationale for this rule is that allowing the addition of postoffer costs would defeat the purpose of C.C.P. 998(c), which bars recovery of these costs where a plaintiff fails to obtain a more favorable judgment, and enable the plaintiff to increase the amount of the "judgment" simply by driving up postoffer costs. (*Harvard Inv. Co. v. Gap Stores* (1984) 156 C.A.3d 704, 712, 202 C.R. 891, quoting *Bennett v. Brown* (1963) 212 C.A.2d 685, 688, 28 C.R. 485 [applying statute].) (See C.C.P. 998(c)(2)(A), supra, §100; *Steele v. Jensen Instrument Co.* (1997) 59 C.A.4th 326, 330, 331, 69 C.R.2d 135 [because attorneys' fees and costs are discretionary in FEHA claim (*Govt.C. 12965(b)*), denial of fees and costs to plaintiff meant that plaintiff had no fees or costs to add to judgment, thus, plaintiff's award was less favorable than defendant's C.C.P. 998(c) offer].)

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c. Costs Provisions in Offer.

6 *Witkin Cal. Proc. PWT* § 102

[§ 102] Costs Provisions in Offer.

Costs provisions in the *C.C.P.* 998 offer do not determine whether costs should be included for purposes of determining a more favorable judgment. In *Stallman v. Bell* (1991) 235 *C.A.3d* 740, 286 *C.R.* 755, the trial judge declined to add any costs to the verdict because plaintiffs' statutory offer, which defendants rejected, contained a provision that each side was to bear its own costs. *Held*, this was error. The costs provision in an offer should be taken into account to determine the amount of the offer for purposes of comparing that amount to the amount of the judgment, but it does not follow that the costs provision in the offer should determine what costs are added to the award of damages in order to arrive at the *amount of the judgment* for purposes of *C.C.P.* 998. (235 *C.A.3d* 750, disagreeing with contrary approach taken in *Rose v. Hertz Corp.* (1985) 168 *C.A.3d Supp.* 6, 11, 214 *C.R.* 795.)

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d. Attorneys' Fees.

6 *Witkin Cal. Proc. PWT* § 103

[§ 103] Attorneys' Fees.

Attorneys' fees recovered by a party should be treated the same as other costs in determining the amount of the judgment; i.e., where the plaintiff rejected a compromise offer, that part of the fee award relating to services performed after the offer must be excluded. (*Harvard Inv. Co. v. Gap Stores* (1984) 156 C.A.3d 704, 713, 202 C.R. 891; *Kelly v. Yee* (1989) 213 C.A.3d 336, 342, 261 C.R. 568.)

A different approach was taken in *Encinitas Plaza Real v. Knight* (1989) 209 C.A.3d 996, 257 C.R. 646, in which the court approved the addition of all of a large attorneys' fee award to a relatively small damages award in calculating the amount of the judgment recovered by plaintiff after rejecting defendants' offer, on the ground that an award of fees based on contract is an element of damages, not costs. (209 C.A.3d 1003.)

In response to *Encinitas Plaza Real*, the Legislature amended C.C.P. 998(c)(2) to supersede the holding in *Encinitas* by providing that attorneys' fees are costs for purposes of determining, under C.C.P. 998(c), whether the plaintiff obtains a more favorable judgment.

In *Heritage Engineering Const. v. Industry* (1998) 65 C.A.4th 1435, 77 C.R.2d 459, a contract dispute, plaintiff rejected defendant's C.C.P. 998 offer of \$ 65,000 that included costs and the jury returned an award of \$ 48,000. Although plaintiff was also awarded more than \$ 100,000 in preoffer attorneys' fees, the trial judge concluded that plaintiff had failed to receive a more favorable judgment and denied all costs. *Held*, reversed. The 1997 amendment of C.C.P. 998 specifically abrogated *Encinitas* on the issue whether attorneys' fees are to be considered costs, and thus returned the "more favorable judgment" determination to its pre-*Encinitas* formulation: When the defendant's offer includes costs, it is to be compared with the plaintiff's judgment *plus preoffer costs, including attorneys' fees*. (65 C.A.4th 1441.) (See 119 A.L.R.5th 121 [allowing and determining attorneys' fees under pretrial offer statutes].)

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e. Amount of Liens Against Judgment.

6 *Witkin Cal. Proc. PWT* § 104

[§ 104] Amount of Liens Against Judgment.

In *Manthey v. San Luis Rey Downs Enterprises* (1993) 16 C.A.4th 782, 20 C.R.2d 265, the trial court ruled that plaintiff was ineligible for costs under C.C.P. 998, because a workers' compensation lien reduced the judgment she recovered from defendant to an amount less than defendant's settlement offer. *Held*, reversed. Plaintiff had a meritorious claim and the later deduction of a lien from the judgment had no affect on the claim's validity. (16 C.A.4th 790.) (See *Poire v. C.L. Peck/Jones Bros. Const. Corp.* (1995) 39 C.A.4th 1832, 1841, 46 C.R.2d 631, 5 Summary (10th), *Torts*, §99 [*Manthey* applied retroactively].)

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f. Amount of Settlement Offset.

6 *Witkin Cal. Proc. PWT* § 105

[§ 105] Amount of Settlement Offset.

Under *C.C.P.* 877, a judgment is reduced by amounts received from settling joint tortfeasors; hence, where plaintiff's damages are reduced by a settlement offset to an amount less than plaintiff's offer of compromise, the judgment is not more favorable and plaintiff is not entitled to recover expert witness costs under *C.C.P.* 998. (*Syversen v. Heitmann* (1985) 171 C.A.3d 106, 114, 214 C.R. 581, 5 Summary (10th), *Torts*, §98 [effect of settlement was that judgment against nonsettling defendant was zero, thus rendering judgment more favorable to defendant than plaintiff's offer].)

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Whether a pretrial settlement and corresponding offset to zero necessarily require the shifting of postoffer costs under *C.C.P.* 998 where the plaintiff has previously rejected a nonsettling defendant's offer was considered in *Guerrero v. Rodan Termite Control* (2008) 163 C.A.4th 1435, 78 C.R.3d 344. Plaintiff sued multiple defendants for claims of defects in a newly purchased home. Defendant R served a *C.C.P.* 998 offer to compromise for \$ 5,000, which plaintiff rejected. Three years later and shortly before trial, plaintiff entered into a judicially approved settlement with another defendant for \$ 34,000. The action proceeded against R and the jury returned a special verdict for plaintiff in the amount of \$ 15,600. The trial court then granted R's motion under *C.C.P.* 877 to offset the settlement proceeds against the verdict and reduce the judgment to zero. After entry of judgment, R moved to tax the costs plaintiff had incurred after the *C.C.P.* 998 offer was filed, arguing that plaintiff's zero judgment was less favorable than R's settlement offer. Plaintiff filed a motion to strike R's memorandum of costs, contending that plaintiff was nonetheless the prevailing party. The trial court granted plaintiff's motion and denied R's motion. *Held*, affirmed.

(a) In determining whether a plaintiff obtains a more favorable judgment or award than a *C.C.P.* 998 offer, "the objective of encouraging settlement requires consideration of the status of the litigation" when the offer was made. Here, R submitted his \$ 5,000 offer early in the litigation. At that time, plaintiff had recovered nothing by way of settlement or otherwise and had a valid claim against R that the jury determined to be worth more than \$ 5,000. Thus, plaintiff "did not reject an offer that the outcome of trial indicates should have been accepted." Nothing justifies rewarding R for submitting the low offer, or penalizing plaintiff for having rejected it. "The costs that plaintiff incurred subsequent to rejecting the \$ 5,000 offer were incurred in pursuit of a claim with a value of at least \$ 15,600. Regardless

of the offset based on subsequent developments in the litigation, plaintiff was justified in rejecting the offer when he rejected it." (163 C.A.4th 1441.)

(b) *C.C.P. 998* does not require an award of all recoverable costs to either party, but only costs incurred subsequent to the rejection of a settlement offer. "The cost burden is placed on the party who, in effect, is responsible for those costs being incurred. ... Thus, [the statute] permits what will normally be a more equitable allocation of the cost burden and provides an incentive for the defendant to make and the plaintiff to accept settlement offers that are reasonable at the time they are made." Here, the trial court appropriately concluded that R was not entitled to shift the cost burden to plaintiff because plaintiff did not fail to obtain a judgment more favorable than what he would have received had he accepted R's offer when it was outstanding. (163 C.A.4th 1445.)



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g. Value of Periodic Payments.

6 *Witkin Cal. Proc. PWT* § 106

[§ 106] Value of Periodic Payments.

Where a statutory settlement offer includes provisions for periodic payments, the offeror has the burden of proving the present value of the payments in order to show a more favorable judgment. (*Hurlbut v. Sonora Community Hosp.* (1989) 207 C.A.3d 388, 409, 254 C.R. 840, supra, §86.) Similarly, the present value of a medical malpractice judgment calling for periodic payments under C.C.P. 667.7 (see 6 *Summary* (10th), *Torts*, §966 et seq.) must be calculated to determine whether the judgment is more or less favorable than a C.C.P. 998 offer. (See *Atkins v. Strayhorn* (1990) 223 C.A.3d 1380, 1399, 273 C.R. 231 [present value is determined by jury in special verdict].)

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h. Prejudgment Interest.

6 Witkin Cal. Proc. PWT § 107

[§ 107] Prejudgment Interest.

Postoffer prejudgment interest under C.C. 3287 (see 1 *Summary* (10th), *Contracts*, §888 et seq.) is not included in determining a more favorable judgment. In *Bodell Const. Co. v. Trustees of Calif. State University* (1998) 62 C.A.4th 1508, 73 C.R.2d 450, plaintiff construction company rejected defendant's C.C.P. 998 offer in a contract action, and a jury subsequently awarded damages to plaintiff. The trial judge added the postoffer portion of prejudgment interest to the jury's award in determining that plaintiff's judgment was more favorable than defendant's offer. *Held*, reversed as to the costs award.

(a) *Nature of prejudgment interest.* An award of prejudgment interest under C.C. 3287 is intended to make the plaintiff whole for "the accrual of wealth which could have been produced during the period of loss." Thus, the prejudgment interest is an element of compensatory damages, not a court cost. (62 C.A.4th 1525.)

(b) *Exclusion of postoffer, prejudgment interest.* To include all C.C. 3287 prejudgment interest in a "more favorable judgment" analysis would defeat the legislative purpose of C.C.P. 998, which is to encourage the settlement of lawsuits prior to trial. Because the interest continues to accrue until entry of judgment, plaintiffs and their counsel may be tempted to reject a reasonable offer hoping the additional amount of prejudgment interest will result in a more favorable judgment, thus not only increasing recovery but avoiding the penalties imposed under C.C.P. 998(c) should a less favorable judgment result. Thus, to promote the purposes of C.C.P. 998, in a *nontort* action in which the plaintiff has not accepted a defendant's C.C.P. 998 offer, *postoffer* prejudgment interest awarded to the plaintiff under C.C. 3287 must be excluded in determining whether plaintiff has received a more favorable judgment. However, any *preoffer* prejudgment interest to which the plaintiff is entitled under C.C. 3287 should be included. (62 C.A.4th 1526.)

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i. Postoffer Payment by Defendant.

6 *Witkin Cal. Proc. PWT* § 108

[§ 108] Postoffer Payment by Defendant.

A defendant's postoffer payment may be considered in determining whether a plaintiff in a contract action has obtained a more favorable judgment. In *Mesa Forest Products v. St. Paul Mercury Ins. Co.* (1999) 73 C.A.4th 324, 86 C.R.2d 398, plaintiff sued defendant contractor and its surety seeking \$ 102,205 in contract damages, which included the balance of contract invoices worth approximately \$ 62,690. Plaintiff rejected defendants' offer of \$ 62,690, but defendant contractor paid plaintiff \$ 62,690 prior to trial. Counsel for the parties informed the jury of the payment, and the jury found for plaintiff in the amount of \$ 13,205. To determine whether plaintiff received a more favorable judgment, the trial judge added the \$ 62,690 payment to the verdict amount, thus giving plaintiff a recovery of \$ 75,895, which exceeded defendants' offer. Accordingly, the trial judge awarded plaintiff preoffer and postoffer attorneys' fees and costs. *Held*, affirmed. *C.C.P.* 998 is silent on what the trial court may include or exclude to determine whether a plaintiff's judgment is more favorable than a defendant's offer to compromise. Because the purpose of *C.C.P.* 998 is to promote settlement and punish a party who fails to accept a reasonable offer, the trial court must realistically and pragmatically assess a settlement proposal in light of actual damages and total recovery. Here, the jury clearly considered the postoffer payment in reaching its verdict, and the trial judge faithfully promoted the statute's goals by assessing the settlement proposal in practical, realistic terms by looking at plaintiff's total damages. (73 C.A.4th 331.) Permitting inclusion of postoffer payments does not permit a plaintiff to inflate the judgment through postoffer conduct, but ensures that a defendant's offer will remain realistically reasonable in a particular case. (73 C.A.4th 336.) (See *Arias v. Katella Townhouse Homeowners Assn.* (2005) 127 C.A.4th 847, 854, 26 C.R.3d 113 [in contract action, defendant's postoffer payments were properly added to judgment to determine that plaintiff obtained more favorable judgment; following *Mesa Forest Products*].)

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j. Value of Jury Verdict.

6 *Witkin Cal. Proc. PWT* § 109

[§ 109] Value of Jury Verdict.

In *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 C.A.4th 1017, 117 C.R.2d 685, an action for breach of fiduciary duty and professional negligence against an attorney and his law firm, plaintiff rejected defendants' offer of a monetary settlement providing that plaintiff would dismiss the action with prejudice. The jury found that defendants had breached their duty but awarded plaintiff less than the offer. Accordingly, the trial court awarded defendants their attorneys' fees and costs under C.C.P. 998. Plaintiff argued that (a) C.C.P. 998 requires that entry of judgment be part of a settlement offer, and thus (b) the jury verdict against defendants was in itself more favorable than a settlement offer of more money without an entry of judgment provision because the primary purpose of the litigation was to obtain a declaration of defendants' wrongdoing. *Held*, affirmed. Entry of judgment in court is not strictly required by C.C.P. 998. An agreement contemplating payment by defendant and dismissal of the action by plaintiff is the legal equivalent of a judgment in plaintiff's favor. (96 C.A.4th 1054.) Moreover, "[w]e cannot see how section 998 could retain any vitality ... if in each case in which it comes into play the plaintiff can attempt to argue that any judgment declaring wrongdoing by the defendant is worth more than the monetary amount offered in settlement. Such an interpretation of section 998 would simply be unworkable." (96 C.A.4th 1056.)

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8. Penalties for Failure To Accept Offer.

a. Offer by Defendant.

6 *Witkin Cal. Proc. PWT* § 110

[§ 110] Offer by Defendant.

C.C.P. 998(c) provides mandatory and discretionary penalties for a plaintiff's failure to recover a judgment or award "more favorable" than the defendant's offer of compromise.

The trial judge or arbitrator has discretion to require the plaintiff to pay the defendant's expert witness fees and costs from the date the complaint was filed. (*C.C.P. 998(c)(1)*.)

The mandatory provision states that "the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." (*C.C.P. 998(c)(1)*); see *Lafayette v. Los Angeles* (1984) 162 C.A.3d 547, 557, 208 C.R. 668; but see *Brown v. Nolan* (1979) 98 C.A.3d 445, 452, 159 C.R. 469 [provision does not bar plaintiff from recovering *preoffer* costs if he or she is prevailing party under *C.C.P. 1032*]; *Shain v. Albany* (1980) 106 C.A.3d 294, 297, 165 C.R. 69; *Stiles v. Estate of Ryan* (1985) 173 C.A.3d 1057, 1066, 219 C.R. 647 [preoffer costs were recoverable even though plaintiff did not prevail against all defendants].)

The following cases are illustrative:

Scott Co. of Calif. v. Blount (1999) 20 C.4th 1103, 1108, 86 C.R.2d 614, 979 P.2d 974, 7 Cal. Proc. (5th), *Judgment*, §112 [in contract action where judgment was less than defendant's offer, prevailing plaintiff was entitled to preoffer fees and costs and defendant was entitled to postoffer costs].

People v. Fremont General Corp. (2001) 89 C.A.4th 1260, 1264, 108 C.R.2d 127 [in unfair business practice and false advertising action by Attorney General seeking civil penalties, restitution, and injunctive relief, state was properly subjected to statute's cost-shifting provisions where plaintiff rejected defendant's \$ 2 million pretrial offer and defendant prevailed; application of statute to state in civil law enforcement action is consistent with mandate of *C.C.P. 1028* that costs be awarded against state as against other parties].

Goebel v. Santa Barbara (2001) 92 C.A.4th 549, 558, 111 C.R.2d 901, *supra*, §84 [approving award of costs in inverse condemnation action where plaintiff property owners rejected defendant city's pretrial offer and defendant

prevailed; distinguishing and disagreeing with *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 C.A.3d 863, 146 C.R. 5, supra, §84].

Biren v. Equality Emergency Med. Group (2002) 102 C.A.4th 125, 140, 125 C.R.2d 325 [defendant shareholder-directors and corporations were entitled to postoffer attorneys' fees where defendants' offer exceeded plaintiff shareholder-director's recovery and shareholder agreement provided for attorneys' fees; defendants need not prevail in action to recover].

Duale v. Mercedes-Benz USA, LLC (2007) 148 C.A.4th 718, 728, 56 C.R.3d 19 [in action under Song-Beverly Act (4 Summary (10th), Sales, §§52, 314 et seq.) prevailing plaintiff buyer was not entitled to postoffer costs and attorneys' fees where award was less than defendant's pretrial offer despite provisions in Act entitling prevailing buyer to costs and fees; plaintiffs under Song-Beverly Act are not exempt from penalties of C.C.P. 998].

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

Illustrative cases: See *Linthicum v. Butterfield* (2009) 175 C.A.4th 259, 271, 95 C.R.3d 538 [in dispute involving equitable easement, defendant was entitled to costs where plaintiff rejected defendant's offer of concessions on various boundary issues in exchange for easement and trial court granted easement and utility rights to defendant, which was more favorable result than offer].



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IV. OFFER TO COMPROMISE

B. Offer Before Trial.

8. Penalties for Failure To Accept Offer.

b. Offer by Plaintiff.

6 *Witkin Cal. Proc. PWT* § 111

[§ 111] Offer by Plaintiff.

If the defendant does not accept an offer of compromise by the plaintiff, and fails to recover a more favorable judgment or award, the judge or arbitrator may order the defendant to pay the plaintiff's postoffer expert witness fees. (*C.C.P.* 998(d).) The plaintiff may recover costs as the prevailing party under *C.C.P.* 1032, and in *personal injury actions* is also entitled to recover interest on the judgment from the date of the offer. (*C.C.* 3291, 6 *Summary* (10th), *Torts*, §1646 et seq.) (See *Gibson v. Bobroff* (1996) 49 *C.A.4th* 1202, 1207, 57 *C.R.2d* 235, *infra*, §491 [recoverable costs included mediation expenses]; *Ray v. Goodman* (2006) 142 *C.A.4th* 83, 91, 47 *C.R.3d* 659 [in personal injury action, where plaintiff made two successive unaccepted *C.C.P.* 998 offers and received more favorable judgment in excess of both, *C.C.* 3291 required interest to accrue from date of plaintiff's first offer].)

In *Saakyan v. Modern Auto* (2002) 103 *C.A.4th* 383, 126 *C.R.2d* 674, the first trial resulted in judgment for defendant, but the judgment was set aside and a new trial held. The second trial resulted in judgment for plaintiffs, but the court denied plaintiffs' motions for expert witness fees under *C.C.P.* 998(d) on the ground that the first verdict extinguished the rights plaintiffs may have acquired under *C.C.P.* 998(d). *Held*, this was error. The trial court's granting a new trial nullified the first judgment. Thus, neither the judgment entered after the first trial, nor the special verdict on which it was based, existed to extinguish benefits arising under *C.C.P.* 998. The order granting plaintiffs a new trial vacated the previous judgment and "placed the parties in the same position as if the case had never been tried ... with any rights under plaintiffs' statutory offers extant." (103 *C.A.4th* 391.)

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



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IV. OFFER TO COMPROMISE

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8. Penalties for Failure To Accept Offer.

c. Expert Witness Fees Allowable.

6 *Witkin Cal. Proc. PWT* § 112

[§ 112] Expert Witness Fees Allowable.

The amount allowable as expert witness fees is "a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case." (*C.C.P. 998(c)(1)*, (d); see *Stiles v. Estate of Ryan* (1985) 173 C.A.3d 1057, 1066, 219 C.R. 647 [cost of deposing experts was "reasonably necessary" in preparing case even though testimony was not needed due to concession of negligence]; *Evers v. Cornelson* (1984) 163 C.A.3d 310, 317, 209 C.R. 497 [fees of surgeon who did not testify were recoverable where "he was potentially an expert witness whose services were obtained in preparation for trial"]; *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 C.A.4th 102, 121, 30 C.R.2d 486 [upholding award of fees for economists' preparation and trial time, and for employees assisting in preparation].) Recovery is not allowed for the costs of experts who are not potential witnesses, e.g., jury selection experts and investigators. (*Evers v. Cornelson*, *supra*, 163 C.A.3d 318.) For purposes of *C.C.P. 998*, police officers are deemed to be expert witnesses. (*C.C.P. 998(f)*.)

C.C.P. 998(h) requires that the costs for expert witness services *at trial* must not exceed those specified in *Govt.C. 68092.5*. (See 7 *Cal. Proc.* (5th), *Judgment*, §133.) Hence, fees may be recovered only for witnesses who testify *solely* as experts, and not also as percipient witnesses. (*Govt.C. 68092.5(a)*; see *Evers v. Cornelson*, *supra*, 163 C.A.3d 316 [only ordinary witness fees were recoverable for treating physician, despite contract with plaintiff for "fees for expert testimony"]; *Stiles v. Estate of Ryan*, *supra*, 173 C.A.3d 1067.)

The following cases are instructive:

Regency Outdoor Advertising v. Los Angeles (2006) 39 C.4th 507, 532, 46 C.R.3d 742, 139 P.3d 119, *supra*, §84 [nothing in *C.C.P. 998* limits award to postoffer expert witness fees; award to defendant of expert witness fees incurred prior to defendant's *C.C.P. 998* offer was proper].

Jones v. Dumrichob (1998) 63 C.A.4th 1258, 1266, 74 C.R.2d 607 [defendant's disclosure of expert witnesses and declaration of counsel that accompanied disclosure was all that was required as evidence that expert costs were reasonable and necessary].

Michelson v. Camp (1999) 72 C.A.4th 955, 974, 85 C.R.2d 539 [upholding award of fees where defendant's expert consulted with counsel but was never deposed or called to testify].

Thompson v. Miller (2003) 112 C.A.4th 327, 338, 4 C.R.3d 905 [in action by minority shareholders, trial court's denial of expert witness fees to prevailing defendant majority shareholder was arbitrary and clear abuse of discretion where defendant's pretrial offer was reasonable].

Skistimas v. Old World Owners Assn. (2005) 127 C.A.4th 948, 952, 26 C.R.3d 319 [trial court erred in denying expert witness fees to prevailing defendant on ground that fees were paid by insurer; defendants were entitled to award, and trial court should have determined propriety of witness fees and reasonableness of amount requested].

Miller v. Union Pac. R. Co. (2007) 147 C.A.4th 451, 458, 53 C.R.3d 893 [federal law controls in actions brought in state court under Federal Employers' Liability Act and Act does not authorize award of expert witness fees; thus, prevailing plaintiff was not permitted to recover fees pursuant to C.C.P. 998].

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

See *Kinsey v. Union Pac. R. Co.* (2009) 178 C.A.4th 201, 204, 100 C.R.3d 253 [trial court erred in permitting prevailing defendant to recover expert witness fees as postjudgment costs in state court action under Federal Employers' Liability Act; federal law controls and permits defendant to recover only when plaintiff prevails and obtains award that is less than defendant's offer; following *Miller v. Union Pac. R. Co.* (2007) 147 C.A.4th 451, 53 C.R.3d 893, text, p. 542].



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V. JUDGMENT BY CONSENT

A. Nature and Effect.

6 *Witkin Cal. Proc. PWT* § 113

[§ 113] Nature and Effect.

(1) *In General.* A party to an action may allow judgment to be rendered without opposition by express consent or stipulation to entry of a particular judgment in a pending action, before or during trial. (See C.E.B., 3 Civil Proc. Before Trial 4th, Chap. 48; Cal. Civil Practice, 3 Procedure, Chap. 20; 46 *Am.Jur.2d, Judgments* (2006 ed.) §183 et seq.; 15 *Am.Jur. P.P. Forms* (2005 Rev.), Judgments, Form 98 et seq.) Judgment may also be rendered without opposition by allowing judgment to be taken by default (*infra*, §133 et seq.), or by accepting an offer to compromise under C.C.P. 998 (*supra*, §81 et seq.).

Stipulated judgments "bear the earmarks both of judgments entered after litigation and contracts derived through mutual agreement: '[C]onsent decrees "have attributes both of contracts and of judicial decrees" a dual character that has resulted in different treatment for different purposes.' ... [A] stipulated judgment is indeed a judgment; entry thereof is a judicial act that a court has discretion to perform. Although a court may not add to or make a new stipulation without mutual consent of the parties ... , it may reject a stipulation that is contrary to public policy ... , or one that incorporates an erroneous rule of law. ... 'While it is entirely proper for the court to accept stipulations of counsel that appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter.' " (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 C.3d 658, 663, 268 C.R. 284, 788 P.2d 1156, quoting *Local Number 93, Int. Assn. of Firefighters, AFL-CIO C.L.C. v. Cleveland* (1986) 478 U.S. 501, 106 S.Ct. 3063, 3073, 92 L.Ed.2d 405, 421, and *Los Angeles v. Harper* (1935) 8 C.A.2d 552, 555, 48 P.2d 75.)

A number of decisions are illustrative. (See *Pardee Const. Co. v. Camarillo* (1984) 37 C.3d 465, 471, 208 C.R. 228, 690 P.2d 701 [consent judgment is binding only as to issues within parties' stipulation]; *Stevens v. Stevens* (1968) 268 C.A.2d 426, 435, 74 C.R. 54 [consent judgment is construed as contract for purposes of interpretation, but is not subject to rescission for breach of condition; like any other judgment it is conclusive, subject to challenge only on grounds applicable to judgments]; *Avery v. Avery* (1970) 10 C.A.3d 525, 529, 89 C.R. 195 [judgment entered on stipulation has same effect as if action were tried on merits]; *Ellena v. California* (1977) 69 C.A.3d 245, 260, 262, 138 C.R. 110 [consent judgment is res judicata as to issues embraced within it (see 7 *Cal. Proc.* (5th), *Judgment*, §372), and is construed by objective standard applicable to contracts (see 1 *Summary* (10th), *Contracts*, §744)]; *Gorman v. Holte* (1985) 164 C.A.3d 984, 988, 211 C.R. 34, *infra*, §422 [settlements are governed by contract principles but have attributes of judgment in deciding parties' rights]; cf. *Mendly v. Los Angeles* (1994) 23 C.A.4th 1193, 1206, 28 C.R.2d

822, 8 Summary (10th), *Constitutional Law*, §1292 [consent judgment in action to enforce county's general assistance obligations was not "contract" for purposes of constitutional Contract Clause analysis; strong dissent arguing that judgment easily qualified as contract].)

The chief problem in consent judgments is the authority of an attorney to make the stipulation. (See *infra*, §120; 1 *Cal. Proc.* (5th), *Attorneys*, §246.)

(2) *Entry of Judgment.* On motion, a court may enter judgment pursuant to the terms of a stipulated settlement. (*C.C.P.* 664.6, *infra*, §115 et seq.) However, a stipulation calling for entry of judgment on the happening of a condition does not justify entry of judgment without a noticed hearing at which the court may determine that the condition did in fact occur. (*S.E.P. Associates v. Peto* (1975) 49 *C.A.3d* 305, 307, 122 *C.R.* 514.) In addition, the judgment must be entered in conformity with the stipulation; an added provision (e.g., costs not agreed to) is in excess of the court's jurisdiction and subject to collateral attack. (*Jones v. World Life Research Institute* (1976) 60 *C.A.3d* 836, 840, 848, 131 *C.R.* 674.)

(3) *Collateral Attack.* A stipulated judgment "may properly be given collateral estoppel effect, at least where the parties manifest an intent to be collaterally bound by its terms." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court*, *supra*, 50 *C.3d* 664.) There is considerable authority to the effect that a party who has consented to an act in excess of the court's jurisdiction is precluded from subsequently challenging it (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §333), but cases involving constitutional grounds or matters of strong public policy have held that a consent judgment is open to collateral attack on the ground that it is void for excess of jurisdiction. (See *In re Marriage of Goodarzirad* (1986) 185 *C.A.3d* 1020, 1027, 230 *C.R.* 203, *infra*, §132 [retention of jurisdiction over child custody]; *John Siebel Associates v. Keele* (1986) 188 *C.A.3d* 560, 564, footnote 3, 233 *C.R.* 231, 7 *Cal. Proc.* (5th), *Judgment*, §331 [constitutional restriction on interest on judgments]; .) A consent judgment may also be collaterally attacked under *C.C.P.* 473 on grounds of mistake, inadvertence, surprise, or excusable neglect. (See *Marston v. Rood* (1944) 62 *C.A.2d* 435, 440, 144 *P.2d* 863 [trial judge had power under *C.C.P.* 473 to modify consent judgment in order to carry out his intention in rendering it]; *Roth v. Morton's Chefs Services* (1985) 173 *C.A.3d* 380, 385, 218 *C.R.* 684 [stipulated judgment was properly set aside where appraisal of disputed items was surprisingly excessive]; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.)

(4) *Appeal.* As a general rule, a judgment entered by consent is not appealable, but exceptions have been recognized where the judgment is void or unconstitutional, or where consent was given for the purpose of facilitating an appeal. (See 9 *Cal. Proc.* (5th), *Appeal*, §43 et seq.)

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



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V. JUDGMENT BY CONSENT

B. Enforcement of Settlement.

1. Former Motion Procedure.

6 *Witkin Cal. Proc. PWT* § 114

[§ 114] Former Motion Procedure.

In *Gregory v. Hamilton* (1978) 77 C.A.3d 213, 142 C.R. 563, plaintiff and her mother sued defendant for damages sustained in an automobile accident. In a mandatory settlement conference, defendant's attorney offered to settle for \$ 7,500 to plaintiff and \$ 1,250 to her mother. Plaintiff's attorney recommended acceptance of the offer, and, after extended discussion and some reluctance, plaintiff accepted. Then her mother signed a release, but plaintiff refused to sign. Defendant moved for an order compelling enforcement of the compromise agreement and entry of judgment. Plaintiff, through new attorneys, filed opposition, claiming mistake; later, she challenged the authority of the court to proceed by motion. After a hearing, the trial judge awarded judgment to plaintiff in the agreed sum, and she appealed. *Held*, affirmed.

(a) The recognized methods of enforcement of a compromise agreement are (1) bringing an independent action to compel its enforcement, or (2) setting up the agreement as a special defense by supplemental pleadings in the pending action. The latter method is favored, because the defendant may have the affirmative defense tried first, before the merits. (77 C.A.3d 217, 218; see C.C.P. 597, 7 Cal. Proc. (5th), Trial, §150.)

(b) No precedent expressly sanctions the procedure by motion. *Gardner v. Shreve* (1949) 89 C.A.2d 804, 202 P.2d 322, *infra*, §210, properly disapproved of the use of a motion for summary judgment, which does not resolve factual issues. (77 C.A.3d 218, 219.) But equitable relief by motion in an existing action has been held proper, and defendant's motion in the instant action was essentially a request for the equitable remedy of specific performance, which is available on refusal to perform a compromise agreement. (77 C.A.3d 219, 220.) Moreover, plaintiff had a full hearing, and the result would have been the same had defendant proceeded by way of an independent action or by a defense in the personal injury action. (77 C.A.3d 221.)

(c) "We commend this simplified method of fact resolution. To require that an independent equitable action be brought, or that settlement be pleaded as a separate defense, would require more pleadings, more paper work, more attorney's fees, and more delay. The matter was handled in an expeditious manner while affording full hearing rights to all involved." (77 C.A.3d 221.)

Gregory was distinguished in *Nabi v. Laudermill* (1982) 130 C.A.3d 282, 284, 182 C.R. 368, on the ground that the

holding applied only where a settlement was judicially supervised; in *Nabi*, the settlement was merely the result of a telephone conference between counsel. (See *Gopal v. Yoshikawa* (1983) 147 C.A.3d 128, 132, 195 C.R. 36 [approving *Gregory* procedure in judicially supervised settlement where facts and terms of settlement are not subject to reasonable dispute].)

Other decisions challenged *Gregory* on a more fundamental ground: *Gregory* assumed that a "nonstatutory speaking motion" was proper despite the holding in *Pianka v. California* (1956) 46 C.2d 208, 293 P.2d 458, that such a motion should be treated as one for summary judgment (see *infra*, §207). In *Hastings v. Matlock* (1980) 107 C.A.3d 876, 166 C.R. 229, the court declared that "the purported speaking motion must be treated as a motion for summary judgment" (107 C.A.3d 880), and added: "We do not believe that the unique remedy fashioned in *Gregory* is appropriate to a full and fair determination of the material issues involved herein." (107 C.A.3d 882.) (See *Mancina v. Hoar* (1982) 129 C.A.3d 796, 800, 801, 181 C.R. 347; *De Groat v. Ingles* (1983) 143 C.A.3d 399, 401, 191 C.R. 761 [declining to follow *Gregory* and reaffirming *Matlock* view that motion is to be treated as one for summary judgment].)

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



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B. Enforcement of Settlement.

2. Statutory Motion for Entry of Judgment.

a. In General.

6 *Witkin Cal. Proc. PWT* § 115

[§ 115] In General.

The "speaking" motion approved in *Gregory v. Hamilton* (1978) 77 C.A.3d 213, 142 C.R. 563, and subjected to criticism (supra, §114), was replaced by a statutory motion accomplishing the same object where the parties have stipulated for settlement.

C.C.P. 664.6 provides as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

In *Corkland v. Boscoe* (1984) 156 C.A.3d 989, 994, 203 C.R. 356, the trial judge granted a *Gregory* motion before enactment of C.C.P. 664.6. The Court of Appeal affirmed the order "in the interest of judicial economy," and gave the statute a liberal construction.

(a) "[W]hat formerly was a nonstatutory 'speaking' motion is now authorized by statute and is applicable not only to judicially supervised settlement conferences, but to stipulations of settlement in writing or orally before the court in pending litigation." (156 C.A.3d 994.)

(b) "Even where there are contentions of disputed facts, if the motion is one for entry of judgment pursuant to such a settlement, the Legislature has now approved the filing of the motion under section 664.6. ... A motion for summary judgment pursuant to section 437c is no longer required." (156 C.A.3d 994.)

(c) "In acting upon a section 664.6 motion, the trial court must determine whether the parties entered into a valid and binding settlement of all or part of the case. In making this determination, trial judges, in the sound exercise of their discretion, may receive oral testimony or may determine the motion upon declarations alone." (156 C.A.3d 994.)

A number of decisions illustrate the scope and application of the statute, including the following:

In re Marriage of Assemi (1994) 7 C.4th 896, 904, 30 C.R.2d 265, 872 P.2d 1190, infra, §122 [discussing

enactment and interpretation of *C.C.P.* 664.6, consistent with views taken in *Corkland*].

Casa de Valley View Owner's Assn. v. Stevenson (1985) 167 C.A.3d 1182, 1189, 213 C.R. 790 [summary judgment motion was not required].

Richardson v. Richardson (1986) 180 C.A.3d 91, 96, 225 C.R. 370 [trial judge could resolve factual disputes on motion to confirm oral settlement].

Fiore v. Alvord (1985) 182 C.A.3d 561, 565, 221 C.R. 400 [trial judge could resolve factual disputes regarding written settlement agreement].

Malouf Bros. v. Dixon (1991) 230 C.A.3d 280, 283, 281 C.R. 235 [trial judge may determine motion on declarations alone, and no statement of decision is required].

Skulnick v. Roberts Express (1992) 2 C.A.4th 884, 889, 3 C.R.2d 597, *infra*, §124 [stipulation in open court; motion may be determined on declarations alone].

In re Jason E. (1997) 53 C.A.4th 1540, 1546, 62 C.R.2d 416, *infra*, §123 [*C.C.P.* 664.6 does not make it mandatory for court to adopt settlement agreement as judgment].

Weddington Productions v. Flick (1998) 60 C.A.4th 793, 809, 71 C.R.2d 265 [*C.C.P.* 664.6 was enacted to provide summary procedure for specifically enforcing settlement contracts without need for new lawsuit; it does not authorize judge to create material terms of agreement].

Gauss v. GAF Corp. (2002) 103 C.A.4th 1110, 1123, 127 C.R.2d 370 [before judgment can be entered on settlement under *C.C.P.* 664.6, there must be writing that contains material terms of agreement; thus, trial court erred in entering judgment where settlement failed to include amount of money defendant was obligated to pay; following *Weddington Productions*].

Timney v. Lin (2003) 106 C.A.4th 1121, 1126, 131 C.R.2d 387 [unlawful deposit forfeiture provision rendered settlement agreement unenforceable under *C.C.P.* 664.6].

Elnekave v. Via Dolce Homeowners Assn. (2006) 142 C.A.4th 1193, 1199, 48 C.R.3d 663 [oral agreement between plaintiffs, homeowners association's insurer, and third-party representative was unenforceable under *C.C.P.* 664.6 where homeowners association failed to have proper representative present during settlement conference].

Osumi v. Sutton (2007) 151 C.A.4th 1355, 1360, 60 C.R.3d 693 [trial court did not impermissibly change or create material terms of agreement by extending closing date for real property transaction, which had passed by time *C.C.P.* 664.6 motion was heard, or ordering plaintiff to sign purchase agreement that incorporated revised counteroffer; both alterations were necessary to effectuate intent of parties and enforce original agreement].

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

See *Hines v. Lukes* (2008) 167 C.A.4th 1174, 1185, 84 C.R.3d 689 [although trial court properly considered merits of motion to enforce oral settlement agreement and opposition, order granting motion did not comply with *C.C.P.* 664.6 because it omitted material terms of settlement and thus, failed to accurately reflect parties' agreement].



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V. JUDGMENT BY CONSENT

B. Enforcement of Settlement.

2. Statutory Motion for Entry of Judgment.

b. Litigation Must Be Pending.

6 *Witkin Cal. Proc. PWT* § 116

[§ 116] Litigation Must Be Pending.

(1) *In General.* The expedited procedure in *C.C.P.* 664.6 is available only when litigation is ending between the parties. In *Kirby v. Southern Calif. Edison Co.* (2000) 78 C.A.4th 840, 93 C.R.2d 223, plaintiff sued for the wrongful, electrocution death of her son. Five months before the action was filed, defendant gave plaintiff a check for \$ 2,500 and plaintiff signed a release, but, after consultation with counsel, plaintiff returned the check. As an affirmative defense, defendant claimed that plaintiff had executed a general release in exchange for the check and that this constituted a binding settlement agreement. Plaintiff opposed defendant's *C.C.P.* 664.6 motion to enforce the alleged agreement, asserting that the check was only to assist with burial of her son. The trial court granted the motion and dismissed the action. *Held*, reversed. The statute's clear and unambiguous language, its legislative history, and cases interpreting the statute support the conclusion that the statute's expedited summary procedure is available only when settlement agreements are entered into while litigation between the settling parties is pending. "The Legislature could have reasonably concluded that settlement agreements entered into after litigation has been filed, when the parties to that litigation are generally represented by counsel, are less likely to result in misunderstandings and disputes than are agreements reached before the parties have retained attorneys." (78 C.A.4th 845.)

(2) *Enforcement of Child Support.* In *re Marriage of Armato* (2001) 88 C.A.4th 1030, 106 C.R.2d 395, concluded that *C.C.P.* 664.6 may be used to enforce a postdissolution child support agreement. Four years following their dissolution, L and E entered into a written agreement that L would pay increased monthly child support for 2 years. When L failed to do so, E filed a motion under *C.C.P.* 664.6 to enforce the written agreement. The trial court entered an order enforcing the agreement over L's objection that there was no litigation pending and that E's only means of enforcing the agreement was to file a separate action for breach of contract. *Held*, affirmed.

(a) The dissolution order was the source of L's child support obligation and expressly stated that the court had continuing jurisdiction to effectuate the terms of the judgment and that no separate proceedings were required, thus ensuring that future child support issues would be decided in this action, not a separate civil suit. (88 C.A.4th 1035.)

(b) *C.C.P.* 664.6, enacted as a summary, expedited procedure to enforce settlement agreements under specified conditions, when used in conjunction with the Family Code, promotes a primary goal of family law, i.e., the simple and

expedient resolution of disputes that arise after dissolution. (*88 C.A.4th 1035.*) California's historic judicial treatment of support orders compels the conclusion that a dissolution action remains pending as to the modification of child support. Thus, for purposes of *C.C.P. 664.6*, litigation was pending when E sought enforcement under the statute. Additionally, the requirement that the agreement be signed by the "parties" was also satisfied, and the trial court properly enforced the agreement. (*88 C.A.4th 1039, 1047.*)

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



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V. JUDGMENT BY CONSENT

B. Enforcement of Settlement.

2. Statutory Motion for Entry of Judgment.

c. Insurance-Funded Settlements.

6 Witkin Cal. Proc. PWT § 117

[§ 117] Insurance-Funded Settlements.

Where a settlement is insurance-funded, insurers may enter into the agreement without involving the insured, and the agreement may be enforced under *C.C.P.* 664.6. In *Fiege v. Cooke* (2004) 125 C.A.4th 1350, 23 C.R.3d 496, plaintiff sued multiple defendants following a traffic accident. All defendants were insured under policies that gave the insurers the right to settle without defendants' consent. Defendants were not present at the mandatory settlement conference, at which the insurers reached an agreement. Plaintiff orally consented but later sought to avoid the settlement arguing that, because defendants did not personally participate in the negotiations, the settlement was unenforceable. The trial court entered judgment consistent with the settlement. *Held*, affirmed.

(a) *Levy v. Superior Court* (1995) 10 C.4th 578, 41 C.R.2d 878, 896 P.2d 171, *infra*, §120, holding that the term "parties" in *C.C.P.* 664.6 means actual litigants and not their attorneys, is distinguishable; *Levy* did not address a situation in which an insurer's adjuster or defense counsel consents to a settlement that will be insurance-funded. "When a defense is being provided without reservation by an insurance carrier, a settlement by the carrier within policy limits does not prejudice the 'substantial rights' of the insured," which was the concern in *Levy*. (125 C.A.4th 1354.)

(b) Insurance policies generally prohibit an insured from settling or negotiating a settlement or interfering with the defense of a claim except on the insurer's request or when the insurer is in breach of contract; on accepting an insurance policy, an insured is bound by these terms. Accordingly, insurance counsel and adjusters commonly negotiate insurance-funded settlements without the involvement of the fully protected insured. Thus, requiring the signature of the insured in an insurance-funded settlement would be superfluous. (125 C.A.4th 1355.)

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1. In General.

6 *Witkin Cal. Proc. PWT* § 118

[§ 118] In General.

In *Datatronic Systems Corp. v. Speron* (1986) 176 C.A.3d 1168, 222 C.R. 658, a breach of contract action between two corporations, the parties reached an oral settlement agreement, which was recorded by a court reporter at a deposition. Both parties stated on the record that they understood the settlement and agreed to it, but plaintiff's president later retracted his support, asserting that the agreement did not contain the parties' entire understanding. Plaintiff's counsel then sent a written, unsigned version of the agreement to defendant. Defendant returned a modified, executed version that was accepted by plaintiff's counsel, but plaintiff's president refused to sign. After several months, unsuccessful negotiations over the exact terms of the settlement recommenced, followed by defendant's C.C.P. 664.6 motion for judgment based on the agreement. The motion was granted and judgment entered. *Held*, reversed.

(a) Under C.C.P. 664.6, as in effect at the time of trial, the stipulation for settlement must be made either (a) "orally before the court," or (b) "in writing." (176 C.A.3d 1171.)

(b) To be made "orally before the court," the stipulation must be made "on the record at a judicially supervised proceeding." (176 C.A.3d 1173.) Here, the agreement was entered into during the recess of a deposition proceeding, which could not be construed as a judicially supervised proceeding. (176 C.A.3d 1174.)

(c) Nor was there a written stipulation within the meaning of the statute. Despite the agreement of the parties' counsel as to its terms, the series of renegotiated changes to the draft, the continuous objections as to content, and the failure of plaintiff's president to sign established that a final, binding written stipulation did not exist. (176 C.A.3d 1175.) (See *Fresno v. Maroot* (1987) 189 C.A.3d 755, 762, 234 C.R. 353 [similar circumstances; following *Datatronic*]; *Scruton v. Korean Air Lines Co., Ltd.* (1995) 39 C.A.4th 1596, 1607, 46 C.R.2d 638 [C.C.P. 664.6 requirements were not met where guardian ad litem withdrew consent to compromise of claim prior to court's approval; there was neither written agreement signed by parties nor oral stipulation before court]; *Conservatorship of McElroy* (2002) 104 C.A.4th 536, 551, 128 C.R.2d 485 [nod of head does not constitute oral assent]; *Lindsay v. Lewandowski* (2006) 139 C.A.4th 1618, 1623, 43 C.R.3d 846 [stipulated settlement resulting from mediation lacked agreement for resolving disputed payment term where it contained inconsistent references to "binding mediation" and "binding arbitration" and was thus

unenforceable]; on enforceability of agreement reached before quasi-judicial officer, see *infra*, §§122, 123.)

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2. Signatures.

6 *Witkin Cal. Proc. PWT* § 119

[§ 119] Signatures.

C.C.P. 664.6 requires that a writing be signed by the parties. In *Williams v. Saunders* (1997) 55 *C.A.4th* 1158, 64 *C.R.2d* 571, one of two named defendants was not present during settlement negotiations and did not personally sign the agreement, although her codefendant spouse and her attorney were present and did sign. The trial judge found that defendant had authorized her spouse to act on her behalf and entered judgment on plaintiff's request pursuant to *C.C.P.* 664.6. Defendant appealed. *Held*, reversed. The signature of a spouse and codefendant is not sufficient to demonstrate assent to settlement terms for purposes of *C.C.P.* 664.6. (55 *C.A.4th* 1163.)

In *Harris v. Rudin, Richman & Appel* (1999) 74 *C.A.4th* 299, 87 *C.R.2d* 822, plaintiff sued defendant law firm and individual attorneys for malpractice. Defendants' counsel sent a letter to plaintiff's counsel purporting to contain the essential terms of a settlement. The letter was signed by two of the four individual defendants, and not by plaintiff. The trial judge denied plaintiff's motion to enforce the agreement under *C.C.P.* 664.6, finding that the statutory requirements were not satisfied because not all the parties had signed the letter, and subsequently entered final judgment against plaintiff. *Held*, affirmed in part. The statute's requirement of a writing "signed by the parties" requires the signature of the parties *seeking to enforce the agreement* and against whom the motion is directed. Here, plaintiff failed to sign; thus the statutory prerequisites were not satisfied. (74 *C.A.4th* 304.) "[O]ur holding does not interpret section 664.6 to require the signature of *all* of the parties in the action. Certainly we can conceive of a multiple-party litigation where some, though not all of the parties enter into a settlement agreement. The statutory purpose of expediting settlement agreements to judgment would not be furthered if it was unavailable to those litigants on both sides of a multiparty action who chose to enter into a settlement agreement in the manner contemplated by the statute." (74 *C.A.4th* 306.)

In *Sully-Miller Contracting Co. v. Gledson/Cashman Const.* (2002) 103 *C.A.4th* 30, 126 *C.R.2d* 400, plaintiffs signed documents agreeing to dismiss their claims against multiple defendants in exchange for money. The documents, prepared by one of defendants' attorneys, contained signature blocks for plaintiffs only and did not specify which of the defendants was responsible for making payments. When plaintiffs did not receive the money, they gave notice that they were withdrawing their agreement to settle. Defendants subsequently moved for settlement under *C.C.P.* 664.6 on the basis of the documents. When plaintiffs pointed out that the documents were not signed by all the parties as required by

the statute, one of the defendants added a signature at the end of both documents. The trial court granted defendants' motion and entered judgment. *Held*, reversed. A party does not satisfy the requirements of C.C.P. 664.6 by adding a signature to a document that does not call for the signature. The purpose of the signed writing requirement--to provide unequivocal proof of the intent to enter a binding settlement--would be frustrated if the court enforced an agreement that only contemplates the signature of one party. "The ad hoc addition of a party's signature that was neither contemplated in the original document nor bargained for is simply insufficient to render the document enforceable under section 664.6." (103 C.A.4th 37.) (See *Gauss v. GAF Corp.* (2002) 103 C.A.4th 1110, 1116, 127 C.R.2d 370 [C.C.P. 664.6 does not permit enforcement of settlement signed by agent].) (On counsel's authority to approve settlement, see *infra*, §120.)

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3. Authority of Attorney.

6 *Witkin Cal. Proc. PWT* § 120

[§ 120] Authority of Attorney.

(1) *In General.* The settlement agreement must be signed by the litigants personally. In *Levy v. Superior Court* (1995) 10 C.4th 578, 41 C.R.2d 878, 896 P.2d 171, an attorney filed a lawsuit against his former client to recover attorneys' fees and costs allegedly incurred. The parties' counsel reached a settlement agreement, but the trial court denied defendant's motion for entry of judgment to enforce the settlement, pursuant to C.C.P. 664.6, on the ground that the written settlement agreement was signed solely by counsel, and plaintiff himself had refused to sign the agreement. *Held*, the term "parties" means "the litigants themselves and does not include their attorneys of record."

(a) Although "party" may refer, depending on the context, either solely to the litigant, or to both the litigant and the litigant's attorney, when the subject of the statute may affect substantial rights of the litigant, the term means the litigant, not the attorney. Unlike steps an attorney may take that are incidental to management of a lawsuit, such as making or opposing motions, seeking continuances, or conducting discovery, settlement of a lawsuit is not incidental to its management; it ends the lawsuit. Accordingly, settlement is such a serious step that it requires the client's knowledge and express consent. (10 C.4th 583.) Thus, in providing an enforcement mechanism for settlement by "parties" under C.C.P. 664.6, the Legislature intended the term to literally mean the litigants personally. (10 C.4th 584.)

(b) C.C.P. 664.6 creates an expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met. Thus, the statute requires the "parties" to stipulate in writing or orally before the court that they have settled the case. The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing on them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations. It also protects parties from impairment of their substantial rights without their knowledge and consent. (10 C.4th 584, 585.)

In *Johnson v. Department of Corrections* (1995) 38 C.A.4th 1700, 45 C.R.2d 740, an employee's suit alleged racial discrimination and other causes of action. The Court of Appeal, in reversing a judgment for defendants entered pursuant to C.C.P. 664.6, held that the *Levy* requirement applies to *oral*, as well as written, settlement agreements.

(a) *Litigant's failure to participate in settlement.* Defendants contend that, because plaintiff was actively involved in the settlement negotiations, his attorney's oral acceptance of the agreement should be sufficient to permit enforcement under C.C.P. 664.6. (38 C.A.4th 1708.) "Direct party-litigant participation in the settlement" is required under *Levy*. Consultation between plaintiff and his attorney during the course of negotiations does not constitute the type of direct participation contemplated, however. "As *Levy* makes clear, the litigant must personally acknowledge the settlement to the court." (38 C.A.4th 1709.)

(b) *Application of Levy holding to oral agreements.* The *Levy* holding is applicable to all settlement agreements, whether written or oral. C.C.P. 664.6 applies to both written and oral settlement agreements, and to hold that "parties" means the litigants in the case of written settlement agreements, but litigants or their attorneys in the case of oral agreements, would create unnecessary confusion and thwart legislative intent. Personal stipulation before the court protects against hasty and improvident settlement agreements ensures that the settlement is the result of mature reflection and deliberate assent, and impresses on litigants the seriousness and finality of the decision to settle. This reasoning applies to all settlement agreements, whether written or oral. (38 C.A.4th 1708.) (On oral stipulations, see *infra*, §121.)

The following cases are instructive:

Murphy v. Padilla (1996) 42 C.A.4th 707, 715, 49 C.R.2d 722, *infra*, §123 [oral settlement ratified by attorney only was unenforceable pursuant to C.C.P. 664.6; following *Levy* and *Johnson*].

Cortez v. Kenneally (1996) 44 C.A.4th 523, 528, 51 C.R.2d 671 [settlement was unenforceable pursuant to C.C.P. 664.6 against party who did not sign agreement or personally participate in discussions and was not present when agreement was stated on record before court; citing *Levy*, *Johnson*, and *Murphy*].

Robertson v. Chen (1996) 44 C.A.4th 1290, 1292, 52 C.R.2d 264 [mandatory settlement conference statement signed only by counsel for one side, and not by parties, was unenforceable pursuant to C.C.P. 664.6].

Burckhard v. Del Monte Corp. (1996) 48 C.A.4th 1912, 1916, 56 C.R.2d 569 [*Levy* holding applied retroactively].

Williams v. Saunders (1997) 55 C.A.4th 1158, 1163, 64 C.R.2d 571, *supra*, §119 [signatures of codefendant spouse and attorney were insufficient to demonstrate assent of defendant who neither participated in negotiations nor signed agreement].

Davidson v. Superior Court (1999) 70 C.A.4th 514, 526, 82 C.R.2d 739 [where agreement was signed only by attorney, judgment based on agreement was void and subsequent contempt premised on its violation was annulled].

(2) *Construction Defect Actions.* In response to *Levy*, the 1998 Legislature enacted C.C.P. 664.7, permitting counsel in a *construction defect* action to bind a party to a settlement in specified circumstances. (C.C.P. 664.7(b).)

A "construction defect action" is a civil action that seeks monetary recovery against a developer, builder, design professional, general contractor, material supplier, or subcontractor of a residential dwelling based on a claim of defects in the design or construction of the dwelling. (C.C.P. 664.7(c).)

If parties to a pending construction defect action stipulate personally or, when a party's contribution is paid by an insurance policy, stipulate through their respective counsel in a writing signed by the parties outside the presence of the court or orally before the court for complete or partial settlement of the case, the court, on motion, may enter judgment pursuant to the terms of the settlement. The parties may request that the court retain jurisdiction to enforce the settlement until its terms are fully performed. (C.C.P. 664.7(a).)

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4. Oral Stipulations.

6 Witkin Cal. Proc. PWT § 121

[§ 121] Oral Stipulations.

Where the parties reach an oral stipulation before the court, their subsequent inability to agree on written terms does not affect the validity of the oral agreement, nor can the stipulation be challenged under the statute of frauds. (*Kohn v. Jaymar-Ruby* (1994) 23 C.A.4th 1530, 1534, 28 C.R.2d 780.)

Elyaoudayan v. Hoffman (2003) 104 C.A.4th 1421, 129 C.R.2d 41, involved a multiparty real property action in which, although defendant H was not present in court when the other parties put their oral settlement on the record, H's counsel was present and agreed. Later, all parties except defendant E signed the written agreement. Although the written agreement included terms not part of the oral agreement, the two agreements shared the same material terms. When performance under the agreement broke down, defendant E moved to have the settlement set aside, arguing that H was not present at the time of the oral agreement, that E did not sign the written agreement, thus, not all parties had entered into the agreement. Defendant H sought enforcement under C.C.P. 664.6. The trial court granted H's motion, finding the agreement valid and enforceable. *Held*, affirmed.

(a) When written agreements follow oral agreements made on the record in open court, conflicts and differences often arise in the drafting process. However, the oral settlement remains binding and enforceable under C.C.P. 664.6. "Having orally agreed to settlement terms before the court, parties may not escape their obligations by refusing to sign a written agreement that conforms to the oral terms." The oral settlement "imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (104 C.A.4th 1431.)

(b) *Harris v. Rudin, Richman & Appel* (1999) 74 C.A.4th 299, 87 C.R.2d 822, *supra*, §119, does not require that all parties agree to a settlement in the same manner, i.e., that "all must sign a writing outside the presence of the court or all must orally agree before the court." A "mix and match" approach to the manner of agreement is permissible as long as all parties agree to the same material terms, as was the case here. (104 C.A.4th 1431.)

Oral stipulations must be personally acknowledged by the party litigants; acknowledgement by a party's attorney is insufficient for purposes of C.C.P. 664.6. (*Johnson v. Department of Corrections* (1995) 38 C.A.4th 1700, 45 C.R.2d

740, *supra*, §120.)

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See 1538 *Cahuenga Partners, LLC v. Turmeko Properties (2009) 176 C.A.4th 139, 143, 97 C.R.3d 552* [party's oral statement in chambers that he understood and agreed to terms of settlement satisfied requirement that party litigant stipulate to settlement "orally before the court"].



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e. Agreement Made in Arbitration.

6 Witkin Cal. Proc. PWT § 122

[§ 122] Agreement Made in Arbitration.

In re Marriage of Assemi (1994) 7 C.4th 896, 30 C.R.2d 265, 872 P.2d 1190, considered whether an oral agreement reached before an arbitrator could be enforced under C.C.P. 664.6. The trial judge, after bifurcating the issue of the parties' marital status and entering a judgment dissolving the marriage, referred the remaining issues to "binding arbitration" before a retired judge. The order, to which the parties stipulated, called for the arbitration proceedings to be transcribed by a reporter and governed by the rules of evidence and procedures applicable to superior court trials, with the arbitrator's decision to be appealable as a superior court judgment. On the scheduled date, the parties advised the arbitrator that they had reached a settlement and sought to place it on the record. The arbitrator, after ascertaining that both parties and their counsel understood and agreed to the settlement terms, accepted the agreement. Subsequently, the wife refused to sign the agreement because, her counsel said, she was convinced that the husband had concealed assets from her. The trial judge granted the husband's motion to enforce the settlement under C.C.P. 664.6, but the Court of Appeal reversed, holding that the settlement had not been reached "before the court" as required by the statute. *Held*, judgment of the Court of Appeal reversed.

(a) The stipulation and order referring the case to arbitration was ambiguous about whether the parties intended the retired judge to act as a privately compensated temporary judge (*infra*, §497) or as an arbitrator under a private agreement as contemplated by C.C.P. 1280 et seq. (*infra*, §499 et seq.). (7 C.4th 907.) The role described in the stipulation and order corresponded more closely to that of a temporary judge, but no oath of office was filed, precluding him from serving in that capacity. (7 C.4th 908.) Hence, it appeared that the parties contemplated the retired judge serving "in some hybrid capacity not clearly consistent with either ... position." (7 C.4th 909.)

(b) To determine whether the parties' agreement had been reached "before the court" within the meaning of C.C.P. 664.6, the arbitrator's position need not be precisely defined. In view of the role specified in the stipulation and order and the circumstances in which the settlement was presented, the "before the court" requirement was met in this case. The arbitrator was authorized to render a binding determination of the controverted issues submitted by the parties, and was acting in a quasi-judicial capacity in approving the settlement presented to him, as the parties understood. Under these circumstances, the settlement must be deemed to have occurred in a "judicially supervised" proceeding, as required by *Datatronic Systems Corp. v. Speron* (1986) 176 C.A.3d 1168, 222 C.R. 658, and *Fresno v. Maroot* (1987)

189 C.A.3d 755, 762, 234 C.R. 353, supra, §118. (7 C.4th 909.) The policies favoring settlement of litigation and greater use of alternative dispute resolution techniques support this conclusion. *(7 C.4th 910.)*

(c) In determining whether the parties entered into a binding settlement, a trial court should consider whether (1) the material terms of the agreement were explicitly defined; (2) the supervising judicial officer questioned the parties as to their understanding of those terms; and (3) the parties expressly acknowledged their understanding of and agreement to those terms. In this case, substantial evidence clearly supported the trial judge's finding of a binding settlement agreement. Correspondence between counsel disclosed that the wife's refusal to sign the agreement was based on belated misgivings, not a belief that the agreement did not accurately reflect the terms of the settlement. *(7 C.4th 911, 912.)*

A strong dissent by two justices argued that the majority opinion rewrote *C.C.P. 664.6* to read "before the court or a quasi-court" or "before the court or an arbitrator," and by doing so deprived the wife of the benefit of the statute of frauds, which was otherwise applicable because the agreement in this case provided for the transfer of an interest in the family residence. *(7 C.4th 912.)* A third justice dissented separately, also taking the majority to task for enlarging the terms of the statute and for ignoring the parties' interest in avoiding improvident agreements and the judiciary's interest in establishing a record that eliminates factual disputes. *(7 C.4th 923.)*

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f. Agreement Made in Mediation.

6 *Witkin Cal. Proc. PWT* § 123

[§ 123] Agreement Made in Mediation.

In *Murphy v. Padilla* (1996) 42 C.A.4th 707, 49 C.R.2d 722, purchasers of land, who did not discover the existence of an easement in favor of an adjacent parcel until after the purchase, brought an action against the owner of the adjacent property and others, alleging various contract claims, fraud, and an equitable claim for abandonment. The trial judge referred the matter to what was termed "mediation" but was ordered pursuant to C.C.P. 638 (reference by agreement; supra, §64). The parties never consented in writing to the purported mediation. After two sessions before a retired judge, a document was prepared memorializing an alleged settlement agreement. The document was not signed by the parties and was intended as a draft to be finalized later by the attorneys. *Held*, order granting motion to enforce settlement reversed. The oral settlement was neither made "before the court" nor personally agreed to by the plaintiff, as required by C.C.P. 664.6.

(a) *No agreement "before the court."*

(1) C.C.P. 664.6, requiring that an oral settlement agreement be reached "before the court," refers to a stipulation presented in a judicially supervised proceeding. However, *In re Marriage of Assemi* (1994) 7 C.4th 896, 30 C.R.2d 265, 872 P.2d 1190, supra, §122, held that the proceeding need not be before a *judge*, i.e., that a broader interpretation is necessary to accommodate the growing reliance on alternative dispute resolution methods of settling litigation. In *Assemi*, the court provided a two-part test. An oral stipulation before a subordinate court officer meets the "before the court" requirement if (a) the court officer was empowered to act with an adjudicatory function and (b) the court officer did, in fact, act in that capacity. (42 C.A.4th 712.)

(2) Here, the parties were referred to mediation pursuant to C.C.P. 638, a statute that contains two distinct sections. Under former C.C.P. 638(1) (now C.C.P. 638(a)), the judge makes a *general* reference to try all legal and factual issues in an action or proceeding and report a statement of decision to the trial court. The referee is vested with power to make a definitive disposition of the issues and action subject to power of the court to affirm the referee's report. Under former C.C.P. 638(2) (now C.C.P. 638(b)), the judge makes a *specific* reference to ascertain some fact, but the referee's decision is not binding on the court. A general referee, like a temporary judge or private arbitrator, may be empowered to make binding decisions about controverted issues. Therefore, an oral stipulation before a general referee pursuant to

former C.C.P. 638(1) could support an enforceable settlement agreement pursuant to C.C.P. 664.6. An oral stipulation before a special referee pursuant to former C.C.P. 638(2) cannot satisfy the "before the court" requirement because of the nonbinding nature of the referee's decision. (42 C.A.4th 713.) Here, however, the mediator was neither a general nor a special referee because the proceeding was not properly referenced under C.C.P. 638. The parties did not give written consent to the reference as required by case law and by rule. (42 C.A.4th 714.)

(3) The retired judge here is most analogous to a mediator in a voluntary settlement conference. His function was principally to work with the attorneys to achieve an early settlement of the litigation and memorialize the terms of the settlement. He was not empowered by statute to make binding decisions in the underlying dispute and, by his own admission, never exercised adjudicative authority. Furthermore, he failed to issue a statement of decision or report to the trial court as required of referees under C.C.P. 644. Accordingly, any oral settlement agreement that may have been reached at the mediation sessions cannot be enforced pursuant to C.C.P. 664.6 because the "before the court" requirement was not satisfied. (42 C.A.4th 715.)

(b) *No agreement by party directly.* The alleged settlement agreement is likewise unenforceable under C.C.P. 664.6 because plaintiff did not directly participate. The agreement was not ratified by plaintiff personally but only by plaintiff's attorney acting as her agent. An attorney may not bind his or her client to a settlement agreement within the context of C.C.P. 664.6 unless the client has personally agreed to the settlement. (42 C.A.4th 715.)

(c) *Agreement is not enforceable under contract principles.* Defendants also rely on an agency theory to assert alternative grounds for affirming the alleged settlement. Although oral or written settlement agreements reached as a result of mediation may be binding on the parties under contract principles, defendants cannot avoid the requirements of C.C.P. 664.6 by asserting a contract claim. Such an action should be brought in a separate motion for summary judgment, a separate suit for equity, or an amendment to the pleadings. (42 C.A.4th 716.) In addition, the agency argument suffers from two principal defects: first, defendants fail to assert any facts to show that plaintiff authorized her attorney, expressly, impliedly, or ostensibly, to bind her to a settlement agreement. Secondly, ratification may be made only by a principal, not by an agent. (42 C.A.4th 717.)

In re Jason E. (1997) 53 C.A.4th 1540, 62 C.R.2d 416, involved a mediation in which the parents, paternal grandparents, and paternal aunt and uncle of a dependent child signed a written stipulation that provided a long-term plan of guardianship. The paternal aunt and uncle, willing to adopt the child, repudiated the agreement within 24 hours of signing. At the permanency planning hearing, the juvenile court declined to enforce the mediation agreement, entered an order finding that the child was likely to be adopted, and terminated the parents' paternal rights. *Held*, affirmed. The parents' argument that the stipulation was a binding agreement under *Assemi* is incorrect.

(a) *Parties had no power to settle matter.* None of the parties to the agreement had the power or authority to determine a permanent plan for the child. The child had been removed from their custody and control by the juvenile court. Thus, *Assemi*, where the parties had the power to determine the subject matter of the agreement, i.e., the division of property, is distinguishable. Hence, the court was not bound by the agreement; it constituted merely a recommendation that the court was free to consider as any other evidence. (53 C.A.4th 1547.)

(b) *Agreement cannot be specifically enforced.* Under C.C. 3391 (see 13 *Summary* (10th), *Equity*, §39), specific performance is not available if enforcement would be unjust or unreasonable. Requiring a child's caretakers to agree to guardianship when they believe adoption would be in the child's best interest would be manifestly unreasonable and unjust. Hence, the mediation agreement is not specifically enforceable. (53 C.A.4th 1547.)

(c) *Absent parties.* Neither the Social Services Department nor the child's attorney participated in the mediation or signed the agreement. Thus, they were not bound and were free to recommend a long-term plan of adoption. (53 C.A.4th 1548.) (See *Weddington Productions v. Flick* (1998) 60 C.A.4th 793, 809, 71 C.R.2d 265 [parties' memorandum arising out of mediation contained unresolved issues; thus, memorandum could not be entered as judgment under C.C.P. 664.6].) (On dependency proceedings, see 10 *Summary* (10th), *Parent and Child*, §538 et seq.)

In *Housing Group v. United Nat. Ins. Co.* (2001) 90 C.A.4th 1106, 109 C.R.2d 497, parties participating in a private mediation filed a stipulated petition in superior court, where no action between the parties was pending, seeking appointment of their mediator as judge pro tempore to preside over the entry of a settlement in the form of a stipulated judgment under C.C.P. 664.6. The court assumed jurisdiction and appointed the parties' mediator, after which the parties recorded their settlement. After a dispute arose, the trial court granted one party's motion to enforce the settlement and entered partial judgment. *Held*, reversed, with directions to dismiss. C.C.P. 664.6 only permits an entry of stipulated judgment by parties to "pending litigation." There is nothing in the history or policy of C.C.P. 664.6 that permits parties who have no case pending in a court to obtain a judgment from that court. (90 C.A.4th 1112.) Moreover, parties may not confer subject matter jurisdiction on a trial court by stipulation. Thus, the trial court lacked the jurisdiction to hear the petition. (90 C.A.4th 1113.)

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CHAPTER VII - Proceedings Without Trial

Witkin Summary of California Law

V. JUDGMENT BY CONSENT

B. Enforcement of Settlement.

2. Statutory Motion for Entry of Judgment.

g. Preservation of Right to Indemnity.

6 *Witkin Cal. Proc. PWT* § 124

[§ 124] Preservation of Right to Indemnity.

In *Skulnick v. Roberts Express* (1992) 2 C.A.4th 884, 3 C.R.2d 597, a personal injury action arising from a traffic accident, plaintiff sued the driver and lessors of a tractor-trailer rig involved in the collision. After a number of judicially supervised settlement conferences, the parties reached an oral agreement, and appeared before the court to place it on the record. The settlement did not mention indemnification rights, nor was the issue raised by any party during the settlement conferences. After the settlement terms were placed on the record, however, one of the lessors, M, and its parent company, R, stated that they intended to preserve their indemnification rights against the defendant driver, who then moved for entry of judgment under C.C.P. 664.6. The trial judge granted the motion and entered judgment against all parties who might seek indemnification, ruling that if R and M had wished to preserve their indemnification rights, they should have done so when the settlement was placed on the record. *Held*, affirmed.

(a) When counsel for R and M agreed to the stated terms of the settlement on the record in open court, the conditions for entry of judgment under C.C.P. 664.6 were satisfied, and the judgment reflected the trial judge's finding that the settlement encompassed the waiver of indemnification rights. (2 C.A.4th 889.)

(b) By remaining silent at the initial settlement conference as to their intent to retain indemnification rights, R and M were equitably estopped from asserting those rights. (2 C.A.4th 890, 891.)

(c) Furthermore, as a matter of public policy, "multiparty settlements will be presumed to be 'global,' i.e., a complete resolution of all claims, unless claims or rights of indemnification or contribution are expressly reserved by agreement." (2 C.A.4th 891.)

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V. JUDGMENT BY CONSENT

B. Enforcement of Settlement.

2. Statutory Motion for Entry of Judgment.

h. Retention of Jurisdiction.

6 *Witkin Cal. Proc. PWT* § 125

[§ 125] Retention of Jurisdiction.

(1) *In General.* Originally, the trial judge lacked continuing jurisdiction to enforce the settlement. In *Viejo Bancorp v. Wood* (1989) 217 C.A.3d 200, 265 C.R. 620, the parties to a management dispute between bank officers entered into a written settlement agreement, and the action was voluntarily dismissed with prejudice. Subsequently, a new action was filed alleging breach of the settlement agreement, and the bank moved to enforce the agreement under C.C.P. 664.6. The trial judge granted the motion and entered a judgment purporting to "relate back" to the original action. *Held*, reversed; a motion under C.C.P. 664.6 may not be considered in an action other than that in which the settlement was made. The statute is expressly limited to settlements reached in *pending* litigation. Once the original action was dismissed, the trial judge lacked subject matter jurisdiction to enter judgment in that action even though he was persuaded that the agreement had been breached. (217 C.A.3d 206.)

This jurisdictional problem was solved by a 1993 amendment to C.C.P. 664.6: if requested by the parties, the court may retain jurisdiction for purposes of enforcing the settlement until it is fully performed.

(2) *Request Is Necessary.* A request that the court retain jurisdiction must conform to the same three requirements that are necessary for an entry of judgment and its enforcement under C.C.P. 664.6. The request must be made (a) during the pendency of the case and not after dismissal in its entirety, (b) by the actual parties, and (c) either in a signed writing or orally before the court. (*Wackeen v. Malis* (2002) 97 C.A.4th 429, 440, 118 C.R.2d 502 [court lacked jurisdiction to enforce settlement where parties did not make clear request for continued jurisdiction for enforcement in separate writing or orally to court].)

In *Hagan Engineering v. Mills* (2003) 115 C.A.4th 1004, 1007, 9 C.R.3d 723, pursuant to a global settlement, the parties dismissed their respective lawsuits with prejudice. Language in the agreement provided that the settlement could be enforced "upon noticed motion submitted by any party hereto," and that the parties agreed that the court would, "notwithstanding entry of the Request for Dismissal ... , retain jurisdiction to enforce" the agreement according to C.C.P. 664.6. The court later granted plaintiff's motion to enforce the settlement. *Held*, reversed. Absent a motion to vacate the dismissal, the dismissal with prejudice deprived the superior court of subject matter jurisdiction, and there was no pending action. (115 C.A.4th 1007; following *Viejo Bancorp.*) Moreover, *Wackeen* does not permit the parties to

confer jurisdiction on trial courts simply by including language in their agreements. The parties must ask the court to retain jurisdiction, and the request must be made to the court. Thus, the language in the settlement was a nullity. (115 C.A.4th 1008.) (See *Hernandez v. Board of Education* (2004) 126 C.A.4th 1161, 1175, 25 C.R.3d 1 [in final order of 34-year-old school desegregation case, trial court properly retained jurisdiction under C.C.P. 664.6 for 2 years for sole purpose of potentially enforcing two provisions of settlement agreement necessary for transition from court supervision to full control by school board].)

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B. Enforcement of Settlement.

3. Other Means of Enforcement.

6 *Witkin Cal. Proc. PWT* § 126

[§ 126] Other Means of Enforcement.

C.C.P. 664.6 provides an expeditious method for reducing a stipulated settlement to judgment, but it is not the exclusive procedure for enforcing settlement agreements. (See *Gorman v. Holte* (1985) 164 C.A.3d 984, 989, 211 C.R. 34 [oral agreements reached at judicially supervised settlement conferences are enforceable in various ways, including motion under *C.C.P.* 664.6, summary judgment, separate equity action, or amendment of pleadings]; *Kilpatrick v. Beebe* (1990) 219 C.A.3d 1527, 1529, 1530, 269 C.R. 52 [summary judgment remains an available remedy]; *Diaz v. May* (1993) 15 C.A.4th 1268, 1271, 19 C.R.2d 409 [statute "provides an expeditious alternative to amendment of the answer or a motion for summary judgment to enforce certain settlement agreements"].)

In *Nicholson v. Barab* (1991) 233 C.A.3d 1671, 285 C.R. 441, the court held that settlement agreements not enforceable under *C.C.P.* 664.6 are governed by general contract principles, including the statute of frauds. (233 C.A.3d 1681.) Despite the policy favoring pretrial settlements, the statute of frauds applies even where the agreement was reached at a judicially supervised settlement conference. "We cannot conclude that judicially supervised settlement agreements should be specially exempted because of the part played by the court. Section 664.6 already provides a statutory method to enforce judicially supervised settlement agreements which are in writing or placed on the record. Where the parties choose not to comply with the requirements of *Code of Civil Procedure* section 664.6, no policy considerations favor exempting such judicially supervised settlement agreements from the statute of frauds." (233 C.A.3d 1683.)

The following cases are also instructive:

Scruton v. Korean Air Lines Co., Ltd. (1995) 39 C.A.4th 1596, 1607, 46 C.R.2d 638 [*C.C.P.* 372, authorizing guardian, conservator, or guardian ad litem to compromise action involving claim by or against minor, incompetent person, or conservatee, is special statute that controls in those actions over general provisions of *C.C.P.* 664.6].

Murphy v. Padilla (1996) 42 C.A.4th 707, 716, 49 C.R.2d 722, *supra*, §123 [alternative procedures include motion for summary judgment, separate action in equity, or amendment to pleadings].

Robertson v. Chen (1996) 44 C.A.4th 1290, 1293, 52 C.R.2d 264 [finding that *C.C.P.* 664.6 was not available due

to lack of compliance with statutory requirements, but recognizing that alternative procedures might be pursued].

Stewart v. Preston Pipeline (2005) 134 C.A.4th 1565, 1584, 36 C.R.3d 901 [although settlement agreement was not signed personally by defendants, and thus did not meet requirements of *C.C.P.* 664.6, trial court correctly considered agreement in granting defendants' alternative motion for summary judgment].

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V. JUDGMENT BY CONSENT

C. Plaintiff's Duties After Settlement.

6 Witkin Cal. Proc. PWT § 127

[§ 127] Plaintiff's Duties After Settlement.

(1) *Notice of Settlement.* If an *entire* case settles, the plaintiff, or other party seeking affirmative relief, must file written notice of the disposition with the court and serve the notice on all parties and the court-appointed ADR neutral for the case, and must give oral notice to the same parties if a hearing, conference, or trial is scheduled to take place within 10 days. A party who fails to notify the ADR neutral of a settlement at least 2 days before a scheduled hearing may be required to compensate the neutral for the scheduled hearing time in an amount determined by the court. (C.R.C., Rule 3.1385(a); see Judicial Council Form No. CM-200 [Notice of Settlement of Entire Case].)

(2) *Unconditional Dismissal.* Unless the settlement is conditional, the plaintiff must also file a request for dismissal of the entire case within 45 days after the date of settlement. If a timely request is not filed, the court must dismiss the case 45 days after receiving notice of the settlement, except on a showing of good cause why the case should not be dismissed. (C.R.C., Rule 3.1385(b); see *Irvine v. Regents of the Univ. of Calif.* (2007) 149 C.A.4th 994, 1000, 57 C.R.3d 500 [trial court should not have dismissed action where plaintiff's allegations that no enforceable settlement was reached constituted good cause under C.R.C., 3.1385(b)]; Judicial Council Form No. CIV-110 [Request for Dismissal].)

(3) *Conditional Dismissal.* If settlement is conditioned on the satisfactory completion of terms that are not to be performed within 45 days, the notice of settlement must specify the date dismissal will be filed. If the plaintiff does not request dismissal within 45 days after that date, the court must dismiss, except on a showing of good cause why the case should not be dismissed. (C.R.C., Rule 3.1385(c).)

(4) *Sanctions.* Failure to comply with these requirements may subject a party to reasonable monetary sanctions, after written notice and an opportunity to be heard, payable to the court, an aggrieved person, or to both. If the failure to comply is the responsibility of counsel and not the party, the penalty must be imposed on counsel and must not adversely affect the party's cause of action or defense. In addition, the court may order the offending party to pay the aggrieved party's reasonable expenses, including reasonable attorneys' fees and costs incurred in connection with the motion for sanctions or order to show cause. The order imposing sanctions must be in writing and state in detail the facts justifying it. (C.R.C., Rule 2.30.)

(5) *Defendant Is Entitled to Notice Before Entry of Dismissal.* Although C.R.C., Rule 3.1385 does not require notice to the defendant of an impending dismissal, due process requires the notice before a dismissal may be entered

pursuant to a settlement. (*Lee v. Placer Title Co. (1994) 28 C.A.4th 503, 510, 33 C.R.2d 572* [construing former C.C.P. 225].)

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

(1) *Notice of Settlement.*

(New) Request for additional time to complete settlement: If the party who has served and filed a notice of settlement determines that the case cannot be dismissed within the prescribed 45 days, that party must serve and file a notice and a supporting declaration advising the court of the party's inability to dismiss the case, showing good cause for the inability to do so, and proposing an alternative date for dismissal. The notice and declaration must be served and filed at least 5 court days before the time for requesting dismissal lapses. If good cause is shown, the court must continue the matter to allow additional time to complete the settlement. (C.R.C., Rule 3.1385(e), added in 2008.)

(2) *Unconditional Dismissal.* C.R.C., Rule 3.1385(b) was amended in 2008 to make its provisions applicable unless the settlement is conditional or involves the compromise of a claim of a minor or disabled person. (On trial court's duty when settlement involves compromise of claim of minor or disabled person, see C.R.C., Rule 3.1385(d), added in 2008.)



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VI. CONFESSION OF JUDGMENT

A. In General.

1. Nature of Proceeding.

6 *Witkin Cal. Proc. PWT* § 128

[§ 128] Nature of Proceeding.

C.C.P. 1132 et seq. authorize a special summary proceeding allowing a judgment to be rendered without an action having been filed.

"A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both." (*C.C.P. 1132(a)*; see *46 Am.Jur.2d, Judgments (2006 ed.)* §204 et seq.; 15 *Am.Jur. P.P. Forms (2005 ed.)*, Judgments, Form 130 et seq.; on federal practice, see 21A *Federal Procedure, L.Ed.*, §51:20.)

The law in some jurisdictions allows a party to a contract, such as the maker of a promissory note, to agree that in the event of default an attorney may enter an appearance and confess judgment against the party. (See *46 Am.Jur.2d, Judgments (2006 ed.)* §210 et seq.; 3 *A.L.R.3d 1147* [formal requirements]; 5 *A.L.R.3d 426* [enforceability of clause against third party obligated for performance of contract]; 40 *A.L.R.3d 1158* [constitutionality, construction, and application of statutes invalidating procedure].) Such a "cognovit note" is not per se unconstitutional, but is open to constitutional challenge if the contract is one of adhesion. (*D.H. Overmyer Co. of Ohio v. Frick Co. (1972) 405 U.S. 174, 92 S.Ct. 775, 783, 31 L.Ed.2d 124, 135*; see 24 *Hastings L. J. 1045* [cognovit notes].)

In California, however, the provisions of *C.C.P. 1132* et seq. are exclusive and must be strictly construed. Accordingly, a confession of judgment on behalf of the debtor, made by an attorney acting under such a provision, is void. Only the debtor may make the confession. (*Barnes v. Hilton (1953) 118 C.A.2d 108, 111, 257 P.2d 98.*) (See *Hulland v. State Bar (1972) 8 C.3d 440, 450, 105 C.R. 152, 503 P.2d 608, 1 Cal. Proc. (5th), Attorneys*, §491 [attorney may not use confession of judgment as means of collecting fee].)

That the California statute makes confession of judgment clauses ineffective in California is made clear by *Barnes*: "If appellant's argument were upheld, then the provisions of the code sections here involved could readily be subverted by the simple device of including in any promissory note a warrant of attorney, whereby any attorney could make the statement in writing, verify it, and confess judgment. Clearly, such is not the policy contemplated by the Legislature. In this connection, it is significant that confession of judgment notes are not in general use in this state." (*118 C.A.2d 110.*)

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VI. CONFESSION OF JUDGMENT

A. In General.

2. Attorney's Advice Is Required.

6 *Witkin Cal. Proc. PWT* § 129

[§ 129] Attorney's Advice Is Required.

(1) *In General.* "A judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that the attorney has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure." (*C.C.P. 1132(b)*); see *Isbell v. Sonoma* (1978) 21 *C.3d* 61, 70, 145 *C.R.* 368, 577 *P.2d* 188 [holding that former California statutes not containing this safeguard were unconstitutional]; *Wax v. Infante* (1982) 138 *C.A.3d* 138, 140, 187 *C.R.* 686 [certificate prepared by attorney who previously represented both parties did not satisfy requirement of "attorney independently representing the defendant," even though certificate stated that attorney could not represent parties individually and that parties, knowing this, desired him to prepare confession of judgment]; *Rivercourt Co. Ltd. v. Dyna-Tel* (1996) 41 *C.A.4th* 1477, 1481, 49 *C.R.2d* 279 [judgment by confession was set aside; attorney who signed certificate on behalf of corporate defendant, but also separately represented president who fraudulently executed confession, was not independent]; *Efstratis v. First Northern Bank* (1997) 59 *C.A.4th* 667, 673, 69 *C.R.2d* 445 [judgment by confession executed by attorney plaintiff in order to obtain unsecured line of credit was invalid; declaration did not demonstrate advice from independent counsel on wisdom of acceding to confessed judgment in plaintiff's circumstances; on its face confessed judgment did not reflect knowing, voluntary, and intelligent waiver of due process rights]; 91 *A.L.R.5th* 485 [vacating or opening judgment by confession on ground of fraud, illegality, or mistake]; 11 *Pacific L. J.* 359.)

(2) *Sister State Nonconforming Statute.* In *Capital Trust v. Tri-Nat. Dev. Corp.* (2002) 103 *C.A.4th* 824, 127 *C.R.2d* 360, a loan from plaintiff corporation to defendant corporation was secured in part by affidavits for confession of judgment executed by defendant under New York law. New York law did not require that the confession of judgment demonstrate or be accompanied by documentation that defendant had voluntarily, knowingly, and intelligently waived the right to due process, as required by *Isbell v. Sonoma*, *supra*, and California statutes. On defendant's default, plaintiff filed the affidavits and was granted a judgment by the New York Supreme Court. Plaintiff sought to enforce the judgment in California under the Sister State and Foreign Money-Judgments Act of 1974 (*C.C. 1710.10 et seq.*; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §449 *et seq.*). Defendant moved to vacate the California judgment, arguing that New York's judgment by confession law violated the Fourteenth Amendment, and a judgment based on it was therefore not entitled to full faith and credit. The trial court denied the motion. *Held*, affirmed.

(a) In this case sophisticated parties negotiated a complex loan. The confession of judgment was accompanied by affidavits executed by defendant that were lodged as exhibits with the California trial court. The parties agree that these affidavits contain a statement that defendant had been represented by and consulted with counsel in regard to the confession of judgment, its form, and its enforceability. (*103 C.A.4th 830.*)

(b) Where the parties' agreement shows that it was negotiated between equal bargainers, a voluntary waiver of due process can be assumed from that agreement. "While the defendants' affidavit acknowledging consultation with counsel does not strictly satisfy the attorney affidavit requirements" of *C.C.P. 1132*, given the context of the case, the affidavit is sufficient to conclude that defendant waived its rights to due process. (*103 C.A.4th 831.*)

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A. In General.

3. Procedure.

6 *Witkin Cal. Proc. PWT* § 130

[§ 130] Procedure.

(1) *Defendant's Statement.* The defendant makes a written, verified statement authorizing entry of judgment for a specified sum. (*C.C.P.* 1133; see 47 *Am.Jur.2d, Judgments* (2006 ed.) §229 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.), Judgments, Form §175 et seq.; on verification requirement, see *Ataka America v. Washington West Trade Corp.* (1977) 66 *C.A.3d* 419, 422, 136 *C.R.* 71 [lack of verification was fatal, where debtor denied owing amount claimed and record supported its contention]; but see *Los Angeles Adjustment Bureau v. Noonan* (1960) 181 *C.A.2d Supp.* 834, 839, 5 *C.R.* 445 [lack of verification was not fatal in otherwise valid judgment where debtor admitted execution of authorization].)

If the statement is for money due or to become due, "it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due"; if it is for the purpose of securing the plaintiff against a contingent liability, "it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same." (*C.C.P.* 1133.)

(2) *Attorney's Certificate.* The attorney's certificate (see *supra*, §129) must be filed with the defendant's statement. (*C.C.P.* 1132(b).)

(3) *Filing and Entry of Judgment.* The statement and certificate are filed with the clerk of the court in which the judgment is to be entered. The clerk "must endorse upon it, and enter a judgment" for the amount confessed, with specified costs that become part of the judgment. "The statement and affidavit, with the judgment endorsed thereon, ... becomes the judgment roll." (*C.C.P.* 1134.)

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VI. CONFESSION OF JUDGMENT

B. Family Law Proceedings.

1. Paternity and Support Judgments.

6 *Witkin Cal. Proc. PWT* § 131

[§ 131] Paternity and Support Judgments.

(1) *Former Law and Revision.* Former Welf.C. 11476.1, as enacted in 1975, authorized the district attorney and a noncustodial parent to enter into an agreement for the entry of a judgment determining paternity and periodic child and spousal support payments. However, *Ventura v. Castro* (1979) 93 C.A.3d 462, 156 C.R. 66, held the statute unconstitutional in failing to protect the due process rights of the noncustodial parent by not providing for notice and hearing or addressing the manner in which those rights could be waived. In response, amendments were made in 1980 to satisfy the constitutional requirements, and in 1999, *Family C. 17000* et seq. established the Department of Child Support Services to administer services and perform functions necessary to establish, collect, and distribute child support. (*Family C. 17200.*) Welfare and Institutions Code provisions formerly dealing with these matters were recast in the Family Code. (See 11 *Summary* (10th), *Husband and Wife*, §309 et seq.)

(2) *Agreement.* A local child support agency that has undertaken enforcement of support may enter into an agreement with the noncustodial parent for the entry of a judgment without action determining paternity and for periodic child and spousal support payments. The agreement may be executed prior to the birth of the child and may provide that the judgment not be entered until after the child is born. (*Family C. 17416(a).*) *Family C. 17416* does not apply where a civil action has been commenced. (*Family C. 17416(i).*)

(3) *Conditions for Entry of Judgment.* The judgment "shall be entered only if one of the following requirements is satisfied":

(a) The noncustodial parent is represented by an attorney who signs a certificate stating: "I have examined the proposed judgment and have advised my client concerning his or her rights in connection with this matter and the consequences of signing or not signing the agreement for the entry of the judgment and my client, after being so advised, has agreed to the entry of the judgment." (*Family C. 17416(b)(1).*)

(b) The judge, after advising the noncustodial parent of his or her rights and the consequences of agreeing or not agreeing to entry of judgment, makes a finding that the noncustodial parent has appeared and the judge has determined that the parent "has willingly, knowingly, and intelligently waived" his or her due process rights. (*Family C. 17416(b)(2).*)

(4) *Hearing on Request.* On the request of the local agency, a hearing must be held within 10 days after the clerk receives the request. The agency may require the person who signed the agreement to attend, and that person's presence is sufficient for the purposes of *C.C.P. 1209.5* (failure to furnish support as evidence of contempt; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §350), if the court makes the findings required by *Family C. 17416(b)(2)*. (*Family C. 17416(d)*.)

(5) *Filing and Entry of Judgment.* The clerk must file the agreement and certificate or finding, and the judge must enter judgment accordingly. The provisions for payment of support to a county officer in *Family C. 4200* et seq. (child support; see 11 *Summary* (10th), *Husband and Wife*, §§313, 317) and *Family C. 4350* et seq. (spousal support; see 11 *Summary* (10th), *Husband and Wife*, §§313, 317) apply to the judgment, which may be enforced in the same manner as any other support judgment. (*Family C. 17416(c)*.)

(6) *Service of Judgment.* The local child support agency must serve on the person who signed the agreement (a) a copy of the judgment, and (b) if the judgment includes an order for child or spousal support, a notice stating that the court has continuing authority to increase or decrease the amount and that the person served may request the court to order that the payments be decreased or eliminated. (*Family C. 17416(e)*.)

(7) *Modification and Revocation.* An order for child and spousal support may be modified or revoked as provided in the Family Code, and the modification may make the support payable to a different person. (*Family C. 17416(f)*.)

(8) *Determining Support Payments.* The court, in determining the noncustodial parent's reasonable ability to pay, must consider any relevant circumstances set out in *Family C. 4005*. (*Family C. 17416(g)*.) Guidelines for determining child support are provided in *Family C. 4050* et seq. (See 10 *Summary* (10th), *Parent and Child*, §394 et seq.)

(9) *Enforcement.* In a prosecution under P.C. 270 (failure to provide for child; see 10 *Summary* (10th), *Parent and Child*, §438), if the requirements of *Family C. 17416(b)* have been satisfied, the court may suspend proceedings or sentence in the criminal action, but this does not limit the later institution of a civil or criminal action or other proceedings to enforce the judgment entered under *Family C. 17416*. (*Family C. 17416(h)*.)

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VI. CONFESSION OF JUDGMENT

B. Family Law Proceedings.

2. Termination of Parental Rights.

6 *Witkin Cal. Proc. PWT* § 132

[§ 132] Termination of Parental Rights.

In re Marriage of Goodarzirad (1986) 185 C.A.3d 1020, 230 C.R. 203, involved an agreement that the court treated as equivalent to a confession of judgment, and held that it was void as contrary to public policy. Plaintiff wife obtained a decree of dissolution and child custody; defendant husband was granted visitation rights and ordered to pay child support. Defendant became delinquent in support payments, and the parties, at a joint hearing on defendant's motion for extended visitation and plaintiff's order to show cause on contempt, stipulated as follows: (a) Defendant waived any present or future right to custody or visitation; (b) plaintiff waived all present, past delinquent, and future rights to child support and attorneys' fees; (c) defendant consented to a petition by plaintiff to free the child from defendant's control. The court approved the stipulation, entered judgment in accordance with it, and denied defendant's subsequent motion to vacate the judgment and stipulation. *Held*, reversed.

(a) *Judgment in excess of jurisdiction*. Although the court had subject matter jurisdiction, its judgment based on the stipulation was in excess of its jurisdiction and therefore void. A dissolution court by statute has continuing jurisdiction over custody and support of a minor child, and primary consideration must be given to the child's welfare; a judgment purporting to nullify that jurisdiction is beyond the court's powers. In addition, although consent or estoppel may in some situations preclude an attack on a stipulated judgment (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §333), strong policy reasons prevailed here, and defendant was not estopped. (185 C.A.3d 1027.)

(b) *Invalid confession of judgment*. Defendant's stipulation to have judgment taken against him on a petition to terminate his parental rights under former C.C. 232 (see 10 *Summary* (10th), *Parent and Child*, §307 et seq.) is "in essence ... a confession of judgment." (185 C.A.3d 1027.) As such it is invalid for the following reasons:

(1) A confession of judgment is not statutorily authorized for a C.C. 232 petition. Former Welf.C. 11476.1 (now Family C. 14716), authorizing confession of judgment in a paternity or child support case (supra, §131), requires an attorney's certification and inquiry by the court, and none of the protections afforded defendants who confess judgments under C.C.P. 1132 et seq. (supra, §128 et seq.) was given to defendant in this case. (185 C.A.3d 1028.)

(2) "[T]he extraordinary practice of utilizing a confession of judgment to terminate parental rights presents opportunities for overreaching that avoid judicial scrutiny." (185 C.A.3d 1029.) Here, for example, defendant had a

contempt proceeding and possible jail sentence if he did not sign the stipulation. (185 C.A.3d 1029.)

(3) Former C.C. 232 et seq. contained precise criteria and procedures that had to be followed before parental custody and control could be terminated. "It is clear that the Legislature wanted these specific procedures followed without deviation from the statutory scheme." (185 C.A.3d 1029.)

(4) To permit a parent through a confession of judgment to terminate parental rights is against public policy: "The state has a compelling interest to be intimately involved in this type of proceeding. To allow a confession of judgment to be entered into would defeat these overriding interests." (185 C.A.3d 1029.) (See *Alameda v. Risby* (1994) 28 C.A.4th 1425, 1429, 34 C.R.2d 333 [stipulation to admissibility of blood test results in action for determination of paternity and reimbursement of public assistance did not amount to confession of judgment or violate public policy; distinguishing *Goodarzirad*]; *In re Marriage of Jackson* (2006) 136 C.A.4th 980, 990, 39 C.R.3d 365 [although defendant father had not signed stipulation terminating plaintiff mother's parental rights, termination hearing at mother's request was considered "stipulated proceeding" and court improperly terminated mother's parental rights without considering best interest of children; following *Goodarzirad*].)

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

Correction: Page 570, line 21, "Family C. 14716" should be " *Family C. 17416*".



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VII. JUDGMENT BY DEFAULT

A. In General.

1. Nature and Effect.

6 *Witkin Cal. Proc. PWT* § 133

[§ 133] Nature and Effect.

If the defendant fails to answer the complaint, *C.C.P.* 585 et seq. authorize entry of judgment in specified circumstances. (See *infra*, §138 et seq.; *C.E.B.*, 2 Civil Proc. Before Trial, 4th, Chap. 38; *Cal. Civil Practice*, 3 Procedure, Chap. 18; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §16.1 et seq.; Rutter Group, 1 Civil Proc. Before Trial 4th, Chap. 5; 46 *Am.Jur.2d*, *Judgments* (2006 ed.) §232 et seq.; 15 *Am.Jur.* P.P. Forms (2005 ed.), *Judgments*, Form 173 et seq.; on relief from default, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.; on federal procedure, see *F.R. Civ. P.*, Rule 55; 10A Federal Practice & Procedure (Wright, Miller & Kane) §2681 et seq.; 21A Federal Procedure, L.Ed., §51.47 et seq.)

A judgment by default is a judgment on the merits in favor of the plaintiff. (See *infra*, §§175, 176; on res judicata and collateral estoppel, see 7 *Cal. Proc.* (5th), *Judgment*, §§372, 448 et seq.)

Unlike a dismissal (*infra*, §319 et seq.), a judgment by default may not be given unless the defendant fails to answer. *C.C.P.* 585 "does not authorize the entry of any default in cases where an answer is on file, whether the defendant does or does not appear at the time the action is called for hearing." (*Warden v. Lamb* (1929) 98 C.A. 738, 741, 277 P. 867; see *Barbaria v. Independent Elevator Co.* (1955) 133 C.A.2d 657, 659, 285 P.2d 91, citing the text; *Wilson v. Goldman* (1969) 274 C.A.2d 573, 576, 79 C.R. 309, *infra*, §476, quoting the text; *Kahn v. Kahn* (1977) 68 C.A.3d 372, 382, footnote 5, 137 C.R. 332; *Heidary v. Yadollahi* (2002) 99 C.A.4th 857, 862, 121 C.R.2d 695 [default was improper where cross-defendants had filed answer but failed to appear at trial].) A special exception to this rule is provided by *C.C.P.* 2023.030(d)(4), which authorizes a default judgment as a discovery sanction. (See *infra*, §151.)

The default judgment procedure does not apply to the plaintiff's failure to amend within the time granted; in that case, the proper procedure is for the judge to enter judgment of dismissal. (*Sousa v. Capital Co.* (1963) 220 C.A.2d 744, 748, 34 C.R. 71, 5 *Cal. Proc.* (5th), *Pleading*, §999.)

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A. In General.

2. Default and Default Judgment Distinguished.

6 *Witkin Cal. Proc. PWT* § 134

[§ 134] Default and Default Judgment Distinguished.

If the defendant fails to answer within the necessary time, a "default" may be entered. (See *infra*, §160 et seq.) Up to the time of that entry, the defendant may ordinarily file a belated pleading, though it is subject to a motion to strike by the plaintiff. (*Goddard v. Pollock* (1974) 37 C.A.3d 137, 141, 112 C.R. 215; see *infra*, §173.) However, the entry of the default cuts off the opportunity to plead, and, unless vacated, permanently precludes the filing of an answer. (See *infra*, §175.)

After a default is entered, the case stands with an unanswered complaint, on which ordinarily the plaintiff is entitled to a "judgment by default" or "default judgment." This judgment is distinct from the default. (See *infra*, §164 et seq.)

The *clerk* always enters the *default*. (See *infra*, §160 et seq.) Thereafter, in a limited class of cases (contract actions for money or damages; unlawful detainer), the clerk may also enter *judgment on the default* (*infra*, §165), but in most cases the judgment may only be entered by the *court* (*infra*, §168 et seq.).

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A. In General.

3. Default of Fewer Than All Defendants.

6 *Witkin Cal. Proc. PWT* § 135

[§ 135] Default of Fewer Than All Defendants.

(1) *In General.* In an action against several defendants, "the Court may, in its discretion, render judgment against one or more of them ... whenever a several judgment is proper." (*C.C.P.* 579.) (See *C.C.P.* 585(a), *infra*, §140 [reference to entry of the default of "the defendant or defendants," and to default judgment "against one or more of the defendants"].) It is clear, therefore, that a default judgment may be rendered against a defaulting defendant in a proper case, even though other defendants answer and go to trial on the merits, and the default of one defendant is not a binding admission as to an answering codefendant. (See *Taylor v. Socony Mobil Oil Co.* (1966) 242 C.A.2d 832, 834, 51 C.R. 764 [although default of employee was deemed admission by him of matters pleaded, it was not admissible as evidence against employer who answered and denied same allegations]; 102 A.L.R.5th 657 [effect of default on defaulting defendant and remaining codefendants].)

(2) *Qualifications.* There are, however, some distinctions and qualifications to keep in mind:

(a) *Employer and employee.* In an action against an employee and his or her employer for the alleged tort of the employee, exoneration of the employee at trial makes it improper to enter a default judgment against the employer. (*Plott v. York* (1939) 33 C.A.2d 460, 463, 91 P.2d 924, 2 Summary (10th), *Agency and Employment*, §167.) Where the employee defaults, the employer may take advantage of favorable aspects of the default judgment, but is not bound by any issues resolved against the employee by default. (*Morehouse v. Wanzo* (1968) 266 C.A.2d 846, 853, 72 C.R. 607 ["that there may be inconsistent results in the default proceedings, and in the trial on the merits against the employer, cannot ... prejudice the employer, or dictate that the plaintiff should be denied a hearing on the default of the employee"; distinguishing *Plott*].)

(b) *Joint and several liability.* Where parties are jointly liable on the same obligation, it is improper to enter a default judgment against one while the action remains pending against others. (*Mirabile v. Smith* (1953) 119 C.A.2d 685, 689, 260 P.2d 179, 7 Cal. Proc. (5th), *Judgment*, §39; *Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co.* (1960) 184 C.A.2d 649, 655, 7 C.R. 761.)

(3) *Role of clerk and court.* The clerk's power to enter a default under *C.C.P.* 585(a) (*infra*, §160) is subject to the court's exercise of discretion under *C.C.P.* 579. (*Lynch v. Bencini* (1941) 17 C.2d 521, 529, 110 P.2d 662 [dictum];

Kooper v. King (1961) 195 C.A.2d 621, 628, 15 C.R. 848.) The reason for this limitation is explained in *Kooper*: If the defenses of the answering defendant go to the plaintiff's right to recover at all, and are successful, they inure to the benefit of the defaulting defendant, who is also entitled to a favorable final judgment. (195 C.A.2d 629.) (Cf. *Diamond Nat. Corp. v. Golden Empire Builders* (1963) 213 C.A.2d 283, 288, 28 C.R. 616 [clerk had power to make entry where all defendants, presumptively liable jointly and severally, were in default].)

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A. In General.

4. Default Against Corporation Under Fictitious Business Name.

6 *Witkin Cal. Proc. PWT* § 136

[§ 136] Default Against Corporation Under Fictitious Business Name.

In *Pinkerton's v. Superior Court* (1996) 49 C.A.4th 1342, 57 C.R.2d 356, a personal injury action in which two individuals sued a corporation by the fictitious business name that it used in California, the corporation demurred to the complaint in its corporate name and obtained a dismissal. Plaintiffs then obtained a default against the corporation under its fictitious business name as a legally distinct entity, and the trial judge denied defendant's motion to set aside the default. *Held*, mandamus issued directing the trial judge to set aside the default and dismiss the fictitious business name from the action.

(a) "If a plaintiff sued 'Mark Twain' for money damages, and Samuel Clemens appeared in court, explained 'Mark Twain' was the fictitious name he used for publishing purposes, responded to the complaint as Samuel Clemens, and obtained Samuel Clemens's dismissal from the case, could the plaintiff then continue to pursue the action against 'Mark Twain'? Of course not! By the same token, we hold here that if a plaintiff sues a corporation by the fictitious business name it uses, and the corporation appears, responds to the complaint in its corporate name, and obtains a dismissal, the plaintiffs cannot then obtain a default judgment against the fictitious business name as a legally distinct entity." (49 C.A.4th 1343.)

(b) Under *C.C.P. 585*, a default may only be entered when no responsive pleading has been filed. In this case, however, defendant filed a demurrer, which was sustained, and it was dismissed from the action. Subsequent proceedings against defendant, whether in its corporate name or its fictitious business name, were improper. (49 C.A.4th 1347.) Use of a fictitious business name does not create a separate legal entity. (49 C.A.4th 1348.) Because defendant had appeared, entry of default against it under its fictitious business name had no legal effect. (49 C.A.4th 1349.) (On suing defendant by fictitious name, see 4 Cal. Proc. (5th), *Pleading*, §478 et seq.)

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5. Restrictions on Default Judgments.

6 *Witkin Cal. Proc. PWT* § 137

[§ 137] Restrictions on Default Judgments.

(1) *Proceedings*. Default judgments are prohibited or restricted in the following proceedings:

(a) Quiet title actions (prohibited). (*C.C.P.* 764.010; see *Yeung v. Soos* (2004) 119 *C.A.4th* 576, 582, 14 *C.R.3d* 502 [although trial judge improperly rendered judgment by normal default prove-up methods rather than evidentiary hearing required by *C.C.P.* 764.010, erroneous procedure did not deprive trial court of power to enter judgment; thus, judgment was not void]; 3 *Cal. Proc.* (5th), *Actions*, §133 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §654 et seq.)

(b) Actions to reestablish destroyed land records (prohibited). (*C.C.P.* 751.14.)

(c) Actions to reestablish boundary disturbed by earth movement (prohibited). (*C.C.P.* 751.59.)

(d) Dissolution of marriage, legal separation, and nullity of marriage (restricted). (*Family C.* 2336; *C.R.C.*, Rules 5.108(b), 5.122, 5.124; see *infra*, §140; 5 *Cal. Proc.* (5th), *Pleading*, §896.)

(e) Mandamus and prohibition (prohibited). (*C.C.P.* 1088, 1105; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §201.)

(f) Class actions (restricted). (See *Kass v. Young* (1977) 67 *C.A.3d* 100, 109, 136 *C.R.* 469, 4 *Cal. Proc.* (5th), *Pleading*, §326.)

(g) Proceedings in small claims court (prohibited). (*C.C.P.* 116.520(b); see 2 *Cal. Proc.* (5th), *Courts*, §298.)

(h) Unlawful detainer actions (restricted). (*C.C.P.* 1169; see *infra*, §165; 12 *Summary* (10th), *Real Property*, §735.)

(i) Proceedings for involuntary dissolution of corporation under *Corp.C.* 1800 et seq. (restricted). (*Rosner v. Benedict Heights* (1963) 219 *C.A.2d* 1, 7, 32 *C.R.* 764 [*C.C.P.* 585 is not applicable because issues inherent in involuntary dissolution proceeding "could not be finally adjudicated forthwith upon the entry of the default of the corporation"]; 9 *Summary* (10th), *Corporations*, §217.)

(2) *Persons*. The following persons are protected against judgment by default:

(a) A fictitiously named defendant. (See *infra*, §177.)

(b) An unwilling plaintiff joined as a nominal defendant. (*Watkins v. Nutting* (1941) 17 C.2d 490, 498, 110 P.2d 384; *Estate of Kuebler v. Superior Court* (1978) 81 C.A.3d 500, 504, 146 C.R. 481; 4 Cal. Proc. (5th), Pleading, §209.)

(c) An indigent incarcerated defendant who is not represented by counsel. (*Payne v. Superior Court* (1976) 17 C.3d 908, 926, 132 C.R. 405, 553 P.2d 565, 1 Cal. Proc. (5th), Attorneys, §49.)

(d) A debtor in bankruptcy. Under 11 U.S.C., §362(a), a proceeding against a debtor on a preexisting claim, including a default judgment, is automatically stayed by the filing of a bankruptcy petition, and the stay is automatically terminated when the petition is dismissed. (*Raczynski v. Judge* (1986) 186 C.A.3d 504, 510, 230 C.R. 741 [default judgment based on order made during stay was properly entered after bankruptcy petition was dismissed].)

(e) A defendant in military service (Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appx., §501 et seq.). (See *Allen v. Allen* (1947) 30 C.2d 433, 434, 182 P.2d 551; *In re Marriage of Lopez* (1981) 115 C.A.3d 776, 781, 782, 173 C.R. 718 [discussing *Allen* and bounds of judicial discretion in applying Act]; Cal. Civil Practice, 3 Procedure, §§18:24, 40, 44; 15 Am.Jur. P.P. Forms (2005 ed.), Judgments, Forms 167, 179, 195; 35 Proof of Facts 3d 323 [entitlement to default judgment relief under Soldiers' and Sailors' Civil Relief Act]; 10A Federal Practice & Procedure (Wright, Miller & Kane) §2691; 3 Federal Procedure, L.Ed., §5:507; 3 Cal. Proc. (5th), Actions, §1008.) The Act requires that an affidavit or declaration showing that a defaulting defendant is not in military service be filed before entry of judgment. (50 U.S.C. Appx., §520(1).) However, the statute does not bar entry of default without an affidavit or declaration; the statute seeks to protect military personnel not from defaults, but from entry of default judgments. (*Interinsurance Exchange of the Auto. Club of Southern Calif. v. Collins* (1994) 30 C.A.4th 1445, 1447, 37 C.R.2d 126 [court clerk could not refuse to enter default on ground that plaintiff had not yet filed signed declaration of nonmilitary status].)

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

(2) *Persons.*

(e) *Defendant in military service:* The Soldiers' and Sailors' Civil Relief Act of 1940 has been renamed the Servicemembers Civil Relief Act. (See 37 A.L.R.Fed 2d 1 [construction and application of Servicemembers Civil Relief Act].)



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B. When Default Will Be Entered.

1. In General.

a. Responses Preventing Entry of Default.

6 *Witkin Cal. Proc. PWT* § 138

[§ 138] Responses Preventing Entry of Default.

C.C.P. 585 originally provided for entry of default and default judgment on the defendant's failure to *answer* within the time allowed. The cases held that "answer" included "demurrer" for purposes of preventing a default (see *Cuddahy v. Gragg* (1920) 46 C.A. 578, 580, 189 P. 721), and this rule was codified in 1933. Subsequent amendments made various other responses effective to prevent entry of default. A defendant or cross-defendant may now avoid default by timely filing the following:

- (1) Answer. (See *infra*, §141 et seq.)
- (2) Demurrer. (See *infra*, §141 et seq.)
- (3) Notice of motion to strike all or part of a pleading. (See *infra*, §146.)
- (4) Notice of motion to transfer under *C.C.P.* 396b. (See *infra*, §146 et seq.)
- (5) Notice of motion for mandatory dismissal based on failure to serve the summons under *C.C.P.* 583.210 et seq. (See *infra*, §146 et seq.)
- (6) Notice of motion to quash service of summons or to stay or dismiss under *C.C.P.* 418.10. (See *infra*, §146 et seq.)
- (7) Notice of petition for writ of mandamus under *C.C.P.* 418.10. (See *infra*, §146 et seq.)

Other responses are generally not effective to avoid default. (See *Wisdom v. Ramirez* (1985) 177 C.A.3d Supp. 1, 7, 222 C.R. 923, *infra*, §160 [declaration opposing application for preliminary injunction could not be construed as answer so as to avoid default]; *Barragan v. Banco BCH* (1986) 188 C.A.3d 283, 299, 232 C.R. 758 [motion for summary judgment did not bar entry of default]; cf. *Laguna Village v. Laborers' Int. Union of North America* (1983) 35 C.3d 174, 181, 197 C.R. 99, 672 P.2d 882, *infra*, §141 [federal motion to dismiss was deemed equivalent to demurrer for purpose of avoiding default].)

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b. Extension of Time.

6 *Witkin Cal. Proc. PWT* § 139

[§ 139] Extension of Time.

When the time to respond is extended, by the court or by stipulation, entry of a default is prevented. (*Steuri v. Junkin* (1931) 113 C.A. 553, 554, 298 P. 828; see *C.C.P. 1054* [orders extending time to plead], 4 *Cal. Proc.* (5th), *Pleading*, §10 et seq.) However, a void order extending the time to plead for more than 30 days without the plaintiff's consent (see *C.C.P. 1054*) does not prevent entry of the default. Reliance by the defendant on the void order may only be urged as a possible ground for relief from the default under *C.C.P. 473*. (*Kennedy v. Mulligan* (1902) 136 C. 556, 557, 69 P. 291.)

The time to respond may also be extended by statute. (See *infra*, §146 et seq.; on extension following denial of petition to compel arbitration, see *C.C.P. 1281.7*, *infra*, §524 et seq.)

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1. In General.

c. Types of Actions.

6 *Witkin Cal. Proc. PWT* § 140

[§ 140] Types of Actions.

(1) *Statutory Framework.* The statutory scheme governing defaults deals separately with the following types of actions:

(a) *C.C.P. 585(a)* governs actions "arising upon contract or judgment for the recovery of money or damages only" (see *infra*, §165 et seq.).

(b) *C.C.P. 585(b)* deals with "other actions" (see *infra*, §169).

(c) *C.C.P. 585(c)* deals with "all actions where the service of the summons was by publication" (see *infra*, §171).

(d) *C.C.P. 585(e)* governs defaults on cross-complaints (see *infra*, §172).

C.C.P. 2023.030(b)(4) authorizes the entry of a default judgment as a sanction for the misuse of the discovery process (see *infra*, §151).

(2) *Dissolution, Separation, and Nullity.* Defaults in proceedings for dissolution of marriage, legal separation, or nullity of marriage are governed by C.R.C., Rules 5.122 and 5.124. (See 5 *Cal. Proc.* (5th), *Pleading*, §896; 11 *Summary* (10th), *Husband and Wife*, §§101, 171.) If the respondent fails to file a response that prevents a default, the clerk enters a default on application of the petitioner. The petitioner may then apply for the relief sought, and the court "must require proof to be made of the facts stated in the petition and may enter its judgment accordingly." (C.R.C., Rule 5.122; see *Family C. 2336* (proof required for default).) The request for default must be completed on Judicial Council Form No. FL-165 [Request to Enter Default]. (C.R.C., Rule 5.124.) (See Judicial Council Form No. FL-170 [Declaration for Default or Uncontested Dissolution or Legal Separation]; C.E.B., *Practice Under the California Family Code*, Chap. 14; *Cal. Civil Practice*, 2 *Family Law Litigation*, Chap. 14.)

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B. When Default Will Be Entered.

2. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Not Filed.

a. Failure To Answer or Demur to Complaint.

6 *Witkin Cal. Proc. PWT* § 141

[§ 141] Failure To Answer or Demur to Complaint.

When the defendant has been served, but has not filed a timely answer, demurrer, or other appropriate responsive pleading (*supra*, §138), a default may be taken. (*C.C.P.* 585(a), (b), (c).)

In *Laguna Village v. Laborers' Int. Union of North America* (1983) 35 *C.3d* 174, 197 *C.R.* 99, 672 *P.2d* 882, defendant had the case removed to federal court, where he moved to dismiss on the ground that the complaint failed to state a claim on which relief could be granted. On remand to the California court, defendant neglected to file a demurrer or answer, and judgment by default was entered. *Held*, defendant's motion to dismiss in the federal court was similar to a California demurrer, and was therefore a sufficient responsive pleading to prevent entry of a default. (35 *C.3d* 181; for full discussion, see 5 *Cal. Proc.* (5th), *Pleading*, §1007.)

In *Barragan v. Banco BCH* (1986) 188 *C.A.3d* 283, 232 *C.R.* 758, defendant demurred on the ground that another action involving substantially the same issues was pending. The parties treated the demurrer as well taken and removed it from the calendar. Over a year after the other action was concluded, plaintiff repeatedly but unsuccessfully requested defendant to recalendar the demurrer, and then obtained entry of default. *Held*, the entry was proper; defendant had effectively abandoned its demurrer, which was moot after the resolution of the other action. (188 *C.A.3d* 298, 299, distinguishing *Laguna Village*.)

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b. Failure To Answer or Demur to Cross-Complaint.

6 *Witkin Cal. Proc. PWT* § 142

[§ 142] Failure To Answer or Demur to Cross-Complaint.

The former default statutes referred only to a complaint, but were applied to the failure to answer or demur to a cross-complaint. (*Furnivall v. Groves* (1957) 154 C.A.2d 846, 852, 317 P.2d 117, citing the text.)

Generally, for purposes of C.C.P. 585 et seq., "complaint" includes a cross-complaint, "defendant" includes a cross-defendant, and "plaintiff" includes a cross-complainant. (C.C.P. 587.5.)

C.C.P. 585(e) expressly provides for entry of default on a cross-complaint: A default may be entered if the cross-defendant has been served with the cross-complaint and has failed to answer, demur, or file an appropriate responsive pleading (supra, §138). (For restriction on entry of default judgment on cross-complaint, see infra, §172.)

If the pleading, though labeled a cross-complaint, is merely defensive matter, it need not be answered, and no default will be taken. (See 5 *Cal. Proc.* (5th), *Pleading*, §§1163, 1184.)

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2. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Not Filed.

c. Failure To Answer or Demur to Amended Complaint.

6 *Witkin Cal. Proc. PWT* § 143

[§ 143] Failure To Answer or Demur to Amended Complaint.

A default may be taken if the complaint has been amended, and the defendant fails to answer, demur, or file a notice of motion to strike, as specified in *C.C.P. 585(f)* (*infra*, §146) within 30 days after service of the amended complaint, or within the time allowed by the court. (*C.C.P. 586(a)(1)*.)

If the amendment is merely a matter of form, the original answer is sufficient and no default may be entered for failure to file a new answer. (*Gray v. Hall* (1928) 203 C. 306, 310, 265 P. 246; *Carrasco v. Craft* (1985) 164 C.A.3d 796, 808, 210 C.R. 599; 5 *Cal. Proc.* (5th), *Pleading*, §1189.) However, a defendant who guesses wrong on this point will be the victim of a good default judgment. (*Bristol Convalescent Hosp. v. Stone* (1968) 258 C.A.2d 848, 856, 66 C.R. 404 [no abuse of discretion in granting judgment by default where amended complaint was substantially different]; see 5 *Cal. Proc.* (5th), *Pleading*, §1243.)

The court in *Bristol* suggests that a defendant who thinks no answer is required should bring that claim to the trial judge's attention either before the default is entered or on motion to set it aside. "It may be noticed judicially that there is a well-established practice in the profession to ask for a stipulation that an answer to an original complaint may be deemed to be the answer to an amended complaint." (258 C.A.2d 863.)

A defendant who has not appeared must be personally served with an amended complaint that raises a matter of substance before a valid default may be entered. (*Engbretson & Co. v. Harrison* (1981) 125 C.A.3d 436, 442, 178 C.R. 77, 5 *Cal. Proc.* (5th), *Pleading*, §1245 ["this new circumstance should be brought home to the defendant with the same force as the notification of the original action"]; *In re Marriage of Rhoades* (1984) 157 C.A.3d 169, 172, 211 C.R. 531 [following *Engbretson*].)

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2. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Not Filed.

d. Failure To Answer After Demurrer Is Overruled.

6 *Witkin Cal. Proc. PWT* § 144

[§ 144] Failure To Answer After Demurrer Is Overruled.

A default may be taken if a demurrer to the complaint is overruled and the defendant fails to answer within the time allowed by the court. (*C.C.P.* 586(a)(2); see *Union Oil Co. of Calif. v. Conejo Oil Co.* (1928) 91 C.A. 652, 653, 267 P. 320 [case law on default was same prior to enactment of statutory provision]; C.R.C., Rule 3.1320(g) [if order is silent, leave to answer within 10 days is deemed granted (5 days for forcible entry or unlawful detainer actions)]; on time to plead after ruling on partial demurrer, see C.R.C., Rule 3.1320(j), 5 *Cal. Proc.* (5th), *Pleading*, §1001.)

The time to answer, however, does not begin to run until notice of the order overruling the demurrer is served. Hence, unless the notice is given or waived in open court, entry of a default is improper. (*C.C.P.* 472b; *Harris v. Minnesota Inv. Co.* (1928) 89 C.A. 396, 401, 265 P. 306; see 5 *Cal. Proc.* (5th), *Pleading*, §983.)

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2. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Not Filed.

e. Failure To Amend After Demurrer Is Sustained.

6 *Witkin Cal. Proc. PWT* § 145

[§ 145] Failure To Amend After Demurrer Is Sustained.

A default may be taken if the demurrer to the answer is sustained and the defendant fails to amend the answer within the time allowed by the court. (*C.C.P. 586(a)(5)*); on demurrer to answer, see 5 *Cal. Proc. (5th), Pleading*, §1181 et seq.)

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



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VII. JUDGMENT BY DEFAULT

B. When Default Will Be Entered.

3. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Filed.

a. Filing of Motion Prevents Default.

6 *Witkin Cal. Proc. PWT* § 146

[§ 146] Filing of Motion Prevents Default.

Various motions and petitions give the defendant an extension of time to plead and prevent the taking of a default, pending their determination:

(1) Motion to strike. (*C.C.P.* 472a(d); 5 *Cal. Proc.* (5th), *Pleading*, §1014.)

(2) Motion to transfer. (*C.C.P.* 396b(e); 3 *Cal. Proc.* (5th), *Actions*, §§936, 939.)

(3) Motion for mandatory dismissal based on failure to serve the summons. (*C.C.P.* 472a(e), *infra*, §356.)

(4) Motion to quash under *C.C.P.* 418.10. (*C.C.P.* 418.10(b), (d); 2 *Cal. Proc.* (5th), *Jurisdiction*, §225.)

(5) Motion to stay or dismiss under *C.C.P.* 418.10. (*C.C.P.* 418.10(b), (d); 2 *Cal. Proc.* (5th), *Jurisdiction*, §380.)

(6) Petition for mandamus to review denial of a motion to quash, stay, or dismiss under *C.C.P.* 418.10, where the defendant has served and filed the required notice. (*C.C.P.* 418.10(c), (d); 2 *Cal. Proc.* (5th), *Jurisdiction*, §225.)

Accordingly, no default may be entered if any of these responses has been made to the filing of the complaint or cross-complaint. (*C.C.P.* 585(a), (b), (c), (e); see *Goddard v. Pollock* (1974) 37 *C.A.3d* 137, 143, 112 *C.R.* 215 [motion to quash summons].)

A "notice of motion to strike" within the meaning of *C.C.P.* 585 "is a notice of motion to strike the whole or any part of a pleading filed within the time within which the moving party is required otherwise to plead to that pleading." The notice must specify a hearing date in accordance with *C.C.P.* 1005. The filing of the notice of motion does not extend the time within which to demur. (*C.C.P.* 585(f); on specification of hearing date, see *supra*, §15.)

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VII. JUDGMENT BY DEFAULT

B. When Default Will Be Entered.

3. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Filed.

b. Default After Granting Motion To Strike or Transfer.

6 Witkin Cal. Proc. PWT § 147

[§ 147] Default After Granting Motion To Strike or Transfer.

(1) *Failure To Answer Unstricken Portion of Complaint.* A default will be entered if a motion to strike, as specified in *C.C.P. 585*, is granted in whole or in part, "and the defendant fails to answer the unstricken portion of the complaint within the time allowed by the court, no demurrer having been sustained or being then pending." (*C.C.P. 586(a)(3)*.)

(2) *Failure To Amend Stricken Answer.* A default will be entered if a motion to strike the answer in whole or in part, as specified in *C.C.P. 585*, is granted with leave to amend and the defendant fails to amend the answer within the time allowed. (*C.C.P. 586(a)(7)*.)

(3) *Answer Stricken Without Leave To Amend.* A default will be entered if a motion to strike the answer in whole, as specified in *C.C.P. 585*, is granted without leave to amend. (*C.C.P. 586(a)(7)*.)

(4) *Failure To Respond After Change of Venue.* Where the defendant moves for a change of venue under *C.C.P. 396b* (see 3 *Cal. Proc.* (5th), *Actions*, §924) without answering, and the motion to transfer is granted, the defendant must respond to the complaint within 30 days after notice of the filing and case number is mailed by the clerk of the new court, or within the time provided in *C.C.P. 586(a)(6)(C)* (*infra*, this section). In the absence of a timely answer, a default may be entered. (*C.C.P. 586(a)(6)(B)*.) For this purpose, "respond" means to answer, demur, or move to strike. (*C.C.P. 586(b)*.)

(5) *Extension After Review of Order Granting Motion To Transfer.* If review by appeal or writ of mandamus is sought to challenge the grant of a motion to transfer under *C.C.P. 396a* or *396b* (see 3 *Cal. Proc.* (5th), *Actions*, §919 et seq.), the court with jurisdiction over the trial must, on application or on its own motion, "allow the defendant a reasonable time to respond to the complaint" after the appeal or mandamus proceeding becomes final, or on the earlier termination of a stay. Notice of the order extending time must be promptly served by the party who obtained the order, or by the clerk if the order is issued on the court's own motion. (*C.C.P. 586(a)(6)(C)*.)

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B. When Default Will Be Entered.

3. Where Motion To Strike, Quash, Transfer, Stay, or Dismiss Is Filed.

c. Default After Denial of Motions.

6 *Witkin Cal. Proc. PWT* § 148

[§ 148] Default After Denial of Motions.

(1) *Denial of Motion To Strike*. Because a motion to strike has a purpose similar to that of a demurrer (see 5 *Cal. Proc.* (5th), *Pleading*, §1008), the statute makes the same provision for entry of a default after denial of a motion to strike as after a demurrer is overruled (*supra*, §144); i.e., default is entered if the defendant fails to answer within the time allowed by the court. (*C.C.P. 586(a)(2)*.)

(2) *Denial of Motion To Quash, Stay, or Dismiss*. After the denial of a motion to quash, stay, or dismiss, or a properly noticed writ of mandamus challenging the denial under *C.C.P. 418.10*, the defendant must plead "within the time provided in that section or as otherwise provided by law." On a failure to so plead, default may be entered. (*C.C.P. 586(a)(4)*.)

(3) *Denial of Motion To Transfer*. Default may be entered after denial of a motion to transfer under *C.C.P. 396b*, if the defendant fails to respond to the complaint within the time allowed by the court under *C.C.P. 396b(e)*, or within the time provided in *C.C.P. 586(a)(6)(C)*. (*C.C.P. 586(a)(6)(A)*.) For this purpose, "respond" means to answer, demur, or move to strike. (*C.C.P. 586(b)*.) Where review of the denial is sought, the provisions of *C.C.P. 586(a)(6)(C)* for extension of time apply to the same extent as when an order granting a motion to transfer is reviewed. (See *supra*, §147.)

(4) *Denial of Motion To Dismiss for Failure To Make Timely Service*. Default may be entered after denial of a motion to dismiss for delay in service (see *C.C.P. 583.250*, *infra*, §319 et seq.) where the defendant fails to respond within the time allowed by the court. (*C.C.P. 586(a)(8)*.)

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VII. JUDGMENT BY DEFAULT

C. Notice of Damages Required Before Taking Default.

1. In General.

a. General Rule: Recovery Is Limited to Amount Alleged.

6 *Witkin Cal. Proc. PWT* § 149

[§ 149] General Rule: Recovery Is Limited to Amount Alleged.

(1) *Nature of Rule.* If there is no answer, the relief granted to the plaintiff may not exceed that demanded in the complaint or the statement of damages. (*C.C.P.* 580; on statement of damages, see *infra*, §154 et seq., and 4 *Cal. Proc.* (5th), *Pleading*, §511.) Under *C.C.P.* 585(a), the plaintiff may have judgment "for the principal amount demanded" in the complaint or the statement of damages, and under *C.C.P.* 585(b) and (c), the default judgment may not exceed that amount. In other words, the defendant is subject only to such a judgment as the plaintiff demands, and any greater or different relief by default judgment is unauthorized.

C.C.P. 580 satisfies the fundamental due process requirement that judgment may not be entered against a defendant who has not been given proper notice and an opportunity to defend. (*Becker v. S.P.V. Const. Co.* (1980) 27 *C.3d* 489, 494, 165 *C.R.* 825, 612 *P.2d* 915, *infra*, §150 [notice requirement "was designed to insure fundamental fairness"]; *In re Marriage of Lippel* (1990) 51 *C.3d* 1160, 1166, 276 *C.R.* 290, 801 *P.2d* 1041 [failure to request child support]; *Matera v. McLeod* (2006) 145 *C.A.4th* 44, 62, 51 *C.R.3d* 331 [service of statement of compensatory and punitive damages on defendants' attorney only 2 days before court struck answer and entered default was insufficient notice for purposes of due process].)

(2) *Illustrations.* The following cases are instructive:

Flores v. Smith (1941) 47 *C.A.2d* 253, 261, 117 *P.2d* 712 [failure to request interest and to adequately describe real property].

Burch v. Hibernia Bank (1956) 146 *C.A.2d* 422, 430, 304 *P.2d* 212 [rule does not apply where defaulting defendant has notice of judgment and consents to its entry].

Lee v. Ski Run Apartments Associates (1967) 249 *C.A.2d* 293, 298, 57 *C.R.* 496 [money judgment was not requested].

In re Marriage of Rhoades (1984) 157 *C.A.3d* 169, 172, 211 *C.R.* 531 [petition for marital separation; error to grant

default judgment for dissolution].

In re Marriage of Wells (1988) 206 C.A.3d 1434, 1439, 254 C.R. 185 [spousal support may not be ordered in excess of demand, but court properly reserved jurisdiction over issue].

Wiley v. Rhodes (1990) 223 C.A.3d 1470, 1474, 273 C.R. 279 [failure to request attorneys' fees].

Feminist Women's Health Center v. Blythe (1993) 17 C.A.4th 1543, 1571, 22 C.R.2d 184 [failure to demand attorneys' fees barred recovery from defaulting defendants, though fees were properly awarded against answering defendants on motion after trial].

Finney v. Gomez (2003) 111 C.A.4th 527, 534, 544, 3 C.R.3d 604 [default award was reversed for lack of jurisdiction where plaintiff in partition action failed to provide defendant with postcomplaint, predefault notice of amount sought].

Garamendi v. Golden Eagle Ins. Co. (2004) 116 C.A.4th 694, 705, 10 C.R.3d 724 [C.C.P. 580 did not apply where defendant answered and actively defended against claims, even though defendant did not participate in trial].

People v. Brar (2005) 134 C.A.4th 659, 668, 36 C.R.3d 272 [relief from default denied; although complaint requested "no less than" \$ 1 million in civil penalties, judgment of approximately \$ 1.8 million was consistent with allegations in complaint that sought statutory penalties for specific number of violations, thus providing method of calculation and fair warning of potential award].

Electronic Funds Solutions, LLC v. Murphy (2005) 134 C.A.4th 1161, 1174, 1176, 36 C.R.3d 663 [complaint seeking damages "in an amount in excess of \$ 50,000" was ineffective to support default judgment of compensatory damages in excess of that amount; because claim did not involve personal injury or wrongful death, service of statement of damages (infra, §154) did not remedy error; distinguishing *Brar*].

Levine v. Smith (2006) 145 C.A.4th 1131, 1136, 52 C.R.3d 197 [in legal malpractice action, default judgment awarding \$ 2.5 million violated C.C.P. 580 and was void where complaint sought damages based on contract and tort theories according to proof and no amount was stated; statement of damages was ineffective for notice requirement; following *Electronic Funds Solutions, LLC*].

(3) *Amount Alleged in Complaint or Prayer.* It was formerly held that a defendant who intended to default did not need to examine the allegations of the complaint to determine what relief might be granted, but was entitled to rely on the specific demands of the prayer. (See *Brooks v. Forington* (1897) 117 C. 219, 221, 48 P. 1073; *Staacke v. Bell* (1899) 125 C. 309, 312, 57 P. 1012; *Gudarov v. Hadjieff* (1952) 38 C.2d 412, 416, 240 P.2d 621.) However, the prayer was in some cases interpreted liberally to authorize the relief. (See *Faucett v. Riveroll* (1928) 203 C. 438, 439, 264 P. 1098; *American Sec. Co. v. Van Loben Sels* (1936) 13 C.A.2d 265, 269, 56 P.2d 1247; *Horton v. Horton* (1941) 18 C.2d 579, 582, 116 P.2d 605.) It is now established that the allegations of the complaint may cure a defective prayer for damages. (*Becker v. S.P.V. Const. Co.*, *supra*, 27 C.3d 494; *Greenup v. Rodman* (1986) 42 C.3d 822, 829, 231 C.R. 220, 726 P.2d 1295.) However, when the allegations of the complaint are inconsistent with the demand in the prayer, the prayer for relief controls. (*Barragan v. Banco BCH* (1986) 188 C.A.3d 283, 305, 232 C.R. 758.)

(4) *Collateral Attack on Void Judgment.* It is well settled that a default judgment outside the scope of the demand is in excess of jurisdiction, and is subject to collateral attack. (See *Burnett v. King* (1949) 33 C.2d 805, 807, 205 P.2d 657; *Swycaffer v. Swycaffer* (1955) 44 C.2d 689, 693, 285 P.2d 1; *Weiss v. Blumencranc* (1976) 61 C.A.3d 536, 542, 131 C.R. 298, citing the text; *In re Marriage of Lippel*, *supra*, 51 C.3d 1167 [collateral attack was permitted 16 years after entry of judgment]; 2 Cal. Proc. (5th), *Jurisdiction*, §313.) However, if a default judgment is only partially void for being excessive, an appellate court will strike the excess and affirm the judgment as to the valid amount of recovery. (*Becker v. S.P.V. Const. Co.*, *supra*, 27 C.3d 495 [modification is proper whether excessive judgment is attacked directly or collaterally]; *Greenup v. Rodman*, *supra*, 42 C.3d 830 [granting plaintiff option of accepting reduced

recovery or amending complaint, where judgment was reversed on issue of first impression]; *National Diversified Services v. Bernstein* (1985) 168 C.A.3d 410, 419, 214 C.R. 113.)

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

(2) *Illustrations.* The following cases are instructive:

David S. Karton, a Law Corp. v. Dougherty (2009) 171 C.A.4th 133, 151, 89 C.R.3d 506 [default judgment was void where amount awarded was based on plaintiff's errors in calculating interest on amount that was not sought in complaint and resulted in award that far exceeded original demand].

Hearn v. Howard (2009) 177 C.A.4th 1193, 1209, 99 C.R.3d 642 [complaint based on legal malpractice adequately notified defendant of damages sought by referencing amount of judgment lost in underlying action; however, award of attorneys' fees was properly stricken because neither complaint nor prayer for relief specified amount that was awarded].(5) (New) *Authority To Vacate Judgment and Accept Amended Complaint.* In *Julius Schifbaugh IV Consulting Service v. Avaris Capital* (2008) 164 C.A.4th 1393, 79 C.R.3d 910, defendant defaulted in a breach of contract action where plaintiff's complaint sought damages "in an amount not presently known ... but which ... exceeds the jurisdiction minimum of this court ... (\$ 25,000)." A default judgment was entered against defendant for a total of \$ 342,728, which included damages, prejudgment interest, attorneys' fees, and costs. After defendant requested reduction of the amount as beyond the trial court's jurisdiction, or alternatively that the judgment be set aside, the trial court vacated the default judgment in its entirety, vacated the underlying default, and permitted plaintiff to amend his complaint to specifically allege the amount of damages and directed that the new complaint be served on defendant. Defendant argued that the trial court exceeded its authority, and that the exclusive remedy was to reduce the default judgment to the amount pleaded. *Held*, order affirmed.

(a) The only specific dollar amount mentioned in plaintiff's complaint was the originally disputed amount of \$ 6,000. Otherwise, the complaint referred only to damages suffered in excess of the court's jurisdictional minimum, thus placing defendant on notice that plaintiff claimed damages of at least \$ 25,000. Accordingly, the amount awarded in excess of the demand was beyond the trial court's jurisdiction under C.C.P. 580, and the original default judgment was void as to an amount over that. (164 C.A.4th 1396.)

(b) Both *Greenup v. Rodman* (1986) 42 C.3d 822, 231 C.R. 220, 726 P.2d 1295, text, p. 585, and *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 C.A.4th 1161, 36 C.R.3d 663, text, p. 584, support the conclusion that, in the interest of fairness, the trial court has discretion to permit the plaintiff either to accept a reduced judgment or to amend the complaint putting the matter back in issue. Nothing precludes the trial court from vacating the underlying default. By vacating the default judgment and permitting the plaintiff to amend the complaint and relitigate, the underlying default is necessarily reopened. The plaintiff may then plead the desired amount, and the defendant gets another chance to avoid default and have a day in court. Thus, there was no evidence here that the trial court abused its discretion. (164 C.A.4th 1397.)



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VII. JUDGMENT BY DEFAULT

C. Notice of Damages Required Before Taking Default.

1. In General.

b. Prayer for Damages According to Proof.

6 *Witkin Cal. Proc. PWT* § 150

[§ 150] Prayer for Damages According to Proof.

In *Becker v. S.P.V. Const. Co.* (1980) 27 C.3d 489, 165 C.R. 825, 612 P.2d 915, an action alleging breach of contract and fraud, the prayer sought damages "in excess of \$ 20,000 ... or according to proof," punitive damages of \$ 100,000, and costs. Judgment by default was entered for \$ 26,457.50 in compensatory damages and \$ 2,500 in attorneys' fees and costs. *Held*, the judgment was invalid.

(a) Plaintiffs contended that the prayer was sufficient under C.C.P. 580 to give notice of potential liability for \$ 26,457.50; they argued that the statute requires notice of the type of relief sought rather than the specific amount. However, the language of C.C.P. 580 makes no such distinction; its plain meaning "encompasses both of these considerations." (27 C.3d 493, 494.) Three other statutes support this view: (1) C.C.P. 425.10 (amount of damages must be pleaded in actions other than for personal injury or wrongful death); (2) C.C.P. 585(1) (now C.C.P. 585(a); judgment on default may be entered only for "the principal amount demanded in the complaint"); (3) C.C.P. 585(2) (now C.C.P. 585(b); in noncontract actions, judgment may be awarded only "for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just"). (27 C.3d 494.)

(b) The notice requirement "would be undermined if the door were opened to speculation, no matter how reasonable it might appear in a particular case, that a prayer for damages according to proof provided adequate notice of a defaulting defendant's potential liability. ... Consequently, a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint." (27 C.3d 494.) It was irrelevant that the award of damages was within the total amount of compensatory and punitive damages demanded. Compensatory and punitive damages are different remedies in nature and purpose, and a demand for one is not a demand for the other or for both. (27 C.3d 494, 495.)

(c) The specific amount of damages alleged was \$ 20,000, and the default judgment was valid as to that amount. The award of an additional \$ 6,457.50 in compensatory damages was void, as was the award of \$ 2,500 in attorneys' fees, because the complaint did not pray for fees. (27 C.3d 494, 495.) (See *Schwab v. Rondel Homes* (1991) 53 C.3d 428, 435, 280 C.R. 83, 808 P.2d 226, *infra*, §154 [prayer for statutory damages according to proof but no less than \$ 250 was insufficient to comply with C.C.P. 425.11, *infra*, §154]; *Thorson v. Western Dev. Corp.* (1967) 251 C.A.2d 206,

213, 59 C.R. 299 [demand for damages according to proof combined with allegations of complaint gave sufficient notice]; *Ludka v. Memory Magnetics Int.* (1972) 25 C.A.3d 316, 323, 101 C.R. 615 [prayer for damages according to proof provided insufficient notice where complaint did not specify damages; distinguishing *Thorson*]; *Parish v. Peters* (1991) 1 C.A.4th 202, 216, 1 C.R.2d 836, *infra*, §154 [following *Schwab* and analyzing Supreme Court cases on notice of damages].)

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C. Notice of Damages Required Before Taking Default.

1. In General.

c. Default Entered as Discovery Sanction.

6 *Witkin Cal. Proc. PWT* § 151

[§ 151] Default Entered as Discovery Sanction.

C.C.P. 2023.030(d)(4) authorizes the entry of a default judgment against a party as a sanction for misuse of the discovery process. (See 2 *Cal. Evidence (4th), Discovery*, §257 et seq.)

In *Greenup v. Rodman* (1986) 42 *C.3d* 822, 231 *C.R. 220*, 726 *P.2d* 1295, plaintiff, a minority shareholder in R Corp., sued the majority shareholder, alleging conspiracy to defraud, breach of fiduciary duty, and other torts, causing damages "in a sum that exceeds the jurisdictional requirements of this court" (superior court, \$ 15,000 minimum). The only specific sum mentioned was in the prayer for \$ 100,000 punitive damages; all other damages were to be "subject to proof at time of trial" or "as the court deems just." Defendant answered and plaintiff commenced discovery, but defendant was recalcitrant throughout the process in both document production and deposition. After initial orders for sanctions, which defendant failed to pay, the trial judge granted plaintiff's motion to strike the answer and enter a default. One month later plaintiff filed a request for a default judgment, claiming a specific amount of damages. At the "prove-up" hearing, she offered evidence and the judge entered judgment for \$ 338,000 compensatory damages and \$ 338,000 punitive damages. Defendant appealed, contending that the statutory limit on damages in a default judgment (*C.C.P. 580*) applies to a default judgment entered as a discovery sanction. The Court of Appeal affirmed the judgment. *Held*, Court of Appeal reversed with directions to modify the trial court judgment.

(a) *Default judgment exceeding demand is void.* *Becker v. S.P.V. Const. Co.* (1980) 27 *C.3d* 489, 165 *C.R. 825*, 612 *P.2d* 915, *supra*, §150, affirmed the strict construction of *C.C.P. 580*, and Courts of Appeal have held that due process requires formal notice of potential liability. (42 *C.3d* 826.) The Legislature underscored the necessity of notice by adding *C.C.P. 425.11*, which provides that, in the single instance in which the amount of damages may not be specified in the complaint (personal injury actions), the plaintiff "shall give notice" of the amount of damages sought before obtaining a default judgment. (42 *C.3d* 827.)

(b) *Rule applies to default judgment as discovery sanction.* Plaintiff contended that *C.C.P. 580* applies only to "ordinary" defaults (presumably, those taken at the pleading stage); here, defendant answered, and argued that the second clause of *C.C.P. 580* should apply, i.e., the court may grant any relief consistent with the case made and embraced within the issue. (42 *C.3d* 827; see 4 *Cal. Proc. (5th), Pleading*, §497.) This contention is not persuasive.

(1) A long line of cases holds that a default occurs not only where there is a failure to answer, but also where an answer is filed and later stricken by the court. (42 C.3d 827.) "[U]nless and until the Legislature specifically provides a separate procedure for defaults after discovery sanctions, these sections remain the sole statutory procedures for default judgments. Indeed, in the present case the ex parte prove-up hearing was conducted pursuant to section 585, subdivision (b). We conclude that the damages awarded must be limited by the terms of the same section: when an answer is stricken as a sanction for the defendant's obstruction of discovery, it is as if no answer had been filed in the first instance." (42 C.3d 827, 828.)

(2) Due process "requires notice to defendants, whether they default by inaction or by wilful obstruction, of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose--at any point before trial, even after discovery has begun--between (1) giving up his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to defend at the cost of exposing himself to greater liability." (42 C.3d 829.)

(c) *Plaintiff is entitled to compensatory and punitive damages.* Although plaintiff stated no amount of damages in her prayer, *Becker* held that the allegations may cure a defective prayer. And here plaintiff alleged that she suffered damages in an amount that exceeded the jurisdictional minimum (\$ 15,000), thus giving sufficient notice to defendant that she claimed at least \$ 15,000 in compensatory damages. The judgment must be reduced to that sum. (42 C.3d 830.) Further, because plaintiff was properly awarded compensatory damages, she was entitled to recover punitive damages. However, the complaint prayed for punitive damages of \$ 100,000, and the judgment must be reduced to that sum. (42 C.3d 830.)

(d) *Plaintiff's option to amend on remand.* This appears to be the first reported decision to hold that a default judgment entered as a discovery sanction is subject to C.C.P. 580, and both plaintiff and the trial judge may have been unaware of plaintiff's option to correct the deficiency in her prayer. Hence, in the interest of fairness plaintiff should be allowed to forgo the reduced award and instead file an amended complaint. If she did so, defendants would be entitled to file a new answer; but if they continued to disobey discovery orders and thereby incurred another default judgment, plaintiff would be entitled to prove her damages up to the limits of her amended prayer. (42 C.3d 830.)

Greenup was followed in *Morgan v. Southern Calif. Rapid Transit Dist.* (1987) 192 C.A.3d 976, 237 C.R. 756, a personal injury action arising from a traffic accident in which defendant claimed its bus driver suffered an unforeseeable loss of consciousness. Defendant did not respond to plaintiff's interrogatory requesting the full name and address of a doctor who had examined the bus driver. After twice ordering defendant to respond and imposing monetary sanctions, the trial court struck defendant's answer, leading to a default judgment for \$ 90,000. On appeal, defendant contended that the amount of the judgment was in excess of the court's jurisdiction. *Held*, because plaintiff failed to serve the notice of damages required by C.C.P. 425.11 (infra, §154), the judgment was excessive and must be amended to conform to the limitations of C.C.P. 580.

(a) *Greenup* did not specifically address the unique situation of personal injury plaintiffs who are prohibited from including the amount of their demand in the complaint. Nevertheless, the due process considerations on which *Greenup* was based compel the conclusion that a plaintiff seeking default as a discovery sanction must provide the defendant with notice of the amount of damages being sought under C.C.P. 425.11. (192 C.A.3d 985.)

(b) Plaintiff argued that defendant was on notice of the damages claimed through discovery and settlement negotiations. However, under *Greenup* and *Becker*, "[t]he possibility the defendant could divine the amount of damages claimed through collateral sources does not satisfy due process." (192 C.A.3d 986.) Plaintiff urged that his sworn answers to interrogatories provided defendant with notice superior to a statement of damages under C.C.P. 425.11. This argument must be rejected for the following reasons: (1) C.C.P. 425.11 requires notice of damages in a discrete document; (2) use of any other document would be contrary to *Greenup* and *Becker*; and (3) using interrogatories and answers to determine the amount of damages claimed would unnecessarily embroil the courts in disputes over the interpretation of those documents. (192 C.A.3d 986, 987.) (See *Cummings Med. Corp. v. Occupational Med. Corp.*

(1992) 10 C.A.4th 1291, 1296, 13 C.R.2d 585, *infra*, §158 [following *Greenup* on applicability of C.C.P. 580 in cases where answer is stricken as discovery sanction]; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 C.A.4th 1161, 1175, 36 C.R.3d 663 [where default was entered as discovery sanction, complaint seeking damages "in an amount in excess of \$ 50,000" was ineffective to support default judgment of compensatory damages in excess of that amount; following *Greenup*]; *Reedy v. Bussell* (2007) 148 C.A.4th 1272, 1294, 56 C.R.3d 216 [trial court exceeded its jurisdiction in entering default judgments against defendant as discovery sanctions where petitions did not specify amount of damages]; for disapproval of *Morgan* on another point, see *Schwab v. Rondel Homes* (1991) 53 C.3d 428, 280 C.R. 83, 808 P.2d 226, *infra*, §154.)

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VII. JUDGMENT BY DEFAULT

C. Notice of Damages Required Before Taking Default.

1. In General.

d. Prayer on Dissolution Petition Form.

6 *Witkin Cal. Proc. PWT* § 152

[§ 152] Prayer on Dissolution Petition Form.

In re Marriage of Lippel (1990) 51 C.3d 1160, 276 C.R. 290, 801 P.2d 1041, involved a dissolution proceeding filed on former Judicial Council Form No. 1281 (now Judicial Council Form No. FL-100). The wife, A, checked the boxes indicating that there was no property to be divided and that she was not requesting spousal support. She also checked the box requesting child custody, but left blank the box calling for child support. The husband, R, was served with summons and a copy of the petition and defaulted. The trial court entered judgment awarding custody of their daughter K to A, with visitation rights to R, and ordering R to pay child support. Notice of entry of the judgment was served on R by mail, but he never received a copy of the judgment, and A never mentioned the support order to him.

During the next 16 years, R maintained a close relationship with K, purchasing clothes, school supplies, and other personal items, and paying for extracurricular activities such as dance classes. At times he took custody of K at A's request. Then San Francisco, which had furnished AFDC aid to A, sought statutory reimbursement by an assignment of R's wages. The trial court found that R owed \$ 18,200 to the county for reimbursement, and ordered a deduction of \$ 300 per month from his wages. R moved to vacate the judgment, the trial court denied the motion, and the Court of Appeal affirmed. *Held*, Court of Appeal decision reversed.

(a) *C.C.P. 580* provides that the relief granted to the plaintiff on the defendant's default cannot exceed that demanded in the complaint. This is a fundamental requirement of due process--a defendant must be given notice of the specific relief sought, in order to decide whether to appear and defend. "The instant case is a prime example." The petition served on R sought no monetary relief, and there was no incentive for him to appear and defend. (51 C.3d 1166.)

(b) Under the plain language of *C.C.P. 580*, a "plaintiff cannot be granted more relief than is asked for in the complaint." (51 C.3d 1166.) *C.C.P. 580* deprives a trial court of jurisdiction to enter a judgment against a defaulting defendant that awards greater relief than that sought in the plaintiff's complaint. Here, R's right to notice and an opportunity to be heard was clearly violated by the judgment ordering child support. (51 C.3d 1167.)

(c) An old line of Supreme Court cases held that a prayer for general relief was sufficient to put a defendant on

notice of a possible support award, even though no request for support was made. In light of the Family Law Act and Judicial Council pleading forms, these cases can no longer be supported. (51 C.3d 1169.)

(d) The standard form dissolution petition requires the petitioner to check boxes indicating the remedy or relief requested. Coupled with the requirement that the respondent be served with a copy of the petition, the manner in which the boxes are checked, or not checked, puts the respondent on notice of the specific relief sought. (51 C.3d 1169.) The list of boxes is accompanied by language requesting the court to grant the judgment specified, make injunctive and other orders as may be proper, and grant the relief indicated by the checked boxes. (51 C.3d 1170.) This language "relates to the form of remedy or judgment, not to additional relief as to issues for which a specific box already exists." (51 C.3d 1170.) In light of these pleading requirements, the idea that a prayer for general relief supports an award of support is not persuasive. (51 C.3d 1170, 1171.)

(e) San Francisco contended that former C.C. 4700 (now *Family C. 4001*) empowering a court to order parents to pay child support "in any proceeding where there is at issue the support of a minor child," made the present order valid. However, the statute stating that the court "may" order child support did not permit the court to dispense with constitutional notice requirements. San Francisco also argued that, in the "totality of the circumstances," the summons provided the father with notice. But, like the statute, the summons simply stated that the court had power to award child support; it did not give notice that such support was being sought. (51 C.3d 1171.)

In re Marriage of Andresen (1994) 28 C.A.4th 873, 34 C.R.2d 147, followed *Lippel* and extended its reasoning to permit a default judgment dividing marital property despite the absence of a demand specifying the amount sought. The wife, E, filed a standard form petition for dissolution of the parties' marriage. She checked the box stating that the marital assets and obligations were listed in the property declaration attachment, and the box requesting that "property rights be determined." The standard form community property declaration contained instructions providing that values and a proposed division of the property need not be included. The husband, C, defaulted, and a default judgment was entered. C then moved to set aside the default and default judgment. The trial court denied the motion but vacated the judgment, on the ground that it gave relief beyond the scope of E's pleadings by requiring C to execute a note as reimbursement for separate monies E had contributed to the marriage. Subsequently, a judgment dissolving the marriage was entered, and later the court issued orders on reserved issues, providing for an in-kind division of the community assets and liabilities and an equalizing payment by C to E. C moved to set aside his default and the orders on reserved issues, contending that they were all void because E's predefault pleadings failed to (a) allege a value for the items listed in the property declaration; (b) identify certain assets that were ultimately awarded to E; and (c) request an equalizing payment. The trial court denied this motion. *Held*, affirmed.

(a) In general, when a defendant has defaulted, C.C.P. 580 bars granting relief to the plaintiff in excess of that demanded in the complaint. This guarantees defaulting parties adequate notice of the maximum judgment that may be assessed against them, permitting them to make an informed decision about whether to appear and defend. (28 C.A.4th 878.)

(b) "As we read *Lippel*, due process is satisfied and sufficient notice is given for section 580 purposes in marital dissolution actions by the petitioner's act of checking the boxes and inserting the information called for on the standard form dissolution petition which correspond or relate to the allegations made and the relief sought by the petitioner. The opinion does not suggest that any greater specificity is required. Although we acknowledge the Supreme Court had no need to address the point, we find nothing in the language of *Lippel* which compels a conclusion that the amount of the relief requested, as contrasted with the type of the relief requested, must be inserted in the relevant form if the form does not itself expressly demand such data." (28 C.A.4th 879.)

(c) In the present case, because E properly and fully completed the petition form and its attachments, C was given adequate notice that she sought a division of the property and liabilities identified in her papers. If C desired to be heard on the subject of the valuation and division of the listed items, he should have appeared. (28 C.A.4th 879.) "This result is consistent with pertinent fundamental family law principles. Except under limited circumstances which are irrelevant

here, the trial court, in its judgment of dissolution or at a later time if it expressly reserves jurisdiction to do so, *must* value and divide the community estate of the parties equally. ... Thus, when a petitioner asks the court to determine the rights of the parties as to specified property, the respondent is necessarily on notice that the court will undertake to assess and then divide the alleged community equally between the parties. If the respondent is willing to rely upon the trial court's independent obligation to accurately value and fairly allocate the community estate as a protection against any attempt by the petitioner to overreach, the respondent need not file a response to the petition. If the respondent disagrees with any allegation of the petition or is concerned about how the court will value an asset or liability identified in the petition or divide the whole of the property placed in issue under the petition, then he or she must file a response to preserve the right to appear before the court and present evidence and argument." (28 C.A.4th 880.)

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VII. JUDGMENT BY DEFAULT

C. Notice of Damages Required Before Taking Default.

1. In General.

e. Action for Accounting.

6 *Witkin Cal. Proc. PWT* § 153

[§ 153] Action for Accounting.

In *Ely v. Gray* (1990) 224 C.A.3d 1257, 274 C.R. 536, plaintiff brought an action for dissolution of two partnerships and for an accounting in both, without specifying or estimating a sum due. On defendant's failure to answer, plaintiff requested a default judgment without specifying an amount sought. The court heard testimony from plaintiff detailing the sums claimed to be due, and rendered judgment in his favor for \$ 44,618.44. *Held*, that part of the judgment decreeing dissolution affirmed, but judgment for money reversed.

(a) Entry of a default judgment that exceeds the relief requested is an act in excess of jurisdiction; due process requires notice to a defaulting defendant of the amount claimed. (224 C.A.3d 1260, 1261.) But the nature of an accounting precludes specifying an amount; specification of a precise amount may be a ground for rejecting the action (see 5 *Cal. Proc.* (5th), *Pleading*, §§819, 820). (224 C.A.3d 1262.) Although there are cases where default judgments have been entered in actions for accounting (see, e.g., *Weiss v. Blumencranc* (1976) 61 C.A.3d 536, 131 C.R. 298), "we have found no case which attempts to rectify the seemingly absolute requirement of notice to the defendant with the required vagueness of an accounting." (224 C.A.3d 1261.)

(b) However, a plaintiff is not precluded from including figures in a complaint requesting a partnership accounting; these actions often include an estimate of the sum due, without specifying an absolute amount. Hence, one possible solution is that a plaintiff "may be able to include in the complaint or prayer for relief an estimate of the amount due him, be willing to be bound by that amount, and receive a default judgment limited to that amount." (224 C.A.3d 1262.)

(c) In the present case, the complaint, the prayer, and the request for entry of default did not give notice. In the analogous situation of a personal injury action, *C.C.P.* 425.10 (infra, §154) prohibits statement of the amount in the complaint, but *C.C.P.* 425.11 (infra, §154) requires notice of the amount a sufficient time before the hearing on the entry of default for the defendant to respond. (224 C.A.3d 1262.) Thus, a plaintiff seeking an accounting may provide "postcomplaint and predefault notice to the defendant of the amount plaintiff will seek to prove due him if the defendant defaults." (224 C.A.3d 1263.) "We do not find such a requirement burdensome since a plaintiff must be able, as this plaintiff was, to prove some level of defendant's financial liability to receive an award of damages upon default. ... This solution was available to plaintiff and common sense should have led him to act accordingly even without any

awareness of the illustrative procedures" of *C.C.P. 425.11*. (224 *C.A.3d* 1263.)

Cassel v. Sullivan, Roche & Johnson (1999) 76 *C.A.4th* 1157, 90 *C.R.2d* 899, declined to follow *Ely*. Plaintiff had sought an accounting and valuation of his interest in defendant law partnership following his withdrawal. Plaintiff first secured judgment by an entry of default against defendant, then by proving his damages and obtaining a default judgment. This default judgment was set aside because plaintiff had not served defendant with a statement of damages. Defendant then participated fully in a second hearing that resulted in entry of a second identical judgment against defendant. *Held*, the trial court's order setting aside the first default judgment was reversed, that judgment was ordered reinstated, and the second judgment was ordered vacated.

(a) *In re Marriage of Lippel* (1990) 51 *C.3d* 1160, 276 *C.R.* 290, 801 *P.2d* 1041, *supra*, §152, concerning proper notice of child support being sought, and *In re Marriage of Andresen* (1994) 28 *C.A.4th* 873, 34 *C.R.2d* 147, *supra*, §152, concerning in-kind division of community assets and liabilities in a dissolution, taken together, permit a default judgment to stand despite the absence of a demand specifying the amount sought when the parties are both aware of the property at stake, the respondent knows that petitioner seeks a division of that property, and the court is statutorily bound to value and divide the property equally. A respondent who thus chooses to default does so with the expectation that he or she will encounter no surprises in the judgment "which will reflect the theretofore unspecified, but reasonably calculable, amount of relief." (76 *C.A.4th* 1162, 1163.)

(b) Here, defendant was in possession of the partnership agreement, which set out specific methods for calculating a withdrawing partner's interest. The remaining partners were in possession of information at least equal to that possessed by plaintiff regarding the partnership's financial status from which plaintiff's interest would be calculated. Thus, defendant could precisely calculate the amount for which it could be liable if it chose to default. (76 *C.A.4th* 1163.) Under these circumstances and in light of *Lippel* and *Andresen*, *Ely* "is not analytically sound." (76 *C.A.4th* 1164.)

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C. Notice of Damages Required Before Taking Default.

2. Service of Statement of Damages.

a. Personal Injury and Wrongful Death Cases.

1. Notice of Damages.

6 *Witkin Cal. Proc. PWT* § 154

[§ 154] Notice of Damages.

In actions for personal injury or wrongful death, the plaintiff is prohibited from stating in the complaint the amount of damages sought. (*C.C.P. 425.10(b)*.) However, the defendant may request a statement of the nature and amount of damages, and, if the plaintiff does not respond, may petition the court to order the plaintiff to respond. (*C.C.P. 425.11(b)*.) Even if the defendant makes no request, the plaintiff must serve the statement before a default may be taken. (*C.C.P. 425.11(c)*; *Hamm v. Elkin* (1987) 196 C.A.3d 1343, 1346, 242 C.R. 545 [service is required before entry of default; service after default but before rendition of judgment was untimely].) If the defendant has not appeared, the statement must be served in the same manner as a summons; if the defendant has appeared, the statement must be served in the manner required by *C.C.P. 1010* for subsequent notices and papers (*supra*, §9). (*C.C.P. 425.11(d)*); see *Scognamillo v. Herrick* (2003) 106 C.A.4th 1139, 1146, 131 C.R.2d 393 [*C.C.P. 425.11* does not require that plaintiff file statement of damages with court; where plaintiff personally served statement on defendant, failure to file copy with court did not render default void]; 4 *Cal. Proc.* (5th), *Pleading*, §511 et seq.)

The damages statement required by *C.C.P. 425.11* may be combined with the punitive damages statement required by *C.C.P. 425.115* (*infra*, §159). (*C.C.P. 425.11(e)*, 425.115(e).) The Judicial Council has adopted Judicial Council Form No. CIV-050 [Statement of Damages (Personal Injury or Wrongful Death)] for mandatory use.

A default judgment entered without giving such notice to the defendant is void. (*Stevenson v. Turner* (1979) 94 C.A.3d 315, 319, 156 C.R. 499 [notice gives defendant "last clear chance" to avoid default judgment]; *Petty v. Manpower* (1979) 94 C.A.3d 794, 798, 156 C.R. 622; *Lopez v. Fancelli* (1990) 221 C.A.3d 1305, 1310, 271 C.R. 87; *Parish v. Peters* (1991) 1 C.A.4th 202, 210, 1 C.R.2d 836 [where service was by publication, and former *C.C.P. 585(c)* required no entry of default (see *infra*, §171), due process required notice equivalent to statement of damages].)

In *Uva v. Evans* (1978) 83 C.A.3d 356, 147 C.R. 795, 6 *Summary* (10th), *Torts*, §1749, an action to recover for injuries inflicted by a dog bite, the complaint prayed for \$ 30,000, in violation of *C.C.P. 425.10*. A default judgment was entered against defendant, who argued on appeal that *C.C.P. 425.10* and 580 (*supra*, §149) operated to deprive the trial court of jurisdiction to render a default judgment. *Held*, judgment affirmed. The jurisdictional issue need not be

resolved on these facts. "Right or wrong, the complaint filed and served herein did contain a recitation of the damages sought and the judgment did not exceed the amount requested." (83 C.A.3d 360.) Defendant could have avoided his present problems by moving to strike the request for damages, which would have prevented entry of a default. (83 C.A.3d 360, footnote 2.) (See *Cummings Med. Corp. v. Occupational Med. Corp.* (1992) 10 C.A.4th 1291, 1297, 13 C.R.2d 585, *infra*, §158 [following *Uva*].)

In *Schwab v. Rondel Homes* (1991) 53 C.3d 428, 280 C.R. 83, 808 P.2d 226, plaintiffs filed a civil rights action under former C.C. 54.1(b)(5) (now C.C. 54.1(b)(6)), alleging that defendants had refused to rent them an apartment because they had a signal dog. The prayer requested damages for emotional distress and other damages "in amount according to proof," but in sum "no less than \$ 250," and punitive damages of \$ 500,000. Defendants defaulted, and the trial court awarded each plaintiff \$ 50,000 and punitive damages of \$ 100,000. The trial court then set aside the default and default judgment because of plaintiffs' failure to serve the statement of damages required by C.C.P. 425.11. The Court of Appeal reversed the order setting aside the default, but limited the default judgment to \$ 25,000 per plaintiff for general damages. The judgment for punitive damages of \$ 100,000 was affirmed. *Held*, judgment of the Court of Appeal reversed.

(a) Plaintiffs, relying on *Morgan v. Southern Calif. Rapid Transit Dist.* (1987) 192 C.A.3d 976, 237 C.R. 756, *supra*, §151, contended that because the action was brought in the superior court defendants were on notice that plaintiffs claimed at least the jurisdictional minimum in damages. The *Morgan* holding, however, is based on an overly broad interpretation of *Greenup v. Rodman* (1986) 42 C.3d 822, 231 C.R. 220, 726 P.2d 1295, *supra*, §151, and is unsound, as demonstrated by the present case. Because plaintiffs' claim of \$ 500,000 in punitive damages had itself established the superior court's jurisdiction, "neither a layperson nor an experienced attorney could be presumed to know the amount of general damages plaintiffs were seeking." (53 C.3d 434.) Accordingly, *Morgan* is disapproved "to the extent that it suggests that a default judgment may be entered in the absence of notice in the complaint or a 'statement of damages' of the special and general damages sought." (53 C.3d 434.)

(b) Other Court of Appeal decisions, contrary to the *Morgan* view, have not presumed notice of a minimum jurisdictional amount in determining whether the requirement of C.C.P. 425.11 was met. (53 C.3d 434.) "We agree with these decisions." In C.C.P. 425.11, "the use of the word 'notice' and the terms of art 'special and general damages' implies that the Legislature intended that a defendant be given actual notice of the special and general damages claimed by the plaintiff." (53 C.3d 435; on subsequent amendment of statute deleting reference to special and general damages, see *infra*, §156.)

One justice strongly dissented and asserted that *Morgan* was correctly decided and consistent with *Greenup*. (53 C.3d 436, 437, 440.)

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a. Personal Injury and Wrongful Death Cases.

2. Effect of Other Claims.

6 *Witkin Cal. Proc. PWT* § 155

[§ 155] Effect of Other Claims.

Where nonpersonal injury claims are "closely tied" to personal injury claims, *C.C.P.* 425.10 and 425.11 apply to all the causes of action. (*Jones v. Interstate Recovery Service* (1984) 160 C.A.3d 925, 930, 206 C.R. 924; *Schwab v. Rondel Homes* (1991) 53 C.3d 428, 432, 280 C.R. 83, 808 P.2d 226, supra, §154 [statutes do not apply if emotional distress claim is "incidental" to cause of action, but they did apply where plaintiffs' emotional distress claims lay "at the heart of their action"]; cf. *Barragan v. Banco BCH* (1986) 188 C.A.3d 283, 304, 232 C.R. 758 [distinguishing *Jones*; false imprisonment cause of action was "not so intertwined" with other causes of action as to require notice under *C.C.P.* 425.11].)

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3. Special and General Damages.

6 *Witkin Cal. Proc. PWT* § 156

[§ 156] Special and General Damages.

In *Uva v. Evans* (1978) 83 C.A.3d 356, 361, 147 C.R. 795, supra, §154, the court determined that defendant was not prejudiced by plaintiff's failure to state the amount of special damages. (83 C.A.3d 361.) Later cases have held that the amount of both special and general damages must be included in the statement of damages for a valid default judgment to be entered. (*Schwab v. Rondel Homes* (1991) 53 C.3d 428, 432, 280 C.R. 83, 808 P.2d 226, supra, §154; *Plotitsa v. Superior Court* (1983) 140 C.A.3d 755, 761, 762, 189 C.R. 769; *Jones v. Interstate Recovery Service* (1984) 160 C.A.3d 925, 929, 206 C.R. 924 [because amount of general damages usually correlates to special damages, defendant is entitled to statement of specials in order to make informed decision on defending against or ignoring plaintiff's claims; rejecting view of *Uva*].)

These cases arose under a former version of C.C.P. 425.11, which specifically required that before a default could be taken the plaintiff had to "give notice to the defendant of the amount of special and general damages sought to be recovered." As amended, the statute provides that the plaintiff "shall serve the statement on the defendant" (C.C.P. 425.11(c)) and to require the statement to specify only "the nature and amount of damages being sought" (C.C.P. 425.11(b)). However, given the significance of the distinction between special and general damages, the "nature" of the damages being sought should include whether they are special or general. (See 6 *Summary* (10th), *Torts*, §1549; 5 *Cal. Proc.* (5th), *Pleading*, §933 et seq.)

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4. Time for Response.

6 *Witkin Cal. Proc. PWT* § 157

[§ 157] Time for Response.

Two cases have held that a defendant is entitled to the same period of time to respond to service of a statement of damages under *C.C.P. 425.11* as is allowed to respond to an amended complaint under *C.C.P. 586(a)(1)* (*supra*, §143); i.e., default may not be entered until 30 days after service. (*Plotitsa v. Superior Court* (1983) 140 C.A.3d 755, 761, 189 C.R. 769; *Twine v. Compton Supermarket* (1986) 179 C.A.3d 514, 517, 518, 224 C.R. 562.) However, this view was rejected in *Connelly v. Castillo* (1987) 190 C.A.3d 1583, 1589, 1590, 236 C.R. 112, which held that only "reasonable" notice is required, and that a 27-day notice period was reasonable. The Supreme Court has apparently approved the "reasonable notice" interpretation of the statute. (See *Schwab v. Rondel Homes* (1991) 53 C.3d 428, 435, 280 C.R. 83, 808 P.2d 226, *supra*, §154 [defendant is entitled to "a reasonable period of time before default may be entered"]; *Parish v. Peters* (1991) 1 C.A.4th 202, 208, 1 C.R.2d 836 [citing *Schwab* and *Connelly*]; *California Novelties v. Sokoloff* (1992) 6 C.A.4th 936, 944, 945, 7 C.R.2d 795 [citing *Schwab*; 17-day notice period was sufficient]; *Schwab v. Southern Calif. Gas Co.* (2004) 114 C.A.4th 1308, 1324, 8 C.R.3d 627 [cross-complainants' service of statement of damages on defendant 9 days before default judgment hearing was insufficient because it gave defendant no time to respond; following *California Novelties*].)

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b. Punitive Damages Claims.

1. Requirement of Notice of Amount Sought.

6 *Witkin Cal. Proc. PWT* § 158

[§ 158] Requirement of Notice of Amount Sought.

C.C.P. 425.10(b) (supra, §154) prohibits stating the amount of "actual or punitive" damages in actions for personal injury or wrongful death. In addition, *C.C. 3295(e)* (5 *Cal. Proc.* (5th), *Pleading*, §917) provides broadly that "[n]o claim for exemplary damages shall state an amount or amounts."

In *Wiley v. Rhodes* (1990) 223 *C.A.3d* 1470, 273 *C.R.* 279, a complaint alleging that defendants improperly charged and retained a \$ 20,000 fee for arranging a home refinance loan sought \$ 20,000 general damages plus interest, unspecified punitive damages, and unspecified costs. After entry of default and a hearing on damages, the trial judge awarded plaintiff \$ 28,399.88 general damages including interest, \$ 100,000 punitive damages, and \$ 3,808 costs including attorneys' fees. *Held*, the punitive damage award violated due process by failing to provide defendant advance notice of the specific amount of punitive damages sought.

(a) *C.C. 3295(e)* precludes a claim for punitive damages from stating an amount, but does not specify how a plaintiff should notify the defendant so as to avoid the jurisdictional and due process objections to a default judgment in excess of the amount demanded. (223 *C.A.3d* 1472.) Nevertheless, plaintiff should have notified defendant of the punitive damages sought before requesting entry of default; nothing in *C.C. 3295(e)* prohibits a plaintiff from giving the defendant notice separate from the complaint. (223 *C.A.3d* 1473, 1474, footnote 4.)

(b) Allegations in the complaint claiming entitlement to punitive damages "appropriate to punish or set example of defendants" were insufficient to satisfy due process; this general allegation is not reasonably calculated to apprise the defendant of potential liability for punitive damages if judgment is taken by default. (223 *C.A.3d* 1474.)

In *Cummings Med. Corp. v. Occupational Med. Corp.* (1992) 10 *C.A.4th* 1291, 1298, 13 *C.R.2d* 585, the seller of a medical center sued the purchaser for failure to make the first installment payment under a promissory note. Defendant cross-complained, alleging misrepresentation of the center's financial condition and violation of plaintiff's covenant not to compete. The trial court struck plaintiff's complaint and answer to the cross-complaint as a discovery sanction, and entered a default judgment in defendant's favor, awarding compensatory and punitive damages. The cross-complaint

specified the amount of punitive damages sought, and plaintiff admitted receiving actual notice of that amount. *Held*, plaintiff received adequate notice of the punitive damages. Plaintiff argued that, because the statement of punitive damages in the cross-complaint violated C.C. 3295(e), it "could ignore it." However, plaintiff's reliance on *Schwab v. Rondel Homes* (1991) 53 C.3d 428, 435, 280 C.R. 83, 808 P.2d 226, *supra*, §154, was misplaced; there, the court held the notice of damages in the complaint insufficient. The appropriate precedent is *Uva v. Evans* (1978) 83 C.A.3d 356, 147 C.R. 795, *supra*, §154, in which a statement of damages violating C.C.P. 425.10 was held sufficient to notify the defaulting party of the damages sought for purposes of taking default. (10 C.A.4th 1297.) Where, as here, the defaulting party admits receiving actual notice of the punitive damages "it would be a travesty of justice, much less logic," to hold that the defaulting party did not have actual notice. (10 C.A.4th 1298.)

Of course, aside from the complications created by C.C.P. 425.10(b) and C.C. 3295(e), the usual rules applicable to damages recoverable on default apply to punitive damage awards. (See *Gudarov v. Hadjieff* (1952) 38 C.2d 412, 416, 240 P.2d 621 [punitive damage award was struck from default judgment, where prayer sought only dollar amount and allegations of complaint supported only compensatory damages]; *Greenup v. Rodman* (1986) 42 C.3d 822, 830, 231 C.R. 220, 726 P.2d 1295, *supra*, §151 [punitive damage award reduced to amount demanded]; *Weiss v. Blumencranc* (1976) 61 C.A.3d 536, 542, 131 C.R. 298, citing the text [default judgment for punitive damages affirmed, where award was within demand].)

An unusual situation was presented in *Ostling v. Loring* (1994) 27 C.A.4th 1731, 1742, 1750, 33 C.R.2d 391. The complaint alleged wrongful destruction of trees on plaintiffs' property and sought \$ 50,000 in actual damages, trebled by statute. Defendant defaulted, and the trial judge entered judgment awarding \$ 150,000 in actual damages. *Held*, this was error. The award was insupportable because the complaint sought only \$ 50,000 in actual damages, and the enhanced damages were punitive in nature. (27 C.A.4th 1741, 1742.) However, the complaint notified defendant of the prospect of statutory damages, and while it did not specify the statute under which they were sought, it was sufficient to put defendant on notice to inquire which statutes might apply. Double damages were mandatory under C.C. 3346 (wrongful injury to trees; see 6 *Summary* (10th), *Torts*, §1733), and hence plaintiffs could recover \$ 100,000. Treble damages were not recoverable, because they were discretionary (see 6 *Summary* (10th), *Torts*, §1734) and required a showing of culpability that plaintiffs did not make. (27 C.A.4th 1750.)

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2. Service of Statement of Damages.

b. Punitive Damages Claims.

2. Damages Statement Preserves Right To Recover.

6 *Witkin Cal. Proc. PWT § 159*

[§ 159] Damages Statement Preserves Right To Recover.

While no claim for punitive damages may state the amount or amounts demanded, due process requires that notice of that amount be given before a default judgment may be awarded for those damages. (See *supra*, §158.) However, a plaintiff may preserve the right to seek punitive damages on a default judgment by serving on the defendant a specified statement setting forth the amount of those damages. (*C.C.P. 425.115.*)

This statement must be served before default may be taken whenever the motion for default judgment includes a request for punitive damages. (*C.C.P. 425.115(f).*) The punitive damages statement may be served as part of the damages statement required by *C.C.P. 425.11* in personal injury and wrongful death cases (*supra*, §154 et seq.). (*C.C.P. 425.11(e), 425.115(e).*)

If the defendant appears in the action, the plaintiff is not limited to the amount set forth in the punitive damages statement. (*C.C.P. 425.115(c).*)

The Judicial Council has adopted Judicial Council Form No. CIV-050 [Statement of Damages (Personal Injury or Wrongful Death)] for mandatory use in personal injury and wrongful death actions.

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D. Procedure on Clerk's Entry of Default.

1. Nature of Clerk's Power.

6 *Witkin Cal. Proc. PWT* § 160

[§ 160] Nature of Clerk's Power.

The clerk "shall enter the default" if the conditions (service and no appropriate response) exist. (*C.C.P.* 585(a), (b), (c); see *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §16.19 et seq.) The clerk's duty is purely ministerial, and is limited by the statutory conditions. It is true that the clerk must ascertain whether these conditions exist, i.e., whether the action is one in which the clerk may act alone, whether summons was served, and whether the time for response has elapsed. (See *supra*, §138 et seq.) However, these matters must be determined from the face of the record; the clerk must enter the default if they appear there, and refrain from entering it if they do not. The clerk may not take outside evidence, or make a judicial determination of disputed matters not apparent on the face of the record. "In the performance of the functions devolved upon him by that subdivision the clerk acts ministerially. He exercises no judicial functions, but is only an agent by whom the judgment is written out and placed upon the record. Consequently, he must conform strictly to the provisions of the statute or his proceedings will be void." (*Farrar v. Steenbergh* (1916) 173 C. 94, 96, 159 P. 707; see *Bristol Convalescent Hosp. v. Stone* (1968) 258 C.A.2d 848, 862, 66 C.R. 404 [entry of default is "a ministerial duty performed by the clerk"]; *Goddard v. Pollock* (1974) 37 C.A.3d 137, 143, 112 C.R. 215 [clerk "has no authority whatever to determine the sufficiency, either as to the substance or form, of a pleading on file"]; *Baske v. Burke* (1981) 125 C.A.3d 38, 45, 177 C.R. 794 [clerk in possession of responsive pleading has no authority to enter default]; cf. *Barragan v. Banco BCH* (1986) 188 C.A.3d 283, 298, 232 C.R. 758, *supra*, §141 ["We would like to think that in spite of bureaucracy, a clerk entering a default is permitted to exercise his or her common sense and ignore a demurrer that is more than moribund"].)

In *Rose v. Leland* (1912) 20 C.A. 502, 129 P. 599, plaintiff sought mandamus to compel the clerk to enter the defendants' default on the ground that their answer was insufficient. In denying the writ, the court said: "[C]onceding the answer to be defective, irregular, or insufficient to constitute a defense, the clerk possesses no judicial power to pass thereon. The question as to the sufficiency of the answer was one for the court to determine upon a motion for judgment upon the pleadings, or motion to strike the purported answer from the files. ... The clerk in entering a default acts ministerially, and in no case is he warranted in making such entry where his authority so to do depends upon a determination of the sufficiency, either as to the substance or form, of a document on file purporting to constitute an answer to the complaint." (20 C.A. 503.) (See *Potts v. Whitson* (1942) 52 C.A.2d 199, 207, 125 P.2d 947 [entry of default was void, where it was based on clerk's conclusion that answer was insufficient].)

In *Wisdom v. Ramirez* (1985) 177 C.A.3d Supp. 1, 222 C.R. 923, defendant responded to the complaint by filing a declaration in opposition to plaintiffs' application for a preliminary injunction, and his default was subsequently entered. On appeal from an order denying his motion to vacate the entry and set aside the ensuing judgment, defendant argued that the document he had filed should be considered as if it were an answer. *Held*, affirmed. Under the settled rule stated in *Rose, Potts, Bristol, and Goddard*, the clerk "was not authorized to peruse the document in question to determine whether or not it constituted an answer or should be construed as one. Instead, the clerk was entitled to rely on the document's label in making the determination whether an answer had been filed by defendant. ... Nothing in the label here would have alerted a reasonable clerk that the document was intended to be an answer to the complaint." (177 C.A.3d Supp. 8.)

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D. Procedure on Clerk's Entry of Default.

2. Application and Affidavit.

6 *Witkin Cal. Proc. PWT* § 161

[§ 161] Application and Affidavit.

The clerk "shall enter" the default "upon written application of the plaintiff." (*C.C.P. 585(a)*, (b), and (c).) The application must be made on Judicial Council Form No. CIV-100 [Request for Entry of Default], or, in family law cases, on Judicial Council Form No. FL-165 [Request to Enter Default]. (See *C.E.B.*, 2 *Civil Proc. Before Trial* 3d, §38.33 et seq.; *Cal. Civil Practice*, 3 *Procedure*, §18:18; on family law practice, see *C.E.B.*, *Practice Under the California Family Code*, §14:9 et seq.; *Cal. Civil Practice*, *Family Law Litigation*, §14:10; 11 *Summary* (10th), *Husband and Wife*, §101; on federal procedure, see *F.R. Civ. P.*, *Rule 55(a)*; 21A *Federal Procedure*, L.Ed., §51:48.)

The application must be accompanied by an affidavit of notice to the defendant. (*C.C.P. 587*, *infra*, §162.) An application involving an action on a contract or judgment for money or damages (*infra*, §165) must include or be accompanied by an affidavit "stating facts showing that the action is or is not" subject to the provisions of *C.C. 1812.10* (prohibiting special venue provision in retail installment contract; see 4 *Summary* (10th), *Sales*, §289) or *C.C. 2984.4* (prohibiting special venue provision in automobile sales contract; see 3 *Cal. Proc.* (5th), *Actions*, §845). (*C.C.P. 585.5*.) Judicial Council Form No. CIV-100 includes spaces for the affidavit of notice to the defendant and the declaration required by *C.C.P. 585.5*. Judicial Council Form No. FL-165 includes space for the affidavit of notice.

Where the application is under *C.C.P. 585(a)* and the contract sued on calls for attorneys' fees without specifying the amount, in order to recover fees the plaintiff must file with the application a written request to have the fees fixed by the court. (*C.C.P. 585(a)*; *infra*, §166.)

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3. Notice to Defendant.

6 *Witkin Cal. Proc. PWT* § 162

[§ 162] Notice to Defendant.

(1) *Former Law: Notice Not Required.* Originally there was no requirement that the plaintiff's attorney notify the defendant's attorney that he or she intended to take a default. However, failure to do so was usually a sufficient ground for setting aside the default under *C.C.P.* 473. In *Farrar v. Steenbergh* (1916) 173 C. 94, 159 P. 707, the court said: "The plaintiff's attorney had previously favored the defendants' attorney by extensions of time to answer. He had good cause to believe that the relations between them were friendly and kindly, and no cause to suspect treachery or deceit. Attorneys do not usually take defaults against opposing attorneys with whom they are on friendly terms, without giving information thereof." (173 C. 98.) (See *Dahlin v. Moon* (1956) 141 C.A.2d 1, 5, 296 P.2d 344, citing the text [affirming order setting aside default]; *Smith v. Los Angeles Bookbinders Union No. 63* (1955) 133 C.A.2d 486, 500, 284 P.2d 194, citing the text [same]; *Frank E. Beckett Co. v. Bobbitt* (1960) 180 C.A.2d Supp. 921, 926, 4 C.R. 833, citing the text; *Lynch v. Betts* (1962) 198 C.A.2d 755, 758, 18 C.R. 345, citing the text; 28 A.L.R.3d 1383 [failure to give notice of application for default judgment where notice is required only by custom]; 1 *Cal. Proc.* (5th), *Attorneys*, §540 [violation of known custom]; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §162 [reliance on opposing counsel as ground for relief under *C.C.P.* 473]; 73 A.L.R.3d 1250 [statute or rule requiring notice to party who has "appeared"].)

(2) *Current Law: Mailed Notice.* *C.C.P.* 587 requires notice as follows:

(a) A copy of the application for entry of default or for judgment on the default must be mailed to the defendant's attorney of record, or if none, to the defendant at his or her last known address. (See *Slusher v. Durrer* (1977) 69 C.A.3d 747, 755, 138 C.R. 265 [plaintiff and counsel must make reasonably diligent search to ascertain defendant's mailing address].)

(b) The application for entry of default or for judgment on the default must include an affidavit stating the fact and the date of mailing. If no address of the defendant is known to the plaintiff or the plaintiff's attorney, the affidavit must state that fact. The application may not be considered unless the affidavit is filed. (On required forms, see *supra*, §161.)

(c) The nonreceipt of the notice will "not invalidate or constitute ground for setting aside any judgment." (See *infra*, §180.)

C.C.P. 587 "was designed to prevent the taking of the default of an unwary litigant, to minimize the possibility that a default might be taken of one who intended to defend on the merits, and to reduce the incidence of motions for relief under *Code of Civil Procedure* section 473 or under the equity power of the court." (*Davis v. Thayer* (1980) 113 C.A.3d 892, 907, 170 C.R. 328.) But there is no requirement of *advance notice*, and the notice is commonly mailed immediately before requesting default. (See C.E.B., 3 Civil Proc. Before Trial 3d, §56.31.)

In *Bellm v. Bellia* (1984) 150 C.A.3d 1036, 198 C.R. 389, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §190, the court affirmed a denial of relief from the entry of a default without notice to opposing counsel, despite the fact that plaintiff's counsel had been in communication with defense counsel concerning another case. Citing cases arising under former law, and without mentioning *C.C.P. 587*, the court stated: "While as a matter of professional courtesy counsel should have given notice of the impending default, and we decry this lack of professional courtesy ... counsel was under no legal obligation to do so. ... By taking a default without giving notice, counsel took the risk that the trial court would grant relief from the default ... , but the failure to notify did not *require* the court to grant relief." (150 C.A.3d 1038.)

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(2) *Current Law: Mailed Notice.* See *Rodriguez v. Henard* (2009) 174 C.A.4th 529, 536, 94 C.R.3d 313, citing the text [although zip code for defendant in plaintiff's notice was incorrect, mailing and affidavit requirements were otherwise met; where plaintiffs' attorney told defendants and defense counsel of plaintiffs' intention to obtain default and date of prove-up hearing, zip code error did not result in prejudice to defendants, and claim of nonreceipt did not warrant relief from default].



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4. Entry and Memorandum.

6 *Witkin Cal. Proc. PWT* § 163

[§ 163] Entry and Memorandum.

C.C.P. 585(a), (b), and (c) state that the clerk "shall enter the default." The entry goes into the register of actions. (*Govt.C.* 69845, 69845.5.) Where the complaint is not answered by any defendant, the request for entry of default, with a "memorandum" of the entry indorsed on it, is part of the judgment roll. (*C.C.P.* 670(a); see *Drinnon v. Oliver* (1972) 24 *C.A.3d* 571, 585, 101 *C.R. 120* [default may be properly entered notwithstanding that original summons has not been returned]; *C.E.B.*, 2 Civil Proc. Before Trial §38.37; *Cal. Civil Practice*, 3 Procedure, §18:17; on entry of default in unlawful detainer proceedings, see *infra*, §165; on federal procedure, see *F.R. Civ. P.*, *Rule 55(a)*; 10A *Federal Practice & Procedure* (Wright, Miller & Kane) §2682; 21A *Federal Procedure*, L.Ed., §51:50.)

The clerk's failure to perform the ministerial duty of entering the default does not affect the plaintiff's rights. If the essential conditions are present, the plaintiff may apply to the court for a *judgment* by default, which will be valid despite lack of entry of the default. (*Hibernia Savings & Loan Soc. v. Matthai* (1897) 116 *C.* 424, 426, 48 *P.* 370; *Crouch v. H.L. Miller & Co.* (1915) 169 *C.* 341, 345, 146 *P.* 880; *Lunnun v. Morris* (1908) 7 *C.A.* 710, 712, 715, 95 *P.* 907; *Wakefield v. Wakefield* (1911) 16 *C.A.* 113, 115, 116 *P.* 309.)

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E. Judgment on the Default.

1. Application and Accompanying Documents.

6 Witkin Cal. Proc. PWT § 164

[§ 164] Application and Accompanying Documents.

The application for a default judgment is made on the same form as the request for entry of default (*supra*, §161). (See C.E.B., 2 Civil Proc. Before Trial 3d, §38.51 et seq; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §16.21 et seq.; Cal. Civil Practice, 3 Procedure, §18:18; on procedure in family law cases, see C.E.B., Practice Under the California Family Code, §14:10 et seq.) Judicial Council Form No. CIV-100 [Request for Entry of Default], which is used for requesting entry of judgment either by the clerk (*infra*, §165 et seq.) or the court (*infra*, §168 et seq.), provides space for the following:

- (1) The amount of the demand in the complaint, with interest and costs (*infra*, §§166, 168), and attorneys' fees (*infra*, §166).
- (2) A memorandum of costs, which must be submitted at the time of application for judgment. (C.R.C., Rule 3.1700(a)(2).)
- (3) Required declarations as to venue (*supra*, §161), mailing of notice to the defendant (*supra*, §162), and the defendant's nonmilitary status (*supra*, §137).

Other required documentation for entry of a default judgment includes the following:

- (1) A copy of the written obligation on which the defendant is liable (if any). (See C.R.C., Rule 3.1806; *Bill Benson Motors v. Macmorris Sales Corp.* (1965) 238 C.A.2d Supp. 937, 941, 48 C.R. 123 [notation memorializes merger into judgment of rights under document]; *Kahn v. Lasorda's Dugout* (2003) 109 C.A.4th 1118, 1124, 135 C.R.2d 790 [because former C.R.C., Rule 234 (now C.R.C., Rule 3.1806) contains language "unless otherwise ordered," trial court has discretion at prove up hearing to accept copy of promissory note where original is lost].)
- (2) Where judgment is to be entered by the court, any documentary evidence offered by the plaintiff. (See *infra*, §§169, 170; for further requirements when the defendant is served by publication, see *infra*, §171.)
- (3) Any other documentation required by local rules or policies. (See C.E.B., 2 Civil Proc. Before Trial 3d, §38.43 et seq.; Cal. Civil Practice, 3 Procedure, §18:30 et seq.)

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E. Judgment on the Default.

2. Entry of Judgment by Clerk.

a. When Clerk May Act.

6 *Witkin Cal. Proc. PWT* § 165

[§ 165] When Clerk May Act.

(1) *Contract or Judgment for Money.* The clerk's power to enter judgment was originally limited to an action "arising upon contract for the recovery of money or damages only," but now applies to "an action arising upon contract or judgment for the recovery of money or damages only." (*C.C.P.* 585(a).)

(2) *Fixed or Determinable Sum.* The statute, which gives the clerk something very close to judicial power, is strictly construed. The contract as pleaded must call for a *fixed and definite sum*, either ascertainable from the contract, or *determinable by calculation* from its terms. If there is uncertainty as to the amount, the clerk, a ministerial officer, cannot resolve it, and the court must act. In brief, the clerk may only *compute*; he or she cannot *adjudicate*. (See *Landwehr v. Gillette* (1917) 174 C. 654, 656, 163 P. 1018, *infra*, §168; *Lynch v. Bencini* (1941) 17 C.2d 521, 525, 110 P.2d 662, *infra*, §168; *Gray v. Laufenberger* (1961) 195 C.A.2d Supp. 875, 878, 15 C.R. 813; *Brown v. Superior Court* (1966) 242 C.A.2d 519, 524, 51 C.R. 633; *Liberty Loan Corp. of North Park v. Petersen* (1972) 24 C.A.3d 915, 919, 101 C.R. 395, *infra*, §168, quoting the text; *Ford v. Superior Court* (1973) 34 C.A.3d 338, 342, 109 C.R. 844 [action on promissory note with allegation that deed of trust security had become valueless by foreclosure of senior security; evidence on this allegation was necessary to establish amount due].)

The clerk's power has been upheld in a number of cases. (See *Alexander v. McDow* (1895) 108 C. 25, 30, 41 P. 24 [complaint on note with provision for 10% as attorneys' fees]; *Jones v. Moers* (1928) 91 C.A. 65, 69, 266 P. 821 [complaint on express agreement to pay \$ 5,000 for legal services]; *Fallon & Co. v. United States Overseas Airlines* (1961) 194 C.A.2d 546, 550, 15 C.R. 354, quoting the text; *Diamond Nat. Corp. v. Golden Empire Builders* (1963) 213 C.A.2d 283, 288, 28 C.R. 616.)

(3) *Separate Causes of Action.* Where a complaint states two or more causes of action, one of which falls within the scope of *C.C.P.* 585(a), the clerk may properly enter a default judgment on that cause even though he or she has no authority to do so on the other. (*Norman v. Berney* (1965) 235 C.A.2d 424, 430, 45 C.R. 467.) However, if the contract claim is merely an *alternate theory of recovery* and not a separate cause of action, and adjudication is required as to the amount recoverable, the clerk may not enter a default judgment. (*Brown v. Superior Court*, *supra*, 242 C.A.2d 524 [claim for reasonable value of services rendered, alleging alternate theory of account stated]; see also *Liberty Loan*

Corp. v. Petersen, supra, 24 C.A.3d 918.)

(4) *Unlawful Detainer Actions.* In unlawful detainer actions, the clerk is authorized to enter the default of a defendant who does not appear and defend, on proper written application by the plaintiff. If requested by the plaintiff, the clerk must "immediately" enter judgment for restitution of the premises and issue a writ of execution. The plaintiff must apply to the court for any other relief demanded in the complaint, including costs. (*C.C.P. 1169*; see Judicial Council Form No. UD--110 [Judgment--Unlawful Detainer]; Judicial Council Form No. UD--116 [Declaration for Default Judgment by Court (Unlawful Detainer--*Code of Civil Proc.*, § 585(d))]; 12 *Summary* (10th), *Real Property*, §735.)

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E. Judgment on the Default.

2. Entry of Judgment by Clerk.

b. Contents of Judgment.

6 *Witkin Cal. Proc. PWT* § 166

[§ 166] Contents of Judgment.

(1) *Demand, Interest, and Costs.* The clerk enters the default (*supra*, §160 et seq.), "and immediately thereafter" enters judgment for (a) the principal amount demanded in the complaint or statement of damages, or a lesser amount if credit has been acknowledged; (b) interest allowed by law or the terms of the contract; and (c) costs. (*C.C.P. 585(a)*; see *Shirran v. Dallas* (1913) 21 C.A. 405, 416, 132 P. 454 [judgment need not be "filed"; entry is enough]; C.E.B., 2 Civil Proc. Before Trial 3d, §38.39 et seq.; Cal. Civil Practice, 3 Procedure, §18:30; on statement of damages, see *supra*, §154; on federal procedure, see *F.R. Civ. P., Rule 55(b)(1)*; 10A Federal Practice & Procedure (Wright, Miller & Kane) §2683; 21A Federal Procedure, L.Ed., §51:50.)

Costs must be requested at the time of applying for the judgment. (C.R.C., Rule 3.1700(a)(2); on application for judgment, see *supra*, §164.)

(2) *Attorneys' Fees.* If the contract specifies the amount of the fee or a basis for calculating it, e.g., 10% of the principal sum, and the plaintiff properly demands attorneys' fees (*supra*, §149), the clerk may include it in the award. (See *Alexander v. McDow* (1895) 108 C. 25, 30, 41 P. 24.) If the contract merely calls for an "attorney's fee" or a "reasonable" attorney's fee, the clerk, who may not adjudicate, may not determine the amount. (See *Landwehr v. Gillette* (1917) 174 C. 654, 656, 163 P. 1018, *infra*, §168.)

Where a schedule of attorneys' fees has been adopted by a rule of court, *C.C.P. 585(a)* permits the clerk to determine the amount of the fee if recovery is allowed by contract or statute. However, the same provision allows the plaintiff, by filing a written request at the time of the application for entry of default (*supra*, §161), to have the fees fixed by the court. The default will be entered, and the court will then hear the application and render judgment for the attorneys' fees and the other relief demanded. (See C.E.B., 2 Civil Proc. Before Trial 3d, §38.54.) The court has discretion to decide the matter on the basis of affidavits instead of or in addition to personal testimony. (*C.C.P. 585(d)*.)

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2. Entry of Judgment by Clerk.

c. Clerk's Delay or Failure To Act.

6 *Witkin Cal. Proc. PWT* § 167

[§ 167] Clerk's Delay or Failure To Act.

The requirement of "immediate entry" (*supra*, §166) is for the benefit of the plaintiff; *delay* cannot prejudice the defendant and does not affect the validity of the belated default judgment ultimately entered. (*Christerson v. French* (1919) 180 C. 523, 525, 182 P. 27; *Brooks v. Nelson* (1928) 95 C.A. 144, 151, 272 P. 610.)

For the same reason, failure to enter judgment is of no consequence. The plaintiff's proper request for entry of default (*supra*, §161) is the important step. Once the default is entered, the time to answer or demur is cut off, regardless of whether the clerk delays or fails to take the final step of entering judgment. (*W.H. Marston Co. v. Kochritz* (1926) 80 C.A. 352, 357, 251 P. 959 ["the clerk's failure to enter judgment upon the default can in no way prejudice the rights of plaintiff and can confer no right on defendant whose default has been regularly entered"]; *Cook v. Justice's Court* (1936) 16 C.A.2d 745, 750, 61 P.2d 357 ["After default is entered, it is then, or thereafter, the ministerial duty of the clerk to enter and docket the judgment ... and he could not by neglecting to perform that duty, destroy or impair the effect of the judgment"].)

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3. Entry of Judgment by Court.

a. Contract Actions: No Definite Sum Demanded.

6 *Witkin Cal. Proc. PWT* § 168

[§ 168] Contract Actions: No Definite Sum Demanded.

Contract actions that at first glance seem to fall within *C.C.P. 585(a)* (supra, §165) often, on analysis, are found to be beyond the scope of the clerk's power.

In *Landwehr v. Gillette* (1917) 174 C. 654, 163 P. 1018, plaintiff sued on a promissory note for \$ 3,000 principal, 6% interest, and \$ 500 attorney's fee, the last under a provision in the note for a "reasonable" fee in case of suit. The clerk entered a default and default judgment as prayed. *Held*, the \$ 500 item was unauthorized; the allegation that it was a reasonable sum did not make it so, and the determination of that issue was for the court. "If the contract declared on is indefinite and uncertain in the amount of damages which plaintiff is entitled to recover on it, and in the nature of things must be ascertained and fixed, the matter then is necessarily one for judicial determination by the court and not for ministerial action by the clerk." (174 C. 656.) (For statutory solution to attorneys' fees problem, see supra, §166.)

In *Lynch v. Bencini* (1941) 17 C.2d 521, 110 P.2d 662, plaintiff alleged that he contracted with defendant directors to cancel a \$ 275,000 corporate indebtedness in exchange for shares of stock; that defendants agreed to repurchase \$ 175,000 worth of the stock within 7 months, crediting dividends on the repurchase price; that they failed to perform and that the repurchase price with interest (\$ 190,312.50) was due and unpaid. *Held*, the case did not come within former C.C.P. 585(1) (now *C.C.P. 585(a)*). The complaint neither alleged tender of the stock nor facts to justify keeping it and nevertheless collecting the price; nor did it allege that no dividends were received, which would have to be credited on the price. Thus, while the prayer was for a definite amount, the contract and the complaint were so uncertain as to require the taking of evidence and the exercise of judicial power to determine the amount due. Approving the test of the *Landwehr* case, the court said: "The language used in section 585 indicates an intention to provide, in subdivision 1, for the entry of judgment by the clerk where no evidence is necessary to disclose the correct amount, and by subdivision 2 for judgment by the court when the taking of evidence or the exercise of discretion is necessary. Evidence is as necessary in order to fix the amount of damages for breach of contract as it is in tort actions, unless this is fixed by the agreement. Subdivision 1 of section 585 seems to refer more to actions based upon contract than to those based upon a breach of contract, although it would include an action for breach of contract in which the amount of the damages had also been agreed upon." (17 C.2d 526.) (See *Crossman v. Vivienda Water Co.* (1902) 136 C. 571, 574, 69 P. 220 [clerk has no power where accounting is necessary].)

In *Liberty Loan Corp. of North Park v. Petersen* (1972) 24 C.A.3d 915, 101 C.R. 395, a complaint on a promissory note showed on its face (by incorporation of a copy of the note) that the original debt was \$ 500 and the alleged unpaid balance was \$ 253. *Held*, the clerk could not enter a default. "Nothing in the complaint indicates how the reduction occurred or negates the possibility the collateral securing the note had not been dealt with or sold by appellant." (24 C.A.3d 919.)

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E. Judgment on the Default.

3. Entry of Judgment by Court.

b. Other Actions.

1. Procedure.

6 *Witkin Cal. Proc. PWT* § 169

[§ 169] Procedure.

The restrictive interpretation of *C.C.P. 585(a)* (supra, §§165, 168) throws most of the cases into *C.C.P. 585(b)*, dealing with "other actions." The procedure is as follows:

(1) After the clerk enters the default, the plaintiff "may apply to the court for the relief demanded in the complaint." (*C.C.P. 585(b)*.) (See supra, §164.)

(2) "If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose." (*C.C.P. 585(b)*.) (On reference, see supra, §63 et seq.)

(3) "If the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved by a reference as above provided." (*C.C.P. 585(b)*.) In either case, the determination is not binding; the court has power to modify the amount awarded. (*Cyrus v. Haveson* (1976) 65 *C.A.3d* 306, 318, 135 *C.R.* 246 [reduction of jury's award].) (See 8 *A.L.R.3d* 1070 [necessity of proof of liability]; 15 *A.L.R.3d* 586 [defendant's right to notice and hearing to determine amount of damages].)

(4) After entry of the default, "[t]he court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor" for the amount that "appears by the evidence to be just," not exceeding the amount stated in the complaint or in the statement of damages. (*C.C.P. 585(b)*.) (On statement of damages, see supra, §154 et seq.; on nature of hearing, see infra, §170; on judgment outside prayer, see supra, §149 et seq.; on federal procedure, see *F.R. Civ. P., Rule 55(b)(2)*; 10 *Federal Practice & Procedure* (Wright, Miller & Kane) §2684; *Federal Procedure*, L.Ed., §51.6 et seq.)

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E. Judgment on the Default.

3. Entry of Judgment by Court.

b. Other Actions.

2. Nature of Hearing.

6 *Witkin Cal. Proc. PWT* § 170

[§ 170] Nature of Hearing.

(1) *In General.* The court "in its discretion may permit the use of affidavits, in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received, or heard in those cases. The facts stated in the affidavit or affidavits shall be within the personal knowledge of the affiant and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." (*C.C.P.* 585(d).)

Only evidence in support of the allegations of the complaint is admissible. (*Jackson v. Bank of America* (1986) 188 C.A.3d 375, 387, 233 C.R. 162.) If the evidence is sufficient to support those allegations, the court must enter judgment for the plaintiff. (*Csordas v. United Slate Tile & Composition Roofers* (1960) 177 C.A.2d 184, 186, 2 C.R. 133.) If the evidence does not support the allegations, the court will deny a default judgment. (*Taliaferro v. Hoogs* (1963) 219 C.A.2d 559, 560, 33 C.R. 415.) (See *Johnson v. Stanhiser* (1999) 72 C.A.4th 357, 361, 85 C.R.2d 82 [at prove-up hearing trial judge erroneously applied preponderance of evidence standard in determining whether plaintiff was entitled to damages; correct standard requires that plaintiff merely establish prima facie case, which plaintiff did through sworn supplemental statement and numerous exhibits detailing relationship with defendant]; *Kahn v. Lasorda's Dugout* (2003) 109 C.A.4th 1118, 1124, 135 C.R.2d 790 [trial court has discretion to accept copy of promissory note where original is lost].)

(2) *Use of Hearsay Evidence.* A particular problem arises with respect to hearsay evidence at a default hearing. Hearsay evidence received without a proper objection is regarded as competent evidence in support of a judgment. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §§393, 394.) However, the defendant is unable to participate in the hearing on a default judgment (see *infra*, this section) and thus cannot object. The only reported case discussing this situation does not resolve the question. In *Flood v. Simpson* (1975) 45 C.A.3d 644, 119 C.R. 675, defendant attacked a default judgment on the ground that an affiant had no personal knowledge of the matters stated in affidavits introduced at the hearing. However, this hearsay objection had been resolved against the defendant on a prior, unreported appeal, and the court held that the defendant was precluded from raising the matter a second time by principles of res judicata and collateral estoppel. (45 C.A.3d 649; on collateral estoppel and default judgments, see 7 *Cal. Proc.* (5th), *Judgment*, §448)

et seq.) (Cf. *City Bank of San Diego v. Ramage* (1968) 266 C.A.2d 570, 584, 72 C.R. 273 [declarations were properly admitted based on lack of hearsay objection, without discussion of defendants' ability to participate in hearing].)

(3) *Defendant May Not Participate*. In *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 C.A.3d 381, 202 C.R. 204, plaintiffs bought a used car from defendant dealer on false representations of its condition, and sued for damages. Defendant defaulted, and a default judgment was rendered for \$ 3,425.69 compensatory and \$ 80,000 punitive damages. On appeal, the court held that evidence of wealth was lacking, and reversed the award of punitive damages for a redetermination of the amount. On remand, the trial judge ruled that defendant could not participate in further proceedings, and after a hearing, again awarded \$ 80,000. On defendant's second appeal, *held*, judgment affirmed.

(a) Entry of a default terminates a defendant's right to take further affirmative steps in the litigation until the default is set aside or a default judgment is entered. Even if the default judgment is vacated, the judge would have to render another unless the default itself is vacated. (155 C.A.3d 385, 386, citing the text.)

(b) Defendant relied on the theory of *Vossler v. Richards Mfg. Co.* (1983) 143 C.A.3d 952, 961, 192 C.R. 219, that defendants have the best access to wealth data and thus should bear the burden of introducing that evidence at trial. This does not mean, however, that *defaulting* defendants are entitled to appear and present that evidence at judgment hearings. C.C.P. 585(b) provides that the court shall hear the evidence offered by the *plaintiff*, and render judgment for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just. (155 C.A.3d 386.) Thus, unless the appellate court directs otherwise, the defendant cannot participate in a second judgment hearing any more than it can in the first hearing. (155 C.A.3d 387.)

(c) In 19 other states, a defaulted defendant has the right to appear and to participate in the hearing to determine damages. But the California statute, manifesting the legislative intent to exclude defaulted defendants from judgment hearings, is controlling. (155 C.A.3d 387, footnote 2.)

(4) *Distinction: Family Code Proceedings*. In proceedings under the Family Code, the court has discretion to order a party whose affidavit has been submitted to appear personally at the hearing on a default judgment. (*Family C.* 2336(b)(4).) Participation by a defaulting party, while unusual, is apparently not precluded. (See *In re Marriage of McKim* (1972) 6 C.3d 673, 682, 100 C.R. 140, 493 P.2d 868 [defaulting husband appeared not as party, but as witness called by wife; "in exceptional cases" the court "may receive in lieu of petitioner's testimony or affidavit the testimony of other competent witnesses including the respondent"]; *In re Marriage of Wells* (1988) 206 C.A.3d 1434, 1439, 254 C.R. 185; 11 *Summary* (10th), *Husband and Wife*, §102.)

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E. Judgment on the Default.

3. Entry of Judgment by Court.

c. Defendant Served by Publication.

6 *Witkin Cal. Proc. PWT* § 171

[§ 171] Defendant Served by Publication.

The following requirements apply for entry of a default judgment by the court in actions where the service of the summons was by publication:

(1) *Proof of Publication.* The plaintiff must make proof of the publication. (*C.C.P. 585(c).*)

(2) *Hearing.* After entry of the default by the clerk, "the court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor" for the amount that "appears by the evidence to be just," not exceeding the amount stated in the complaint or in the statement of damages. (*C.C.P. 585(c).*) (On statement of damages, see *supra*, §154 et seq.; on judgment outside prayer, see *supra*, §149 et seq.) Before *C.C.P. 585(c)* was amended in 1993, there was no cap on the amount of recovery, and the entry of a default was not required; instead, a default judgment was simply entered. This caused a problem in personal injury cases, because there was no provision for a defendant served by publication to receive the statement of damages prior to the entry of a default. (See *Parish v. Peters* (1991) 1 C.A.4th 202, 211, 1 C.R.2d 836, *supra*, §154 [due process required service of equivalent of statement]; *Taylor v. Varga* (1995) 37 C.A.4th 750, 757, 43 C.R.2d 904 [cross-defendants failed to demonstrate prejudice where cross-complainants in pre-1993 case followed present practice of seeking entry of default before requesting judgment].)

(3) *Out-of-State Defendant.* If the defendant is not a California resident, the court "shall" require the plaintiff or his agent to be examined on oath as to payments made to the plaintiff on account of the demand. (*C.C.P. 585(c).*) (See *Winston v. Idaho Hardwood Co.* (1913) 23 C.A. 211, 214, 137 P. 601.)

(4) *Default Involving Real Property.* The power to enter a default judgment in cases affecting title to or possession of real property is limited: (a) No judgment is proper on proof of occupancy not ripened into title by adverse possession; (b) where the plaintiff's claim is based on a paper title, evidence establishing his or her equitable right to judgment must be taken; but (c) where a verified complaint seeks only *possession*, and shows that no party claims title, judgment may be entered on proof of occupancy by the plaintiff and ouster by the defendant. (*C.C.P. 585(c).*)

(5) *Mailed Notice.* No default under *C.C.P. 585(c)* may be entered without the filing of an affidavit of mailed notice

to the defendant's attorney of record, or if none, to the defendant at his last known address. (*C.C.P.* 587; *supra*, §162.) However, nonreceipt does not invalidate the default judgment or constitute a ground for setting it aside. (See *Candelaria v. Avitia* (1990) 219 *C.A.3d* 1436, 1444, 269 *C.R.* 32 [hearing application for default judgment in absence of affidavit of notice was harmless error where prior mailings of letters to defendant's last known address had been unsuccessful]; *infra*, §180.)

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d. Judgment on Cross-Complaint.

6 *Witkin Cal. Proc. PWT* § 172

[§ 172] Judgment on Cross-Complaint.

C.C.P. 585(e) requires an additional discretionary finding by the court where a default judgment is sought on a cross-complaint while the main action is pending: The judgment may not be entered "unless a separate judgment may, in fact, be properly awarded on that cross-complaint and the court finds that a separate judgment on that cross-complaint would not substantially delay the final disposition of the action between the parties."

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F. Waiver of Right to Default.

1. Waiver of Right To Take Default.

6 *Witkin Cal. Proc. PWT* § 173

[§ 173] Waiver of Right To Take Default.

If the plaintiff fails to take the initial step of requesting the clerk to enter a default (*supra*, §161), whether out of neglect, a desire to have judgment on the merits, or an unwillingness to take advantage of the defendant's delinquency, the defendant may file a belated answer and prevent a default. (*Reher v. Reed* (1913) 166 C. 525, 528, 137 P. 263 ["The clerk is not authorized to enter a default for failure to file an answer when such answer is on file at the time such default is attempted to be entered"]; *Bank of Haywards v. Kenyon* (1917) 32 C.A. 635, 637, 163 P. 869; *A & B Metal Products v. MacArthur Properties* (1970) 11 C.A.3d 642, 647, 89 C.R. 873 ["an untimely pleading is not a nullity, and it will serve to preclude the taking of default proceedings unless it is stricken"]; *Goddard v. Pollock* (1974) 37 C.A.3d 137, 141, 112 C.R. 215; see 16 U.C. Davis L. Rev. 187 [criticizing rule, and arguing that untimely answers should not be allowed].)

The same is true where there is no proper entry of the default, and the answer is on file before the default judgment is entered. (*Baird v. Smith* (1932) 216 C. 408, 409, 14 P.2d 749 [default prematurely entered].)

This rule has been explained in terms of an "implied grant" by the plaintiff of additional time to plead. (See *Reher v. Reed*, *Baird v. Smith*, and *Goddard v. Pollock*, *supra*.) This is inaccurate both in theory and result. The plaintiff cannot extend the defendant's time to plead except expressly in the manner provided by statute (see 4 *Cal. Proc.* (5th), *Pleading*, §§10, 12), and the waiver does not confer any right on the defendant. The plaintiff, by inaction, loses the right to have a default and default judgment entered as a matter of course, but the defendant does not gain an absolute right to file a belated answer. The answer, filed after the time has elapsed, may, in the court's discretion, be stricken out on motion of the plaintiff, and then the default may be entered. (*Cuddahy v. Gragg* (1920) 46 C.A. 578, 581, 189 P. 721.)

As the court said in *Cuddahy*: "The plaintiff has no absolute right to have the pleading stricken from the files merely because it was not filed in time; and, on the other hand, the defendant has no absolute right to have his belated pleading remain in the files; for a defendant cannot, *as of right*, answer or demur after the expiration of the time prescribed by statute. It is a proper practice, therefore, for the plaintiff to move to strike the pleading from the files; and, in the exercise of a sound discretion, the court very properly may grant such motion to strike." (46 C.A. 580.) (See *Lunnun v. Morris* (1908) 7 C.A. 710, 715, 95 P. 907 [proper practice is to move to strike plea from files]; *Buck v. Morrossis* (1952) 114 C.A.2d 461, 464, 250 P.2d 270 [late demurrer stricken to permit entry of default judgment]; cf.

Bank of Haywards v. Kenyon, supra, 32 C.A. 637 [answer filed 1 day late, motion to strike 1 month later; abuse of discretion to strike answer and give default judgment].)

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F. Waiver of Right to Default.

2. Waiver of Default Entered.

6 *Witkin Cal. Proc. PWT* § 174

[§ 174] Waiver of Default Entered.

(1) *Amendment of Complaint.* Even a default already entered may be waived if the plaintiff amends the complaint in some substantial manner. A default judgment cannot be had unless the amended complaint is served on the defendant and the latter fails to respond within the proper time. The amended complaint is said to open the default. (*Linott v. Rowland* (1897) 119 C. 452, 454, 51 P. 687; *Sheehy v. Roman Catholic Archbishop of San Francisco* (1942) 49 C.A.2d 537, 539, 122 P.2d 60; *Gerardo v. Gerardo* (1952) 114 C.A.2d 371, 374, 250 P.2d 276; *Leo v. Dunlap* (1968) 260 C.A.2d 24, 27, 66 C.R. 888; *Ford v. Superior Court* (1973) 34 C.A.3d 338, 342, 109 C.R. 844; *Engbretson & Co. v. Harrison* (1981) 125 C.A.3d 436, 442, 178 C.R. 77 [defendant who has not appeared must be personally served with amended complaint]; 5 *Cal. Proc.* (5th), *Pleading*, §§1244, 1245.)

(2) *Failure To Challenge Erroneous Order Vacating Default.* The cases cited above deal with a waiver based on the plaintiff's subsequent affirmative action. In *Brown v. Pacific Tel. & Tel. Co.* (1980) 105 C.A.3d 482, 164 C.R. 445, the court applied the reasoning of these cases to reach the same result where the plaintiff merely failed to act. The trial judge, on a mistaken theory of law, vacated the entry of a valid default. More than 2 years after the complaint was filed, defendant moved to dismiss for lack of prosecution. Plaintiff could have moved to strike the erroneous order vacating the default, but instead contested the motion to dismiss on the merits. The judge granted the motion to dismiss, and plaintiff appealed, asserting for the first time that the judge's vacating order was in excess of jurisdiction and void. *Held*, judgment of dismissal affirmed. The failure to challenge the vacating order in the trial court (i.e., failure to assert the validity of the default as entered) was a waiver of the entry. (105 C.A.3d 486.)

(3) *De Facto Amendment.* In *Jackson v. Bank of America* (1986) 188 C.A.3d 375, 233 C.R. 162, the complaint alleged in conclusory terms that plaintiff had been damaged, but did not allege out-of-pocket expenses or any causal connection between the parties' transactions and monetary loss. At the default hearing, plaintiff introduced, and the trial court considered, evidence at variance with the complaint and evidence of events occurring after the complaint was filed. *Held*, judgment on default reversed. Although no formal amendment was requested or authorized, plaintiff's argument and proof at the default hearing constituted a de facto amendment. "We see no distinction between the formal or de jure amendments in *Gerardo* and the informal or de facto amendments here, particularly because the lack of any formal amendment on the court's part here was chargeable to plaintiff's highly questionable orchestration of this default hearing, where, unlike the hearing in *Gerardo*, the commissioner was palpably misled concerning the variance between

the pleadings and the proof." (188 C.A.3d 390.) (Cf. *Beeman v. Burling* (1990) 216 C.A.3d 1586, 1595, 1596, 265 C.R. 719 [*Jackson* rule did not apply where asserted de facto amendments were not substantive and exposed defaulting defendant to no different liability].)

Two subsequent decisions refused to follow *Jackson*, and criticized its reasoning. In *Ostling v. Loring* (1994) 27 C.A.4th 1731, 33 C.R.2d 391, a defaulting defendant argued that plaintiffs' request at the default hearing for actual damages in excess of the complaint amounted to a de facto amendment under *Jackson*, requiring that his default be set aside. *Held*, defendant's argument and the reasoning in *Jackson* were unpersuasive. "We have no quarrel with the result ... but we respectfully part company with *Jackson's* characterization of the proceedings as a 'de facto amendment of the complaint.' The characterization was not necessary for the relief afforded the defendant." (27 C.A.4th 1744.) "If the plaintiff wholly departs from the existing complaint at a hearing on damages ... , the trial court should hew to the complaint. ... If the trial court errs and awards a judgment which is utterly unwarranted under the unamended complaint, as in *Jackson*, the defendant's remedy is a motion for a new trial (new judgment hearing) or an appeal from the default judgment." (27 C.A.4th 1745.) This approach "preserves the legitimate interest of the plaintiff in the underlying default against the party in default who has reconsidered the failure to respond but lacks a sufficient claim to obtain relief from the default" under C.C.P. 473. (27 C.A.4th 1747.)

Jackson was similarly criticized by *In re Marriage of Andresen* (1994) 28 C.A.4th 873, 34 C.R.2d 147, a dissolution proceeding in which the husband argued that the entry of his default was void because the wife interjected a new issue--the husband's alleged agreement to reimburse her for separate property contributions to the community--into the default judgment. Relying on *Jackson*, the husband argued that this constituted a de facto amendment of the petition, which opened the default and entitled him to service of an amended pleading. *Held*, the default was not void, and the trial court had properly vacated the default judgment and entered another that did not include the separate property reimbursement. *Jackson* is at odds with *Becker v. S.P.V. Const. Co.* (1980) 27 C.3d 489, 165 C.R. 825, 612 P.2d 915, supra, §150, and *In re Marriage of Lippel* (1990) 51 C.3d 1160, 276 C.R. 290, 801 P.2d 1041, supra, §152. (28 C.A.4th 884.) There, the Supreme Court did not require that default judgments exceeding the demand be vacated in their entirety or permit an answer to be filed; instead, it directed the trial courts to modify the judgments to strike only the excessive portions. (28 C.A.4th 885.) "Assessed against *Becker* and *Lippel*, *Jackson* simply goes too far." (28 C.A.4th 886.)

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

(1) *Amendment of Complaint.* See *Crestmar Owners Assn. v. Stapakis* (2007) 157 C.A.4th 1223, 1231, 69 C.R.3d 231 [failure to serve amended complaint on defaulting corporate defendant, whose charter was suspended for failure to pay taxes, was harmless where complaint was served on corporation's president and sole shareholder].



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VII. JUDGMENT BY DEFAULT

G. Effect of Default and Default Judgment.

1. When Properly Taken.

a. Defendant's Procedural Rights Are Cut Off.

6 *Witkin Cal. Proc. PWT* § 175

[§ 175] Defendant's Procedural Rights Are Cut Off.

The clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers. "A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action." Thus, the defendant may not, until the default is set aside in a proper proceeding, file pleadings or move for a new trial, or demand notice of subsequent proceedings. If the judgment were vacated it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition to it. (*Christerson v. French* (1919) 180 C. 523, 525, 182 P. 27; see *Strong v. Shatto* (1927) 201 C. 555, 557, 258 P. 71; *Brooks v. Nelson* (1928) 95 C.A. 144, 147, 272 P. 610; *Mackie v. Mackie* (1960) 186 C.A.2d 825, 832, footnote 5, 9 C.R. 173, quoting the text [defaulting defendant may not set up claim of disqualification of judge]; *A & B Metal Products v. MacArthur Properties* (1970) 11 C.A.3d 642, 646, 89 C.R. 873 [time to answer expired December 22, default was entered December 26 at 9:53 a.m., mailed answer received same day at 12:18 p.m. was properly disregarded by clerk]; *Forbes v. Cameron Petroleum* (1978) 83 C.A.3d 257, 262, 147 C.R. 766 [demurrer filed after default was "legal nullity"]; *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 C.A.3d 381, 385, 386, 202 C.R. 204, *supra*, §170, citing the text [defendant may not participate in default hearing]; *Sporn v. Home Depot USA* (2005) 126 C.A.4th 1294, 1301, 24 C.R.3d 780, citing the text [defendant was no longer active party in litigation after default was entered, and thus was not entitled to notice of status conference]; *Steven M. Garber & Associates v. Eskandarian* (2007) 150 C.A.4th 813, 823, 59 C.R.3d 1, citing the text [entry of default barred defendant from pursuing merits of case].) (For the special rule applicable to class actions, see *Kass v. Young* (1977) 67 C.A.3d 100, 136 C.R. 469, 4 *Cal. Proc.* (5th), *Pleading*, §326.)

Because it is the clerk's entry of default that has this effect, the entry is a *proceeding* taken against the defendant, which starts the 6-month period for relief under C.C.P. 473. (*Brooks v. Nelson*, *supra*; *Monica v. Oliveira* (1956) 147 C.A.2d 275, 276, 305 P.2d 169; *Weiss v. Blumencranc* (1976) 61 C.A.3d 536, 541, 131 C.R. 298; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §176; cf. *Rutan v. Summit Sports* (1985) 173 C.A.3d 965, 970, 219 C.R. 381 [6-month period ran separately from times of default and default judgment, where entry of default was not conclusive of plaintiffs' right to deficiency judgment].)

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G. Effect of Default and Default Judgment.

1. When Properly Taken.

b. Conclusive Admission of Material Facts.

6 *Witkin Cal. Proc. PWT* § 176

[§ 176] Conclusive Admission of Material Facts.

The judgment by default is said to "confess" the material facts alleged by the plaintiff, i.e., the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint. The judgment is, in consequence, *res judicata* on the issue of the right to the relief awarded. "The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint." (*Brown v. Brown* (1915) 170 C. 1, 5, 147 P. 1168; see *Fitzgerald v. Herzer* (1947) 78 C.A.2d 127, 131, 177 P.2d 364 ["A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed"]; *Christiana v. Rose* (1950) 100 C.A.2d 46, 50, 222 P.2d 891 [husband defaulted in divorce action in which complaint declared that there was no community property; thus, in subsequent cause of action brought by wife for wrongful death of child, husband was estopped from claiming interest as community property; following *Brown*]; *O'Brien v. Appling* (1955) 133 C.A.2d 40, 42, 283 P.2d 289 [judgment in action to recover money obtained by fraud was *res judicata* in subsequent proceeding by motion to cancel record of judgment after adjudication in bankruptcy; prior judgment conclusively determined that debt was nondischargeable]; *In re Circosta* (1963) 219 C.A.2d 777, 786, 33 C.R. 514, 4 Cal. Proc. (5th), *Pleading*, §428 [defendant was deemed to confess that true copies of regulation and order were attached to complaint]; *Martin v. General Finance Co.* (1966) 239 C.A.2d 438, 443, 48 C.R. 773 [because prior default judgment did not address issue of fraud and collusion it was not *res judicata*, and was thus insufficient to support summary judgment against those issues]; *Sporn v. Home Depot USA* (2005) 126 C.A.4th 1294, 1303, 24 C.R.3d 780 [because default admits plaintiff's allegations, defaulting defendant lacked standing to complain of extraneous evidence introduced at prove-up hearing]; *Steven M. Garber & Associates v. Eskandarian* (2007) 150 C.A.4th 813, 823, 59 C.R.3d 1, citing the text [default judgment against defendant resulted in truth of plaintiff's allegations that legal services were rendered in accordance with fee agreement]; 2 Cal. Proc. (5th), *Judgment*, §§372, 448 et seq.)

Even where the cause of action and parties are different, and the default judgment is not *res judicata*, the essential allegations of the complaint have evidentiary value in a subsequent proceeding as judicial admissions. (*Bohn v. Watson*

(1954) 130 C.A.2d 24, 33, 278 P.2d 454, 5 Cal. Proc. (5th), *Pleading*, §709; see 1 Cal. Evidence (4th), *Hearsay*, §98.)

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G. Effect of Default and Default Judgment.

2. When Improperly Taken.

a. Wrongly or Fictitiously Named Defendant.

6 Witkin Cal. Proc. PWT § 177

[§ 177] Wrongly or Fictitiously Named Defendant.

(1) *Wrongly Named Defendant.* A default judgment against a person not obligated to the plaintiff and not correctly named in the complaint is erroneous and is subject to direct attack by motion or appeal, but is good against collateral attack. (*Brum v. Ivins* (1908) 154 C. 17, 19, 96 P. 876, 4 Cal. Proc. (5th), *Pleading*, §477.)

(2) *Fictitiously Named Defendant.* A default judgment against a fictitiously named defendant is invalid unless (a) the process bears on its face a notice of the fictitious designation; (b) the proof of service states the fictitious name and that the required notice was given; and (c) the complaint was amended to state the defendant's true name. (*C.C.P.* 474; *Armstrong v. Superior Court* (1956) 144 C.A.2d 420, 423, 301 P.2d 51; *Jonson v. Weinstein* (1967) 249 C.A.2d 954, 957, 58 C.R. 32; 3 Cal. Proc. (5th), *Actions*, §991.) However, a default taken against a properly served defendant before the complaint is amended to show defendant's true name is valid. (*Jonson v. Weinstein, supra*, 249 C.A.2d 959.)

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

(2) *Fictitiously Named Defendant.* See *Pelayo v. J.J. Lee Management Co.* (2009) 174 C.A.4th 484, 496, 498, 94 C.R.3d 502, citing the text [summons complied with *C.C.P.* 474, but proof of service failed to state fictitious name under which defendant was served; thus, clerk's entry of default and subsequent judgment violated statute and vacation was required].



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b. Case Not Within Clerk's Power.

6 *Witkin Cal. Proc. PWT* § 178

[§ 178] Case Not Within Clerk's Power.

If the judgment does not fall within *C.C.P.* 585(a) (contract or judgment for money or damages only; *supra*, §165), the clerk is entirely without power to act. An unauthorized entry is void, and may be set aside on motion. (*Crossman v. Vivienda Water Co.* (1902) 136 C. 571, 575, 69 P. 220; *Lynch v. Bencini* (1941) 17 C.2d 521, 525, 110 P.2d 662, *supra*, §168; *Brown v. Superior Court* (1966) 242 C.A.2d 519, 524, 51 C.R. 633; *Lewis v. Le Baron* (1967) 254 C.A.2d 270, 278, 61 C.R. 903; *Westport Oil Co. v. Garrison* (1971) 19 C.A.3d 974, 978, 97 C.R. 287; see *supra*, §168.)

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c. Premature Entry.

6 *Witkin Cal. Proc. PWT* § 179

[§ 179] Premature Entry.

The clerk is without power to enter a default before the expiration of the defendant's time to answer. A premature entry is void; it cannot be the basis of a valid default judgment, and may be set aside by the court at any time without the necessity of a motion under *C.C.P.* 473. (*Baird v. Smith* (1932) 216 C. 408, 410, 14 P.2d 749; *Steuri v. Junkin* (1931) 113 C.A. 553, 555, 298 P. 828; *Montgomery v. Norman* (1953) 120 C.A.2d 855, 858, 262 P.2d 360; see *Whealton v. Whealton* (1967) 67 C.2d 656, 659, 63 C.R. 291, 432 P.2d 979, 11 Summary (10th), *Husband and Wife*, §168; *Dauenhauer v. Superior Court* (1957) 149 C.A.2d 22, 26, 307 P.2d 724 [mandamus issued to compel trial court to hear demurrers and motions filed after void entry]; see also *C.C.P.* 418.10(d), 2 *Cal. Proc.* (5th), *Jurisdiction*, §222 [default may not be entered before expiration of defendant's time to plead].)

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d. Entry Without Affidavit of Notice.

6 *Witkin Cal. Proc. PWT* § 180

[§ 180] Entry Without Affidavit of Notice.

(1) *Statutory Requirement.* No default "shall be entered" unless an affidavit is filed stating that a copy of the application was mailed to the defendant's attorney of record, or if none, to the defendant at his last known address. (*C.C.P.* 587; see *supra*, §162.) However, nonreceipt of the notice of the application does not invalidate a default judgment or constitute a ground for setting it aside. (*C.C.P.* 587; *Jackson v. Bank of America* (1983) 141 C.A.3d 55, 59, 190 C.R. 78.)

(2) *Affidavit Is Mandatory but Not Jurisdictional.* *In re Marriage of Harris* (1977) 74 C.A.3d 98, 141 C.R. 333, held a default judgment valid despite noncompliance with *C.C.P.* 587. The husband sent the documents to attorney R, whom the wife had consulted, and filed the required affidavit. R returned the documents, stating that he had not been retained, but had advised the wife that her default would be taken. The husband then sent the documents to the wife at her residence, but no affidavit evidencing this mailing was filed. The wife moved to set aside the default and default judgment, and appealed from an order denying her motion. *Held*, affirmed.

(a) The consequences of failing to file the affidavit are not prescribed in the statute; though phrased in mandatory terms, it does not expressly make the affidavit a jurisdictional step, and the legislative history is inconclusive. (74 C.A.3d 101.)

(b) The purpose of the statute is to reduce the time spent in considering motions for relief from default; and this purpose would be achieved whether or not the requirement is regarded as jurisdictional. (74 C.A.3d 102.)

(c) The consequences of a jurisdictional characterization would be that years after a default judgment had been rendered it could be declared void, despite actual notice, because the clerk had mistakenly entered it without an affidavit on file showing that notice had been given. Thus, although it was error to enter the default, the error was not prejudicial in view of the evidence of actual notice to the wife. (74 C.A.3d 102.) (See *Candelaria v. Avitia* (1990) 219 C.A.3d 1436, 1444, 269 C.R. 32 [hearing application in absence of affidavit was harmless error, where prior mailings of letters to defendant's last known address were unsuccessful].)

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e. Entry Without Proof of Service.

6 *Witkin Cal. Proc. PWT* § 181

[§ 181] Entry Without Proof of Service.

C.C.P. 585(a) requires "proof of the service of the summons" before the clerk may enter the defendant's default, and *C.C.P. 585(c)* similarly requires "proof of the publication" in cases of service by publication. No similar express requirement is stated in *C.C.P. 585(b)* and (d).

In *National Diversified Services v. Bernstein* (1985) 168 C.A.3d 410, 214 C.R. 113, defendant was personally served, but after the 3-year time limit for service. A default judgment was subsequently entered under *C.C.P. 585(b)*. Defendant's motion to vacate the judgment, made more than 6 months after entry of the default judgment, was denied. *Held*, the judgment was not subject to collateral attack. It is established that a default judgment, at least one entered under *C.C.P. 585(b)*, is valid when based on actual service of summons on the defendant, even though proof of service is not filed before entry of the judgment. (168 C.A.3d 416.) It would be inconsistent to maintain that a default judgment can be valid without proof of service, but can become void if the proof is filed late. Thus, the rule is "that a judgment based on a late return of summons is irregular, but not void." Here, the late return of the summons was merely an irregularity, which did not render the default judgment void; hence, the judgment was subject to the 6-month time limit of *C.C.P. 473* and could not be attacked collaterally. (168 C.A.3d 416.) (See *Connelly v. Castillo* (1987) 190 C.A.3d 1583, 1589, 236 C.R. 112 [plaintiff's failure to file proof of service of statement of damages was mere irregularity that did not render judgment void where defendant conceded that he was personally served with statement before entry of default; following *National Diversified Services*].)

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f. Defendant's Answer Sufficient.

6 *Witkin Cal. Proc. PWT* § 182

[§ 182] Defendant's Answer Sufficient.

Where the defendant is not in default because an answer is on file (*Potts v. Whitson* (1942) 52 C.A.2d 199, 207, 125 P.2d 947), or because the original answer is sufficient to controvert a complaint amended in some minor aspect (*supra*, §143), cases conflict as to the effect of a default judgment. One line of cases holds that the judgment is not void, but merely error to be corrected on appeal or by motion for relief under C.C.P. 473. (See *Gray v. Hall* (1928) 203 C. 306, 313, 265 P. 246; *Brooding v. Brooding* (1959) 172 C.A.2d 94, 96, 342 P.2d 50; *Bristol Convalescent Hosp. v. Stone* (1968) 258 C.A.2d 848, 862, 66 C.R. 404; cf. *Potts v. Whitson*, *supra*, 52 C.A.2d 208 [motion under C.C.P. 473; court acknowledges "sometimes questioned doctrine of *Gray v. Hall*," but leaves open question whether judgment is void or merely erroneous].)

Another line of cases holds that the judgment is void and is subject to attack at any time. (See *Reher v. Reed* (1913) 166 C. 525, 528, 137 P. 263; *Miller v. Cortese* (1952) 110 C.A.2d 101, 105, 242 P.2d 84; *Wilson v. Goldman* (1969) 274 C.A.2d 573, 577, 79 C.R. 309; *Heidary v. Yadollahi* (2002) 99 C.A.4th 857, 862, 121 C.R.2d 695 [where default was entered for cross-defendants who had filed answer but failed to appear at trial, relief sought was from void judgment "which the court has authority to set aside at any time"].)

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g. Plaintiff's Complaint Insufficient.

6 *Witkin Cal. Proc. PWT* § 183

[§ 183] Plaintiff's Complaint Insufficient.

A defendant who fails to answer admits only facts that are well pleaded. (See 5 *Cal. Proc.* (5th), *Pleading*, §1051.) If the complaint fails to state a cause of action or the allegations do not support the demand for relief, the plaintiff is no more entitled to that relief by default judgment than if the defendant had expressly admitted all the allegations. Such a default judgment is erroneous, and will be reversed on appeal. (*Williams v. Foss* (1924) 69 C.A. 705, 707, 231 P. 766; *Rose v. Lawton* (1963) 215 C.A.2d 18, 20, 29 C.R. 844, quoting the text; *Taliaferro v. Davis* (1963) 216 C.A.2d 398, 409, 31 C.R. 164; *Vasey v. California Dance Co.* (1977) 70 C.A.3d 742, 749, 139 C.R. 72, citing the text [defendants who defaulted did not admit allegation that corporation was their alter ego, where complaint was insufficient in pleading elements to justify disregard of entity]; *Molen v. Friedman* (1998) 64 C.A.4th 1149, 1153, 75 C.R.2d 651, quoting the text [well-pleaded complaint doctrine does not apply to collateral attack on complaint]; *Falahati v. Kondo* (2005) 127 C.A.4th 823, 829, 26 C.R.3d 104, citing the text [default judgment was void where third amended complaint contained no factual allegations regarding defendant and failed to apprise defendant of plaintiff's demand or amount of damages].)

However, it has been held that the judgment is not void if the court has jurisdiction of the parties and the subject matter, and the defective complaint is sufficient to apprise the defendant of the nature of the plaintiff's demand. (*Trans-Pac. Trading Co. v. Patsy Frock & Romper Co.* (1922) 189 C. 509, 513, 514, 209 P. 357; *Thorson v. Western Dev. Corp.* (1967) 251 C.A.2d 206, 215, 59 C.R. 299.)

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h. No Subject Matter Jurisdiction.

6 *Witkin Cal. Proc. PWT* § 184

[§ 184] No Subject Matter Jurisdiction.

Obviously, a court lacking subject matter jurisdiction may not render a judgment, either on the merits (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §11) or by default. In *Eveleth v. American Brass & Iron Foundry, Plastics Div.* (1962) 203 C.A.2d 41, 21 C.R. 95, B sued E in the municipal court. E cross-complained against B and A for an amount in excess of the court's jurisdiction, necessitating a transfer to the superior court (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §399). Before the transfer, the default of A was entered. *Held*, the entry was void, and the order denying a motion to set it aside must be reversed. (203 C.A.2d 44.) (Cf. *Security Pac. Nat. Bank v. Lyon* (1980) 105 C.A.3d Supp. 8, 12, 165 C.R. 95 [recognizing rule, but holding that default judgment entered by municipal court was not void, where allegations of cross-complaint did not support damages in excess of jurisdictional amount].)

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A. In General.

1. Former Common Law Motion.

6 *Witkin Cal. Proc. PWT* § 185

[§ 185] Former Common Law Motion.

Before 1994, no statute or rule prescribed the grounds or procedure for a motion for judgment on the pleadings, but it was a well-established practice in frequent use. (See *Sofias v. Bank of America* (1985) 172 C.A.3d 583, 586, 218 C.R. 388; *Kortmeyer v. California Ins. Guarantee Assn.* (1992) 9 C.A.4th 1285, 1293, 12 C.R.2d 71.) Either prior to trial or at trial, a party could bring a common law motion for judgment on the pleadings on the same grounds as could be urged (or had unsuccessfully been urged) by general demurrer: failure to state a cause of action or defense. (See *Stockton Newspapers v. Redevelopment Agency of Stockton* (1985) 171 C.A.3d 95, 99, 214 C.R. 561, citing the text; *Heredia v. Farmers Ins. Exchange* (1991) 228 C.A.3d 1345, 1358, 279 C.R. 511, citing the text; *Smiley v. Citibank* (1995) 11 C.4th 138, 44 C.R.2d 441, 900 P.2d 690, *infra*, §187 [standards for determining motion]; on general demurrer, see 5 *Cal. Proc.* (5th), *Pleading*, §952.)

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2. Statutory Motion.

6 *Witkin Cal. Proc. PWT* § 186

[§ 186] Statutory Motion.

(1) *In General.* The common law motion for judgment on the pleadings was codified by the enactment of *C.C.P. 438* in 1993. (See *C.E.B.*, 2 Civil Proc. Before Trial 4th, Chap. 27; Rutter Group, 1 Civil Proc. Before Trial §7:275 et seq.; 61A *Am.Jur.2d* (1999 ed.), *Pleading* §602 et seq.; on federal procedure, see *F.R. Civ. P.*, *Rule 12(c)*; 5C Federal Practice & Procedure (Wright & Miller) §1367 et seq.; 27A Federal Procedure, L.Ed., §62:612 et seq.)

As used in *C.C.P. 438*, "complaint" includes a cross-complaint, "plaintiff" includes a cross-complainant, and "defendant" includes a cross-defendant. (*C.C.P. 438(a)*.)

A party may move for judgment on the pleadings. (*C.C.P. 438(b)(1)*.) The court may also grant judgment on the pleadings on its own motion (*C.C.P. 438(b)(2)*), but an order made without warning, and without affording an opportunity for argument or amendment, may constitute a serious abuse of discretion and a violation of due process. (*Moore v. California Minerals Products Corp.* (1953) 115 C.A.2d 834, 837, 252 P.2d 1005, 2 Cal. Proc. (5th), *Jurisdiction*, §304; cf. *Peters v. California* (1987) 188 C.A.3d 1421, 1424, 234 C.R. 117 [no surprise and no lack of opportunity to be heard; distinguishing *Moore*]; *Jayasinghe v. Lee* (1993) 13 C.A.4th Supp. 33, 36, 17 C.R.2d 117, quoting the text [court properly granted judgment on pleadings on its own motion, without warning or opportunity for argument or amendment, where stipulated facts established that action could not be maintained].)

A motion for judgment on the pleadings may be directed either at the entire complaint or answer, or at any cause of action or affirmative defense set forth in the pleadings. (*C.C.P. 438(c)(2)*); for similar provision as to demurrers, see 5 Cal. Proc. (5th), *Pleading*, §954 et seq.)

(2) *Differences With Common Law Motion.* The statutory motion differs from the common law motion in the following respects:

(a) Lack of subject matter jurisdiction is now a ground for the motion when brought by a defendant. (See *infra*, §189.)

(b) The time within which the motion may be brought is restricted. (See *infra*, §193.)

(c) If the court has overruled a demurrer, a motion on the same grounds requires a material change in the law. (See *infra*, §195.)

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3. General Demurrer Compared.

6 *Witkin Cal. Proc. PWT* § 187

[§ 187] General Demurrer Compared.

(1) *In General.* The motion for judgment on the pleadings differs from a general demurrer mainly in that the motion may be made after all the pleadings are in, or at trial. (See *infra*, §193, and see 5 *Cal. Proc.* (5th), *Pleading*, §1002.) Also, unlike a demurrer, a motion for judgment on the pleadings does not extend the time to plead so as to avoid a default (*supra*, §138), and thus should not be filed in lieu of a responsive pleading.

Like a demurrer, a motion for judgment on the pleadings is confined to the face of the pleading under attack, and the plaintiff's allegations are accepted as true. (See *C.C.P.* 438(d), *infra*, §189; *Colberg v. California* (1967) 67 C.2d 408, 412, 62 C.R. 401, 432 P.2d 3; *Sullivan v. Los Angeles* (1974) 12 C.3d 710, 714, footnote 3, 117 C.R. 241, 527 P.2d 865, citing the text; *Buck v. Standard Oil Co. of Calif.* (1958) 157 C.A.2d 230, 235, 321 P.2d 67, citing the text; *Stencel Aero Engineering Corp. v. Superior Court* (1976) 56 C.A.3d 978, 987, 128 C.R. 691, citing the text; *Hughes v. Western MacArthur Co.* (1987) 192 C.A.3d 951, 954, 237 C.R. 738, citing the text; *Ponderosa Homes v. San Ramon* (1994) 23 C.A.4th 1761, 1767, 29 C.R.2d 26, citing the text.)

(2) *Extrinsic Matter.* If the pleading, though uncertain or otherwise defective in form, sufficiently states a cause of action or defense, the motion may not be granted based on a showing of extrinsic matters, except those of which judicial notice may be taken. (*Hibernia Savings & Loan Soc. v. Thornton* (1897) 117 C. 481, 482, 49 P. 573; *Morris v. Harbor Boat Bldg. Co.* (1952) 112 C.A.2d 882, 886, 247 P.2d 589; *Columbia Cas. Co. v. Northwestern. Nat. Ins. Co.* (1991) 231 C.A.3d 457, 468, 282 C.R. 389; *Jayasinghe v. Lee* (1993) 13 C.A.4th Supp. 33, 36, 17 C.R.2d 117; for cases discussing judicial notice, see *infra*, §189; on judicial notice in ruling on demurrer, see 4 *Cal. Proc.* (5th), *Pleading*, §§440, 441; 5 *Cal. Proc.* (5th), *Pleading*, §948.) However, a written instrument attached to a pleading and properly incorporated by reference may be examined by the court on a motion for judgment on the pleadings, in lieu of the pleader's allegations of the instrument's legal effect. (*Cohen v. Ratinoff* (1983) 147 C.A.3d 321, 327, 195 C.R. 84; *Lumbermens Mut. Cas. Co. v. Vaughn* (1988) 199 C.A.3d 171, 178, 244 C.R. 567 [extending rule to approve consideration of document whose legal effect was merely alleged in complaint, where certified copy was attached to plaintiff's trial brief, defendant's brief quoted document, and parties evidently approved of trial court's consideration]; *Columbia Cas. Co. v. Northwestern. Nat. Ins. Co.*, *supra*, 231 C.A.3d 468; *Burnett v. Chimney Sweep* (2004) 123 C.A.4th 1057, 1063, 20 C.R.3d 562 [trial court did not err in considering signed copy of lease accompanying defendants' motion; lease provisions were same as those in unsigned copy attached to plaintiff's complaint, which were properly

incorporated by reference]; for same rule as applied to demurrers, see 4 *Cal. Proc.* (5th), *Pleading*, §431; 5 *Cal. Proc.* (5th), *Pleading*, §948.)

(3) *Answer*. A sufficient complaint may not be attacked by reference to matters stated in the answer. (*Elmore v. Tingley* (1926) 78 C.A. 460, 464, 248 P. 706; *Schwartz v. Schwartz* (1946) 74 C.A.2d 711, 169 P.2d 688 [answer showed conclusive defense]; *Hughes v. Western MacArthur Co.* (1987) 192 C.A.3d 951, 957, 237 C.R. 738, citing the text.)

(4) *Waiver*. Just as a plaintiff waives any error in a ruling sustaining a demurrer by electing to amend (see 5 *Cal. Proc.* (5th), *Pleading*, §989), a plaintiff who chooses to amend the complaint after the court grants a motion for judgment on the pleadings waives the right to raise on appeal any error in the ruling on the motion. (*Anmaco v. Bohlken* (1993) 13 C.A.4th 891, 900, 16 C.R.2d 675, citing the text.)

(5) *Standard of Review*. The standard of review is the same as on a judgment following a successful demurrer. (See *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 675, 138 C.R. 338, quoting the text; *Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 C.A.3d 218, 225, 162 C.R. 669, citing the text; *Fosgate v. Gonzales* (1980) 107 C.A.3d 951, 957, 166 C.R. 233, quoting the text; *April Enterprises v. KTTV* (1983) 147 C.A.3d 805, 815, 195 C.R. 421; *Ramirez v. USAA Cas. Ins. Co.* (1991) 234 C.A.3d 391, 397, 285 C.R. 757, citing the text.)

In *Smiley v. Citibank* (1995) 11 C.4th 138, 44 C.R.2d 441, 900 P.2d 690, plaintiff credit card holder brought suit against the issuer, a national bank located in South Dakota, alleging that defendant's imposition of late charges violated state law. The trial judge granted defendant's motion for judgment on the pleadings and the Court of Appeal affirmed. *Held*, the motion was properly granted. Under federal law, a national bank is authorized to charge interest at the rate allowed by the laws of the state in which the bank is located, and the term "interest" includes late payment fees; the amount charged was allowed by the laws of South Dakota; and the federal law preempted any California law in conflict. In the course of its opinion, the Supreme Court summarized the standards for deciding a common law motion for judgment on the pleadings:

(a) *Trial judge's determination*. In ruling on a common law motion for judgment on the pleadings made by a defendant, a trial judge determines what has been called a pure question of law, but what is in fact "a mixed question of law and fact that is predominantly legal": Does the plaintiff's complaint state facts sufficient to constitute a cause of action against the defendant? In making this determination, the trial judge generally confines consideration to the complaint and accepts as true all material facts alleged in the complaint. (11 C.4th 145, 146.) As appropriate, however, the judge may extend consideration to matters that are subject to judicial notice. In this, the judge performs essentially the same task as ruling on a general demurrer. (11 C.4th 146.)

(b) *Appellate review*. An appellate court independently reviews the trial judge's order on the motion. Independent review is called for in all actions in which the underlying determination involves a purely legal question or a predominantly legal mixed question. "We have no need to defer, because we can ourselves conduct the same analysis. In fact, we have need *not* to defer, in order to be free to further the uniform articulation and application of the law within our jurisdiction." (11 C.4th 146.)

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A. In General.

4. Use of Answer To Support Complaint.

6 *Witkin Cal. Proc. PWT* § 188

[§ 188] Use of Answer To Support Complaint.

May the answer be used in opposition to a defendant's motion for judgment on the pleadings? In *Way v. Shaver* (1906) 2 C.A. 650, 84 P. 283, plaintiff beneficiary's complaint was defective in failing to allege that defendants denied the trust or that the alleged trustee refused to carry out its terms. However, the answer denied the trust and alleged payment in satisfaction of the claim. *Held*, this cured the defect in the complaint, and a judgment on the pleadings for defendants was reversed. (2 C.A. 652.)

Hatch v. Draper (1943) 59 C.A.2d 411, 138 P.2d 682, took a contrary view without mentioning *Way*. However, the decision merely affirmed a judgment of dismissal, after an objection to evidence was sustained and the plaintiff failed to take advantage of leave to amend. It would seem that, ordinarily, admissions in the answer ought to be considered, either directly or indirectly by giving the plaintiff an opportunity to amend the complaint in conformity with the admissions. (See *Estate of Supple* (1966) 247 C.A.2d 410, 415, 55 C.R. 542, quoting the text [issue noted but not resolved, where opportunity to amend was offered and declined, and contention that defects were cured by answer was untenable]; *infra*, §194.)

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B. Grounds for Motion.

1. Statutory Requirements.

6 *Witkin Cal. Proc. PWT* § 189

[§ 189] Statutory Requirements.

(1) *Motion by Plaintiff.* When the moving party is the plaintiff, there is only one ground for a motion for judgment on the pleadings: "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (*C.C.P. 438(c)(1)(A)*.) This is the same ground on which the former common law motion was based (*supra*, §185), and the same as for a general demurrer to the answer (see 5 *Cal. Proc. (5th), Pleading*, §1182).

(2) *Motion by Defendant.* When the moving party is the defendant, there are two permissible grounds: (a) The court lacks subject matter jurisdiction, or (b) the complaint does not state facts sufficient to constitute a cause of action against the defendant. (*C.C.P. 438(c)(1)(B)*.) The second of these is the traditional ground, and the same as for a general demurrer. (See 5 *Cal. Proc. (5th), Pleading*, §§951, 952.) The first, lack of subject matter jurisdiction, is an appropriate statutory addition; though it is a ground for special demurrer, it is even more fundamental than failure to state a cause of action, and, though not commonly alleged in demurrers, it has been treated in the same manner as the ground for general demurrer. (See 5 *Cal. Proc. (5th), Pleading*, §§953, 969.)

(3) *Court's Own Motion.* The grounds on which a court may grant judgment on the pleadings on its own motion are identical to those provided for the parties. (*C.C.P. 438(c)(3)*.)

(4) *Judicial Notice.* As with the general demurrer (*supra*, §187), the grounds of the motion must appear "on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (*C.C.P. 438(d)*; on compulsory judicial notice, see 1 *Cal. Evidence (4th), Judicial Notice*, §7 et seq. [compulsory judicial notice]; §36 et seq. [compulsory notice on request].) When the motion is based on a matter of which the court may take judicial notice under *Ev.C. 452* or *453*, "the matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit." (*C.C.P. 438(d)*.)

The taking of judicial notice on a motion for judgment on the pleadings was an established practice under the former common law motion. (See *Alford v. Hesse (1929) 100 C.A. 66, 279 P. 831* [government regulations]; *Kachig v. Boothe (1971) 22 C.A.3d 626, 630, 99 C.R. 393*, citing the text [court records]; *Stencel Aero Engineering Corp. v. Superior Court (1976) 56 C.A.3d 978, 987, footnote 6, 128 C.R. 691*, citing the text [responses to requests for

admissions and interrogatories, authenticated under oath by counsel]; *Barker v. Hull* (1987) 191 C.A.3d 221, 224, 227, 236 C.R. 285 [prior action as basis for collateral estoppel]; *Sebago v. Alameda* (1989) 211 C.A.3d 1372, 1379, 1380, 259 C.R. 918 [trial court declined to take notice of responses to interrogatories and requests for admissions, but notice was taken by appellate court]; *Ponderosa Homes v. San Ramon* (1994) 23 C.A.4th 1761, 1768, 29 C.R.2d 26 [parties' statements of undisputed facts filed on motion for summary adjudication]; *Evans v. California Trailer Court* (1994) 28 C.A.4th 540, 549, 33 C.R.2d 646 [recorded trust deed]; cf. *Bach v. McNelis* (1989) 207 C.A.3d 852, 865, 255 C.R. 232 [judicial notice may not be taken of *truth of assertions* in filed declarations or affidavits]; *Columbia Cas. Co. v. Northwestern Nat. Ins. Co.* (1991) 231 C.A.3d 457, 469, 282 C.R. 389 [judicial notice of court records may not be taken to establish truth of content].)

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B. Grounds for Motion.

2. Motion by Defendant.

6 *Witkin Cal. Proc. PWT* § 190

[§ 190] Motion by Defendant.

A defendant's motion for judgment on the pleadings has largely the same purpose and effect as a general demurrer (see 5 *Cal. Proc.* (5th), *Pleading*, §951 et seq.).

(1) *Granting of Motion Held Proper.* Cases in which the defendant was granted judgment on the pleadings, or was held on appeal to be entitled to the judgment, include the following:

Colberg v. California (1967) 67 *C.2d* 408, 412, 425, 62 *C.R.* 401, 432 *P.2d* 3, citing the text [declaratory relief on right to seek damages for impairment of access to shipping channel; right of access was burdened with servitude in favor of state].

Ser-Bye Corp. v. C. P. & G. Markets (1947) 78 *C.A.2d* 915, 920, 179 *P.2d* 342 [unlawful detainer; failure to allege improper assignment of lease].

Buck v. Standard Oil Co. of Calif. (1958) 157 *C.A.2d* 230, 235, 321 *P.2d* 67, citing the text [negligence action; failure to allege breach of duty by defendant who was deceased at time of accident].

Kachig v. Boothe (1971) 22 *C.A.3d* 626, 632, 99 *C.R.* 393 [failure to state viable causes of action for fraud, malicious prosecution, and intentional infliction of emotional distress].

Sofias v. Bank of America (1985) 172 *C.A.3d* 583, 586, 218 *C.R.* 388 [third-party beneficiary claim against lender was barred by statute].

Donohue v. California (1986) 178 *C.A.3d* 795, 804, 224 *C.R.* 57 [tort action against state; facts alleged in complaint were not stated in claim presented to state].

Barker v. Hull (1987) 191 *C.A.3d* 221, 227, 236 *C.R.* 285 [complaint barred by collateral estoppel].

Hunt v. Shasta (1990) 225 *C.A.3d* 432, 440, 275 *C.R.* 113 [complaint barred by statute of limitations].

Kahn v. Bower (1991) 232 C.A.3d 1599, 1615, 284 C.R. 244 [defamation; failure to plead knowing and reckless falsehood].

Ponderosa Homes v. San Ramon (1994) 23 C.A.4th 1761, 1768, 29 C.R.2d 26, citing the text [complaint barred by statute of limitations].

Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 C.A.4th 750, 765, 62 C.R.2d 778, citing the text [mandamus proceeding; motion was properly granted because defendants were not legally bound to exercise discretion in first instance].

(2) *Granting of Motion Held Improper.* Cases upholding the denial of the motion, or reversing an order granting it, are merely cumulative of decisions on general demurrer. Illustrative cases include the following:

Hibernia Savings & Loan Soc. v. Thornton (1897) 117 C. 481, 483, 49 P. 573 [complaint was sufficient to state cause of action for recovery on promissory note].

Rannard v. Lockheed Aircraft Corp. (1945) 26 C.2d 149, 156, 157 P.2d 1 [general allegations of negligence was sufficient].

Dragna v. White (1955) 45 C.2d 469, 470, 472, 289 P.2d 428, citing the text [false imprisonment was sufficiently alleged].

Alliance Mortg. Co. v. Rothwell (1995) 10 C.4th 1226, 1235, 44 C.R.2d 352, 900 P.2d 601 [judgment on pleadings was improperly granted; full credit bid at nonjudicial foreclosure sale did not preclude claim by lender purchasing at sale of fraud in inducement of underlying loan obligation].

Morris v. Harbor Boat Bldg. Co. (1952) 112 C.A.2d 882, 886, 247 P.2d 589 [fraud was sufficiently alleged].

Mobil Oil Corp. v. Exxon Corp. (1986) 177 C.A.3d 942, 948, 223 C.R. 392 [extrinsic evidence was required to resolve dispute over contractual arbitration clause].

Bach v. McNelis (1989) 207 C.A.3d 852, 865, 255 C.R. 232 [sufficiently stated cause of action was not defeated by matters properly subject to judicial notice].

Heredia v. Farmers Ins. Exchange (1991) 228 C.A.3d 1345, 1360, 279 C.R. 511 [complaint stated contract and tort causes of action that survived summary adjudication in defendant's favor].

Ludgate Ins. Co., Ltd. v. Lockheed Martin Corp. (2000) 82 C.A.4th 592, 603, 98 C.R.2d 277 [plaintiff in declaratory relief action was bound by its allegations of existing, actual controversy between itself and defendant and thus waived opportunity to deny controversy by motion for judgment under C.C.P. 438(c)(1)(B) (supra, §189) on defendant's cross-complaint for declaratory relief].

(3) *Motion Used To Obtain Declaratory Relief Judgment.* A motion for judgment on the pleadings may be used in an action for declaratory relief to obtain a declaratory judgment on the merits in favor of the defendant, rather than dismissal of the plaintiff's action. (See *Wilson v. Board of Retirement of the Los Angeles County Employees Retirement Assn.* (1957) 156 C.A.2d 195, 201, 319 P.2d 426, 5 Cal. Proc. (5th), Pleading, §878; *Aarons v. Brasch* (1964) 229 C.A.2d 197, 199, 40 C.R. 153, citing the text; *Dohrmann Co. v. Security Savings & Loan Assn.* (1970) 8 C.A.3d 655, 662, 87 C.R. 792.)

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B. Grounds for Motion.

3. Motion by Plaintiff.

6 *Witkin Cal. Proc. PWT* § 191

[§ 191] Motion by Plaintiff.

As with the defendant's motion (*supra*, §190), particular grounds for a motion by the plaintiff will be found in cases dealing with the sufficiency of the answer on general demurrer. (See 5 *Cal. Proc.* (5th), *Pleading*, §1181 et seq.)

(1) *Motion Granted*. The following cases are illustrations of motions granted:

Hardy v. Admiral Oil Co. (1961) 56 *C.2d* 836, 840, 16 *C.R.* 894, 366 *P.2d* 310 [facts alleged in original answer, showing defective title, could not be withdrawn by filing amended answer].

Le Breton v. Stanley Contracting Co. (1911) 15 *C.A.* 429, 434, 114 *P.* 1028 [failure to deny indebtedness, and denials as to lender's insolvency and appointment of receiver insufficiently based on information and belief].

Adjustment Corp. v. Hollywood Hardware & Paint Co. (1939) 35 *C.A.2d* 566, 569, 96 *P.2d* 161 [evasive answer admitting indebtedness].

Bank of America v. Hirsch Mercantile Co. (1944) 64 *C.A.2d* 175, 181, 148 *P.2d* 110 [no denial of material facts in dispute over subordination clause of trust deed].

Carlson v. Lindauer (1953) 119 *C.A.2d* 292, 301, 259 *P.2d* 925 [facts alleged in answer and cross-complaint showed that defendants did not own disputed oil rights].

Bank of America v. Vannini (1956) 140 *C.A.2d* 120, 295 *P.2d* 102 [failure to sufficiently allege fraud as defense in action to recover on contract].

Los Angeles v. California Towel & Linen Supply Co. (1963) 217 *C.A.2d* 410, 416, 31 *C.R.* 832 [action for taxes due; answer admitted failure to exhaust administrative remedies to challenge assessment].

Knoff v. San Francisco (1969) 1 *C.A.3d* 184, 200, 81 *C.R.* 683 [answer raised only questions of law and immaterial issues].

Allstate Ins. Co. v. Kim W. (1984) 160 C.A.3d 326, 331, 206 C.R. 609 [declaratory judgment on the pleadings finding no coverage under insurance policy].

Sebago v. Alameda (1989) 211 C.A.3d 1372, 1379, 1380, 259 C.R. 918 [declaratory judgment on the pleadings holding ordinance facially unconstitutional].

(2) *Pleading Sustained*. Examples of cases upholding the pleading, either by sustaining the denial or by reversing the granting of the motion, include the following:

MacIsaac v. Pozzo (1945) 26 C.2d 809, 813, 161 P.2d 449, *infra*, §194 [answer raising fraud defense required factual determination].

Patterson v. Pacific Indem. Co. (1931) 119 C.A. 203, 206, 6 P.2d 102 [allegations of answer were ambiguous, but sufficient to entitle defendant to hearing].

Osborne v. Abels (1939) 30 C.A.2d 729, 87 P.2d 404 [answer denied all allegations of complaint and set up valid defense as to acquisition of title].

Fabbro v. Dardi & Co. (1949) 93 C.A.2d 247, 252, 209 P.2d 91 [extrinsic evidence was required for construction of ambiguous contract].

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C. Procedure.

1. Notice.

6 *Witkin Cal. Proc. PWT* § 192

[§ 192] Notice.

C.C.P. 438 appears to presume, without specifying, that motions for judgment on the pleadings will be brought on written notice. (See *C.C.P. 438(d)*, supra, §189 ["a matter of which the court may take judicial notice ... shall be specified in the notice of motion, or in the supporting points and authorities"].) Apart from the statute, notice would ordinarily be required, given the significance of the rights at stake. (See supra, §7; for forms of noticed motion with points and authorities, see C.E.B., 2 Civil Proc. Before Trial 4th, §§27.28; Cal. Civil Practice, 2 Procedure, §§10:139, 10:140.)

In contrast, a common law motion for judgment on the pleadings made at the trial, with the parties present, required no prior notice. (*Morel v. Morel* (1928) 203 C. 417, 418, 264 P. 760; *Macbeth v. West Coast Packing Corp.* (1947) 83 C.A.2d 96, 99, 187 P.2d 815; *Lortz v. Connell* (1969) 273 C.A.2d 286, 292, 78 C.R. 6.) This rule might be applied where the court grants permission for a belated statutory motion under *C.C.P. 438(e)* (infra, §193).

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C. Procedure.

2. Time of Motion.

6 *Witkin Cal. Proc. PWT* § 193

[§ 193] Time of Motion.

(1) *Common Law*. There was no restriction on the time for bringing a common law motion for judgment on the pleadings, apart from the necessity that it be made some time after the pleading was on file and before the entry of final judgment. (See *Morel v. Morel* (1928) 203 C. 417, 264 P. 760 [motion made and granted on day case was set for trial]; *McNew v. Mulcahy* (1938) 24 C.A.2d 656, 658, 76 P.2d 143 [no waiver of right to move resulted from contemporaneous filing of memorandum to set cause for trial]; *Shabrick v. Moore* (1961) 195 C.A.2d 56, 59, 15 C.R. 310, citing the text [4 days before trial]; *Donohue v. California* (1986) 178 C.A.3d 795, 800, 224 C.R. 57.)

(2) *Statutory Preconditions for Motion*. Under C.C.P. 438(f), a motion for judgment on the pleadings may be made only after the opposing party's pleading has been filed and the time for demurrer has expired. (On time for filing demurrers, see C.C.P. 430.40, 4 *Cal. Proc.* (5th), *Pleading*, §7 et seq. [30 days from filing of complaint or cross-complaint; 10 days from filing of answer].)

(3) *Time After Which Court Permission Is Required*. A motion for judgment on the pleadings may not be made after entry of a pretrial conference order under C.C.P. 575 (see 7 *Cal. Proc.* (5th), *Trial*, §43 et seq.), or within 30 days of the date initially set for trial, whichever is later, unless otherwise permitted by the court. (C.C.P. 438(e); see *Sutherland v. Fort Bragg* (2000) 86 C.A.4th 13, 17, 102 C.R.2d 736 [court permitted defendant to file motion after initial pleadings were filed and date for trial was set; motion was granted after oral argument]; *Burnett v. Chimney Sweep* (2004) 123 C.A.4th 1057, 1063, 20 C.R.3d 562 [C.C.P. 438(e) does not impose "good cause" requirement for untimely motion].)

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C. Procedure.

3. Effect of Failure To File General Demurrer.

6 *Witkin Cal. Proc. PWT* § 194

[§ 194] Effect of Failure To File General Demurrer.

The failure to demur does not preclude a party from moving for judgment on the pleadings. (*C.C.P. 438(g)(2)*.) This is consistent with the rule that the fundamental defects of lack of jurisdiction and failure to state facts sufficient to state a cause of action or defense are never waived. (*C.C.P. 430.80, 5 Cal. Proc. (5th), Pleading, §958.*)

It is also consistent with established practice under the common law. Although it was sometimes said to be bad practice to refrain from attacking a defective pleading by general demurrer, keeping the objection in reserve until moving for judgment on the pleadings at trial (see *Gallagher v. California Pac. Title & Trust Co. (1936) 13 C.A.2d 482, 486, 57 P.2d 195; Nelson v. Nevel (1984) 154 C.A.3d 132, 141, 201 C.R. 93*), the delay was not deemed a sufficient reason to deny the motion and waste further time in a trial on fatally defective pleadings. But the disfavor in which this practice was held nevertheless led to a sound rule of policy, which should also apply where the court exercises its discretion to permit a late motion under *C.C.P. 438(e)* (*supra*, §192): The belated attack will not give the moving party any tactical advantage. The notion that, because amendments are less readily allowed during trial (see *5 Cal. Proc. (5th), Pleading, §1205*), leave to amend is less likely to follow the granting of a motion for judgment on the pleadings at trial than the sustaining of a demurrer, has been squarely repudiated. The motion may be well taken and the order granted, but the pleader may then ask leave to amend, and leave will be granted just as if a general demurrer were sustained. And it may be reversible error to deny leave to amend to correct defects long known to the defendant and raised at the time of trial, without giving the plaintiff an opportunity to elect to amend or stand on the pleading.

This rule was strongly affirmed in the leading case of *MacIsaac v. Pozzo (1945) 26 C.2d 809, 161 P.2d 449* as follows: "[W]hen the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them. The granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits." (*26 C.2d 815.*) (See *Beverage v. Canton Placer Mining Co. (1955) 43 C.2d 769, 778, 278 P.2d 694; Cruise v. San Francisco (1951) 101 C.A.2d 558, 561, 225 P.2d 988; Nelson v. Nevel, supra, 154 C.A.3d 141*, citing the text; *Lortz v. Connell (1969) 273 C.A.2d 286, 293, 78 C.R. 6.*)

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4. Effect of Prior Overruling of General Demurrer.

6 *Witkin Cal. Proc. PWT* § 195

[§ 195] Effect of Prior Overruling of General Demurrer.

If the moving party has already demurred unsuccessfully on the same grounds alleged in the motion for judgment on the pleadings, the motion does not lie unless there has been a material change in applicable case law or statute since the ruling on the demurrer. (*C.C.P.* 438(g)(1).)

This aspect of the statute imposes a significant change from the common law practice. The renewal in a motion for judgment on the pleadings of an objection raised in a general demurrer was formerly deemed neither irregular nor undesirable. The interests of all parties were said to be advanced by avoiding a trial and reversal for defect in the pleadings; hence, if the demurrer was erroneously overruled, the moving party acted properly in raising the point again. A trial judge who made the former ruling was not bound by it, and if the demurrer was overruled by a different judge, the trial judge was equally free to reexamine the sufficiency of the pleading. (See *Ser-Bye Corp. v. C. P. & G. Markets* (1947) 78 C.A.2d 915, 918, 179 P.2d 342 [different judge may reassess pleading]; *Davis v. Santa Ana* (1952) 108 C.A.2d 669, 684, 239 P.2d 656 [judge was not bound by own prior ruling]; *Ion Equipment Corp. v. Nelson* (1980) 110 C.A.3d 868, 877, 168 C.R. 361, citing the text; *Donohue v. California* (1986) 178 C.A.3d 795, 800, 801, 224 C.R. 57.) However, leave to amend was generally granted when the trial judge disagreed with the law and motion judge on the sufficiency of a pleading. (See *Shabrick v. Moore* (1961) 195 C.A.2d 56, 60, 15 C.R. 310, quoting the text; *Dobbins v. Hardister* (1966) 242 C.A.2d 787, 796, 51 C.R. 866, quoting the text; *Olson v. Sacramento* (1969) 274 C.A.2d 316, 329, 330, 79 C.R. 140, quoting the text; *Coshov v. Escondido* (2005) 132 C.A.4th 687, 701, 34 C.R.3d 19 [although court previously overruled defendant's demurrers, those rulings did not deprive court of inherent power to construe plaintiff's subsequent motions in limine as motion for judgment on pleadings and to issue order that plaintiff failed to state causes of action for declaratory or injunctive relief]; *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 C.A.4th 1007, 1013, 46 C.R.3d 425 [because standing was not issue in defendant's overruled demurrer, defendant was free to raise it by motion for judgment on pleadings].)

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C. Procedure.

5. Renewal of Motion.

6 *Witkin Cal. Proc. PWT* § 196

[§ 196] Renewal of Motion.

Under the common law rule, just as a motion for judgment on the pleadings could properly follow the overruling of a demurrer on the same grounds, the motion could be renewed on multiple occasions, with the court retaining jurisdiction to reconsider the matter even in the absence of compliance with the requirements for renewed motions provided in *C.C.P. 1008*. (*Donohue v. California* (1986) 178 C.A.3d 795, 800, 801, 224 C.R. 57 [motion was properly granted after complaint survived demurrer and two prior motions for judgment on pleadings].)

This rule has been modified and a significant limitation added by *C.C.P. 438(g)(1)*, which provides that the motion may be made even though the "moving party has already demurred to the complaint or answer ... on the same grounds as is the basis for the motion" for judgment on the pleadings, "provided that there as been a material change in applicable case law or statute since the ruling on the demurrer." The requirement of the change in the law comports with *C.C.P. 1008*, which requires a showing of "new or different facts, circumstances, or law" for a renewed motion (*supra*, §47). (See C.E.B., 2 Civil Proc. Before Trial 4th, §27.8; Rutter Group, 1 Civil Proc. Before Trial §7.305:1.)

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C. Procedure.

6. Order and Judgment.

6 Witkin Cal. Proc. PWT § 197

[§ 197] Order and Judgment.

(1) *In General.* Judgment on the pleadings may be granted with or without leave to file an amended complaint or answer. (C.C.P. 438(h)(1).) If leave to amend is granted, the court must allow 30 days for the filing of an amended pleading. (C.C.P. 438(h)(2); see *infra*, §198.) If the motion is granted as to the entire complaint or answer without leave to amend, judgment must be entered "forthwith" in favor of the moving party. (C.C.P. 438(h)(3).) (For forms of order and judgment, see C.E.B., 2 Civil Proc. Before Trial 4th, §§27.29, 27.30; on orders generally, see *supra*, §§44, 45.)

(2) *Leave to Amend.* As when a demurrer is sustained, after a motion for judgment on the pleadings is granted, leave to amend should be permitted if there is a reasonable possibility that the defective pleading can be cured by amendment. (*Clack v. California* (1969) 275 C.A.2d 743, 750, 80 C.R. 274; *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 C.A.3d 1131, 1141, 261 C.R. 146; *Virginia G. v. ABC Unified School Dist.* (1993) 15 C.A.4th 1848, 1852, 19 C.R.2d 671; on leave to amend following demurrer, see 5 Cal. Proc. (5th), Pleading, §988 et seq.) Where the motion is granted as to the original complaint, denial of leave to amend is an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. (*Virginia G. v. ABC Unified School Dist.*, *supra*; for rule applicable to belated motions, see *supra*, §194.)

Nevertheless, the burden of showing a reasonable possibility that the defect can be cured by amendment is on the pleading party, and it is proper to deny leave to amend where there can be no liability as a matter of law (*La Jolla Village Homeowners' Assn. v. Superior Court*, *supra*), or where opportunities to amend have been repeatedly ignored (*Hardy v. Admiral Oil Co.* (1961) 56 C.2d 836, 842, 16 C.R. 894, 366 P.2d 310).

In determining a motion to amend, the trial judge may consider evidence that could not be considered in connection with the motion for judgment on the pleadings. (*Lortz v. Connell* (1969) 273 C.A.2d 286, 292, 293, 78 C.R. 6.)

(3) *Review.* The order granting the motion, like an order sustaining a demurrer without leave to amend, is not directly appealable. Appeal lies from the judgment thereafter entered. (*Budrow v. Wheatcraft* (1953) 115 C.A.2d 517, 522, 252 P.2d 637; *Old Town Dev. Corp. v. Urban Renewal Agency of Monterey* (1967) 249 C.A.2d 313, 317, 57 C.R. 426; see 9 Cal. Proc. (5th), Appeal, §154.) An order granting partial judgment on the pleadings is an interlocutory order reviewable only on appeal from the final judgment. (*Uptain v. Duarte* (1988) 206 C.A.3d 1258, 1261, 1262, 254 C.R.

150.) In unusual cases of a grave nature or with a significant legal impact, review may be obtained by extraordinary writ. (See *Safeway Stores v. Superior Court* (1987) 190 C.A.3d 713, 716, 235 C.R. 636.)

A party may properly assert for the first time on appeal that the failure to grant leave to amend was an abuse of discretion. (*Galligan v. San Bruno* (1982) 132 C.A.3d 869, 876, 183 C.R. 466.)

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C. Procedure.

7. Further Proceedings Where Leave To Amend Is Granted.

6 *Witkin Cal. Proc. PWT* § 198

[§ 198] Further Proceedings Where Leave To Amend Is Granted.

(1) *Time for Filing Amended Pleading.* *C.C.P. 438(h)(2)* requires the court to allow 30 days for filing an amended pleading after a grant of judgment on the pleadings with leave to amend. The time to amend runs from the service of notice of the ruling on the motion under *C.C.P. 1019.5* (supra, §45). (*People v. \$ 20,000 United States Currency* (1991) 235 *C.A.3d* 682, 691, 286 *C.R.* 746 [adopting rule by analogy to procedure after demurrer]; on procedure after demurrer, see 5 *Cal. Proc.* (5th), *Pleading*, §983.)

(2) *Effect of Failure To Timely File.* If the amended pleading is filed late, the court may strike it under *C.C.P. 436* (see 5 *Cal. Proc.* (5th), *Pleading*, §1009) and enter judgment in favor of the party seeking judgment on the pleadings. (*C.C.P. 438(h)(4)(A)* and (h)(4)(B).) If judgment on the pleadings was granted as to the entire complaint or answer, and an amended pleading is not timely filed, the court must enter judgment "forthwith" in favor of the moving party. (*C.C.P. 438(h)(4)(C)*.)

(3) *Necessity of Further Proceedings.* When judgment on the pleadings is granted with leave to amend, the court may not enter judgment in favor of a party until one of the following occurs:

(a) The party moves for entry of judgment in its favor, if no amended pleading was filed. (*C.C.P. 438(i)(1)(B)*.)

(b) The party moves to strike the amended pleading and for entry of judgment in its favor, if an amended pleading was filed and the moving party contends that the filing was untimely or that the amended pleading violates the court's ruling on the motion for judgment on the pleadings. (*C.C.P. 438(i)(1)(A)*.)

Motions made under *C.C.P. 438(i)* are subject to the notice requirements of *C.C.P. 1010* (supra, §7 et seq.). (*C.C.P. 438(i)(2)*.) At the hearing on that motion, the court must determine whether to enter judgment in favor of a particular party. (*C.C.P. 438(i)(3)*.)

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VIII. JUDGMENT ON THE PLEADINGS

D. Objection to All Evidence.

1. Nature and Purpose of Objection.

6 *Witkin Cal. Proc. PWT* § 199

[§ 199] Nature and Purpose of Objection.

(1) *In General.* A plaintiff or defendant may object to the introduction of any evidence by a party whose pleading is fatally defective. The purpose of this objection is identical to that of a motion for judgment on the pleadings (*supra*, §185 et seq.); the objecting party seeks to end the trial and obtain a favorable judgment, on the pleadings, without any evidence. The ground is also the same; the only basis for total exclusion of evidence is that if the allegations were proved they still would not state a cause of action or defense. (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 C.A.4th 672, 676, 78 C.R.2d 225; see 61A Am.Jur. 2d (1999 ed.), Pleading §603.)

An objection to all evidence is always raised at trial; it is not subject to C.C.P. 438(e), requiring permission from the court to move for judgment on the pleadings near the time of trial (*supra*, §193). Nor is it subject to C.C.P. 438(g)(1), requiring a change in law before an objection raised by demurrer may be renewed in a motion for judgment on the pleadings (*supra*, §195), although a similar showing (new or different facts, circumstances, or law) would be required if an objection to all evidence is deemed a request for renewal or reconsideration of a prior application for an order, under C.C.P. 1008 (*supra*, §46 et seq.).

In other respects, the objection to all evidence shares the characteristics of the general demurrer and the motion for judgment on the pleadings, i.e., the court considers only the sufficiency of the pleading, accepting its allegations as true, ignoring evidentiary matters and the claims of the opposing pleading. (*Miller v. McLaglen* (1947) 82 C.A.2d 219, 223, 224, 186 P.2d 48; *Stilwell v. Trutanich* (1960) 178 C.A.2d 614, 617, 3 C.R. 285.) Where the objection is the first challenge to the pleading, the pleading is liberally construed. (*Stilwell v. Trutanich, supra*; *Uptown Enterprises v. Strand* (1961) 195 C.A.2d 45, 50, 15 C.R. 486). The pleader is entitled to an opportunity to amend if the defect can be cured. (*Redondo Imp. Co. v. Redondo Beach* (1934) 3 C.A.2d 299, 39 P.2d 438 [leave to amend was erroneously denied]; *McFaddin v. H.S. Crocker Co.* (1963) 219 C.A.2d 585, 594, 33 C.R. 389 [leave to amend was not requested]; *Powers v. Sissoev* (1974) 39 C.A.3d 865, 870, 114 C.R. 868 [entire record including testimony at trial may be considered in deciding on leave to amend].)

(2) *Objections Sustained.* The following cases illustrate situations in which objections to all evidence were properly sustained:

Neff v. New York Life Ins. Co. (1947) 30 C.2d 165, 175, 180 P.2d 900 [action barred by statute of limitations].

Parker v. Bowron (1953) 40 C.2d 344, 351, 254 P.2d 6 [plaintiff lacked beneficial interest needed for standing].

Campbell v. Clark (1958) 159 C.A.2d 432, 437, 324 P.2d 51 [lack of standing to sue corporation in individual capacity].

McKay v. Riverside (1959) 175 C.A.2d 247, 250, 345 P.2d 949 [defendant was protected by governmental immunity].

Powers v. Sissoev, supra [mother could not state cause of action for emotional distress resulting from injury to child].

(3) *Objections Defeated*. Examples of cases holding the pleadings sufficient to defeat the objection include the following:

Dragna v. White (1955) 45 C.2d 469, 470, 289 P.2d 428 [causes of action for false arrest and false imprisonment was stated].

Perry v. Futch (1953) 119 C.A.2d 556, 558, 259 P.2d 971 [fraud was sufficiently pleaded; misjoinder of contract cause of action was not fatal].

Chohon v. Kersey Kinsey Co. (1959) 173 C.A.2d 548, 551, 343 P.2d 614 [breach of oral contract was sufficiently alleged].

Stilwell v. Trutanich, supra, 178 C.A.2d 620 [cause of action was stated for accounting in regard to joint venture].

Uptown Enterprises v. Strand, supra [grounds were stated for injunctive relief against interference with business].

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VIII. JUDGMENT ON THE PLEADINGS

D. Objection to All Evidence.

2. Judgment Where Objection Is Sustained.

6 *Witkin Cal. Proc. PWT* § 200

[§ 200] Judgment Where Objection Is Sustained.

There is some uncertainty as to the procedure for entering judgment after sustaining an objection to all evidence.

In some cases, the objecting party has moved for a judgment on the pleadings, either with the objection or after it has been sustained. (See *Beverage v. Canton Placer Mining Co.* (1955) 43 C.2d 769, 778, 278 P.2d 694; *Dragna v. White* (1955) 45 C.2d 469, 470, 289 P.2d 428; *Allen v. California Mut. Bldg. & Loan Assn.* (1940) 40 C.A.2d 374, 376, 104 P.2d 851.) Often the cases merely recite that the court sustained the objection and rendered judgment in favor of the objecting party. The theory of these cases might be that, despite the odd form, the objection is equivalent to a common law motion for judgment on the pleadings and may be treated as such; or it might be that, after sustaining the objection, the court took the only appropriate remaining step and granted judgment on the pleadings on its own motion. Whatever the explanation, an additional motion is not essential; the objection to evidence, if sustained, will be followed by a judgment. (See, e.g., *Parker v. Bowron* (1953) 40 C.2d 344, 350, 254 P.2d 6 [objection sustained and judgment entered]; *Bradley Co. v. Ridgeway* (1936) 14 C.A.2d 326, 329, 58 P.2d 194 ["It is undoubtedly true that the trial court considered the objection raised by the defendants to the introduction of evidence as a motion for a judgment on the pleadings. The judgment rendered in the action so recites"].)

Where the objection is by the defendant, a judgment of dismissal is proper, just as after a demurrer is sustained without leave to amend. (See 5 *Cal. Proc.* (5th), *Pleading*, §997.) In *Clemens v. American Warranty Corp.* (1987) 193 C.A.3d 444, 452, 238 C.R. 339, citing the text, the trial court suggested that defendants move to dismiss after granting six separate motions in limine barring the introduction of evidence. *Held*, the ensuing judgment of dismissal was proper, despite the unorthodox procedural posture of the case. Defendants' motions in limine were, in net effect, an objection to all evidence on the ground of failure to state a cause of action. The motions were properly granted, and if defendants had next objected to the introduction of all evidence, the "objection inevitably would have been sustained and a dismissal would have followed." Hence, there was no prejudice from the procedural peculiarities. (193 C.A.3d 452.)

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IX. SUMMARY JUDGMENT

A. In General.

1. Nature of Remedy.

6 *Witkin Cal. Proc. PWT* § 201

[§ 201] Nature of Remedy.

(1) *Governing Law.* The summary judgment remedy in California is set forth in *C.C.P. 437c*. "Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense." (*C.C.P. 437c(a)*; on motion, see *infra*, §213 et seq.) The statute was enacted in 1933 and has been frequently amended.

The general remedy of motion for summary judgment must be distinguished from special statutory procedures for summary determination of liability, e.g., in tax proceedings (see *People v. Skinner* (1941) 18 *C.2d* 349, 115 *P.2d* 488) or bail forfeiture (see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §103 et seq.).

Relief may be sought not only for summary judgment per se, i.e., to determine the entire action (*C.C.P. 437c(c)*), but also for summary adjudication, i.e., to dispose of one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action (*C.C.P. 437c(f)(1)*). (On summary adjudication, see *infra*, §267 et seq.)

The analogous federal remedy is set forth in *F.R. Civ. P., Rule 56*. (See 10A *Federal Practice & Procedure* (Wright, Miller & Kane) §2711 et seq.; 27A *Federal Procedure*, L.Ed., §62:622 et seq.)

(2) *Commentary.* Summary judgment has been the subject of extensive commentary. (See 39 *Cal. L. Rev.* 307; 40 *Cal. L. Rev.* 195, 204; 36 *Hastings L. J.* 419 [proposed statutory revision]; 24 *Pacific L. J.* 1845 [comprehensive review and criticism of state and federal legislation and case law]; 23 *Pepperdine L. Rev.* 125 [two-way fee-shifting on summary judgment as equitable deterrent to unmeritorious lawsuits]; 43 *San Diego L. Rev.* 319 [proposal to expand role of summary judgment in nonjury cases]; 11 *So. Cal. L. Rev.* 436; 13 *So. Cal. L. Rev.* 523; 2 *Stanf. L. Rev.* 190; 22 *U.C. Davis L. Rev.* 93 [analysis and criticism of the use of expert evidence by affidavits in summary judgment proceedings]; 10 *U.C.L.A. L. Rev.* 347 [study of standards applied by California courts]; C.E.B., 2 *Civil Proc. Before Trial* 4th, Chap. 36; C.E.B., *Civil Lit. Forms* §32.1 et seq.; C.J.E.R., *Judges Benchbook*, *Civil Proceedings: Before Trial* 2d, §13.1 et seq.; Rutter Group, 3 *Civil Proc. Before Trial*, Chap. 10; *Cal. Civil Practice*, 3 *Procedure*, Chap. 21; 73 *Am.Jur.2d* (2001 ed.), *Summary Judgment* §1 et seq.; 23 *Am.Jur. P.P. Forms* (2001 ed.), *Summary Judgment* §1 et seq.; 5 *Am.Jur. Trials* 105.)

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IX. SUMMARY JUDGMENT

A. In General.

2. Purpose of Summary Judgment.

6 *Witkin Cal. Proc. PWT* § 202

[§ 202] Purpose of Summary Judgment.

The purpose of summary judgment is to penetrate evasive language and adept pleading and to ascertain, by means of supporting and opposing papers, the presence or absence of triable issues of fact. (*Chern v. Bank of America* (1976) 15 C.3d 866, 873, 127 C.R. 110, 114, 544 P.2d 1310; *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 1107, 252 C.R. 122, 762 P.2d 46.)

Courts recognize an inherent power to dismiss an action or to strike out an answer when the complaint or the defense is a sham, i.e., when the pleading is good as such but is falsely made and cannot be supported by proof. (See 5 *Cal. Proc.* (5th), *Pleading*, §§1004 et seq., 1057.) However, the discovery of sham is extremely difficult unless a method is available to compel the party whose pleading is thus attacked to make some disclosure of the kind of proof that the party intends to present. The summary judgment procedure furnishes that method--a motion for judgment without trial, decided on affidavits and counteraffidavits. Prompt disposition of a sham case is thus made a normal remedy, invoked pursuant to a statutory procedure, and granted on a proper showing, rather than a casual and reluctant assertion of inherent power to dismiss. (See *Walsh v. Walsh* (1941) 18 C.2d 439, 441, 116 P.2d 62; *Eagle Oil & Refining Co. v. Prentice* (1942) 19 C.2d 553, 555, 122 P.2d 264; *Coyne v. Krempels* (1950) 36 C.2d 257, 262, 223 P.2d 244; *Stationers Corp. v. Dun & Bradstreet* (1965) 62 C.2d 412, 420, 421, 42 C.R. 449, 398 P.2d 785; *Kelly v. Liddicoat* (1939) 35 C.A.2d 559, 560, 96 P.2d 186; *McHugh v. Howard* (1958) 165 C.A.2d 169, 174, 331 P.2d 674; *Family Service Agency of Santa Barbara v. Ames* (1958) 166 C.A.2d 344, 347, 333 P.2d 142; *Spencer v. Hibernia Bank* (1960) 186 C.A.2d 702, 707, 9 C.R. 867; *Saporta v. Barbagelata* (1963) 220 C.A.2d 463, 468, 33 C.R. 661, citing the text; *Hayward Union High School Dist. of Alameda v. Madrid* (1965) 234 C.A.2d 100, 128, 44 C.R. 268; *Orser v. George* (1967) 252 C.A.2d 660, 669, 60 C.R. 708, citing the text; *Thornton v. Victor Meat Co.* (1968) 260 C.A.2d 452, 457, 67 C.R. 887; *Kurokawa v. Blum* (1988) 199 C.A.3d 976, 988, 245 C.R. 463, citing the text.)

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IX. SUMMARY JUDGMENT

A. In General.

3. When Summary Judgment Is Available.

a. In General.

6 *Witkin Cal. Proc. PWT* § 203

[§ 203] In General.

(1) *Statutory Development.* The scope of the summary judgment statute has been steadily expanded. California's 1925 statute was a narrow one, restricted to municipal courts, available in a limited class of actions, and for plaintiffs only. In 1933, the superior courts were given power to render summary judgment, and in 1939, the motion was made available to defendants. The most far-reaching amendment, however, was made in 1953. Prior to that year, the statute, originally limited to "an action to recover a debt or liquidated demand," went through a gradual process of amendment to include actions to foreclose a lien or mortgage, to recover property, and for specific performance and accounting. The 1953 revision eliminated this list of actions and adopted the broad approach of *F.R. Civ. P., Rule 56*, containing no restrictions.

(2) *Expanded Scope of Motion.* A 1973 revision enacted the present rule, authorizing the motion "in any action or proceeding." (*C.C.P.* 437c(a); see generally *Taliaferro v. Coakley* (1960) 186 C.A.2d 258, 260, 9 C.R. 529 [mandamus proceeding]; *Dryer v. Dryer* (1964) 231 C.A.2d 441, 446, 41 C.R. 839 [defense of res judicata may be raised by motion]; *Lokeijak v. Irvine* (1998) 65 C.A.4th 341, 344, 76 C.R.2d 429 [local court policy discouraging summary judgment by requiring parties to consult with each other and trial judge and agree on different procedure was invalid for improperly interfering with right to move for summary judgment or summary adjudication at any time under *C.C.P.* 437c]; *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 exceeded its jurisdiction and contravened *C.C.P.* 437c by issuing supplemental case management order that precluded parties from filing motion without first complying with specified procedural requirements; however, court may adopt procedure for hearing motion, and statute does not preclude deferring hearing until choice-of-law issues are decided]; 73 *Am.Jur.2d* (2001 ed.), *Summary Judgment* §4 et seq.; 3 *A.L.R.3d* 675 [mandamus or prohibition].)

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A. In General.

3. When Summary Judgment Is Available.

b. Actions for Unlawful Detainer and Forcible Entry.

6 *Witkin Cal. Proc. PWT* § 204

[§ 204] Actions for Unlawful Detainer and Forcible Entry.

Summary judgment is expressly made available in unlawful detainer and forcible entry actions. (*C.C.P. 1170.7*; see 12 *Summary* (10th), *Real Property*, §735.) The motion may be made at any time after the answer is filed, on giving 5 days' notice. (*C.C.P. 1170.7*; cf. *C.C.P. 437c(q)* [nothing in *C.C.P. 437c* extends period of trial provided by *C.C.P. 1170.5*]; *C.C.P. 437c(r)* [*C.C.P. 437c(a)* and (b) "do not apply" to unlawful detainer and forcible entry actions]; on time of summary judgment generally, see *infra*, §214.) The motion must be granted or denied on the same basis as a motion under *C.C.P. 437c*. (*C.C.P. 1170.7*.)

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IX. SUMMARY JUDGMENT

A. In General.

3. When Summary Judgment Is Available.

c. Actions for Declaratory Relief.

6 *Witkin Cal. Proc. PWT* § 205

[§ 205] Actions for Declaratory Relief.

The summary judgment procedures of *C.C.P. 437c* are applicable to declaratory relief actions. In *Walker v. Munro* (1960) 178 C.A.2d 67, 2 C.R. 737, plaintiffs, retail liquor dealers, brought an action for declaratory relief against defendant officials of the Department of Alcoholic Beverage Control and defendant corporations (sellers of distilled spirits) to obtain a determination that the fair trade provisions of the Alcoholic Beverage Control Act were unconstitutional. *Held*, summary judgments for defendants affirmed. The gradual expansion of actions to which the procedure applies made it apparent that declaratory relief actions were included. "If there is a jurisdictional defect not apparent on the face of the complaint, or if the relief sought is dependent upon facts which are shown by uncontradicted affidavits not to exist, or if it appears that in the particular case the court desires to exercise the discretion invested in it by section 1061, *Code of Civil Procedure*, there is no reason why the case should be prolonged and a summary judgment not granted." (178 C.A.2d 70.) (See *Spencer v. Hibernia Bank* (1960) 186 C.A.2d 702, 712, 9 C.R. 867 ["Appellants' contention that the summary judgment procedure ... does not apply to declaratory relief actions ... collapses when exposed to the rationale" of *C.C.P. 437c*]; *Travers v. Loudon* (1967) 254 C.A.2d 926, 932, 62 C.R. 654 [summary judgment was proper exercise of trial court's discretion to dispose of improper use of declaratory action].)

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IX. SUMMARY JUDGMENT

A. In General.

4. When Summary Judgment Is Not Available.

6 *Witkin Cal. Proc. PWT* § 206

[§ 206] When Summary Judgment Is Not Available.

Although the summary judgment statute provides that the remedy may be sought in *any* action or proceeding (*C.C.P. 437c(a)*), there are certain actions in which, by statute or case law, summary judgment is unavailable. (See *Sherman v. Mertz Enterprises* (1974) 42 C.A.3d 769, 774, 117 C.R. 188 [summary judgment "should be sparingly granted" in antitrust cases].)

(1) *Consumer Class Action*. A summary judgment motion is expressly unavailable in class actions under the Consumer Legal Remedies Act (C.C. 1780 et seq.). (C.C. 1781(c); see 4 *Cal. Proc.* (5th), *Pleading*, §302.) However, a party, on noticed motion supported by affidavit, may have a hearing to determine whether the action is without merit or there is no defense. (C.C. 1781(c).)

(2) *Election Contest*. Because of the inherent inconsistency between the procedural requirements of *C.C.P. 437c* and *Elec. C. 16000* et seq., summary judgment is not available in election contests. The statutory scheme requires that trial commence no later than 45 days from the time of filing notice of the contest, while a motion for summary judgment cannot be made until 60 days from the date of a general appearance. By the time the 60 days have run, the trial must have been commenced and often will have been concluded; hence, the summary judgment procedure cannot be applicable. (*Anderson v. Santa Barbara* (1976) 56 C.A.3d 780, 128 C.R. 707.)

(3) *Action To Terminate Parental Rights*. Summary judgment is not available to avoid a trial in a special proceeding to declare a child free from custody of the natural father. (*In re Mark K.* (1984) 159 C.A.3d 94, 104, 205 C.R. 393 ["the summary judgment procedure is inappropriate to the statutorily required time periods which have been enacted with consideration for the needs of the parent, the child, and the public"].)

(4) *Proceeding Under Sexually Violent Predators Act*. Although proceedings under the Sexually Violent Predators Act (SVPA) (*Welf.C. 6600* et seq.; 3 *Cal. Crim. Law* (3d), *Punishment*, §193 et seq.) are civil in nature and the Civil Discovery Act applies, the proceedings are neither actions at law nor suits in equity but are special proceedings involving civil commitment. Under the SVPA, a full evidentiary hearing must be held. To permit summary judgment could allow an individual to be adjudicated a sexually violent predator without proof beyond a reasonable doubt, as required by statute. (*Bagration v. Superior Court* (2003) 110 C.A.4th 1677, 1684, 1688, 3 C.R.3d 292, citing the text.)

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IX. SUMMARY JUDGMENT

A. In General.

5. Other Procedures Compared.

a. Motion To Dismiss or Strike.

6 *Witkin Cal. Proc. PWT* § 207

[§ 207] Motion To Dismiss or Strike.

(1) *Motion To Dismiss Action for Sham.* A motion to dismiss an action as sham, based on matters outside the pleadings, is hardly distinguishable from a motion for summary judgment, and the former California recognition of this type of motion to dismiss caused considerable confusion. This was eventually resolved by holding that the judicially developed "speaking motion" to dismiss was superseded by the statutory summary judgment procedure. (*Pianka v. California* (1956) 46 C.2d 208, 293 P.2d 458; *Vallejo v. Montebello Sewer Co.* (1962) 209 C.A.2d 721, 730, 26 C.R. 447; 5 *Cal. Proc.* (5th), *Pleading*, §1006; see *Saltarelli & Steponovich v. Douglas* (1995) 40 C.A.4th 1, 5, 46 C.R.2d 683, *infra*, §209 [motion to dismiss, based on extrinsic evidence and ineffective as summary judgment motion, was treated as nonstatutory motion for judgment on the pleadings].)

(2) *Motion To Strike Sham Pleading.* The motion for summary judgment appears to be the sole device for using evidentiary affidavits to attack a pleading as false or sham. A motion to strike a sham answer was authorized by former C.C.P. 453. Unlike a motion for summary judgment, it was limited to answers made in bad faith. (See 39 *Cal. L. Rev.* 305.) The 1982 Legislature repealed C.C.P. 453 and added C.C.P. 436 and 437, which permit a motion to strike from any pleading matter that is "irrelevant, false, or improper" (C.C.P. 436(a)), but require that the grounds for the motion appear on the face of the pleadings or from matter of which the court is *required* to take judicial notice (C.C.P. 437(a)). (See 5 *Cal. Proc.* (5th), *Pleading*, §§1009, 1014.)

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IX. SUMMARY JUDGMENT

A. In General.

5. Other Procedures Compared.

b. Motion for Judgment on the Pleadings.

1. Distinction Between Remedies.

6 *Witkin Cal. Proc. PWT* § 208

[§ 208] Distinction Between Remedies.

The motion for summary judgment assumes the sufficiency of the pleadings and calls for evidentiary affidavits to show whether there is any substantial proof to support the allegations. (See *infra*, §221 et seq.) The motion for judgment on the pleadings attacks fundamental defects in the pleadings, and, like a demurrer, is ordinarily confined to the pleadings. (See *supra*, §187.)

In *Coyne v. Krempels* (1950) 36 C.2d 257, 223 P.2d 244, plaintiff sued for breach of contract. Defendants filed a verified answer denying the allegations and alleging, as an affirmative defense, facts of plaintiff's own failure to perform. Plaintiff moved for summary judgment, filing affidavits of the facts of his attempted performance and defendants' breach. Defendants filed no counteraffidavits, contending that the motion should be denied if the plaintiff's affidavits are controverted by a verified answer that raises an issue of fact. Upholding the order granting judgment, the court said: "So construed, section 437c would be meaningless. ... If the pleadings are insufficient, the defect may be raised by demurrer or motion to strike, or by motion for judgment on the pleadings. The procedure for the entry of a summary judgment provides a method by which, if the pleadings are not defective, the court may determine whether the triable issues apparently raised by them are real or merely the product of adept pleading. The question therefore is not whether defendant states a good defense in his answer but whether he can show that the answer is not an attempt 'to use formal pleading as means to delay the recovery of just demands.' " (36 C.2d 262.)

In *Taylor v. Lockheed Martin Corp.* (2000) 78 C.A.4th 472, 92 C.R.2d 873, plaintiff, an employee of defendant civilian contractor on an Air Force base, sued defendant for wrongful termination. Defendant moved for summary judgment on the ground that the base was a federal enclave under federal jurisdiction. The trial court elected to treat the motion as one for judgment on the pleadings and granted it with leave to amend. *Held*, affirmed in part and reversed in part, and trial court ordered to vacate order dismissing the action and to enter order granting summary judgment in defendant's favor as to specified counts.

(a) The nature of the motion is a threshold issue because the result determines the scope of review. The trial court's written ruling stated that it elected to treat the motion as one for judgment on the pleadings because the plaintiff's

complaint "coupled with facts of which the court may take judicial notice discloses the problem of applying state law within a federal enclave." (78 C.A.4th 479.) This was incorrect because extrinsic evidence was needed to establish two essential facts supporting the ruling: (1) that plaintiff actually worked at the enclave, and (2) that his claims arose there. "We therefore treat the court's order as one granting summary judgment and review it de novo." (78 C.A.4th 479.)

(b) This approach is appropriate because other language in the ruling establishes that the trial court found no triable issue of fact whether the claims arose on a federal enclave. The trial court "simply erred in concluding that the evidence offered in support of summary judgment was also subject to judicial notice, and thus could be considered as part of a motion for judgment on the pleadings." (78 C.A.4th 479.)

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A. In General.

5. Other Procedures Compared.

b. Motion for Judgment on the Pleadings.

2. Effect Of Seeking Summary Judgment.

6 *Witkin Cal. Proc. PWT* § 209

[§ 209] Effect Of Seeking Summary Judgment.

On some occasions the parties, overlooking this distinction, have sought summary judgment when they should have moved for judgment on the pleadings.

In *Miller v. Glass* (1955) 44 C.2d 359, 282 P.2d 501, defendants' general demurrer was overruled. Defendants then answered and moved for summary judgment on the ground that the complaint failed to state a cause of action. Although the order granting the motion was reversed, the court expressed no disapproval of the procedure, but merely said that the sole issue was whether the complaint stated a cause of action.

In *Magna Dev. Co. v. Reed* (1964) 228 C.A.2d 230, 234, 244, 39 C.R. 284, an action for specific performance, defendants moved for summary judgment on the ground that the contract was too uncertain to support a decree. The contract was attached to the complaint, and defendants raised this issue of law on the face of the pleadings, without any affidavits. *Held*, the motion was in effect one for judgment on the pleadings, and the order granting it was affirmed.

In *Jones-Hamilton Co. v. Franchise Tax Bd.* (1968) 268 C.A.2d 343, 73 C.R. 896, plaintiff contended that the prepayment provision in a franchise tax statute was unconstitutional because of alleged failure to obtain the constitutionally required two-thirds vote of legislators. The point was raised in an action to recover the tax paid, and a certified copy of the statute and legislative vote was attached and incorporated by reference in the complaint. Both sides moved for summary judgment, and the judge granted defendant's motion. *Held*: (a) A pure question of law was presented, whether the prepayment requirement came within the constitutional restriction on taxing statutes; there was no factual dispute. (b) The appropriate motion was therefore for judgment on the pleadings. (c) Plaintiff's contention was legally unsound; hence, the judge's order reached the right result, but it was in effect a judgment on the pleadings, not an order for summary judgment. (268 C.A.2d 347.)

Summary judgment is sometimes granted on the ground that the complaint fails to state a cause of action. Courts of Appeal tend to treat the judgment as if it had been made pursuant to a motion for judgment on the pleadings. (See *C.L. Smith Co. v. Roger Ducharme* (1977) 65 C.A.3d 735, 745, 135 C.R. 483 [motion by defendant necessarily includes test

of sufficiency of complaint; citing *Magna*]; *Bowden v. Robinson* (1977) 67 C.A.3d 705, 710, 136 C.R. 871, citing the text; *Blanch v. Young* (1984) 152 C.A.3d 1016, 1019, 200 C.R. 9; *Hejmadi v. AMFAC* (1988) 202 C.A.3d 525, 536, 249 C.R. 5; *Hansra v. Superior Court* (1992) 7 C.A.4th 630, 647, 9 C.R.2d 216 [treating summary judgment motion as motion for judgment on pleadings, and giving plaintiffs opportunity to add allegations to complaint to cure its deficiencies]; *Lee v. Bank of America* (1994) 27 C.A.4th 197, 215, 32 C.R.2d 388 [reviewing court may treat summary judgment motion as motion for judgment on pleadings and reverse to allow leave to amend, but prior request to amend must have been made in trial court].)

In *Stolz v. Wong Communications Ltd. Partnership* (1994) 25 C.A.4th 1811, 31 C.R.2d 229, the court said: "A summary judgment motion necessarily includes a test of the pleadings and can become a motion for a judgment on the pleadings. ... [The] pleading may be defective in failing to allege an element of a cause of action or in failing to intelligibly identify a defense thereto. In such a case, the moving party need not address a missing element or, obviously, respond to assertions that are unintelligible or make out no recognizable legal claim. The summary judgment proceeding is thereby necessarily transmuted into a test of the pleadings and the summary judgment motion into a motion for a judgment on the pleadings. ... Where a motion for summary judgment is in effect a motion for a judgment on the pleadings, the court may grant a plaintiff leave to amend the complaint." (25 C.A.4th 1817.) (On role of pleadings in summary judgment proceedings, see *infra*, §212.)

In *Saltarelli & Steponovich v. Douglas* (1995) 40 C.A.4th 1, 46 C.R.2d 683, the trial judge granted a motion by defendant, a former client of plaintiff attorney, to dismiss plaintiff's action for unpaid fees and costs. Defendant had sought dismissal based on his bankruptcy discharge, relying on a declaration from his present attorney and several exhibits, but had cited no statutory basis for dismissing the action. The Court of Appeal treated defendant's motion as a nonstatutory motion for judgment on the pleadings.

(a) The procedure of moving to dismiss an action based on extrinsic evidence is disapproved in California, and the motion is permitted only where it complies with the requirements for a motion for summary judgment. Here, the motion failed to comply with any of the procedural requirements for a summary judgment motion. (40 C.A.4th 5.)

(b) However, the motion may be treated as a nonstatutory motion for judgment on the pleadings, and may be granted when the complaint fails to state facts sufficient to constitute a cause of action. In considering the motion, a court may consider matters properly subject to judicial notice. In this case, the trial judge took judicial notice of the exhibits presented by the parties, and the declarations, although not a proper subject for judicial notice, were superfluous to the decision. (40 C.A.4th 5.)

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5. Other Procedures Compared.

c. Trial of Special Defenses.

6 *Witkin Cal. Proc. PWT* § 210

[§ 210] Trial of Special Defenses.

Under *C.C.P.* 597, when the answer raises triable issues involving fundamental defenses not on the merits, such as the statute of limitations or *res judicata*, these may, on motion, be tried first, and the decision may make a trial on the merits unnecessary. (See 7 *Cal. Proc.* (5th), *Trial*, §150.) The summary judgment proceeding is readily distinguishable, for it does not try anything; it merely determines whether there is a triable issue. (See *supra*, §202.) (See *Kaiser Foundation Hosp. v. Superior Court* (1967) 254 *C.A.2d* 327, 330, 331, 62 *C.R.* 330, citing the text [defense of *res judicata* may be raised either by motion for summary judgment or by motion under *C.C.P.* 597].)

In *Gardner v. Shreve* (1949) 89 *C.A.2d* 804, 202 *P.2d* 322, plaintiff moved for summary judgment on a claim for money. The main issue was whether plaintiff had accepted a note either in full satisfaction or as a suspension of the right to enforce the obligation. At the hearing of the motion, the court allowed plaintiff and defendant to testify on the matters covered by the conflicting affidavits. Judgment for plaintiff was then granted, reciting that a full trial of the issue of accord and satisfaction was had. *Held*, this was error.

(a) *C.C.P.* 597 applies only to a limited group of special defenses not involving the merits. (89 *C.A.2d* 808.)

(b) Former *C.C.P.* 2042 (now *Ev.C.* 320), allowing the trial judge to regulate the order of proof, and thus to give priority to the trial of any kind of issue, applies only to a trial. (89 *C.A.2d* 809; see 7 *Cal. Proc.* (5th), *Trial*, §149; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §44.)

(c) Here, the only proceeding was a motion for summary judgment, followed by a hearing, continuance, and resumed hearing. The recital in the judgment was merely "an expression by the court of the opinion that the hearing of witnesses on a motion for summary judgment, contrary to normal procedure, could be considered a full trial of the issue presented by the answer. With this opinion we cannot agree. If this were permitted the defendant could be deprived of jury trial without a waiver ... and without any actual intention to waive it. Jury trial cannot be waived by implication or in another manner than by one of the modes prescribed in" *C.C.P.* 631. (89 *C.A.2d* 809.)

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5. Other Procedures Compared.

d. Motion To Enforce Settlement.

6 *Witkin Cal. Proc. PWT § 211*

[§ 211] Motion To Enforce Settlement.

While a summary judgment motion is designed to determine the merits of the case (*supra*, §202), a motion under *C.C.P.* 664.6 (*supra*, §115 et seq.) permits the court to enforce a settlement. It is unnecessary to file a summary judgment motion to enforce settlements within the scope of *C.C.P.* 664.6. However, the remedy is limited to settlements in writing and to oral stipulations in court. (*C.C.P.* 664.6.) Also, unless the trial judge retains jurisdiction to enforce the settlement, the motion may be made only in the action that the settlement purports to settle. (*Viejo Bancorp v. Wood* (1989) 217 C.A.3d 200, 265 C.R. 620, *supra*, §125.)

An oral, out-of-court settlement may be enforced by a motion for summary judgment. Nothing in *C.C.P.* 664.6 suggests that it was intended to be exclusive. "Rather, it appears to do nothing more than provide a streamlined method for reducing a stipulated settlement to judgment." (*Kilpatrick v. Beebe* (1990) 219 C.A.3d 1527, 1529, 269 C.R. 52 [affirming summary judgment for personal injury defendant].)

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A. In General.

6. Role of Pleadings.

6 Witkin Cal. Proc. PWT § 212

[§ 212] Role of Pleadings.

The purpose of summary judgment is to penetrate the pleadings to determine the presence or absence of triable issues of fact. (See *supra*, §202.) The pleadings are nevertheless critical in a summary judgment proceeding in that they measure materiality. The first step in analyzing a motion for summary judgment is to identify the issues framed by the pleadings. It is these allegations to which the motion must respond by showing that there is no factual basis for relief or defense on any theory reasonably contemplated by the opponent's pleading. (*Sadlier v. Superior Court* (1986) 184 C.A.3d 1050, 1054, 229 C.R. 374; *Andersen v. Pacific Bell* (1988) 204 C.A.3d 277, 285, 251 C.R. 66; *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 C.A.3d 260, 273, 261 C.R. 484 [summary judgment could not be granted as to causes of action to which federal affirmative defense purportedly was applicable where defendant had waived defense by failing to raise it in pleadings]; *FPI Dev. v. Nakashima* (1991) 231 C.A.3d 367, 381, 282 C.R. 508 [purported affirmative defenses were not at issue and therefore not proper grounds for summary judgment where answer pleaded only general denial].)

Affidavits or other evidence submitted on a motion for summary judgment or summary adjudication cannot raise unpleaded issues. (See *Keniston v. American Nat. Ins. Co.* (1973) 31 C.A.3d 803, 812, 107 C.R. 583 [affidavit addressed to issues outside pleadings]; *Dorado v. Knudsen Corp.* (1980) 103 C.A.3d 605, 611, 163 C.R. 477 [affidavits in support of motion for summary judgment do not constitute second set of pleadings; their purpose is only to show whether issues apparently made by final pleadings are genuine]; *Fireman's Fund Ins. Co. v. Turlock* (1985) 170 C.A.3d 988, 994, 216 C.R. 796 [where defendant is moving party, papers submitted in support of and in opposition to motion must address issues raised by complaint]; *AARTS Productions v. Crocker Nat. Bank* (1986) 179 C.A.3d 1061, 1064, 225 C.R. 203 [sufficient motion cannot be successfully resisted by counterdeclarations that create immaterial factual conflicts outside scope of pleadings]; *Oakland Raiders v. National Football League* (2005) 131 C.A.4th 621, 648, 32 C.R.3d 266 [plaintiff's opposition to defendant's motion for summary adjudication contained allegations regarding defendant's breach of fiduciary duty that were not included in plaintiff's complaint, and thus were not properly before court]; *Santa Clara v. Atlantic Richfield Co.* (2006) 137 C.A.4th 292, 332, 40 C.R.3d 313 [because complaint in action for damages caused by lead paint did not mention issues relating to nonlead paint, plaintiff could not reference those issues in opposing defendant's motion for summary judgment].)

If either party finds that the pleading is not adequate, either by way of allegation or denial, the court may permit the

party to amend. (See *Dorado v. Knudsen Corp*, *supra*, 103 C.A.3d 605.)

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See *Laabs v. Victorville* (2008) 163 C.A.4th 1242, 1258, 78 C.R.3d 372 [plaintiff could not, for first time in opposition to defendant city's motion for summary judgment, raise theory that defendant's placement of street lighting constituted dangerous condition; theory was not remotely mentioned or encompassed by either original or amended complaint]; *Nein v. HostPro* (2009) 174 C.A.4th 833, 851, 95 C.R.3d 34 [in action to recover commissions, plaintiff could not raise issue of oral contract for first time in opposition to defendant's motion for summary judgment where operative complaint did not allege that terms of employment relationship were dictated by oral agreement]; *Bosetti v. United States Life Ins. Co. in New York* (2009) 175 C.A.4th 1208, 1225, 96 C.R.3d 744 [plaintiff could not defeat defendant's motion for summary judgment by raising theory of liability at hearing that was not alleged in complaint].



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B. Motion.

1. In General.

6 *Witkin Cal. Proc. PWT* § 213

[§ 213] In General.

Any party "may move for summary judgment." (*C.C.P.* 437c(a); see *C.E.B.*, 2 Civil Proc. Before Trial 4th, §36.35 et seq.; *Cal. Civil Practice*, 3 Procedure, §21:12 et seq.; 23 *Am.Jur. P.P. Forms* (2001 ed.), Summary Judgment §8 et seq.; on federal practice, see *F.R. Civ. P.*, Rule 56(c); 10A *Federal Practice & Procedure* (Wright, Miller & Kane) §§2717, 2718; 27A *Federal Procedure*, L.Ed., §62:684 et seq.; on motion procedure generally, see *supra*, §7 et seq.)

There can be no summary judgment without a motion. In *Dvorin v. Appellate Dept.* (1975) 15 *C.3d* 648, 125 *C.R.* 771, 542 *P.2d* 1363, defendant in a municipal court action moved for summary judgment and the motion was granted. Plaintiff appealed, and the appellate department reversed the summary judgment for defendant with a direction to enter summary judgment for plaintiff. *Held*, this was in excess of jurisdiction. The statute authorizes granting summary judgment "on motion," and defendant was the sole moving party. The direction also deprived defendant of the opportunity to show additional facts justifying trial of factual issues, and thereby deprived him of a fair trial. (15 *C.3d* 651.) (See *Sierra Craft v. Magnum Enterprises* (1998) 64 *C.A.4th* 1252, 1254, 1256, 75 *C.R.2d* 681 [party desiring summary judgment must make own motion; local rule permitting judge to grant summary judgment to opposing party even though that party made no cross-motion was held void for conflicting with *C.C.P.* 437c]; *Village Nurseries, L.P. v. Greenbaum* (2002) 101 *C.A.4th* 26, 46, 123 *C.R.2d* 555 [in malpractice action against multiple attorneys, defendant K's notice of joinder in another defendant's motion for summary judgment failed to constitute motion for summary judgment for K].)

Both parties may move for summary judgment, and these cross-motions do not conclusively establish the absence of a triable issue of fact or compel the granting of summary judgment; the trial court must still independently determine the matter. (*Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 *C.A.3d* 576, 584, 118 *C.R.* 818.)

The motion must be supported by affidavits, declarations, notice of motion, separate statement of undisputed material facts, supporting memorandum, and request for judicial notice, as appropriate. (See *C.C.P.* 437c(b); *C.R.C.*, Rule 3.1350(c); *infra*, §§215, 216, 221 et seq.) An opposition to the motion (*infra*, §217 et seq.) must contain and be supported by similar documents. (*C.R.C.*, Rule 3.1350(e).)

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B. Motion.

2. Time After Which Motion May Be Made.

6 *Witkin Cal. Proc. PWT* § 214

[§ 214] Time After Which Motion May Be Made.

A motion for summary judgment may be made (1) "at any time after 60 days have elapsed since the general appearance in the action or proceeding" of the party against whom the motion is directed, or (2) "at any earlier time after the general appearance that the court, with or without notice and upon good cause shown may direct." (*C.C.P. 437c(a)*; see *C.C.P. 1014* [appearance of defendant defined].)

California's former statute was construed to preclude a summary judgment against a nondefaulting defendant before the defendant filed an answer. (*Orange County Air Pollution Control Dist. v. Superior Court* (1972) 27 C.A.3d 109, 112, 103 C.R. 410.) A 1973 revision nullified the rule of this case. (*Sadlier v. Superior Court* (1986) 184 C.A.3d 1050, 1055, 229 C.R. 374, quoting the text.) However, as pointed out in *Sadlier*, the *Orange County* rule, as applied to a plaintiff's motion, is based on sound policy as follows:

(a) Where the defendant makes the motion, the existence or nonexistence of the defendant's answer is irrelevant, for the defendant is merely required to establish a defense to a plaintiff's claim by affidavits addressed to the complaint. (184 C.A.3d 1055.)

(b) The situation is different where the plaintiff makes the motion. "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings. ... Since the defensive issues are not delimited until an answer is filed, the plaintiff cannot intelligently address the factual averments in his affidavits or declarations to the defensive issues, and it is, therefore, inappropriate for him to move for summary judgment prior to the filing of an answer by the defendant." (184 C.A.3d 1055.) Thus, the trial court, under the present language of C.C.P. 473c(a), may consider the plaintiff's motion before the answer is on file; but, in view of the persuasive reasoning of *Orange County*, "[w]e need not decide" whether the court is required to do so. (184 C.A.3d 1056 and footnote 7.)

Sadlier also dealt with the question when the motion is deemed "made" for purposes of the 60-day requirement. Defendants made their first general appearance on September 20. On November 13, plaintiffs filed their notice of motion; this was less than 60 days after defendant's appearance, and seemingly premature. The notice of motion set a date of hearing on December 12 (still too soon); but the trial court continued the hearing on the motion to December 17,

and then granted it, observing that "a motion is made when heard." *Held*, the motion was timely.

(a) Under *C.C.P. 1005.5* (*supra*, §38), a motion is deemed to have been made when the notice of motion is duly served and filed. The statute "clearly allows a party to meet restrictive time deadlines by deeming the motion 'made' at the time of filing although the hearing may be scheduled after the deadline." (*184 C.A.3d 1054.*)

(b) Where, as here, *C.C.P. 437c(a)* does not require a motion to be made before a specified time, but instead provides that it cannot be made until after a period had elapsed, *C.C.P. 1005.5* should not be read as determinative of when a motion is "made," for such an interpretation would deprive a party of a hearing to which the party was entitled. Hence, the motion for summary judgment may be heard and decided if either the filing or the hearing occurs after the 60-day period. (*184 C.A.3d 1054.*)

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B. Motion.

3. Notice of Motion.

6 *Witkin Cal. Proc. PWT* § 215

[§ 215] Notice of Motion.

(1) *Written Notice.* A party seeking summary judgment must request the order by written notice of motion. Service must be had on "all other parties to the action." (*C.C.P. 437c(a)*.)

The notice of motion must be accompanied by supporting affidavits, supporting memorandum and other evidence, and by a separate statement of material facts. (*C.C.P. 437c(b)*; *C.R.C.*, Rule 3.1350(c); on supporting papers, see *infra*, §§216, 221 et seq.)

Although a supporting memorandum is required to accompany a notice of motion (*supra*, §11), compliance with this requirement is neither mandatory nor jurisdictional. The court may in its discretion consider and grant a motion for summary judgment despite absence of the memorandum. (See *Taliaferro v. Coakley* (1960) 186 C.A.2d 258, 262, 9 C.R. 529.)

(2) *Time of Service.* Notice of the motion and supporting papers must be served at least 75 days before the time set for hearing. (*C.C.P. 437c(a)*; see *Wells Fargo Bank v. Superior Court* (1988) 206 C.A.3d 918, 922, 254 C.R. 68 [construing former 28-day service requirement and holding invalid local rule that resulted in extension of that period].) However, the extensions of time where service is made by mail (*C.C.P. 1013(a)*), by fax (*C.C.P. 1013(e)*), or by express mail or other overnight delivery method (*C.C.P. 1013(c)*) apply to summary judgment motions. (*C.C.P. 437c(a)*; see *C.E.B.*, 2 Civil Proc. Before Trial 4th, §36.77; on extensions of time of service, see *supra*, §30 et seq.)

Given the express language of *C.C.P. 437c(a)* and absent the consent of the parties, a trial court may not shorten the minimum notice period. (*McMahon v. Superior Court* (2003) 106 C.A.4th 112, 115, 130 C.R.2d 407 [after granting plaintiff's motion for trial preference, trial court erred in ordering that only 21 days' notice was required prior to hearing on motions for summary judgment]; see *Urshan v. Musicians' Credit Union* (2004) 120 C.A.4th 758, 764, 766, 15 C.R.3d 839, citing the text [trial court erred by shortening time and permitting defendant to file motion for summary judgment only 10 days before scheduled trial date; following *McMahon*]; *Boyle v. CertainTeed Corp.* (2006) 137 C.A.4th 645, 653, 40 C.R.3d 501 [San Francisco Superior Court rule permitting expedited summary judgment in asbestos injury cases on 60 days' notice and without supporting papers conflicted with 75-day notice and supporting papers requirement of *C.C.P. 437c* and was invalid].)

The 75-day notice period is measured "from the date notice is served to the date of the actual hearing, and not the originally scheduled hearing." (*Lackner v. North* (2006) 135 C.A.4th 1188, 1209, 37 C.R.3d 863 [defendant's motion for summary adjudication of plaintiff's punitive damages claim filed 84 days before rescheduled hearing date was timely].) (See *Barefield v. Washington Mut. Bank* (2006) 136 C.A.4th 299, 303, 38 C.R.3d 858 [defendant's service of motion for summary judgment by express mail added 2 court days under C.C.P. 437c(a); thus, service 77 days before scheduled hearing was timely].)

"The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading." (C.C.P. 437c(a).)

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

(2) *Time of Service.* In *Robinson v. Woods* (2008) 168 C.A.4th 1258, 86 C.R.3d 241, on January 26, 2007, defendant served plaintiff by mail with a motion for summary judgment noticed for hearing on April 12, 2007, which was 76 days after mailing and 18 days before trial. On March 22, plaintiffs filed their opposition, arguing not the merits but that the motion was untimely because (a) the hearing had to be set for 80 days after service by mail (standard 75 days plus 5 days for mailing), and (b) the motion had to be heard no later than 30 days before the trial date unless the trial court ruled otherwise for good cause. At the April 12 hearing, although faulting defendants for procedural errors in their time of service, the court attempted to resolve the issues by continuing the hearing for 4 days to April 16, making that the 80th day after mailing of the motion, and had defendants file a declaration to establish why the motion should be heard within 30 days of trial. The trial court also denied plaintiff counsel's request that the motion be dismissed rather than continued. At the April 16 hearing, the trial court found good cause for the motion to be heard within 30 days of trial and also ruled that that plaintiffs had failed to rebut the substance of defendants' motion. Plaintiffs' counsel again objected to the procedure adopted by the trial court, arguing that counsel should have more than just 4 days to file a response. The trial court granted summary judgment for defendants. *Held*, reversed.

(a) The 76-day notice given by defendants was invalid, and the trial court had no authority to continue the hearing for a mere 4 days. At that point, notice had to begin again, and the 75-day period is mandatory where, as here, notice is given personally. If the trial court desired not to continue the trial date for the necessary amount of time, it could have taken the motion off calendar. The 4-day continuance was a violation of due process and an abuse of discretion. (168 C.A.4th 1268.)

(b) Plaintiffs were under no obligation to file more than the notice objections in response to defendants' January 26 notice. "The party opposing a summary judgment motion should not be under an obligation to respond on the merits--and risk wasting its resources--given that the trial court may ultimately decide that good cause does not exist" to alter the 30-day rule. (168 C.A.4th 1268.) Here, the trial court found good cause on April 16, the day the parties were instructed to return to court, and then proceeded to hear the summary judgment at that hearing. Plaintiffs had no time to prepare an opposition, which was another due process violation and an abuse of discretion. (168 C.A.4th 1268.)

See *UAS Management v. Mater Misericordiae Hosp.* (2008) 169 C.A.4th 357, 368, 87 C.R.2d 81 [defendant's renewed motion for summary judgment brought over 11 months after denial of original motion, was not motion for reconsideration but new motion for summary judgment; thus, defendant was required to provide 75 days' notice, which it failed to do, and trial court was without authority to shorten time over plaintiff's objection].



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B. Motion.

4. Statement of Material Facts.

6 *Witkin Cal. Proc. PWT* § 216

[§ 216] Statement of Material Facts.

(1) *In General.* The supporting papers must include a separate statement setting forth clearly and concisely all material facts deemed by the moving party to be undisputed, followed by a reference to the supporting evidence. (*C.C.P.* 437c(b); *C.R.C.*, Rule 3.1350(c)(2); see *Blackman v. Burrows* (1987) 193 *C.A.3d* 889, 895, 238 *C.R.* 642, *infra*, §218 [memorandum of points and authorities (now supporting memorandum) does not satisfy requirement of separate statement].) The statement must separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with regard to these items. (*C.R.C.*, Rule 3.1350(d); see *King v. United Parcel Service* (2007) 152 *C.A.4th* 426, 437, 60 *C.R.3d* 359 [trial court properly considered portions of declarations not specifically referenced in defendant's statement of facts where evidence was material to single, dispositive issue of whether plaintiff's termination was pretextual].) (On format, see *C.R.C.*, Rule 3.1350(d) and (h).)

(2) *Necessity of Compliance.* Separate statements are required in order to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for summary judgment and determine quickly and efficiently whether material facts are disputed. (*United Community Church v. Garcin* (1991) 231 *C.A.3d* 327, 335, 282 *C.R.* 368.)

Failure to comply may in the trial judge's discretion constitute a sufficient ground for denial of the motion. (*C.C.P.* 437c(b).) The prevailing view is that it is only in the truly exceptional case involving a single, simple issue with minimal evidentiary support that a court will consider the merits of a motion unaccompanied by a separate statement. (*Blackman v. Burrows*, *supra*, 193 *C.A.3d* 893; *United Community Church v. Garcin*, *supra*, 231 *C.A.3d* 335; *Security Pac. Nat. Bank v. Bradley* (1992) 4 *C.A.4th* 89, 5 *C.R.2d* 220, *infra*, §218; see *Scripps Clinic v. Superior Court* (2003) 108 *C.A.4th* 917, 928, 134 *C.R.2d* 101 [trial court properly denied defendant's motion for summary adjudication on plaintiff's claim of interference with contractual relations where defendant failed to address that issue in separate statement of facts].)

(3) *Notice of Joinder Is Insufficient.* A notice of joinder by itself is insufficient for purposes of the summary judgment statute. In *Frazee v. Seely* (2002) 95 *C.A.4th* 627, 115 *C.R.2d* 780, a legal malpractice action against multiple attorneys, defendant S filed for summary judgment and the trial court permitted defendant H to join in the motion based solely on a motion to join, and granted summary judgment. *Held*, this was error. Although this form of joinder may be

sufficient for some purposes, *C.C.P. 437c(b)* requires each moving party to support the motion for summary judgment or adjudication with a separate statement setting forth plainly and concisely all material facts the moving party contends are undisputed. This was not done, and the statement and documentation of defendant S set forth no facts relating to H's alleged malpractice that H contended were not in dispute. Without those factual assertions, the court's grant of summary judgment was improper. (95 *C.A.4th* 635.)

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

(2) *Necessity of Compliance.* See *Teselle v. McLoughlin* (2009) 173 *C.A.4th* 156, 161, 173, 92 *C.R.3d* 696 [in action involving trust property, trial court erred in granting summary judgment for defendant where defendant failed to address in statement of material facts key allegation and supporting evidence in plaintiff's complaint seeking to remove disputed property from trust provisions].



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C. Opposition.

1. In General.

6 *Witkin Cal. Proc. PWT* § 217

[§ 217] In General.

(1) *Content.* The opposition to a motion for summary judgment must contain a memorandum in opposition, evidence in opposition (*infra*, §222), and a request for judicial notice, if appropriate. (C.R.C., Rule 3.1350(e).) In addition, the opposition papers must include a separate statement that responds to each of the material facts that the moving party contends are undisputed, indicating whether the opposing party agrees or disagrees that the facts are undisputed. (C.C.P. 437c(b)(3); C.R.C., Rule 3.1350(e)(2); see *infra*, §218.)

(2) *Method of Service.* Service of the opposition papers must be by personal delivery, fax transmission, express mail, or other means "reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers ... are filed." (C.C.P. 1005(c).)

(3) *Time for Service and Filing.* The opposition papers must be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. (C.C.P. 437c(b)(2); see *Hobson v. Raychem Corp.* (1999) 73 C.A.4th 614, 623, 86 C.R.2d 497 [although plaintiff failed to establish diligence or good cause for late submissions in opposition, record was ambiguous on evidence that trial judge actually considered; thus, absence of clear order finding good cause and implication that trial judge reviewed plaintiff's submissions were proper exercise of trial judge's discretion to do so].)

The statutory extensions of the period in which to file provided by C.C.P. 1005 and 1013 (*supra*, §§17, 30) are not applicable. (C.C.P. 437c(b)(6).)

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



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C. Opposition.

2. Statement of Material Facts.

6 *Witkin Cal. Proc. PWT* § 218

[§ 218] Statement of Material Facts.

The papers opposing a summary judgment motion must contain a separate statement that (1) indicates whether the opposing party agrees or disagrees with the moving party's assertion that specific material facts are undisputed (*supra*, §216), (2) sets forth plainly and concisely any other material facts that the opposing party contends are disputed, and (3) refers to the supporting evidence for each contention. (*C.C.P. 437c(b)(3)*; on detailed form, see *C.R.C.*, Rule 3.1350(f) and (h).) Failure to comply may, in the trial judge's discretion, constitute sufficient ground for granting the motion. (*C.C.P. 437c(b)(3)*.)

In *Blackman v. Burrows* (1987) 193 C.A.3d 889, 238 C.R. 642, plaintiff sued defendant for medical malpractice, and defendant moved for summary judgment. Plaintiff responded only with a memorandum of points and authorities, without the separate statement required by *C.C.P. 437c(b)*, and the trial judge granted the motion for summary judgment without prejudice to a motion for reconsideration. Plaintiff filed a motion for reconsideration that also failed to include a separate statement, and the judge denied that motion. *Held*, summary judgment affirmed.

(a) "A properly prepared separate statement ... can materially ease the trial court's burden. While it is not required, it is preferable that the statement be in a separately bound or filed document not physically attached to the memorandum of points and authorities. In any event, the document must at least be a totally discrete section separate and apart from the memorandum of points and authorities itself." (193 C.A.3d 894.)

(b) The opposing statement "should list, and preferably quote each of the facts set forth in the moving papers. If the opposing party admits any of the statements set forth in the moving separate statement, the admission should be clearly listed." (193 C.A.3d 895.)

In *Security Pac. Nat. Bank v. Bradley* (1992) 4 C.A.4th 89, 5 C.R.2d 220, defendant, appearing in pro. per., failed to file a separate statement in opposition to plaintiff's motion for summary judgment and the trial court granted judgment in a sum exceeding \$ 1 million on that ground alone without reaching the merits. *Held*, reversed; that trial court abused its discretion by not allowing defendant a further opportunity to file a statement.

(a) The statute gives the trial court discretion to grant a motion for summary judgment when the opposing party

fails to file the statement; and local Los Angeles County Superior Court Rules expand on the trial court's discretion. (4 C.A.4th 89.) Hence, the court did not abuse its discretion in refusing to proceed with the motion in the absence of defendant's statement. (4 C.A.4th 93.) The abuse of discretion lies in the failure to give defendant a further opportunity to file a statement, especially because there were numerous circumstances and policies that afforded that opportunity. (4 C.A.4th 94.)

(b) The purpose of a separate responsive statement "is to ease the trial court's burden and put the moving party on notice of the evidence which is disputed by respondent. ... Therefore, unless the trial court has reason to believe no responsive statement would be filed even if the respondent was afforded a reasonable opportunity to file one, the respondent should be afforded that opportunity rather than suffer a judgment not supported by a decision on the merits." (4 C.A.4th 99.)

In *Assad v. Southern Pac. Trans. Co.* (1996) 42 C.A.4th 1609, 50 C.R.2d 443, the parties in a personal injury action stipulated that defendant admitted negligence and that plaintiff, while waiving punitive damages and all other causes of action except negligence, expressly reserved the right to dispute issues relating to "damage causation" or "damages." Defendant moved for summary judgment, on the theory that the firefighter's rule defeated an element of plaintiff's negligence cause of action. Defendant did not mention the stipulation in its separate statement of material facts or supporting evidence. Plaintiff set forth the stipulation in full in his opposition to the motion, but did not refer to it in his separate statement. *Held*, summary judgment for defendant reversed. The applicability of the firefighter's rule was not reserved for dispute, because the stipulation admitted negligence, and plaintiff was not required to refer to the stipulation in his separate statement.

(a) C.C.P. 437c(b) required plaintiff--as the party opposing the motion for summary judgment--to "include a separate statement which *responds to each of the material facts contended by the moving party to be undisputed*." Under the plain wording of the statute, plaintiff had no obligation to *respond* with any mention of the stipulation because defendant as the moving party had not listed it as an undisputed fact. (42 C.A.4th 1614.) C.C.P. 437c(b) also required plaintiff to list disputed material facts in his separate statement. As the existence of the stipulation was not in dispute, plaintiff had no obligation to include the stipulation in his separate statement. (42 C.A.4th 1614.)

(b) Defendant demonstrates a fundamental misunderstanding with respect to what are "facts" within the meaning of the summary judgment statute. The terms of the stipulation did not contain facts that were relevant or material to the issue raised by defendant's summary judgment motion. Instead, the terms of the stipulation concerned the parties' partial settlement of the case and their agreement as to the legal issues they reserved for dispute. (42 C.A.4th 1615.) Consequently, nothing in C.C.P. 437c(b) required plaintiff to set forth the stipulation in his separate statement. Plaintiff placed the stipulation in evidence in his opposition to the motion for summary judgment. Thus, the stipulation was properly before the trial court. (42 C.A.4th 1615.)

The following cases are also instructive:

Gilbertson v. Osman (1986) 185 C.A.3d 308, 315, 316, 229 C.R. 627 [failure to submit separate statement of disputed and undisputed facts did not justify order granting motion where issues were simple, evidentiary material was not extensive, and failure was not wilful].

North Coast Business Park v. Nielsen Const. Co. (1993) 17 C.A.4th 22, 30, 31, 21 C.R.2d 104 [omission of factual claim in separate statement resulted in waiver of issue on appeal].

Wright v. Stang Mfg. Co. (1997) 54 C.A.4th 1218, 1225, footnote 2, 63 C.R.2d 422 [plaintiff's mistaken response by mixing up numbers of defendant's statement of facts was not "judicial admission" or concession on issues because mistake contradicted other portions of plaintiff's response].

Leep v. American Ship Management, LLC (2005) 126 C.A.4th 1028, 1039, 24 C.R.3d 463 [in dispute for wages based on employment period, plaintiff's statement in opposition failed to dispute specific paragraph in defendant's

statement in support of motion for summary judgment, but plaintiff's entire response and totality of evidence showed that plaintiff disputed defendant's assertion of indefinite employment period, thus raising triable issue; summary judgment for defendant reversed].

Parkview Villas Assn. v. State Farm Fire & Cas. Co. (2005) 133 C.A.4th 1197, 1211, 35 C.R.3d 411 [although plaintiff's separate statement in opposition failed to comply fully with requirements, defects were curable and trial court abused discretion in granting summary adjudication for defendant without giving plaintiff opportunity to correct deficiencies; following *Security Pac. Nat. Bank*].

Collins v. Hertz Corp. (2006) 144 C.A.4th 64, 72, 50 C.R.3d 149 [after giving plaintiff opportunity to cure defects, trial court did not err in striking portions of plaintiff's resubmitted opposing statement and granting defendant's motion for summary judgment where plaintiff's statement contained numerous additional facts not linked to any item in defendant's motion, failed to state precisely what facts were disputed, and failed to cite evidence supporting plaintiff's allegations].

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

The following cases are instructive:

Whitehead v. Habig (2008) 163 C.A.4th 896, 902, 77 C.R.3d 679 [summary adjudication for plaintiff was proper where defendant failed to file separate statement of facts in opposition; separate statement is mandatory, not discretionary, and statutory language makes failure to comply sufficient grounds to grant motion].

Oldcastle Precast v. Lumbermens Mut. Cas. Co. (2009) 170 C.A.4th 554, 576, 88 C.R.3d 363 [defendant's request for continuance to revise responsive separate statement were properly denied where statement's deficiencies were not curable procedural defects but substantive flaws (failure to dispute elements of plaintiff's case and establish affirmative defenses); distinguishing *Parkview Villas Assn. v. State Farm Fire & Cas. Co. (2005) 133 C.A.4th 1197, 35 C.R.3d 411*, text, p. 659].

Kojababian v. Genuine Home Loans (2009) 174 C.A.4th 408, 418, 420, 94 C.R.3d 288 [summary judgment for defendants and denial of continuance to plaintiff were proper where defendants' uncontroverted declarations made prima facie showing that no triable issues existed and plaintiff failed to file statement of material facts in opposition; plaintiff's failure was not curable procedural mistake but was based on lack of admissible evidence that continuance would not cure].

Nazir v. United Airlines (2009) 178 C.A.4th 243, 263, 100 C.R.3d 296 [trial court erred in stating that it would be at liberty to strike or disregard plaintiff's separate statement because it failed to conform to statute and rule; proper response would be to permit plaintiff to file conforming statement].



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C. Opposition.

3. Consideration of Other Papers.

6 *Witkin Cal. Proc. PWT* § 219

[§ 219] Consideration of Other Papers.

In *Kulesa v. Castleberry* (1996) 47 C.A.4th 103, 54 C.R.2d 669, a legal malpractice action was filed more than 1 year after the alleged malpractice occurred, but within 1 year after defendants ceased to represent plaintiff. Under C.C.P. 340.6(a)(2), the legal malpractice statute of limitations, the continued representation tolled the statute. Plaintiff failed to raise the tolling argument in his separate statement of undisputed material facts, but did raise the issue in his memorandum of points and authorities and supporting exhibits. *Held*, summary judgment for defendants reversed. A trial judge must consider all of the papers submitted to determine whether triable issues of fact exist before exercising his or her discretion under C.C.P. 437c(b) to grant a summary judgment based on the failure of the opposing party to file an adequate separate statement.

(a) While C.C.P. 437c(b) permits the trial judge to grant summary judgment where the opposing party fails to meet the requirements concerning a separate statement of undisputed material facts, C.C.P. 437c(c) directs the judge to consider all the evidence set forth in all the papers submitted to determine whether any triable issue of fact exists. (47 C.A.4th 111.) Hence, a trial judge may not grant a summary judgment motion based on an inadequate separate statement until reviewing all of the papers filed in conjunction with the motion. (47 C.A.4th 112.) Here, the most cursory review of all the papers shows the motion to be utterly without factual or legal merit, and the judge had no discretion to grant the summary judgment. (47 C.A.4th 113.)

(b) This construction of the statute does not, however, strip the trial judge of the discretion to grant a summary judgment based on an inadequate opposing separate statement, or prevent the judge from exercising this discretion in proper circumstances. The judge may have discretion to grant the motion when the matter is complex and the opposing party buries its triable issues of fact in voluminous exhibits or presents its legal points in prolix, convoluted rhetoric. To say the trial judge has no discretion to grant a summary judgment motion without first looking at all of the papers submitted "is not to say the trial court has a duty to grope its way through a maze of arguments and reams of documents, searching for obscure traces of triable issues of material fact." (47 C.A.4th 117.)

San Diego Watercrafts v. Wells Fargo Bank (2002) 102 C.A.4th 308, 125 C.R.2d 499, rejected the rule of *Kulesa* to the extent it requires a trial judge to "consider all evidence whether referenced in the separate statements or not," and held instead that, in ruling on a motion for summary judgment, a trial judge must consider all the evidence submitted

but *may* ignore evidence not disclosed in a moving party's separate statement of undisputed facts. (102 C.A.4th 315.) However, the court also rejected the rule enunciated in *United Community Church v. Garcin* (1991) 231 C.A.3d 327, 282 C.R. 368, of an absolute prohibition against considering nonreferenced evidence. (102 C.A.4th 315.)

In *San Diego Watercrafts*, defendant sought summary judgment, and in opposition plaintiff submitted triable issues whether defendant had breached a lease. In a reply, defendant submitted a supplemental declaration containing new facts to rebut plaintiff's evidence. Over plaintiff's objection, the trial judge considered this supplemental declaration in ruling on the motion. *Held*, summary judgment reversed; the trial judge erred in considering evidence first submitted with defendant's reply.

(a) Defendant's supplemental declaration was filed after receiving plaintiff's opposition and thus its facts were not referenced in the separate statement of undisputed facts submitted with the motion. *Kulesa* would require the trial judge to consider the supplemental declaration under C.C.P. 437c(c). The better view is that C.C.P. 437c(c) is limited under C.C.P. 437c(b) by a trial judge's discretionary power to ignore evidence not identified in the separate statement. This permits an efficient use of the statements of undisputed facts by the trial judge in ruling on summary judgment motions because the process allows the judge to "only review evidence pertaining to disputed facts; there is no need for [the judge] to review evidence supporting facts which are agreed to be undisputed nor evidence not referenced in the moving party's separate statement or in the opposing party's responsive statement." (102 C.A.4th 314.)

(b) C.C.P. 437c(b) gives a trial judge discretion in cases of noncompliance; it is permissive, not mandatory. Thus, it is not necessary to adopt a rule that the trial judge must never consider evidence not referenced in the separate statement. However, in exercising discretion, the trial judge must consider the due process aspect of the separate statement, i.e., that it is to inform the opposing party of the evidence to be disputed to defeat the motion. Here, the evidence was omitted from the separate statement and was not filed until after plaintiff had responded to the issues raised in that statement. Thus, in considering the later declaration, the trial judge violated plaintiff's due process rights. "Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (102 C.A.4th 316.)

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C. Opposition.

4. Reply.

6 *Witkin Cal. Proc. PWT* § 220

[§ 220] Reply.

A reply to the opposition to a summary judgment motion must "be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise." (*C.C.P. 437c(b)(4)*.) The use of replies was recognized in summary judgment proceedings even before enactment of this provision. (See *Johnson v. Banducci* (1963) 212 C.A.2d 254, 260, 27 C.R. 764 [at hearing, both parties were permitted to file additional affidavits; *C.C.P. 437c* does not purport to cover summary judgment procedure in minute detail, and leaves judge free to permit answering affidavits to be filed].)

Service of the reply must be by personal delivery, fax transmission, express mail, or other means "reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers ... are filed." (*C.C.P. 1005(c)*.)

The statutory extensions of the period in which to file provided by *C.C.P. 1005* and *1013* (*supra*, §§17, 30) are not applicable. (*C.C.P. 437c(b)(6)*.)

The court may consider supplemental declarations or other evidence submitted by the moving party with the reply. In *Weiss v. Chevron, U.S.A. (1988)* 204 C.A.3d 1094, 251 C.R. 727, plaintiff's claim against defendant oil company was based solely on a theory of vicarious liability arising from an alleged principal-agent relationship between defendant and a service station. Defendant's motion for summary judgment was made on the ground that plaintiff, as demonstrated by her answers to interrogatories, had no evidence supporting an agency relationship. Plaintiff's counteraffidavit stated that the burden was on defendant to negate the fact of agency. Defendant then submitted a reply, which incorporated a declaration of one of defendant's managers and the sales and lease contracts between defendant and the service station. On the basis of this evidence the trial judge found that there was no agency, and granted summary judgment. Plaintiff argued that because the dispositive evidence did not accompany defendant's original moving papers, the trial judge was precluded from considering it. *Held*, judgment affirmed.

(a) *C.C.P. 437c(b)* does not expressly or impliedly prohibit including evidentiary matter with the reply. Moreover, *C.C.P. 437c(c)* requires that the motion be granted if "all the papers submitted" establish that there is no triable issue. This unqualified reference to the papers before the court, without limitation to documents submitted with the original

motion, supports the conclusion that the trial judge should consider all admissible evidence of which the opposing party has had notice and opportunity to respond. (204 C.A.3d 1098.)

(b) This conclusion is consistent with a trial court's inherent power to control all proceedings relating to the litigation before it, because one aspect of that power is the ability to obtain evidence on which to base a judgment. "[I]n summary judgment proceedings, the trial court is vested with discretion to permit the filing of affidavits in addition to those specifically mentioned in the statute and its determination in this respect will not be disturbed on appeal unless an abuse of discretion is clearly shown." (204 C.A.3d 1099.)

(c) No abuse of discretion was shown here. Plaintiff had notice of defendant's intention to rely on the papers submitted with its reply, but chose to make only a technical procedural objection, despite being granted a continuance to review the declaration, depose the declarant, and present further substantive opposition. (204 C.A.3d 1099.)

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D. Evidence.

1. In General.

a. Supporting Evidence.

6 *Witkin Cal. Proc. PWT* § 221

[§ 221] Supporting Evidence.

The motion for summary judgment "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*C.C.P. 437c(b)(1)*.)

Neither the moving party nor the opposing party may rely on allegations or denials in the party's own pleadings to cure deficiencies in these authorized forms of evidence. (*C.C.P. 437c(p)*); on burden of proof, see *infra*, §235 et seq.) However, either may use, as admissions, allegations pleaded by the other. (*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 C.3d 176, 181, 89 C.R. 737, 474 P.2d 689.*)

Any incorporation by reference of matter in the court's file must set forth with specificity the exact matter to which reference is made and may not incorporate the entire file. (*C.C.P. 437c(b)(7)*.)

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D. Evidence.

1. In General.

b. Opposing Evidence.

1. Necessity For Evidence.

6 *Witkin Cal. Proc. PWT* § 222

[§ 222] Necessity For Evidence.

Because the object of a summary judgment proceeding is to discover proof, the adverse party must file an affidavit or other evidence in opposition to a motion that is supported by evidence; the party may not rely on a pleading alone, regardless of whether it is verified. (See *C.C.P.* 437c(p); *Kelly v. Liddicoat* (1939) 35 C.A.2d 559, 560, 96 P.2d 186; *Coyne v. Krempels* (1950) 36 C.2d 257, 262, 223 P.2d 244; on burden of proof generally, see *infra*, §235 et seq.) This rule applies where the defendant makes affirmative allegations of a defense (e.g., by cross-complaint) but does not support them by affidavits. (*Hayward Union High School Dist. of Alameda v. Madrid* (1965) 234 C.A.2d 100, 44 C.R. 268.)

The following cases are instructive:

Cone v. Union Oil Co. of Calif. (1954) 129 C.A.2d 558, 563, 277 P.2d 464 ["Often there is no genuine issue of fact, although such an issue is raised by the formal pleadings"].

Maltby v. Shook (1955) 131 C.A.2d 349, 355, 280 P.2d 541 [plaintiff counsel's affidavits in opposition contained no facts showing existence of cause of action].

Schessler v. Keck (1956) 138 C.A.2d 663, 668, 292 P.2d 314, quoting the text [affidavit incorporating allegations of complaint].

Barry v. Rodgers (1956) 141 C.A.2d 340, 343, 296 P.2d 898 [affidavit stated only conclusions and generalities].

Snider v. Snider (1962) 200 C.A.2d 741, 753, 19 C.R. 709, citing the text [counteraffidavit declaring existence of written agreement merely repeated allegation in complaint and supplied no evidentiary facts].

Weir v. Snow (1962) 210 C.A.2d 283, 290, 26 C.R. 868, quoting the text [declaration by plaintiff's attorney contained "nothing more than the general allegations of a pleading"].

Goldstein v. Hoffman (1963) 213 C.A.2d 803, 811, 813, 29 C.R. 334 [facts competently stated in moving party's affidavits will be accepted as true].

Dugar v. Happy Tiger Records (1974) 41 C.A.3d 811, 818, 116 C.R. 412, citing the text [because defendant failed to file affidavits in opposition, trial court was entitled to accept as true facts stated in support of plaintiff's motion].

Leo F. Piazza Paving Co. v. Foundation Constructors (1981) 128 C.A.3d 583, 590, 177 C.R. 268 [failure to file affidavits in opposition].

Cochran v. Linn (1984) 159 C.A.3d 245, 249, 205 C.R. 550 [failure to file counterdeclarations].

Lyons v. Security Pac. Nat. Bank (1995) 40 C.A.4th 1001, 1012, 48 C.R.2d 174 [oral opposition at hearing on motion, unsupported by affidavits, was not sufficient; court could accept as true facts within moving party's personal knowledge and competency alleged in affidavits].

Sangster v. Paetkau (1998) 68 C.A.4th 151, 166, 80 C.R.2d 66 [plaintiff's mere assertion that there would be some disputed facts relevant to merits of her malicious prosecution action was insufficient to defeat defendant's showing of probable cause for defendant's underlying cross-complaint].

Thatcher v. Lucky Stores (2000) 79 C.A.4th 1081, 1083, 94 C.R.2d 575 [court may grant summary judgment where party fails to file opposition and court concludes that moving party has met initial burden of proof].

Under the Federal Rules, although affidavits are not essential, when the motion is supported by affidavits or other evidentiary matter, a countershowing must be made. (*F.R. Civ. P. 56(e)*; see 10A Federal Practice & Procedure (Wright, Miller & Kane) §2738; 27A Federal Procedure, L.Ed., §62:709 et seq.)

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D. Evidence.

1. In General.

b. Opposing Evidence.

2. Nature of Evidence.

6 *Witkin Cal. Proc. PWT* § 223

[§ 223] Nature of Evidence.

"The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*C.C.P.* 437c(b)(2); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 *C.4th* 826, 843, 107 *C.R.2d* 841, 24 *P.3d* 493, *infra*, §239 [extensive review and clarification of law that courts must apply in ruling on motions for summary judgment]; *Barton v. Elxsys Int.* (1998) 62 *C.A.4th* 1182, 1191, 73 *C.R.2d* 212 [plaintiff's declarations in opposition to defendant's summary judgment motion were disregarded where they contradicted plaintiff's discovery responses; thus, no triable issue was raised]; *Browne v. Turner Const. Co.* (2005) 127 *C.A.4th* 1334, 1349, 26 *C.R.3d* 433 [absent discovery abuse, opposition may include evidence previously undisclosed in discovery responses]; for discussion of applicable requirements, see *infra*, §224 *et seq.*; on opposing evidence generally, see *C.E.B.*, 2 *Civil Proc. Before Trial* 4th, §36.89 *et seq.*; *Cal. Civil Practice*, 3 *Procedure*, §21:31 *et seq.*; 23 *Am.Jur. P.P. Forms* (2001 ed.), *Summary Judgment* §53 *et seq.*)

As in the case of the moving papers, any incorporation by reference of matter in the court's file must set forth with specificity the exact matter to which reference is made and may not incorporate the entire file. (*C.C.P.* 437c(b)(7).)

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D. Evidence.

2. Affidavits and Declarations.

a. General Requirements.

6 *Witkin Cal. Proc. PWT* § 224

[§ 224] General Requirements.

"Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (*C.C.P.* 437c(d); see *Scheble v. Nell* (1962) 200 C.A.2d 435, 439, 19 C.R. 375 [affidavit was insufficient]; *Baron v. Mare* (1975) 47 C.A.3d 304, 308, 120 C.R. 675 [undated declaration that did not indicate where it was executed was defective and should not have been considered].)

A declaration may be used in lieu of affidavit. (See *C.C.P.* 2015.5; *Kulshrestha v. First Union Commercial Corp.* (2004) 33 C.4th 601, 612, 15 C.R.3d 793, 93 P.3d 386 [out-of-state declaration not certified as true "under the laws of the State of California" as required by *C.C.P.* 2015.5 was defective and could not support opposition to summary judgment]; *Stockinger v. Feather River Community College* (2003) 111 C.A.4th 1014, 1026, 4 C.R.3d 385 [subscription requirements of *C.C.P.* 2015.5 are applicable to declarations used in summary judgment proceedings]; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §3.)

Many opinions contain illustrations of sufficient affidavits. (See, e.g., *Atchison v. McGee* (1956) 141 C.A.2d 515, 518, 296 P.2d 860; *Goldstein v. Hoffman* (1963) 213 C.A.2d 803, 808, 29 C.R. 334; *Reich v. Yow* (1967) 249 C.A.2d 12, 14, 57 C.R. 117; *Thornton v. Victor Meat Co.* (1968) 260 C.A.2d 452, 457, footnote 6, 67 C.R. 887 [listing cases]; *Keniston v. American Nat. Ins. Co.* (1973) 31 C.A.3d 803, 810, 811, 107 C.R. 583; *Osmond v. EWAP* (1984) 153 C.A.3d 842, 851, 200 C.R. 674; *Melorch Builders v. Superior Court* (1984) 160 C.A.3d 931, 936, 937, 207 C.R. 47 [defendant's uncontested declarations showed conduct that was neither extreme nor outrageous, and thus, as a matter of law, negated essential element of plaintiff's cause of action for intentional infliction of emotional distress].)

Under the Federal Rules, a summary judgment motion may be made "with or without supporting affidavits." (*F.R. Civ. P.*, *Rule* 56(a), (b) [affidavit not essential]; 10B *Federal Practice & Procedure* (Wright, Miller & Kane) §2738.)

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2. Affidavits and Declarations.

b. Affiant's Personal Knowledge.

6 *Witkin Cal. Proc. PWT* § 225

[§ 225] Affiant's Personal Knowledge.

The affidavit or declaration supporting or opposing summary judgment must be made on personal knowledge and must show affirmatively that the affiant or declarant is competent to testify to the matters stated. (*C.C.P.* 437c(d).) These elements must be shown by facts set forth in the affidavit or declaration and not merely by conclusory statements to that effect. The bare statement that the facts are within the affiant's or declarant's knowledge does not fulfill the requirement where the facts set forth do not show this. (See *Maltby v. Shook* (1955) 131 C.A.2d 349, 353, 280 P.2d 541; *Hayward Union High School Dist. of Alameda v. Madrid* (1965) 234 C.A.2d 100, 113, 44 C.R. 268; *Swope v. Moskovitz* (1967) 253 C.A.2d 514, 61 C.R. 277; *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 C.A.4th 703, 716, 128 C.R.2d 529 [declaration of plaintiff's expert documenting his expertise and credentials, material relied on, basis of analysis, and conclusions raised triable issues sufficient to defeat defendant's summary judgment motion].) The text of the affidavit or declaration itself must demonstrate the requisite personal knowledge and competency. (See *Snider v. Snider* (1962) 200 C.A.2d 741, 754, 19 C.R. 709 [affidavit showed no facts within personal knowledge of affiant of existence of alleged agreement].)

A declaration stating facts "to the best of my knowledge" is insufficient; the statement implies that the allegations are based on information and belief, rather than personal knowledge. (*Bowden v. Robinson* (1977) 67 C.A.3d 705, 720, 136 C.R. 871, citing the text.)

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2. Affidavits and Declarations.

c. Admissibility of Evidence Recited.

6 *Witkin Cal. Proc. PWT* § 226

[§ 226] Admissibility of Evidence Recited.

The affidavits or declarations offered must set forth admissible evidence. (*C.C.P. 437c(d)*.) Matters that would be excluded under the rules of evidence if offered by a witness in a trial, such as inadmissible hearsay or opinions, will be disregarded if an evidentiary objection is made, either orally or in writing. The following cases are illustrative:

Low v. Woodward Oil Co. (1955) 133 C.A.2d 116, 121, 283 P.2d 720 [where affidavits depend on documents, they cannot be considered unless authenticated copies are annexed or excuse for nonproduction is shown].

Family Service Agency of Santa Barbara v. Ames (1958) 166 C.A.2d 344, 350, 333 P.2d 142 [affidavits of tax collector and assessors as to matters in tax records without attaching copies of records or showing excuse for nonperformance; insufficient].

Southern Pac. Co. v. Fish (1958) 166 C.A.2d 353, 362, 333 P.2d 133 [hearsay, conclusions, and opinions].

Kramer v. Barnes (1963) 212 C.A.2d 440, 446, 27 C.R. 895 [police officer's affidavit as to matters in police report, which were inadmissible hearsay].

Oliver v. Swiss Club Tell (1963) 222 C.A.2d 528, 543, 35 C.R. 324 [hearsay and conclusions].

Miley v. Harper (1967) 248 C.A.2d 463, 469, 56 C.R. 536 [declaration summarizing another person's report was not best evidence and was inadmissible].

Larsen v. Johannes (1970) 7 C.A.3d 491, 500, 501, 86 C.R. 744 [statements of intention were inadmissible under parol evidence rule].

Martin v. Johnson (1979) 88 C.A.3d 595, 602, 606, 151 C.R. 816 [hearsay].

L & B Real Estate v. Superior Court (1998) 67 C.A.4th 1342, 1346, 79 C.R.2d 759 [use of transcript testimony from criminal trial in support of summary judgment motion was inadmissible hearsay].

Sanchez v. Hillerich & Bradsby Co. (2002) 104 C.A.4th 703, 719, 128 C.R.2d 529 [exhibits submitted with motion for summary judgment were inadmissible where only attempt at authentication was counsel's declaration of familiarity with subject matter and issues, which did not meet requirements of *Ev.C. 1271* (admissibility of writing made as record of act; 1 *Cal. Evidence (4th)*, *Hearsay*, §227 et seq.)].

The requirement of admissibility applies to opposing, as well as moving, papers. (*C.C.P. 437c(d)*; see *Martin v. Johnson (1979) 88 C.A.3d 595, 605, 151 C.R. 816*; *C.E.B., 2 Civil Proc. Before Trial 4th*, §36.107; 67 *ALR3d 970* [evidence excludable under dead man's statute].)

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

See *Alvis v. Ventura (2009) 178 C.A.4th 536, 549, 100 C.R.3d 494* [in plaintiff's opposition to defendant's motion for summary adjudication, declaration of expert that directly contradicted declarant's prior statement in report to insurer was not acceptable as substantial evidence of triable issue of fact where contradiction was unexplained].



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2. Affidavits and Declarations.

d. Statement of Evidentiary Facts.

6 *Witkin Cal. Proc. PWT* § 227

[§ 227] Statement of Evidentiary Facts.

A common defect of affidavits or declarations is the recital of legal conclusions or ultimate facts, instead of statements of evidentiary facts. These statements are insufficient in opposing, or supporting, affidavits and declarations. The following cases are illustrative:

Murphy v. Kelly (1955) 137 C.A.2d 21, 30, 289 P.2d 565 [no evidentiary facts stating value of property].

Fidelity Investors v. Better Bathrooms (1956) 146 C.A.2d Supp. 896, 898, 304 P.2d 283 [no mention of "book account" on which complaint was based].

Martens v. Winder (1961) 191 C.A.2d 143, 149, 12 C.R. 413 [reference in defendants' affidavit to former judgment failed to identify relevant terms].

Rodes v. Shannon (1961) 194 C.A.2d 743, 749, 15 C.R. 349 [affidavits recited legal effect of written contract but contract was not attached].

Scheble v. Nell (1962) 200 C.A.2d 435, 439, 19 C.R. 375 [although plaintiff's affidavit claimed encroachment by defendant, it gave no information about extent or inconvenience].

De Echeguren v. De Echeguren (1962) 210 C.A.2d 141, 148, 26 C.R. 562 [defendant's declaration did "not contain a single statement of fact in regard to the action for declaratory relief"].

Johnson v. Banducci (1963) 212 C.A.2d 254, 264, 27 C.R. 764 [moving affidavits were "comprised of ambiguous statements, conclusions, ultimate facts, inconsistent averments, and valueless items of information" but were "barren of evidentiary facts"].

Oliver v. Swiss Club Tell (1963) 222 C.A.2d 528, 544, 35 C.R. 324 [hearsay statements and ultimate facts].

Keniston v. American Nat. Ins. Co. (1973) 31 C.A.3d 803, 813, 107 C.R. 583 [no evidentiary facts].

Dugar v. Happy Tiger Records (1974) 41 C.A.3d 811, 815, 116 C.R. 412 [affidavits incorporating unattached exhibits were not cured by unverified declaration of attorney].

Baron v. Mare (1975) 47 C.A.3d 304, 308, 311, 120 C.R. 675, citing the text [conclusory statements].

Leyva v. Superior Court (1985) 164 C.A.3d 462, 475, 210 C.R. 545 [securities fraud; insufficient relevant facts on whether fractional interests in promissory notes constituted securities].

Hoover Community Hotel Dev. Corp. v. Thomson (1985) 167 C.A.3d 1130, 1137, 213 C.R. 750 [bare conclusions of law].

Hayman v. Block (1986) 176 C.A.3d 629, 638, 222 C.R. 293 [insufficient credible evidence that defendant sheriff engaged in discriminatory enforcement of public nuisance statutes against prostitutes].

Witchell v. De Korne (1986) 179 C.A.3d 965, 975, 225 C.R. 176, citing the text [supporting documents described as memorandum of points and authorities were not sufficiently evidentiary].

Hoffman v. Sports Car Club of America (1986) 180 C.A.3d 119, 126, 225 C.R. 359 [defendant raised plaintiff's signed release as affirmative defense in personal injury action; plaintiff argued that release was obtained by fraud and undue influence but failed to provide by declaration or reference to discovery product sufficient facts to show elements of fraud or undue influence].

Guthrey v. California (1998) 63 C.A.4th 1108, 1120, 75 C.R.2d 27 [plaintiff's declaration was objectionable because it was based on opinion and conclusions instead of evidentiary facts].

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e. Penalty for Affidavits in Bad Faith.

6 *Witkin Cal. Proc. PWT* § 228

[§ 228] Penalty for Affidavits in Bad Faith.

C.C.P. 437c(j), adopting the substance of *F.R. Civ. P., Rule 56(g)* and extending it to moving as well as opposing parties, provides that if the court determines "at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur. Sanctions may not be imposed ... except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard." (On comparable practice under *F.R. Civ. P., Rule 56(g)*, see 10B Federal Practice & Procedure (Wright, Miller & Kane) §2742; 27A Federal Procedure, L.Ed., §62:704.)

In *Winick Corp. v. County Sanitation Dist. No. 2* (1986) 185 C.A.3d 1170, 230 C.R. 289, the court held that a subcontractor's action against a property owner lacked good faith and was without merit where the proper remedy for unpaid labor and materials was against the surety on a stop notice release bond; defendant was entitled to attorneys' fees under *C.C.P. 128.5* and former *C.C.P. 437c(i)* (now *C.C.P. 437c(j)*) for drafting the answer and the summary judgment motion. (185 C.A.3d 1176.)

In *Collins v. State Dept. of Trans.* (2003) 114 C.A.4th 859, 864, 8 C.R.3d 132, the court viewed the reference in *Winick* to former *C.C.P. 437c(i)* as dicta "because section 437c addresses only bad faith affidavits," whereas the misconduct in *Winick* involved a meritless action. (114 C.A.4th 869.) *C.C.P. 437c* does not authorize an award of attorneys' fees as a sanction, and attorneys' fees are not recoverable as "reasonable expenses." Instead, the statute allows recovery of expenses such as expert fees and service fees. (114 C.A.4th 870.)

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3. Evidence Obtained by Discovery.

6 *Witkin Cal. Proc. PWT* § 229

[§ 229] Evidence Obtained by Discovery.

(1) *Authorized Discovery Products.* *C.C.P.* 437c(b) expressly authorizes the use of admissions, answers to interrogatories, and depositions to support or oppose a motion for summary judgment. (See *Gatton v. A.P. Green Services* (1998) 64 *C.A.4th* 688, 692, 695, 75 *C.R.2d* 523 [plaintiff's use of deposition testimony given by unrelated party in another action in place of affidavit was not permissible]; on comparable practice under *F.R. Civ. P.*, *Rule 56(c)* and (e), see 10A *Federal Practice & Procedure* (Wright, Miller & Kane) §2721 et seq.; 27A *Federal Procedure*, L.Ed., §§62:723, 62:725.)

(2) *Admissions.* In addition to matter obtained through requests for admissions (*C.C.P.* 2033.010 et seq.; 2 *Cal. Evidence* (4th), *Discovery*, §157 et seq.), a party may also rely on admissions obtained through other means of discovery. (See *Hejmadi v. AMFAC* (1988) 202 *C.A.3d* 525, 249 *C.R.* 5 [summary disposition of defamation cause of action was proper where truth of allegedly defamatory statement was effectively conceded in plaintiff's deposition and opposition papers]; on admissions contained in pleadings of opponent, see *infra*, §230.)

In *D'Amico v. Board of Med. Examiners* (1974) 11 *C.3d* 1, 112 *C.R.* 786, 520 *P.2d* 10, the court observed that, when discovery produces an admission or concession, the normal rules of strict construction against the motion (*infra*, §244) are relaxed or altered. (11 *C.3d* 21.) As the law recognizes in other contexts, admissions against interest (see *Ev.C.* 1220 et seq.) have high credibility value, particularly where, as here, they are made in the context of proceedings designed to elicit the facts. "Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits." (11 *C.3d* 22.)

In *Price v. Wells Fargo Bank* (1989) 213 *C.A.3d* 465, 261 *C.R.* 735, the court followed the holding of *D'Amico* but disagreed with a broad statement of that holding in *Leasman v. Beech Aircraft Corp.* (1975) 48 *C.A.3d* 376, 382, 121 *C.R.* 768, to the effect that "when a defendant can establish his defense with the plaintiff's admissions ... the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive." (213 *C.A.3d* 482.) The *Price* court took note of a commentator's observation that this view could lead to the anomalous result that if the case went to trial, the judge or jury might choose to believe the contradictory testimony, but on motion for

summary judgment, the party is bound by his or her admissions made in the course of discovery. (213 C.A.3d 482.) However, the court took a more reasonable position on what *D'Amico* holds. "We do not interpret the decision, however, as saying that admissions should be shielded from careful examination in light of the entire record. A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence. We are persuaded that the trial court properly relied on the admissions in the case at bar only because we find nothing in the record that is materially inconsistent with the admissions." (213 C.A.3d 482.) (See *Mason v. Marriage & Family Center* (1991) 228 C.A.3d 537, 545, 279 C.R. 51 [quoting *Price* and reversing summary judgment]; *FPI Dev. v. Nakashima* (1991) 231 C.A.3d 367, 396, 282 C.R. 508 [in action on note, evidence of oral condition was inconsistent with admission that note was enforceable and was inadmissible on motion for summary judgment]; *People v. Ad Way Signs* (1993) 14 C.A.4th 187, 200, 201, 17 C.R.2d 496 [summary judgment reversed; while admission constituted evidence of permit revocation, it was not dispositive].)

In *Scalf v. D.B. Log Homes* (2005) 128 C.A.4th 1510, 27 C.R.3d 826, a home builder brought an action to foreclose a mechanic's lien on a log cabin home it constructed for Y. Y in turn cross-complained, bringing in cross-defendants L, the supplier, and S, the manufacturer. Taking an expansive view of *D'Amico*, the trial court granted summary judgment to L based solely on inculpatory statements made by S in S's deposition taken by L, and refused to consider other evidence disclosing triable issues. *Held*, reversed.

(a) The rule enunciated in *D'Amico* requires that a party's admissions obtained through discovery receive high deference in summary judgment proceedings, and that, absent a credible explanation, these admissions prevail over that party's later inconsistent declarations. Properly applied, "the rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." For summary judgment purposes, deposition answers are not to be given the conclusive effect afforded to judicial admissions, but are merely evidence "considered and weighed in conjunction with other evidence." (128 C.A.4th 1522.)

(b) *D'Amico* does not hold that highly inculpatory deposition statements are sufficient by themselves to warrant summary judgment. The moving party retains the burden of showing the absence of a genuine factual dispute. While S's admissions may have been damaging to S, they did not in themselves exonerate L from liability in the underlying matter initiated by Y's complaint. Here, the record was replete with evidence that should have been considered in opposition to L's motion. Thus, the trial court abused its discretion by refusing to look beyond S's responses. (128 C.A.4th 1525.)

(3) *Deposition of Experts*. When a party presents evidence that raises a significant question about the foundation of an expert's opinion supporting or opposing a motion for summary judgment or summary adjudication, a deposition limited to that question should be allowed, subject to the trial judge's discretion. Objective facts must demonstrate a significant question regarding the validity of the affidavit or declaration which, if successfully pursued, will impeach the foundation of the affidavit or declaration. (*St. Mary Med. Center v. Superior Court* (1996) 50 C.A.4th 1531, 1534, 1540, 58 C.R.2d 182 [medical malpractice action; "expert" doctor's declaration filed in opposition to motion for summary judgment].)

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4. Reliance on Adversary's Pleadings.

6 *Witkin Cal. Proc. PWT* § 230

[§ 230] Reliance on Adversary's Pleadings.

Neither party may rely on his or her own pleadings as a factual source on a motion for summary judgment. (*Romak Iron Works v. Prudential Ins. Co.* (1980) 104 C.A.3d 767, 163 C.R. 869.) Either, however, may rely on the other's pleadings, the allegations of which are judicial admissions. (*Cayley v. Nunn* (1987) 190 C.A.3d 300, 235 C.R. 385; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 C.A.3d 1049, 1059, 271 C.R. 1 [pleadings in prior action]; on admissibility of judicial admissions, see 1 *Cal. Evidence* (4th), Hearsay, §97 et seq.; on admissions in discovery products, see *supra*, §229.) For example, a defendant, in addition to his own declaration, may rely on an allegation of the complaint; there is no need for the defendant's declaration to repeat matters already asserted in the complaint. (*Troche v. Daley* (1990) 217 C.A.3d 403, 266 C.R. 34; see *Uram v. Abex Corp.* (1990) 217 C.A.3d 1425, 266 C.R. 695.)

In *Joslin v. Marin Mun. Water Dist.* (1967) 67 C.2d 132, 60 C.R. 377, 429 P.2d 889, defendant moved for summary judgment. It filed an affidavit lacking an essential averment of fact, but the fact appeared from the allegations of the complaint. *Held*, summary judgment was properly granted. A plaintiff cannot rely on the complaint, and a defendant cannot rely on the answer (see *supra*, §§221, 222), but either party can rely on the other's pleading. (67 C.2d 147, 148.) (See *Reich v. Yow* (1967) 249 C.A.2d 12, 14, 57 C.R. 117 [plaintiff's affidavit need not cover material facts alleged in complaint and admitted by defendant's failure to deny]; *Thornton v. Victor Meat Co.* (1968) 260 C.A.2d 452, 461, 67 C.R. 887 [defendant's motion; following *Joslin*]; *Dugar v. Happy Tiger Records* (1974) 41 C.A.3d 811, 818, 116 C.R. 412, citing the text; *Brown v. Fremont* (1977) 75 C.A.3d 141, 146, 142 C.R. 46, citing the text; *Gigax v. Ralston Purina Co.* (1982) 136 C.A.3d 591, 597, 186 C.R. 395; *Kurini v. Hanna & Morton* (1997) 55 C.A.4th 853, 870, 64 C.R.2d 324 [in legal malpractice action, granting summary judgment on cross-complaint for unpaid attorneys' fees was proper where defendant attorney relied on admissions in plaintiff's pleadings in underlying action that fees were reasonable and that plaintiff was legally bound to pay them]; *Castillo v. Barrera* (2007) 146 C.A.4th 1317, 1325, 53 C.R.3d 494 [plaintiff's repeated allegations in complaint that he was manager constituted judicial admissions on which defendant properly relied in his motion for summary judgment].)

In *24 Hour Fitness v. Superior Court* (1998) 66 C.A.4th 1199, 78 C.R.2d 533, *infra*, §520, plaintiff former employee brought an action for harassment against defendants employer and various employees. Defendants sought summary judgment on the basis of an arbitration agreement that covered all of plaintiff's claims. The *employee*

defendants properly relied on the allegations in plaintiff's complaint that employee defendants were acting within the scope of their employment at all relevant times, and thus the arbitration agreement extended to them. As to defendant employees except one, plaintiff rested her opposition on an allegation in defendant *employer's* answer that any harassment was carried out by employees acting beyond the scope of their employment. However, as to the one defendant employee, plaintiff rested her opposition on his admission in discovery that he made certain objectionable statements to her outside the scope of his employment. *Held*, plaintiff failed to meet her burden under *C.C.P. 437c* as to employee defendants except one. The defendant employer's allegations were not admissions by the *individual defendants*. Thus, to the extent plaintiff's opposition rested only on the pleadings, rather than evidence, it was insufficient to satisfy her burden. (66 *C.A.4th* 1211.) However, plaintiff met her burden as to the single defendant employee by resting her opposition on his discovery admission. (66 *C.A.4th* 1212.)

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5. Documentary Evidence.

6 *Witkin Cal. Proc. PWT* § 231

[§ 231] Documentary Evidence.

Documentary evidence submitted in support of or opposition to a summary judgment motion must be in the form of admissible evidence. (*Dugar v. Happy Tiger Records* (1974) 41 C.A.3d 811, 116 C.R. 412, citing the text [documents appended to plaintiff's motion for summary judgment representing invoices for goods and materials that were not originals of those documents but copies were not competent evidence and their consideration by court was in violation of best evidence rule and improper]; on admissibility of submitted evidence generally, see *supra*, §226.) Thus, documentary evidence must meet the following requirements:

(1) It must be authenticated. (See *Ev.C. 1400* et seq.; on authentication, see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §3 et seq.)

(2) It must comply with the rules for secondary evidence (formerly "best evidence rule"). (See *Ev.C. 1520* et seq.; on secondary evidence, see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §27 et seq.)

(3) If hearsay, it must come within an exception to the hearsay rule. (See *Ev.C. 1200* et seq.; on hearsay exceptions, see 1 *Cal. Evidence (4th)*, *Hearsay*, §51 et seq.)

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6. Judicial Notice.

6 *Witkin Cal. Proc. PWT* § 232

[§ 232] Judicial Notice.

A motion for summary judgment may be supported by matters of which judicial notice must or may be taken. (*C.C.P. 437c(b)*; on judicial notice, see 1 *Cal. Evidence (4th)*, *Judicial Notice*, §1 et seq.) Matters that must be judicially noticed are set forth in *Ev.C. 451*. Matters that may be judicially noticed are set forth in *Ev.C. 452*.

A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the *truth* of facts asserted in those documents as orders, findings of fact and conclusions of law, and judgments. For example, a court may not take judicial notice of the truth of hearsay allegations just because they are part of a court record or file. (*In re David C. (1984) 152 C.A.3d 1189, 1205, 200 C.R. 115.*)

A summary judgment motion is frequently based on the contents of court files in another case. The court may take judicial notice of its own records and also those of any other court of record in the United States. (*Ev.C. 452(d).*)

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7. Objections to Evidence.

6 *Witkin Cal. Proc. PWT* § 233

[§ 233] Objections to Evidence.

(1) *In General.* Originally, objections to the form and substance of moving and opposing papers could be raised for the first time on appeal. (See *Witchell v. De Korne* (1986) 179 C.A.3d 965, 974, 225 C.R. 176; *Zuckerman v. Pacific Savings Bank* (1986) 187 C.A.3d 1394, 232 C.R. 458.) The summary judgment statute was amended in 1990 to provide that evidentiary objections not made at the hearing of a summary judgment motion "shall be deemed waived." (C.C.P. 437c(b)(5); see C.C.P. 437c(d) [objections based on failure of affidavits or declarations to meet requirements are deemed waived if not made at hearing].) Hence, if not objected to, otherwise inadmissible evidence may be relied on by the trial court in ruling on the motion. (See *Weil v. Federal Kemper Life Assur. Co.* (1994) 7 C.4th 125, 149, footnote 9, 27 C.R.2d 316, 866 P.2d 774 [hearsay statements considered in absence of objection]; *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 C.A.4th 732, 60 C.R.2d 710 [defendants' reference in statement of undisputed facts to plaintiff's inadmissible hearsay evidence did not waive contemporaneous objection to that evidence in accompanying points and authorities]; *Hollywood Screentest of America v. NBC Universal* (2007) 151 C.A.4th 631, 643, 60 C.R.3d 279 [in complying with Court of Appeal's writ to reconsider defendant's motion for summary judgment on record previously submitted, trial court properly ruled on parties' evidentiary objections contained in that record].)

(2) *Written Objection.* A party desiring to object to evidence in the papers on a motion for summary judgment must either submit objections in writing or arrange for a court reporter to be present at the hearing. (C.R.C., Rule 3.1352.)

Unless the court deems otherwise, the written objections must be served and filed at the same time the objecting party's opposition or reply papers are served and filed. (C.R.C., Rule 3.1354(a).) The objections must be served and filed separately from the other papers and must identify with specified particularity the material objected to. (C.R.C., Rule 3.1354(b).) The objections must be accompanied by a proposed order, as specified. (C.R.C., Rule 3.1354(c).) (For examples of mandated formats for objections and orders, see C.R.C., Rule 3.1354.)

(3) *Trial Court Ruling on Objections.* There is some dispute on the trial court's duty to rule on evidentiary objections. *Biljac Associates v. First Interstate Bank* (1990) 218 C.A.3d 1410, 267 C.R. 819, 1 Summary (10th), Contracts, §608, held that the trial judge need not rule on each evidentiary objection, but could preserve the record for review by merely stating that he or she was disregarding portions of the evidence considered incompetent and inadmissible. (218 C.A.3d 1419.)

Demps v. San Francisco Housing Authority (2007) 149 C.A.4th 564, 57 C.R.3d 204, rejected the *Biljac* approach, and held that the trial court must expressly rule on each properly presented objection and that the failure to do so results in the objections being waived, unless the record reflects otherwise, and the objected-to evidence is included in the record. (149 C.A.4th 578.) Although not mentioning *Biljac*, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 670, footnote 1, 25 C.R.2d 137, 863 P.2d 207, 6 Summary (10th), Torts, §1136, and *Sharon P. v. Arman, Ltd.* (1999) 21 C.4th 1181, 1186, footnote 1, 91 C.R.2d 35, 989 P.2d 121, 6 Summary (10th), Torts, §1135, deemed the objections to evidence waived and the evidence admitted where the record contained no rulings. These decisions have "impliedly overruled *Biljac*." (149 C.A.4th 578.)

The following cases were also relied on by *Demps*:

Long Beach v. Farmers & Merchants Bank of Long Beach (2000) 81 C.A.4th 780, 784, 97 C.R.2d 140 [trial judge's failure to rule on written evidentiary objections in summary judgment proceeding did not result in waiver where defense counsel twice orally requested ruling and further request would have been futile].

Sambrano v. San Diego (2001) 94 C.A.4th 225, 234, 114 C.R.2d 151 [trial court has duty to rule on evidentiary objections].

Swat-Fame v. Goldstein (2002) 101 C.A.4th 613, 623, 124 C.R.2d 556 [trial court's failure to rule on written objections was "unacceptable circumvention of the court's obligation"].

Vineyard Springs Estates, LLC v. Superior Court (2004) 120 C.A.4th 633, 643, 15 C.R.3d 587 [after promising parties three times that he would rule on evidentiary objections, trial judge failed in mandatory duty to do so; writ of mandamus issued directing that order denying defendant's summary judgment motion be vacated and all of defendant's evidentiary objections be ruled on; following *Long Beach* and *Sambrano*].

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

(3) *Trial Court Ruling on Objections.* See *Nazir v. United Airlines* (2009) 178 C.A.4th 243, 255, 100 C.R.3d 296 [trial court's blanket ruling sustaining all but one of defendants' 764 objections was abuse of discretion and therefore there was no "ruling" and objections were deemed waived; following *Demps v. San Francisco Housing Authority* (2007) 149 C.A.4th 564, 57 C.R.3d 204, text, p. 675].



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CHAPTER VII - Proceedings Without Trial

Witkin Summary of California Law

IX. SUMMARY JUDGMENT

E. Determination.

1. Hearing.

6 *Witkin Cal. Proc. PWT* § 234

[§ 234] Hearing.

(1) *Time of Hearing.* "The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise." (*C.C.P.* 437c(a); see 10 *Pacific L. J.* 340.)

The 30-day time limit is extended when the original trial date is continued; i.e., it is based on the trial date in effect at the time the motion is noticed. This construction of *C.C.P.* 437c is consistent with its overall purpose of disposing of meritless claims before trial. (*Green v. Bristol Myers Co.* (1988) 206 *C.A.3d* 604, 608, 609, 253 *C.R.* 745.)

In *Sentry Ins. Co. v. Superior Court* (1989) 207 *C.A.3d* 526, 255 *C.R.* 13, the date set for trial was January 17, 1989, and the motion for summary judgment had to be heard no later than December 16, 1988. Petitioners attempted to file their motion on November 1, 1988, but were advised that the first date the motion could be heard was December 22, 1988, and that a court order would be necessary to obtain an earlier date. Petitioners immediately sought an order shortening time, which was denied, and their motion for reconsideration was also denied. The presiding judge suggested that they move to continue the trial date, they did, and this motion was also denied. *Held*, mandamus issued directing the trial court to continue the trial date and hear the motion: "A trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c. ... Local rules and practices may not be applied so as to prevent the filing and hearing of such a motion." (207 *C.A.3d* 529.)

(2) *Right to Hearing.* The summary judgment statutes require an *oral* hearing at which counsel has the opportunity to be heard. This hearing involves the contemporaneous presence, whether in person or electronically, of the parties and a judge. In *Mediterranean Const. Co. v. State Farm Fire & Cas. Co.* (1998) 66 *C.A.4th* 257, 77 *C.R.2d* 781, two parties in a prior action brought separate bad faith actions against an insurer. The trial judge granted the insurer summary judgment in each, but in one of the actions announced his decision without allowing oral argument. *Held*, both judgments reversed.

(a) *Statutory requirement.* The trial judge erred in ruling for summary judgment without permitting oral argument. The reference in *C.C.P.* 437c to a "hearing" requires the opportunity for oral argument so that litigants may address the judge who will decide the motion. The statute imposes evidentiary burdens and procedural requirements, and there are repeated references to a "hearing," including notice requirements and a cutoff date for when the motion must be heard

before the trial date. While litigants are not given the right to present testimony at the hearings, there is no restriction against oral argument. (66 C.A.4th 262.)

(b) *Only opportunity to be heard.* Equally important is that the hearing offers the litigants their only opportunity to orally argue their case and respond to the judge's inquiries. Moreover, the hearing enhances the public visibility and accountability of the judicial process. Thus, judges may not elevate judicial expediency over the mandate for hearings under C.C.P. 437c. Although judges retain extensive discretion regarding how the hearing is to be conducted, they may not entirely bar parties from having a say. (66 C.A.4th 264, 265.) (See *Gwartz v. Superior Court* (1999) 71 C.A.4th 480, 481, 83 C.R.2d 865 [trial judge erred in denying defendant's motion for summary judgment without hearing oral argument; following *Mediterranean*]; *Brannon v. Superior Court* (2004) 114 C.A.4th 1203, 1209, 8 C.R.3d 491, citing the text [trial judge erred in issuing telephonic order denying summary judgment motion and stating that "[n]o oral argument will be entertained"; following *Mediterranean*].)

(3) *No Oral Testimony.* In determining whether there is a triable issue as to any material fact, the court "shall consider all of the evidence set forth in the papers." (C.C.P. 437c(c).) The former statute was silent on the use of testimony, but its use was disapproved; oral evidence would tend to make the hearing a trial of the issues rather than a means of discovering whether triable issues exist. (See *Gardner v. Shreve* (1949) 89 C.A.2d 804, 809, 202 P.2d 322, supra, §210; *Spencer v. Hibernia Bank* (1960) 186 C.A.2d 702, 717, 9 C.R. 867; C.E.B., 2 Civil Proc. Before Trial 4th, §36.109; 53 A.L.R.4th 527 [admissibility of oral testimony in state summary judgment hearings].)

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



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E. Determination.

2. Burden of Proof.

a. Plaintiff or Cross-Complainant.

6 *Witkin Cal. Proc. PWT* § 235

[§ 235] Plaintiff or Cross-Complainant.

On a summary judgment or summary adjudication motion, a plaintiff or cross-complainant has met the burden of showing that there is no defense to the cause of action (*supra*, §201) "if that party has proved each element of the cause of action entitling the party to judgment on that cause of action." Once the party has done so, "the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense." (*C.C.P.* 437c(p)(1); on summary adjudication, see *infra*, §267 et seq.)

The defendant or cross-defendant may not rely merely on the allegations or denials of the pleadings, but must respond with specific facts demonstrating a triable issue of material fact as to the cause of action or a defense. (*C.C.P.* 437c(p)(1).)

A 1992 amendment to *C.C.P.* 437c "eliminated the former requirement that a plaintiff moving for summary judgment refute each of the defendant's affirmative defenses, thereby bringing California practice in line with federal law." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 C.4th 287, 301, footnote 4, 24 C.R.2d 467, 861 P.2d 1153; see *Santa Ana Unified School Dist. v. Orange County Dev. Agency* (2001) 90 C.A.4th 404, 411, 108 C.R.2d 770 [plaintiff's burden did not include disproving defendants' affirmative defense of laches; summary judgment for plaintiff was proper where plaintiff successfully shifted burden and defendants failed to produce evidence of laches in their opposition papers]; 41 *Santa Clara L. Rev.* 39 [effect of 1992 and 1993 amendments to *C.C.P.* 437c].)

When the plaintiff's claim carries a clear and convincing burden of proof, the evidence and resultant inferences must meet the higher standard. (*Rowe v. Superior Court* (1993) 15 C.A.4th 1711, 1724, 19 C.R.2d 625; see *Basich v. Allstate Ins. Co.* (2001) 87 C.A.4th 1112, 1118, 105 C.R.2d 153 [on motion for summary adjudication, evidence to support punitive damages claim must be tested under clear and convincing standard].)

In *Security Pac. Nat. Bank v. Associated Motor Sales* (1980) 106 C.A.3d 171, 165 C.R. 38, plaintiff bank obtained summary judgment against defendant as an indorser of dishonored checks. The bank's moving papers established a presumption of dishonor under U.C.C. 3510 which, by the terms of U.C.C. 1210, affected the burden of producing evidence. Defendant introduced no evidence to dispel the presumption. *Held*, summary judgment affirmed. (a) The

presumption required the trial court to assume the existence of the presumed fact unless contrary evidence was introduced. (*106 C.A.3d 178.*) (b) Neither the placement of the burden of proof at trial nor a presumption affecting the burden of proof affects the power to grant summary judgment; the moving party must show that there is no basis for a trial, without regard to which party has the burden of proof at trial. (*106 C.A.3d 179.*) However, the presumption affecting the burden of producing evidence required the resisting party to produce evidence to negate the assumed fact created by the presumption; and, without that evidence, there was no triable issue of fact. (*106 C.A.3d 180.*)

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



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E. Determination.

2. Burden of Proof.

b. Defendant or Cross-Defendant.

1. In General.

6 *Witkin Cal. Proc. PWT* § 236

[§ 236] In General.

A defendant or cross-defendant has met the burden of showing that a cause of action has no merit (*supra*, §201) if that party "has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." Once the party has done so, "the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense." (*C.C.P. 437c(p)(2)*.) The plaintiff or cross-complainant may not rely merely on the allegations or denials of the pleadings, but must respond with specific facts demonstrating a triable issue of material fact as to the cause of action or a defense. (*C.C.P. 437c(p)(2)*.)

The following cases are instructive:

Kulesa v. Castleberry (1996) 47 C.A.4th 103, 112, 54 C.R.2d 669, *supra*, §219 [plaintiff in legal malpractice action had burden, in opposition to defense motion based on statute of limitations, to demonstrate triable issue that statute tolled].

Hanson v. Grode (1999) 76 C.A.4th 601, 606, 90 C.R.2d 396 [declarations of plaintiff's experts in medical malpractice action satisfied plaintiff's burden in opposition to defendants' motion for summary judgment by creating reasonable inferences of defendants' breach of duty and causation].

Weseloh Family Ltd. Partnership v. K.L. Wessel Const. Co. (2004) 125 C.A.4th 152, 164, 22 C.R.3d 660 [in professional negligence action, summary judgment was proper for defendants, design engineer consultants, who met their burden by proving they had no duty to plaintiffs, and hence no liability for collapsed retaining wall, by showing that they had no contractual privity with plaintiffs and had rendered only consultative services for subcontractor that built wall].

Kotler v. PacifiCare of Calif. (2005) 126 C.A.4th 950, 956, 24 C.R.3d 447 [trial court erred in granting health care service plan defendant's motion for summary adjudication on plaintiff's breach of contract action where defendant failed

to negate plaintiff's claim that, contrary to contractual obligations, defendant unreasonably delayed in referring plaintiff to medical specialist].

Nardizzi v. Harbor Chrysler Plymouth Sales (2006) 136 C.A.4th 1409, 1415, 39 C.R.3d 530 [declaration of plaintiff's expert in opposition to defendant's motion for summary judgment was merely speculation and conjecture and failed to address many points of evidence presented in defendant's motion].

Unpleaded allegations need not be controverted. In *Scolinos v. Kolts* (1995) 37 C.A.4th 635, 44 C.R.2d 31, plaintiff attorney referred a client to defendant attorneys and then sued to recover a fee for the referral. The agreement was void as against public policy because it was made without the written consent of the client. *Held*, summary judgment for defendants affirmed. Although plaintiff contended that he was not equally culpable, because defendants had agreed to obtain the client's written consent, plaintiff failed to plead these allegations, and thus defendants were not required to meet them to be entitled to summary judgment. (37 C.A.4th 640.)

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

See *Y.K.A. Industries v. Redevelopment Agency of San Jose* (2009) 174 C.A.4th 339, 367, 94 C.R.3d 424 [because plaintiffs in wage dispute failed to demonstrate in their motion for summary judgment on defendant's cross-complaint for deprivation of due process that doctrine of exhaustion of judicial remedies applied to defendant, or that defendant failed to seek writ of mandamus as doctrine required, burden never shifted to defendant to show exhaustion].



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E. Determination.

2. Burden of Proof.

b. Defendant or Cross-Defendant.

2. Burden When Asserting Compete Defense.

6 *Witkin Cal. Proc. PWT* § 237

[§ 237] Burden When Asserting Compete Defense.

The burden on a defendant moving for summary judgment based on an affirmative defense is different from the burden to show that one or more elements of a cause of action cannot be established. Instead of merely submitting evidence to negate a single element of a claim, or offering evidence such as insufficient discovery responses to show that the plaintiff does not have evidence to create a triable issue, a defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. (*Consumer Cause v. SmileCare* (2001) 91 C.A.4th 454, 467, 110 C.R.2d 627.)

In *Consumer Cause*, defendant dental corporation was sued by a consumer group alleging that defendant had violated the Safe Drinking Water and Toxic Enforcement Act of 1986 by exposing employees and patients to amalgam fillings containing mercury, a reproductive toxin, without providing the requisite warning. Defendant's motion for summary judgment was based on the affirmative defense of the Act's exposure exemption, which provides that a person is exempt from warning others about a reproductive toxin if the person can provide specific data establishing that the level of exposure is 1,000 times below the "no observable effect level" in question for specified substances. In support of its motion, defendant produced a declaration by an expert that the standard dental amalgam was safe, and plaintiff's admissions and answers to interrogatories establishing essentially that plaintiff did not allege or know if defendant's use of amalgam exceeded the safe level. *Held*, summary judgment for defendant reversed. Plaintiff properly alleged a prima facie case that defendant knowingly and intentionally exposed individuals to mercury without providing a warning. Defendant did not challenge this showing, but asserted an affirmative defense and argued that the exposure met the statutory exemption. But defendant failed to introduce any evidence to prove an element of that defense. Neither the expert's declaration nor plaintiff's responses to defendant's requests for admissions and special interrogatories addressed any of the relevant factors under the exposure exemption, i.e., the specific exposure level in issue. Thus, defendant failed to shift the burden to plaintiff to raise a disputed issue with respect to the exemption. (91 C.A.4th 470, 476.)

The following cases are also instructive:

Arciniega v. Bank of San Bernardino (1997) 52 C.A.4th 213, 231, 60 C.R.2d 495 [summary judgment was proper;

defendant's valid defense of retraxit shifted burden to plaintiff, who failed to produce evidence of triable issue as to that defense].

Bacon v. Southern Calif. Edison Co. (1997) 53 C.A.4th 854, 859, 62 C.R.2d 16 [defendant met burden of establishing immunity in personal injury action, thus shifting burden to plaintiff who failed to establish wilful and malicious conduct necessary to overcome immunity].

Lopez v. University Partners (1997) 54 C.A.4th 1117, 1125, 63 C.R.2d 359 [defendants' evidence was sufficient to establish peculiar risk limitations applicable to them, thus shifting burden to plaintiff who failed to show triable issue].

Lowe v. California League of Professional Baseball (1997) 56 C.A.4th 112, 124, 65 C.R.2d 105 [defendants offered neither relevant nor competent evidence to resolve prima facie dispositive issue of primary assumption of risk, thus failing to shift burden to plaintiff].

McManis v. San Diego Postal Credit Union (1998) 61 C.A.4th 547, 559, 71 C.R.2d 617 [defendant did not prove that its contractual repossession of plaintiff's vehicle was lawful, thus defendant neither established complete defense nor met burden to negate plaintiff's contract claim].

Quintilliani v. Mannerino (1998) 62 C.A.4th 54, 58, 72 C.R.2d 359 [defendant as moving party had initial burden and failed to prove that all claims were time-barred].

Elcome v. Chin (2003) 110 C.A.4th 310, 318, 1 C.R.3d 631 [summary judgment for defendants in medical malpractice action was proper; through expert witness declarations, defendants met their initial burden of showing no breach of care, thus shifting burden to plaintiff, who failed to establish triable issue].

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

Correction: Title of section should be "Burden When Asserting Complete Defense."



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2. Burden of Proof.

b. Defendant or Cross-Defendant.

3. Burden To Disprove Multiple Claims.

6 *Witkin Cal. Proc. PWT* § 238

[§ 238] Burden To Disprove Multiple Claims.

To warrant a grant of summary judgment, the defendant's evidence submitted in support of the motion must either disprove at least one essential element of every cause of action of the plaintiff's complaint or prove an affirmative defense that would bar every cause of action of the complaint. (See *Pena v. W.H. Douthitt Steel & Supply Co. (1986) 179 C.A.3d 924, 929, 930, 225 C.R. 76* [personal injury action based on manufacture and sale of defective machinery; summary judgment for defendants was properly denied where defendants' affidavits failed to negate manufacture even though plaintiff would be required to prove manufacture and sale at trial]; *Witchell v. De Korne (1986) 179 C.A.3d 965, 976, 225 C.R. 176* [action against seller of real property based on failure to improve road as required by contract of sale; summary judgment for defendant was improper where affidavit failed to address plaintiff's issues concerning scope of improvement obligation and whether gravel paving was sufficient improvement]; *Lopez v. Superior Court (1996) 45 C.A.4th 705, 714, 52 C.R.2d 821* [moving defendant failed, in slip-and-fall case, to "define all of the theories alleged in the complaint and challenge each factually"]; *Hawkins v. Wilton (2006) 144 C.A.4th 936, 943, 949, 51 C.R.3d 1* [granting defendant's motion for summary judgment was prejudicial error where defendant failed to address or negate plaintiff's liability theories].)

In *Conn v. National Can Corp. (1981) 124 C.A.3d 630, 638, 177 C.R. 445*, plaintiff union employees sued defendant employer and defendant union, alleging, in several counts, deprivation of seniority rights, conspiracy resulting in untimely loss of employment, and breach of the union's duty of fair representation. In anticipation of the defense of failure to exhaust contractual remedies, they also alleged that the union had refused to institute grievance proceedings. Defendant employer moved for summary judgment, on declarations asserting only the failure of plaintiffs to use the contractual grievance remedies. No employer declaration questioned the complaint's allegations as to the employer's violation of the contract, the conspiracy, or the union's failure to fairly represent the employees. The trial judge, invoking the rule that a party cannot rely on his own pleading to controvert the opposing party's declaration (supra, §§221, 222), granted the motion. *Held*, reversed.

(a) Where the plaintiff pleads several causes of action based on one set of facts, the plaintiff has the usual burden of proof at the trial on at least one of the theories asserted. However, "the initial duty to define the issues presented by the

complaint and to challenge them factually is on the defendant who seeks a summary judgment." (125 C.A.3d 638.) Hence, if as here the plaintiff pleads several theories or anticipates affirmative defenses, the moving defendant must "affirmatively react to each theory *and* excusing or justifying event, or condition which supports a theory. ... The moving defendant whose declarations omit facts as to any such theory or its qualifying excuse or justification permits that portion of the complaint to be unchallenged. In that event the plaintiff properly uses his own complaint. He does so, not to controvert the moving party's declaration, or in lieu of one for himself, but rather to show that certain facts or theories remain unchallenged." (124 C.A.3d 639.)

(b) Here, defendant employer's breach of contract and the conspiracy were not controverted by its declarations. "The employer stood on the single assertion that it was protected against lawsuit because a grievance procedure was available and not properly used. No attempt was made to state any facts on the portion of the complaint alleging the excusing facts of unfair union representation." (124 C.A.3d 640.) The trial judge erred in placing on the plaintiff the burden of going forward on this issue; the burden was on defendant, the moving party. (124 C.A.3d 640.)

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



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2. Burden of Proof.

b. Defendant or Cross-Defendant.

4. Production of Evidence To Negate Claim.

aa. Evidence Need Not Be Conclusive.

6 *Witkin Cal. Proc. PWT* § 239

[§ 239] Evidence Need Not Be Conclusive.

(1) *Federal Rule*. Under *F.R. Civ. P.*, Rule 56, as interpreted by the United States Supreme Court in *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, a defendant moving for summary judgment satisfies his or her burden of proof by simply pointing to the absence of evidence to support the plaintiff's claim. The defendant need not produce evidence of his own to *negate* the plaintiff's claim. The *Celotex* standard has made the federal courts receptive to the use of summary judgment motions to dispose of meritless litigation.

(2) *California Rule*. Before the 1992 and 1993 amendments to *C.C.P.* 437c, California courts generally required a defendant to produce evidence to negate the plaintiff's claim in order to carry the burden on a summary judgment motion. (See *Barnes v. Blue Haven Pools* (1969) 1 C.A.3d 123, 81 C.R. 444 [moving defendant cannot secure summary judgment merely by relying on plaintiff's discovery responses that reveal absence of evidence of liability or damage]; *Biljac Associates v. First Interstate Bank* (1990) 218 C.A.3d 1410, 267 C.R. 819 [California standard was incompatible with that laid down in *Celotex*].) The defendant's burden was to disprove the complaint; thus, it was "not enough to simply show that the plaintiff ... admitted having 'no witnesses' or 'no evidence' to back up certain claims (and therefore would be nonsuited if the case went to trial)." (*Do It Urself Moving & Storage v. Brown, Leifer, Slatkin & Berns* (1992) 7 C.A.4th 27, 38, 9 C.R.2d 396.)

California now requires that a moving defendant need only show that the plaintiff cannot establish a least one element of the cause of action. Although the defendant may, he or she need not conclusively negate the element. However, although under federal law a defendant may shift the burden of proof merely by asserting that plaintiff lacks evidence, California continues to require a moving defendant to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. Under *C.C.P.* 437c(b), the defendant must support the motion with evidence, including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 C.4th 826, 853, 855, 107 C.R.2d 841, 24 P.3d 493; see *Krantz v. BT Visual Images, L.L.C.* (2001) 89 C.A.4th 164, 173, 107 C.R.2d 209 [trial court improperly shifted burden to plaintiff where defendant's motion was supported only by declarations

containing conclusory statements that plaintiff's allegations were untrue]; C.E.B., 2 Civil Proc. Before Trial 3d, §36.112; Rutter Group, 3 Civil Proc. Before Trial §10:243; on nature of "affirmative evidence," see *infra*, §241.)

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



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b. Defendant or Cross-Defendant.

4. Production of Evidence To Negate Claim.

bb. Cases Illustrating California Rule.

6 *Witkin Cal. Proc. PWT § 240*

[§ 240] Cases Illustrating California Rule.

In *Hunter v. Pacific Mechanical Corp.* (1995) 37 C.A.4th 1282, 44 C.R.2d 335, an action by a bricklayer alleging injuries resulting from occupational exposure to asbestos, summary judgment for the defendant was affirmed where defendant relied on plaintiff's deposition testimony establishing that plaintiff was unaware of defendant's activities at any of the job sites where plaintiff worked. This shifted the burden to plaintiff to establish a triable issue of fact whether defendant's activities were a substantial factor in causing his injuries. Plaintiff's reply failed to provide any evidence about the regularity or nature of contact with defendant's asbestos-related activities. Plaintiff only offered evidence demonstrating that there was an overlap in work sites during various time frames, suggesting it was possible that he could have been present at the same jobsite as defendant's employees. This was speculation and conjecture, not the specific evidence necessary to prove that a triable issue of material fact existed as to causation. (37 C.A.4th 1289.) Consequently, there is no genuine factual dispute for jury resolution, and summary judgment was warranted. (37 C.A.4th 1290.)

In *McGonnell v. Kaiser Gypsum Co.* (2002) 98 C.A.4th 1098, 120 C.R.2d 23, plaintiffs alleged in a wrongful death action that decedent died of lung cancer resulting from his exposure to asbestos during 24 years as a plumber and pipe fitter in various locations. Decedent was deposed before his death, and defendants, in their summary judgment motion, relied on an excerpt from that deposition in which decedent testified that he had never heard of defendants' company and had never worked for the company or others using defendants' products. Based on that testimony, defendants asserted that there was no evidence that decedent had contact with their products and thus no evidence that their products caused his injuries. The trial court granted summary judgment. *Held*, affirmed. A threshold issue in asbestos litigation is exposure to a defendant's product; if there is no exposure, there is no causation. Defendants' deposition evidence is precisely the type of evidence specified by C.C.P. 437c(d) (supra, §224) and *Aguilar v. Atlantic Richfield Co.* (2001) 25 C.4th 826, 853, 855, 107 C.R.2d 841, 24 P.3d 493, supra, §239, as proper support for a summary judgment motion. "That evidence showed plaintiffs could not establish an element of their case--causation," and plaintiffs offered no sufficient evidence in opposition to establish a triable issue. (98 C.A.4th 1104.)

In *Gaggero v. Yura* (2003) 108 C.A.4th 884, 134 C.R.2d 313, an action to specifically enforce a real estate sales agreement, defendant was granted summary judgment based solely on allegations in defendant's separate statement of facts that plaintiff did not and could not establish that he was ready, willing, and able to perform under the purchase agreement. *Held*, reversed. Defendant failed to meet the threshold burden of producing evidence on the issue of plaintiff's financial ability. All that defendant provided were allegations that plaintiff (a) had produced no evidence of financial ability to purchase the property and (b) had refused to testify at his deposition regarding financial ability, erroneously invoking the right to privacy. Neither, without more, satisfied the burden of production under *Aguilar*. Nor did plaintiff's silence and privacy objection at his deposition, even if erroneous, amount to the equivalent of a factually devoid interrogatory response. The only thing to be inferred from the error was that plaintiff mistakenly believed the information sought was protected, not that he either possessed or did not possess it. (108 C.A.4th 890.)

The following cases are also instructive:

Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson (2005) 131 C.A.4th 1466, 1485, 33 C.R.3d 111 [in fee dispute action by attorney, defendant moving for summary judgment failed to prove that plaintiff's legal work was in connection with defendant's bankruptcy proceeding, thus subject to bankruptcy court approval, and trial court erred in granting summary judgment on that ground; summary judgment affirmed on other grounds].

Eddins v. Redstone (2005) 134 C.A.4th 290, 302, 35 C.R.3d 863 [summary judgment for defendants on plaintiff's conspiracy claim was proper where defendants made prima facie showing that no agreement existed, burden shifted to plaintiff, and plaintiff failed to meet burden to produce contrary evidence; following *Aguilar*].

Johnson v. Superior Court (2006) 143 C.A.4th 297, 307, 49 C.R.3d 52 [in medical malpractice action arising from alleged improper implantation of radioactive seeds in treatment of plaintiff's prostate cancer, trial court erred in granting summary judgment for defendants based on expert's conclusory declaration that failed to relate how number of seeds to be implanted is determined or identify recognized standard for making that determination].

Weber v. John Crane (2006) 143 C.A.4th 1433, 1442, 50 C.R.3d 71 [in asbestos case, summary judgment for defendant was improper where motion was based solely on plaintiff's failure to recall defendant's name in deposition testimony; this evidence does not permit inference that plaintiff neither possesses nor can reasonably obtain necessary evidence of causation].

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

See *DiCola v. White Bros. Performance Products* (2008) 158 C.A.4th 666, 677, 69 C.R.3d 888 [in wrongful death action based in part on strict products liability, defendants met their burden of producing evidence that they did not manufacture or sell relevant product, thus shifting burden to plaintiff who failed to produce controverting evidence].



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2. Burden of Proof.

b. Defendant or Cross-Defendant.

4. Production of Evidence To Negate Claim.

cc. Affirmative Evidence Requirement.

6 *Witkin Cal. Proc. PWT* § 241

[§ 241] Affirmative Evidence Requirement.

A moving defendant may not shift the burden to the plaintiff to put on a prima facie case simply by suggesting the possibility that plaintiff cannot prove its case. An affirmative showing in support of the motion must be made to show that an element of the cause of action cannot be established. Thus, before the burden of producing a prima facie case may be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case is required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case. (*Hagen v. Hickenbottom* (1995) 41 C.A.4th 168, 184, 186, 48 C.R.2d 197 [in action to set aside trust and will, plaintiff failed to make requisite showing that plaintiffs' case "cannot be established" sufficient to shift burden of production of evidence]; see *Addy v. Bliss & Glennon* (1996) 44 C.A.4th 205, 214, 51 C.R.2d 642 [moving defendant must produce admissible evidence that one or more elements of cause of action cannot be established; thus, rule that moving defendant must make affirmative showing in support of motion was applicable].)

In *Scheiding v. Dinwiddie Const. Co.* (1999) 69 C.A.4th 64, 81 C.R.2d 360, an action against a construction company for asbestos-related injuries, defendant moved for summary judgment on the ground that plaintiff's responses to depositions propounded by other parties did not mention defendant as being present at any work site where the injuries allegedly occurred. The trial judge granted the motion when plaintiff did not submit a declaration in opposition. *Held*, reversed. After an extensive review of California's summary judgment law and noting lack of agreement in connection with what "affirmative evidence" must be shown, the court agreed with *Hunter v. Pacific Mechanical Corp.* (1995) 37 C.A.4th 1282, 44 C.R.2d 335, *supra*, §240, that "the *circumstantial evidence* which would be required by *Hagen* can consist of 'factually devoid' discovery responses from which an absence of evidence can be inferred. ... Reconciliation of the two views is not difficult once the inferential reasoning expressly permitted by section 437c is considered." (69 C.A.4th 83.) Here, defendant's presence was key to liability, and defendant could have pursued further discovery aimed specifically at determining its presence or absence. Defendant's motion, however, relied on argument rather than evidence, and was insufficient to support a reasonable inference that plaintiffs could not produce further evidence to support an element crucial to their claims. (69 C.A.4th 83.) (On factually devoid discovery responses, see

infra, §242.) (See *Saelzler v. Advanced Group 400* (2001) 25 C.4th 763, 767, 107 C.R.2d 617, 23 P.3d 1143, 6 Summary (10th), Torts, §1138 [approving and following *Scheidung*].)

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

See *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 C.A.4th 1171, 1178, 80 C.R.3d 6 [through declarations and other evidence, plaintiff successfully shifted burden to defendant to establish evidence of defendant's performance of contract and thus create triable issue, which defendant failed to do].



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b. Defendant or Cross-Defendant.

4. Production of Evidence To Negate Claim.

dd. Factually Devoid Discovery Responses.

6 *Witkin Cal. Proc. PWT* § 242

[§ 242] Factually Devoid Discovery Responses.

A moving defendant may rely on factually devoid discovery responses to shift the burden of proof under *C.C.P.* 437c(p)(2). "Once the burden shifts as a result of the factually devoid discovery responses, the plaintiff must set forth the specific facts which prove the existence of a triable issue of material fact." (*Union Bank v. Superior Court* (1995) 31 *C.A.4th* 573, 590, 37 *C.R.2d* 653.) The following cases are illustrative:

Brantley v. Pisaro (1996) 42 *C.A.4th* 1591, 1598, 50 *C.R.2d* 431 [moving defendant may rely on factually insufficient discovery responses to show that plaintiff cannot establish essential element of claim, or may utilize "tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action"].

Lopez v. Superior Court (1996) 45 *C.A.4th* 705, 713, 52 *C.R.2d* 821 [defendant moving for summary judgment may rely on factually devoid discovery responses to shift burden of production on motion].

Chaknova v. Wilbur-Ellis Co. (1999) 69 *C.A.4th* 962, 974, 81 *C.R.2d* 871 [in asbestos-related injury action, defendant successfully shifted burden of proof by relying on factually devoid discovery responses and deposition testimony where plaintiff specifically denied knowing defendant and could not recall using specific asbestos products during his career].

Gulf Ins. Co. v. Berger, Kahn, Shafon, Moss, Figler, Simon & Gladstone (2000) 79 *C.A.4th* 114, 133, 93 *C.R.2d* 534, 1 *Cal. Proc.* (5th), *Attorneys*, §42 [in legal malpractice action, plaintiff's nonresponsive answer to interrogatory asking about damages in underlying action but not asking about damages from alleged malpractice was not "factually devoid" discovery sufficient to shift burden, because defendant did not seek information specific to causation issue that defendant's motion sought to negate].

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

See *Great Amer. Ins. Cos. v. Gordon Trucking* (2008) 165 *C.A.4th* 445, 452, 81 *C.R.3d* 65 [defendant could not use

plaintiff's insured's factually devoid interrogatory responses to demonstrate that subrogated insurer had no facts with which to prove its allegations; summary judgment for defendant reversed].



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a. Existence of Triable Issue of Material Fact.

6 *Witkin Cal. Proc. PWT* § 243

[§ 243] Existence of Triable Issue of Material Fact.

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*C.C.P.* 437c(c); see *Bro v. Glaser* (1994) 22 *C.A.4th* 1398, 1406, 27 *C.R.2d* 894 [where plaintiff's opposition raised no material issue of fact, trial court's task became to decide as matter of law whether facts permitted recovery]; *Donchin v. Guerrero* (1995) 34 *C.A.4th* 1832, 1837, 41 *C.R.2d* 192 [if there is a triable issue, "it is error for the trial court to grant summary judgment"]; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §13.46 et seq.) This provision, based on *F.R. Civ. P.*, Rule 56(c), imposes a mandatory duty on the trial court. (See *Sangster v. Paetkau* (1998) 68 *C.A.4th* 151, 166, 80 *C.R.2d* 66, citing the text.)

The statutory condition of no triable issue of fact is obviously met where the affidavits show that the parties are agreed on the facts and that they seek a determination of an issue of law, e.g., interpretation of an instrument or a statute. (See *Burke Concrete Accessories v. Superior Court* (1970) 8 *C.A.3d* 773, 87 *C.R.* 619 [stipulation of facts].)

The following cases are instructive:

Lyons v. Security Pac. Nat. Bank (1995) 40 *C.A.4th* 1001, 1013, 48 *C.R.2d* 174 [trial judge, in resolving summary judgment motion, should seek to discover, through supporting papers, "whether the parties possess evidence requiring the weighing procedures of a trial"].

WYDA Associates v. Merner (1996) 42 *C.A.4th* 1702, 1710, 50 *C.R.2d* 323 [expiration date of financing contingency period under real estate purchase option was triable issue of material fact where language of option, considered with extrinsic evidence of parties' conduct, was ambiguous about when period was to begin].

Tully v. World Savings & Loan Assn. (1997) 56 *C.A.4th* 654, 661, 65 *C.R.2d* 545 [parties' contradictory statements raised triable issue whether lender agreed to terminate pending foreclosure sale].

Kelley v. Trunk (1998) 66 *C.A.4th* 519, 524, 78 *C.R.2d* 122 [trial judge erred in granting defendant's motion for

summary judgment in medical malpractice action; defendant's expert's declaration provided only ultimate opinion, was not supported by reasons or explanations, did not address crucial issues, and thus did not establish absence of material fact].

Hanson v. Grode (1999) 76 C.A.4th 601, 606, 90 C.R.2d 396 [declarations of plaintiff's experts in medical malpractice action satisfied plaintiff's burden in opposition to defendants' motion for summary judgment by giving rise to triable issues of fact as to defendants' breach of duty and causation; court declined to require "excruciating" showing of factual basis for opinion as suggested by *Kelley*].

Elcome v. Chin (2003) 110 C.A.4th 310, 318, 1 C.R.3d 631 [in medical malpractice action, plaintiff's lay declaration was insufficient to establish elements of *res ipsa loquitur*, thus raising no triable issue to defeat defendants' motions for summary judgment].

Bushling v. Fremont Med. Center (2004) 117 C.A.4th 493, 509, 11 C.R.3d 653 [in medical malpractice action, summary judgment for defendants was proper where plaintiff's evidence in opposition consisted only of physician declarations of opinion without factual foundation, thus raising no triable issues].

Leep v. American Ship Management, LLC (2005) 126 C.A.4th 1028, 1041, 24 C.R.3d 463 [in dispute for wages based on length of employment, summary judgment for defendant was reversed where parties submitted conflicting evidence on applicability and interpretation of documents regarding plaintiff's assigned period of employment, thus creating triable issue of fact].

Andrews v. Foster Wheeler LLC (2006) 138 C.A.4th 96, 108, 41 C.R.3d 229 [in asbestos exposure action, summary judgment for defendant manufacturer was affirmed where plaintiff's evidence in opposition consisted of "sparse facts and two expert declarations" that failed to raise triable issue whether plaintiff had been exposed to asbestos fibers released from gaskets in defendant's products].

Cheviot Vista Homeowners Assn. v. State Farm Fire & Cas. Ins. Co. (2006) 143 C.A.4th 1486, 1499, 50 C.R.3d 1 [trial court properly granted defendant insurer's motion for summary judgment where defendant satisfied initial burden of demonstrating that plaintiff could not establish necessary elements of its causes of action, and declaration of plaintiff's attorney in response, with mere passing reference to cost of repair unsupported by any evidence, failed to create triable issue].

Powell v. Kleinman (2007) 151 C.A.4th 112, 128, 59 C.R.3d 618 [in medical malpractice action, trial court erred in granting defendant's motion for summary judgment and disregarding plaintiff's evidence in opposition consisting of expert's declaration, adequately supported by record, that raised triable issues regarding defendant's breach of duty care and of causation].

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b. Construing Moving and Opposing Papers.

6 *Witkin Cal. Proc. PWT* § 244

[§ 244] Construing Moving and Opposing Papers.

Because of the drastic nature of the summary judgment procedure and the importance of safeguarding the adverse party's right to a trial, the moving party must make a strong showing, and the affidavits are strictly construed. (See *Eagle Oil & Refining Co. v. Prentice* (1942) 19 C.2d 553, 556, 122 P.2d 264; *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 1107, 252 C.R. 122, 762 P.2d 46; *Weichman v. Vetri* (1950) 100 C.A.2d 177, 179, 223 P.2d 288; *Kelliher v. Kelliher* (1950) 101 C.A.2d 226, 231, 225 P.2d 554 [where plaintiff's affidavit insufficient, no need to consider defects in defendant's counteraffidavits]; *Family Service Agency of Santa Barbara v. Ames* (1958) 166 C.A.2d 344, 333 P.2d 142; *Callahan v. Chatsworth Park* (1962) 204 C.A.2d 597, 600, 22 C.R. 606; *Harding v. Purtle* (1969) 275 C.A.2d 396, 399, 79 C.R. 772, quoting the text; *Rincon v. Burbank Unified School Dist.* (1986) 178 C.A.3d 949, 955, 224 C.R. 88, quoting the text [supporting declarations were conclusory, were not based on personal knowledge, and were not sufficiently detailed to show that notice of rejection of claim was properly mailed]; *Chevron U.S.A. v. Superior Court* (1992) 4 C.A.4th 544, 548, 552, 553, 5 C.R.2d 674.)

This rule applies even though the adverse party makes no countershowing. (See *Southern Pac. Co. v. Fish* (1958) 166 C.A.2d 353, 362, 333 P.2d 133; *De Echeguren v. De Echeguren* (1962) 210 C.A.2d 141, 148, 26 C.R. 562; cf. *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 21, 112 C.R. 786, 520 P.2d 10, supra, §229 [strict rule relaxed when discovery results in admission or concession]; *Preach v. Monter Rainbow* (1993) 12 C.A.4th 1441, 1451, 16 C.R.2d 320 [witness' affidavit was disregarded insofar as it conflicted with his deposition testimony].)

On the other hand, the affidavits of the party opposing the motion are liberally construed. (See *Desny v. Wilder* (1956) 46 C.2d 715, 725, 299 P.2d 257; *Miller v. Bechtel Corp.* (1983) 33 C.3d 868, 874, 191 C.R. 619, 663 P.2d 177; *Pender v. Radin* (1994) 23 C.A.4th 1807, 1813, 29 C.R.2d 36; *Shively v. Dye Creek Cattle Co.* (1994) 29 C.A.4th 1620, 1627, 35 C.R.2d 238 [trial judge erred in construing plaintiff's opposition papers strictly].)

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c. Drawing Inferences.

6 *Witkin Cal. Proc. PWT* § 245

[§ 245] Drawing Inferences.

In determining a summary judgment motion, the court must consider all of the evidence set forth in the papers, except that to which objections have been made and sustained, "and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (*C.C.P.* 437c(c); see *Hepp v. Lockheed-Calif. Co.* (1978) 86 C.A.3d 714, 717, 718, 150 C.R. 408, citing the text; *Maxwell v. Colburn* (1980) 105 C.A.3d 180, 185, 163 C.R. 912 [losing party may argue inferences not urged below; trial court is required to consider *all* inferences reasonably deducible for the evidence submitted]; *Girard v. Ball* (1981) 125 C.A.3d 772, 781, 178 C.R. 406, citing the text; *Alexander v. Codemasters Group Ltd.* (2002) 104 C.A.4th 129, 144, 127 C.R.2d 145 [summary judgment in favor of former employer in breach of contract claim by former employee was inappropriate where evidence permitted conflicting inferences about existence and nature of stock option agreement].)

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d. Accepting Truth of Uncontroverted Evidence.

6 *Witkin Cal. Proc. PWT* § 246

[§ 246] Accepting Truth of Uncontroverted Evidence.

(1) *In General.* If the moving party's evidence is not controverted, the court must ordinarily accept it as true for purposes of the motion. In other words, the judge generally lacks discretion to deny the motion and send the case to trial simply to allow the opposing party to cross-examine the affiants or otherwise test their credibility. (See *C.C.P.* 437c(e).)

It was formerly held that where the showing consisted of testimonial evidence of the affiant, thus raising the question of his or her credibility, the opposing party was entitled to cross-examine the affiant at a trial, and the motion should be denied. (See *Frye v. Felder* (1966) 246 C.A.2d 136, 140, 54 C.R. 627.) The *Frye* rule has been abrogated. A summary judgment may no longer be denied solely "on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment." (*C.C.P.* 437c(e); see *Lerner v. Superior Court* (1977) 70 C.A.3d 656, 660, 139 C.R. 51 [*Frye* is no longer controlling].)

(2) *When Discretion To Deny Motion May Be Exercised.* Discretion to deny the motion on these grounds is authorized in the following situations:

(a) "[W]here the only proof of a material fact ... is an affidavit or declaration made by ... the sole witness to that fact." (*C.C.P.* 437c(e).)

(b) "[W]here a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." (*C.C.P.* 437c(e).)

In *Meighan v. Shore* (1995) 34 C.A.4th 1025, 40 C.R.2d 744, a negligence action against an attorney, based on his failure to inform either plaintiff or her husband when he was retained to represent the husband in a medical malpractice action that she had a potential cause of action for loss of consortium, defendant moved for summary judgment. One ground for the motion was that his decision not to raise the loss of consortium issue was based on his professional and reasonable judgment that the claim lacked merit, and hence, was not actionable. *Held*, the trial judge did not abuse discretion in rejecting this ground. The claim rested on the attorney's declaration describing his mental process in reaching his conclusion. The trial judge did not believe his statement and properly exercised his authority, under the

"state of mind" provision of *C.C.P. 437c(e)*, to deny a motion for summary judgment that otherwise would be granted. In any event, the reasonableness of the claim was controverted by plaintiff's declaration, which was sufficient to raise a triable issue on the point. (*34 C.A.4th 1046*.)

On the other hand, because the court's decision in the two situations authorizing denial is discretionary, it is not necessarily an abuse of discretion to grant the motion. (*Golden West Baseball Co. v. Talley* (1991) 232 C.A.3d 1294, 1305, 284 C.R. 53; *Butcher v. Gay* (1994) 29 C.A.4th 388, 34 C.R.2d 771.)

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e. Considering Grounds Not Raised by Moving Party.

6 Witkin Cal. Proc. PWT § 247

[§ 247] Considering Grounds Not Raised by Moving Party.

In *Juge v. Sacramento* (1993) 12 C.A.4th 59, 15 C.R.2d 598, the question was whether the trial court may grant the motion on a ground of law not explicitly tendered by the moving party, if the application of that law to an undisputed material fact put in issue by the parties' separate statements of undisputed material facts is dispositive of a cause of action presented by the pleadings. (12 C.A.4th 61.) *Held*, granting defendant's motion was a proper exercise of the trial court's discretion.

(a) *C.C.P.* 437c imposes on the moving party both a pleading requirement and a substantive burden in order to prevail on a motion for summary judgment. The statute does not state the form in which a moving party must advance the contention that the cause of action has no merit or there is no defense; but portions of the statute suggest that the moving party must state with specificity each of the grounds of law on which the moving party relies. (12 C.A.4th 66.) In addition, *C.C.P.* 437c(b) requires a separate statement of material facts which the moving party contends are undisputed, and evidence in support of that contention. (12 C.A.4th 67.)

(b) "A contrary rule not only would run afoul of a commonsense reading of section 437c as a whole, but also would impose an undue burden on the trial court." (12 C.A.4th 67.) The court would have to search through the allegations of undisputed material facts and identify the legal significance of each fact; and a summary judgment order could be overturned where the moving party belatedly recognizes the legal significance of such a fact but failed to bring it to the trial court's attention. "Such a result would be contrary to the general doctrine of waiver." (12 C.A.4th 68.)

(c) However, it is in the public interest to rid the judicial system expeditiously of a case in which a party is entitled to judgment as a matter of law without requiring protracted litigation and a trial on the matter. (12 C.A.4th 70, citing the text.) Hence, the trial court has the inherent power to grant summary judgment where the parties' statements demonstrate the absence of a triable issue of material fact put in issue by the pleadings, and negate the opponent's claim as a matter of law. (12 C.A.4th 70.)

(d) Due process requires that the opposing party be given an opportunity to respond. (12 C.A.4th 70.) "We imply no view on whether due process requires notification of and an opportunity to respond to the 'new' ground of law *prior* to

the trial court's ruling on the summary judgment motion." (12 C.A.4th 71.) Here, the trial court gave plaintiff notice that it intended to grant defendant's motion on the new ground; and plaintiff, with the opportunity to identify triable issues of fact material to that ground, was unable to do so. (12 C.A.4th 71.) (See *Gomez v. Acquistapace* (1996) 50 C.A.4th 740, 744, 57 C.R.2d 821 [trial judge erred in relying on new issue without notice and without providing plaintiff meaningful opportunity to respond]; *Cordova v. 21st Century Ins. Co.* (2005) 129 C.A.4th 89, 108, 28 C.R.3d 170 [trial judge erred by granting defendant's motion for summary judgment on alternate ground never asserted by defendant and thus not giving plaintiff opportunity to produce evidence in opposition; following *Juge*].)

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f. Free Speech Cases.

6 *Witkin Cal. Proc. PWT* § 248

[§ 248] Free Speech Cases.

(1) *Defamation of Public Figures*. The suggestion that summary judgment is a "favored remedy" for defendants in defamation actions brought by public figures (see 52 *So. Cal. L. Rev.* 1783; 14 *U.S.F. L. Rev.* 77) was examined in *Reader's Digest Assn. v. Superior Court* (1984) 37 *C.3d* 244, 208 *C.R.* 137, 690 *P.2d* 610:

(a) Statements to the effect that summary judgment is a favored remedy because protracted litigation would have a chilling effect on the exercise of First Amendment rights appear in a number of *California cases*. (37 *C.3d* 251.) A contrary view was expressed in *Hutchinson v. Proxmire* (1979) 443 *U.S.* 111, 99 *S.Ct.* 2675, 2680, footnote 9, 61 *L.Ed.2d* 411, 422. (37 *C.3d* 251.) However, "[i]t is pointless to declare in the abstract that summary judgment is a favored or disfavored remedy. A more subtle analysis is required--one that explains how a motion for summary judgment should be decided in a defamation case under the *New York Times* test." (37 *C.3d* 252; see *New York Times Co. v. Sullivan* (1964) 376 *U.S.* 254, 84 *S.Ct.* 710, 11 *L.Ed.2d* 686; on defamation and freedom of speech generally, see 7 *Summary* (10th), *Constitutional Law*, §425 et seq.)

(b) "We recognize a potential chilling effect from protracted litigation as well as a public interest in resolving defamation cases promptly. That does not mean, however, that a court should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence--i.e., evidence sufficient to permit a trier of fact to find for the plaintiff and for an appellate court to determine that the resulting judgment 'does not constitute a forbidden intrusion on the field of free expression'. ... To this extent, therefore, summary judgment remains a 'favored' remedy in defamation cases involving the issue of 'actual malice' under the *New York Times* standard." (37 *C.3d* 252.)

(2) *Nonmedia Defendants*. The actual malice test applies whether or not the defendant-publisher is a news medium. *Miller v. Nestande* (1987) 192 *C.A.3d* 191, 237 *C.R.* 359, was a defamation action by an incumbent candidate for public office against his opponent and several former prisoners of war (POWs) for the dissemination of a pamphlet accusing the incumbent of cooperating with the enemy while he was a POW. A grant of summary judgment to defendants was affirmed. Plaintiff, as an incumbent candidate for public office, was required to prove that the statements were

published with actual malice, even though defendants were not members of the news media, and even though the statements did not relate to his conduct in office. However, he could not prove actual malice, in light of numerous published descriptions of his conduct while a POW, his censure by the Navy, and defendants' own observations and information while POWs. Thus, the record revealed no triable issue as to actual malice. (192 C.A.3d 201, 202.)

(3) *Defamation of Private Individuals*. Summary judgment may be appropriate, under generally applicable principles, in defamation actions by nonpublic figures. (See, e.g., *Aguilar v. Universal City Studios* (1985) 174 C.A.3d 384, 219 C.R. 891 [portrayal of character in film].)

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F. Order.

1. Denying Motion.

a. In General.

6 *Witkin Cal. Proc. PWT* § 249

[§ 249] In General.

(1) *Form of Order.* The order denying summary judgment may be written or oral. If oral, the court must record its determination by court reporter. (*C.C.P. 437c(g).*) (For forms of order, see *C.E.B.*, 2 Civil Proc. Before Trial 4th, §36.164; *Cal. Civil Practice*, 3 Procedure, §21:65; 23 *Am.Jur. P.P. Forms* (2001 ed.), Summary Judgment §98 et seq.)

(2) *Order Is Not Final Judgment.* An order denying a summary judgment motion is not a final judgment and is not res judicata. (*C.C.P. 437c(k).*) Hence, a subsequent motion for summary judgment may be made and granted. (*Schulze v. Schulze* (1953) 121 *C.A.2d* 75, 83, 262 *P.2d* 646 [second motion after filing of amended and supplemental complaint].)

(3) *Order Is Not Appealable.* The order of denial is also not appealable; like other intermediate rulings before judgment, it is ordinarily reviewable only on appeal from the final judgment. (*Nevada Constructors v. Mariposa Public Util. Dist.* (1952) 114 *C.A.2d* 816, 818, 251 *P.2d* 53; *Los Angeles County-U.S.C. Med. Center v. Superior Court* (1984) 155 *C.A.3d* 454, 459, 202 *C.R.* 222, citing the text; see 15 *A.L.R.3d* 899 [reviewability of denial of summary judgment motion]; on review of nonappealable order on appeal of subsequent judgment, see 9 *Cal. Proc.* (5th), *Appeal*, §153.)

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1. Denying Motion.

b. Specification of Reasons for Denial.

1. In General.

6 *Witkin Cal. Proc. PWT* § 250

[§ 250] In General.

To facilitate review of an order denying a summary judgment motion, *C.C.P. 437c(g)* requires the trial judge to specify the reasons for his or her action. (See *Waller v. TJD* (1993) 12 *C.A.4th* 830, 833, 16 *C.R.2d* 38 [even if trial court erroneously denied summary judgment, and failed to state reasons as required by *C.C.P. 437c(g)*, final judgment adverse to moving party cannot be reversed in absence of prejudice at trial]; *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 *C.A.4th* 439, 448, 105 *C.R.2d* 856 [in action for negligence and nuisance, trial judge's failure to provide statement of reasons for ruling on defendant's summary judgment motion was not harmless error; issues were complex and lack of sufficient statement precluded meaningful de novo review]; *C.E.B.*, 2 *Civil Proc. Before Trial* 4th, §36.132.)

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b. Specification of Reasons for Denial.

2. Denial Because of Existence of Triable Issue of Fact.

6 *Witkin Cal. Proc. PWT* § 251

[§ 251] Denial Because of Existence of Triable Issue of Fact.

If a summary judgment motion is denied because of the existence of a triable issue as to one or more material facts, the judge, by written or oral order, must specify one or more material facts constituting a triable controversy and must specifically refer to the evidence establishing the controversy. (*C.C.P. 437c(g)*.) Failure to comply with this requirement is itself sufficient to require that a writ be issued. (*Globe Indem. Co. v. Superior Court* (1992) 6 C.A.4th 725, 728, footnote 1, 8 C.R.2d 251; see *Tera Pharmaceuticals v. Superior Court* (1985) 170 C.A.3d 530, 532, 215 C.R. 923 [failure to detail conflicting evidence on each triable issue]; *Young v. Superior Court* (1986) 179 C.A.3d 28, 31, 32, 224 C.R. 405 [burden of detailing conflicting evidence on triable issues imposed on trial court by *C.C.P. 437c(g)* "will be eased considerably" if court insists on strict compliance with *C.C.P. 437c(b)* (*supra*, §221), requiring parties to include detailed specification of material facts and evidence in supporting and opposing papers]; *Sacks v. FSR Brokerage* (1992) 7 C.A.4th 950, 960, 9 C.R.2d 306 [where opposing party failed to offer evidence or arguments against motion for summary judgment, court's order granting judgment was valid even though it failed to specify evidence on which judgment was based]; *Payless Drug Store v. Superior Court* (1993) 20 C.A.4th 277, 24 C.R.2d 506 [insufficient merely to refer to opposition filed].)

In *Continental Ins. Co. v. Superior Court* (1985) 165 C.A.3d 1069, 212 C.R. 140, defendant insurer sought a summary judgment on the ground that the action was barred by the 1-year limitations period in plaintiff's policy. The trial judge's order denying the motion stated that the date on which the 1-year period started to run was a factual issue. As evidence indicating a controversy on this issue, the order listed various documents in the file, i.e., the complaint, insurance policy, seven letters, a deposition excerpt, a request for judicial notice, and another document. *Held*, the order was defective.

(a) It failed to specifically refer to evidence in a way to indicate a triable controversy; i.e., it failed to identify a conflict by reference to the evidence for and against a particular asserted fact. (165 C.A.3d 1071.)

(b) The purpose of *C.C.P. 437c(g)* is to force the trial judge to focus on where legal issues end and factual issues begin. This purpose is not satisfied by a mere cataloging of submitted documents, without extracting specific opposing

facts. By encouraging the parties and the trial judge to analyze the law before concluding that disputed factual issues exist, *C.C.P. 437c(g)* may lead to the discovery that the facts are not in conflict and to the granting or denial of the motion on a point of law. (165 C.A.3d 1072.)

In *Greater Irvine Credit Union v. Superior Court* (1986) 186 C.A.3d 1189, 231 C.R. 296, an action by plaintiff debtor against defendant credit union, which had repossessed her car for default on a loan, plaintiff claimed that she was in bankruptcy with a stay order in effect and that the seizure of the car was wrongful. The trial judge, in his minute order denying defendant's summary judgment motion, stated that "[t]here are triable issues of material [fact] as to whether defendants breached their duty to plaintiff, whether defendants were justified in depriving plaintiff of her property and whether defendants caused a delay in returning plaintiff's property by refusal to reinstate the loan." *Held*, the order did not meet the statutory requirement. After noting the suggestion in *Tera Pharmaceuticals v. Superior Court*, *supra*, 170 C.A.3d 532, that judges shift the burden by requiring counsel to prepare the detailed order, and the suggestion in *Young v. Superior Court*, *supra*, 179 C.A.3d 31, that the parties detail the evidence supporting their contentions, the court added that counsel "can play an even greater role in the production of a proper and useful order by asking the law and motion judge for a formal order, particularly when they intend to file a writ petition. The assumption of this responsibility by counsel should result in better orders and fewer writs." (186 C.A.3d 1192.)

In *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 C.A.4th 814, 41 C.R.2d 551, plaintiff insurer sued defendant, the corporate parent of its insured, for reimbursement of defense costs in underlying asbestos actions. The trial court granted defendant's motion for summary judgment, and denied plaintiff's cross-motion for the same relief. The order specifically stated that defendant's motion was granted on grounds set forth in defendant's moving papers and separate statement, that defendant was not an insurer of its subsidiary, and further that the cross-motion was denied "on grounds set forth in the opposition papers." *Held*, affirmed; the trial court complied with *C.C.P. 437c(g)*. Plaintiff's cross-motion for summary judgment was also its opposition to defendant's motion, and the trial court concurrently considered the motions for summary judgment. When the court granted defendant's motion, plaintiff's cross-motion became moot. The language of the court's order subsumed the denial of plaintiff's cross-motion and grounded the order on the evidence offered in support of defendant's motion. Because the arguments in plaintiff's opposition and cross-motion were identical, granting defendant's motion necessarily meant denying plaintiff's cross-motion. The court's reasons for granting defendant's motion, and thereby denying the plaintiff's cross-motion, were clear. (35 C.A.4th 828.)

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IX. SUMMARY JUDGMENT

F. Order.

1. Denying Motion.

c. Denial or Continuance To Procure Evidence.

1. In General.

6 *Witkin Cal. Proc. PWT* § 252

[§ 252] In General.

(1) *When Order Is Mandatory.* If it appears from the affidavits submitted in opposition to a summary judgment motion "that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." An application for a continuance to obtain the discovery may be made by ex parte motion. (*C.C.P. 437c(h)*; on *F.R. Civ. P., Rule 56(f)*, see 10B Federal Practice & Procedure (Wright, Miller & Kane) §§2740, 2741; 27A Federal Procedure, L.Ed., §62:695 et seq.)

(2) *When Order Is Discretionary.* In the absence of the showing prescribed by *C.C.P. 437c(h)*, the granting of a continuance is ordinarily in the trial court's discretion. (See *Mahoney v. Southland Mental Health Associates Med. Group* (1990) 223 C.A.3d 167, 170, 272 C.R. 602 [denial of second continuance was not abuse of discretion where neither counsel's minor illness nor departure of partner in his law firm explained delay in requesting continuance]; *O'Laskey v. Sortino* (1990) 224 C.A.3d 241, 250, 251, 273 C.R. 674 [denial of request for continuance was not abuse of discretion, where party opposing summary judgment motion was unable to show why he had been unable to obtain, prior to hearing, investigator's declaration needed to oppose motion]; *Wachs v. Curry* (1993) 13 C.A.4th 616, 623, 16 C.R.2d 496 [continuance was properly denied, where expert opinions that plaintiffs wished to obtain would have been irrelevant]; *A & B Painting & Drywall v Superior Court* (1994) 25 C.A.4th 349, 356, 30 C.R.2d 418 [declaration did not explain what efforts had been made to take necessary depositions or why they could not have been taken earlier]; *Scott v. CIBA Vision Corp.* (1995) 38 C.A.4th 307, 324, 44 C.R.2d 902 [denial of continuance was proper; pending discovery orders did not satisfy affidavit requirement, even though trial judge took judicial notice of them]; cf. *FSR Brokerage v. Superior Court* (1995) 35 C.A.4th 69, 75, 41 C.R.2d 404 [denial of continuance was required, and denial of summary judgment was abuse of discretion, where no facts purportedly subject to future discovery would support opposition to motion].)

(3) *Noncompliance.* Following a continuance to permit specified additional discovery, if the party seeking summary judgment unreasonably fails to allow discovery, the court must either grant a further continuance to facilitate that discovery or deny the motion for summary judgment or summary adjudication. (*C.C.P. 437c(i)*.) (See *Stationers Corp.*

v. Dun & Bradstreet (1965) 62 C.2d 412, 420, 421, 42 C.R. 449, 398 P.2d 785, 5 Summary (10th), *Torts*, §597 [order granting summary judgment was reversed where ground was merely that opposing party refused to supply evidence needed to establish essential fact].)

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2. Illustrations.

6 *Witkin Cal. Proc. PWT* § 253

[§ 253] Illustrations.

The following cases are instructive in the application of *C.C.P. 437c(h)* (*supra*, §252):

Mamola v. San Bernardino (1979) 94 C.A.3d 781, 783, 156 C.R. 614 [conditional order stating that "[m]otion granted unless plaintiff can by affirmative showing within ninety days demonstrate liability of State for plaintiff's injuries"].

Nazar v. Rodeffer (1986) 184 C.A.3d 546, 556, 229 C.R. 209 [summary judgment for defendant was improper; plaintiff motorcyclist injured on defendant's property was entitled to continuance to discover defendant's actual or constructive knowledge of hazards to recreational users].

Mary Morgan v. Melzark (1996) 49 C.A.4th 765, 770, 57 C.R.2d 4, *infra*, §302 [on declaration under *C.C.P. 437c(h)*, trial judge's "discretion is strictly limited and a continuance may be mandated"].

People v. \$ 4,503 United States Currency (1996) 49 C.A.4th 1743, 1746, 57 C.R.2d 467 [defendant's summary judgment motion was properly denied to allow further discovery; failure by defendant, who was fugitive from justice, to cooperate with discovery deprived state of opportunity to prove its case].

St. Mary Med. Center v. Superior Court (1996) 50 C.A.4th 1531, 1534, 1540, 58 C.R.2d 182 [failure to permit deposition of "expert" doctor who supplied declaration in opposition to motion for summary judgment was abuse of discretion where declaration's factual correctness was in doubt].

Bahl v. Bank of America (2001) 89 C.A.4th 389, 395, 107 C.R.2d 270 [trial court abused discretion in denying plaintiff continuance to complete discovery to support her opposition to defendant's motion for summary judgment where deposition transcripts had not yet been received from reporter and defendant had produced over 600 pages of documentation after plaintiff had filed her opposition].

Frazee v. Seely (2002) 95 C.A.4th 627, 633, 115 C.R.2d 780 [trial court abused discretion in granting defendant's

motion for summary judgment, thus implicitly denying plaintiff continuance where plaintiff's opposition contained declaration by plaintiff's attorney specifying vital pending discovery matters, including nonreceipt of deposition transcripts, need to depose defendant's expert witnesses who filed declarations in support of defendant's motion, and receipt of answers to interrogatories].

Desaigoudar v. Meyercord (2003) 108 C.A.4th 173, 190, 133 C.R.2d 408 [plaintiffs were not denied discovery and trial court did not err in granting defendants' motion for summary judgment based on special litigation committee defense (9 Summary (10th), Corporations, §103) where plaintiff shareholders neither sought discovery about committee's members or investigative process nor properly requested continuance to do so prior to plaintiffs' motion in opposition].

California Auto. Ins. Co. v. Hogan (2003) 112 C.A.4th 1292, 1305, 5 C.R.3d 761 [trial court did not err in denying continuance where plaintiffs' opposition to motion for summary judgment provided no details concerning evidence they expected to develop through additional discovery or why further discovery was necessary; following *Frazer*].

Bushling v. Fremont Med. Center (2004) 117 C.A.4th 493, 511, 11 C.R.3d 653 [trial court properly denied continuance in medical malpractice action where plaintiff's opposition to motion for summary judgment consisted of physician affidavits that implied without explanation that further discovery would disclose who was guilty of negligence, and did not explain why those facts could not have been presented earlier].

Lerma v. Orange (2004) 120 C.A.4th 709, 717, 15 C.R.3d 609 [although continuance was not mandatory because plaintiff's motion failed to meet requirements of C.C.P. 437c(h), trial court nevertheless erred in failing to grant continuance where declaration of plaintiff's attorney in support of motion revealed his debilitating postoperative condition from cancer that prevented him from gathering, organizing, and presenting necessary evidence].

ACE Amer. Ins. Co. v. Walker (2004) 121 C.A.4th 1017, 1025, 18 C.R.3d 1 [trial court properly denied continuance where discovery sought by defendant was not essential to her opposition to plaintiff's motion for summary judgment].

Knapp v. Doherty (2004) 123 C.A.4th 76, 100, 20 C.R.3d 1 [denial of continuance was proper where plaintiff's application contained none of following: (a) facts indicating that opposition to defendant's motion for summary judgment might exist, (b) facts essential to disposition of motion to justify continuance, or (c) justification for failure to conduct timely discovery].

Cooksey v. Alexakis (2004) 123 C.A.4th 246, 257, 19 C.R.3d 810 [lack of diligence was proper ground for denial of continuance where declarations of plaintiff's attorney and expert explained neither relevancy of outstanding discovery nor why discovery could not have been initiated earlier; also, because expert's declaration was filed with plaintiff's application for continuance on day of summary judgment hearing, it was untimely under C.C.P. 437c(h)].

Tilley v. CZ Master Assn. (2005) 131 C.A.4th 464, 491, 32 C.R.3d 151 [trial court properly denied plaintiff's ex parte request for continuance to conduct deposition made 1 day before hearing on defendant's motion for summary judgment where plaintiff had not referred to further discovery in previous opposition papers, had been granted two previous continuances, and had made no effort to conduct discovery during pendency of summary judgment motion].

Ambrose v. Michelin North America (2005) 134 C.A.4th 1350, 1353, 37 C.R.3d 1 [where plaintiff failed to request continuance in opposing papers and failed to file required affidavit to establish good cause, trial court did not abuse discretion in denying plaintiff's oral motion for continuance made at hearing on motion for summary judgment].

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

See *Combs v. Skyriver Communications* (2008) 159 C.A.4th 1242, 1270, 72 C.R.3d 171 [trial court properly denied continuance where plaintiff counsel's supporting declaration did not explain why information in requested documents was essential to opposing defendant's motion or why additional time was needed].



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F. Order.

2. Granting Motion.

6 *Witkin Cal. Proc. PWT* § 254

[§ 254] Granting Motion.

(1) *Form of Order.* The order granting summary judgment may be written or oral. If oral, the court must record its determination by court reporter. (*C.C.P.* 437c(g).)

(2) *Statement of Reasons for Granting Motion.* On granting the motion on the ground that there is no triable issue of material fact, the judge must specify the reasons for the determination, and must specifically refer to the evidence indicating that no triable issue exists. The reference must be both to the evidence offered in support of the motion and, if applicable, to that offered in opposition. (*C.C.P.* 437c(g); see *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 C.A.4th 814, 828, 41 C.R.2d 551, *supra*, §251 [specification where motion is granted and cross-motion is denied]; *Hagen v. Hickenbottom* (1995) 41 C.A.4th 168, 178, 48 C.R.2d 197 [trial judge's asserted failure to refer to evidence is not dispositive on appeal]; *Carnes v. Superior Court* (2005) 126 C.A.4th 688, 692, 23 C.R.3d 915 [trial judge erred in granting defendant's motion for summary judgment without stating reasons, without ruling on parties' evidentiary objections, and by directing defense counsel to prepare order and findings without specifying what those findings should be].)

(3) *Two-Step Procedure.* The summary judgment statute contemplates the double steps of an *order* granting the motion, followed by entry of *summary judgment* in favor of the moving party. Thus, except "when a separate judgment may properly be awarded in the action, no final judgment may be entered on a motion for summary judgment prior to the termination of the action." (*C.C.P.* 437c(k); see *Integral Land Corp. v. Anderson* (1944) 62 C.A.2d 770, 145 P.2d 364; for forms of order, see C.E.B., 2 Civil Proc. Before Trial 4th, §36.162 et seq.; Cal. Civil Practice, 3 Procedure, §21:63 et seq.; 23 Am.Jur. P.P. Forms (2001 Rev.), Summary Judgment §83 et seq.)

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F. Order.

3. Challenging Order in Trial Court.

6 *Witkin Cal. Proc. PWT* § 255

[§ 255] Challenging Order in Trial Court.

(1) *After Denial of Motion.* Following the denial of a motion for summary judgment, a party may move in the trial court for reconsideration of the motion under *C.C.P. 1008(a)* or renewal of the motion under *C.C.P. 1008(b)*. (See *Graham v. Hansen* (1982) 128 C.A.3d 965, 180 C.R. 604 [party's second motion for summary judgment was motion for renewal]; C.E.B., 2 Civil Proc. Before Trial 4th, §§36.150, 36.151; on motions for reconsideration and renewal generally, see *supra*, §46 et seq.) These motions must be based on an alleged different state of facts. (*C.C.P. 1008(a)*, (b); see *Blue Mountain Dev. Co. v. Carville* (1982) 132 C.A.3d 1005, 183 C.R. 594 [party seeking reconsideration must provide not only new evidence but also satisfactory explanation for failure to produce that evidence at earlier time].) A motion for reconsideration must be made within 10 days after service of written notice of entry of the order. (*C.C.P. 1008(a)*.) This time limit is not applicable to motions for renewal. (*C.C.P. 1008(b)*; *Graham v. Hansen*, *supra*, 128 C.A.3d 965, 970 [motion filed nearly 1 year after first motion was denied].)

Motions under *C.C.P. 1008* will only lie before the judgment is entered. (*Hartford Acc. & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 C.A.3d 1285, 260 C.R. 190; *Ten Eyck v. Industrial Forklifts* (1989) 216 C.A.3d 540, 545, 265 C.R. 29 [untimely motion did not extend time for filing appeal]; see *supra*, §§51, 52.)

(2) *After Grant of Motion.* A grant of summary judgment may be challenged in the trial court before the judgment is entered by way of a motion for reconsideration under *C.C.P. 1008(a)*. (*Mink v. Superior Court* (1992) 2 C.A.4th 1338, 1342, 4 C.R.2d 195; on challenge after judgment, see *infra*, §259.)

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G. Judgment.

1. Entry.

6 *Witkin Cal. Proc. PWT* § 256

[§ 256] Entry.

Entry of a final judgment on a summary judgment motion is prohibited until termination of the action, except "when a separate judgment may properly be awarded in the action." (*C.C.P.* 437c(k); see 7 *Cal. Proc.* (5th), *Judgment*, §38 et seq.) Hence, for cases within the exception, the statute permits the trial judge to enter an appealable summary adjudication order before the trial of the remaining issues. (See *Worth v. Asiatic Transpacific* (1979) 93 *C.A.3d* 849, 856, 156 *C.R.* 110; on summary adjudication, see *infra*, §267 et seq.)

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G. Judgment.

2. Judgment Exonerating Codefendant.

6 *Witkin Cal. Proc. PWT* § 257

[§ 257] Judgment Exonerating Codefendant.

Originally, if one codefendant was granted a summary judgment, the remaining defendants could attempt to establish a defense by placing blame on their former, "protected," codefendant; this tactic often confused the jury and resulted in a verdict for the remaining defendants. (See *14 Pacific L. J. 507*.) *C.C.P. 437c(l)* prohibits this practice in actions involving personal injury or property damage where the basis for the summary judgment was that the defendant was without fault. In this situation, "no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." (See *Knowles v. Tehachapi Valley Hosp. Dist.* (1996) *49 C.A.4th 1083, 1094, 57 C.R.2d 192, 5 Summary* (10th), *Torts*, §94 [any error in permitting defendant hospital to introduce evidence suggesting that decedent's treatment at another hospital was cause of death, notwithstanding entry of summary judgment exonerating other hospital, was harmless; evidence went to issue of causation, and jury never reached that issue after finding that defendant did not breach duty of care].)

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G. Judgment.

3. Amendment.

6 *Witkin Cal. Proc. PWT* § 258

[§ 258] Amendment.

A summary judgment is subject to modification by the trial court in proper circumstances. In *Dow Jones Co. v. Avenel* (1984) 151 C.A.3d 144, 198 C.R. 457, plaintiff brought an action on an open book account against defendant C, a corporation, and successfully moved for summary judgment. After entry of the summary judgment, plaintiff filed a motion to amend it to include an individual and another corporation as judgment debtors, on the ground that they were alter egos of C. The judge so found and made the requested amendment. The added judgment debtors appealed, contending that, because the trial court could not make factual determinations at a summary judgment hearing, it should not be allowed to make them on a later motion, and that the new judgment debtors were entitled to a trial on the merits. *Held*, amended judgment affirmed.

(a) The trial court could not have determined the issue of appellants' alter ego liability at the hearing on the motion for summary judgment, even if they had been named as defendants, for disputed issues of fact cannot be resolved on the motion. However, under the broad authority granted by *C.C.P. 187*, conferring on a trial court all the means necessary to carry its jurisdiction into effect, a court may amend a judgment in order to add additional judgment debtors. (151 C.A.3d 148, citing the text.) Hence, the court correctly amended the judgment to add appellants as the real defendants. (151 C.A.3d 149.)

(b) Appellants were not denied due process. They were entitled to a hearing on the issue of their liability, and did have such a hearing and trial of the issues of fact on the motion to amend the judgment. (151 C.A.3d 149.) It was immaterial that they did not have a trial on the merits of the liability of C; C had the opportunity to present its defense at the summary judgment hearing, and neither C nor appellants challenged the propriety of the summary judgment. Because C's liability was thus conceded, and the alter ego issue was fully litigated, appellants suffered no prejudice from the procedure employed by the trial court. (151 C.A.3d 149, 150, 151.)

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G. Judgment.

4. Challenging Judgment in Trial Court.

6 *Witkin Cal. Proc. PWT* § 259

[§ 259] Challenging Judgment in Trial Court.

After entry of summary judgment, the following general methods are available for attacking judgments in the trial court:

(1) *Motion for New Trial*. A motion for a new trial may be made after summary judgment. (*Green v. Del-Camp Inv.* (1961) 193 C.A.2d 479, 481, 14 C.R. 420; *Jacobs v. Retail Clerks Union, Local No. 1222* (1975) 49 C.A.3d 959, 963, 123 C.R. 309; *Passavanti v. Williams* (1990) 225 C.A.3d 1602, 275 C.R. 887; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §18 et seq.) The motion may be based on any available statutory ground for a new trial, such as "newly discovered evidence" or "accident or surprise." (C.C.P. 657.) The motion must be filed within 15 days of the date of the clerk's mailing of notice of entry of the judgment. (C.C.P. 659.)

(2) *Motion for Relief for Mistake, etc.* A motion under C.C.P. 473(b) will lie for relief from summary judgment for "mistake, inadvertence, surprise, or excusable neglect." (See *Lynch v. Spilman* (1967) 67 C.2d 251, 258, 62 C.R. 12, 431 P.2d 636; *Mink v. Superior Court* (1992) 2 C.A.4th 1338, 1342, 4 C.R.2d 195; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.) The motion must be made within 6 months after entry of the judgment. (C.C.P. 473(b).)

(3) *Motion To Set Aside Judgment for Extrinsic Fraud or Mistake*. A motion may be made to set aside the judgment for extrinsic fraud or mistake preventing the movant from having a fair hearing, provided the movant's diligence and the existence of a meritorious case are shown. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §215 et seq.)

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H. Review.

1. Appeal.

6 *Witkin Cal. Proc. PWT* § 260

[§ 260] Appeal.

The order granting a summary judgment motion is not appealable; the appeal is taken from the summary judgment then entered. Thus, a summary judgment entered under *C.C.P. 437c* is "an appealable judgment as in other cases." (*C.C.P. 437c(m)*; see *Haumeder v. Lipsett* (1949) 90 C.A.2d 167, 169, 202 P.2d 819; *Ten Eyck v. Industrial Forklifts* (1989) 216 C.A.3d 540, 542, footnote 1, 265 C.R. 29; *Stolz v. Wong Communications Ltd. Partnership* (1994) 25 C.A.4th 1811, 1816, 31 C.R.2d 229 [dismissing appeal from order]; 9 *Cal. Proc.* (5th), *Appeal*, §145.)

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H. Review.

2. Mandamus.

6 *Witkin Cal. Proc. PWT* § 261

[§ 261] Mandamus.

(1) *Judicially Developed Rule.* Where the right to summary relief is clear and the remedy by appeal is inadequate, it has been held, even in the absence of statute, that mandamus may issue to compel granting a summary judgment motion and entry of judgment. (See *Reader's Digest Assn. v. Superior Court* (1984) 37 C.3d 244, 250, 208 C.R. 137, 690 P.2d 610; *Whitney's at the Beach v. Superior Court* (1970) 3 C.A.3d 258, 266, 83 C.R. 237; *Bank of America v. Superior Court* (1970) 4 C.A.3d 435, 440, 84 C.R. 421; *Burke Concrete Accessories v. Superior Court* (1970) 8 C.A.3d 773, 774, 87 C.R. 619; *Los Angeles v. Security Ins. Co.* (1975) 52 C.A.3d 808, 816, 125 C.R. 701; *Lerner v. Superior Court* (1977) 70 C.A.3d 656, 660, 139 C.R. 51; *Versa Technologies v. Superior Court* (1978) 78 C.A.3d 237, 240, 142 C.R. 570; *Krasley v. Superior Court* (1980) 101 C.A.3d 425, 432, 433, 161 C.R. 629; *Golden West Broadcasters v. Superior Court* (1981) 114 C.A.3d 947, 959, 171 C.R. 95; *Los Angeles County-U.S.C. Med. Center v. Superior Court* (1984) 155 C.A.3d 454, 459, 202 C.R. 222; *Parsons Mfg. Corp. v. Superior Court* (1984) 156 C.A.3d 1151, 1156, 203 C.R. 419; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §113.)

(2) *Codification of Rule.* C.C.P. 437c(m)(1) states that on "entry of any order pursuant to this section except the entry of summary judgment," a party may "petition an appropriate reviewing court for a peremptory writ." Accordingly, an order denying a motion for summary judgment and orders granting or denying motions for summary adjudication may be challenged by writ. (See *American Int. Underwriters Agency Corp. v. Superior Court* (1989) 208 C.A.3d 1357, 256 C.R. 730 [denial of motion]; on summary adjudication, see *infra*, §267 et seq.) C.C.P. 437c "merely codifies decisional law" and "has not changed the standards employed by the appellate courts in deciding whether to entertain the writ on its merits." (*Parsons Mfg. Corp. v. Superior Court*, *supra*, 156 C.A.3d 1156, footnote 1.) (On issuance of peremptory writ in the first instance without issuance of an alternative writ, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §223 et seq.)

(3) *Time for Petition.* C.C.P. 437c(m) prescribes the following time limits for the petition:

(a) Ordinarily, it may be filed within 20 days after service of written notice of entry of the order, or within a further time (not exceeding 10 days) as the trial judge may for good cause allow.

(b) If service of the notice is by mail, the period for filing is increased by 5 days if the place of address is within this

state, by 10 days if it is outside this state but within the United States, and 20 days if it is outside the United States.

(c) If service of the notice is by fax or overnight delivery, the initial period within which to file the petition is increased by 2 court days.

The prescribed time limits are mandatory. (*Sturm, Ruger & Co. v. Superior Court* (1985) 164 C.A.3d 579, 581, 210 C.R. 573 [untimely petition was denied; statutory language and legislative history show that mandatory time limits were established to prevent losing party from delaying trial by filing dilatory petitions]; *Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 369, 370, 214 C.R. 234 [time limits on review of summary judgment applied to summary adjudication of issues; following *Sturm*]; *Bensimon v. Superior Court* (2003) 113 C.A.4th 1257, 1258, 7 C.R.3d 151 [motion for reconsideration does not extend jurisdictional time for writ petition].)

In *Seibert Sec. Services v. Superior Court* (1993) 18 C.A.4th 394, 22 C.R.2d 514, defendant's writ petition challenging the denial of its summary judgment motion was filed almost 2 months after the date on which the trial court's order stated that copies of the order were sent to counsel. The declarations of defendant's counsel and counsel's secretary stated that they had not received notice of the ruling and that plaintiff had been directed to prepare a formal order, which likewise was not received. Plaintiff confirmed mailing notice and a copy of the formal ruling on a date as to which the petition would also have been untimely. *Held*, the conflict was resolved in favor of defendant. While adequate proof of mailing is presumptive evidence of receipt (*Ev.C. 641*, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §78), defendant's declarations were substantial direct evidence of nonreceipt as well as circumstantial evidence that notice was not mailed as claimed, and no party was prejudiced by appellate review. (18 C.A.4th 394.)

In *Eldridge v. Superior Court* (1989) 208 C.A.3d 1350, 256 C.R. 724, the clerk, on August 9, mailed counsel for E a file-stamped copy of an order denying summary adjudication; and on August 15, counsel for real parties in interest mailed a "Notice of Order Denying Motion for Summary Adjudication." If mailing of the file-stamped copy constituted service of the written notice of entry, the petition had to be filed by August 24; but it was not filed until August 25. *Held*, petition dismissed. *Schmidt v. Superior Court* (1989) 207 C.A.3d 56, 60, 254 C.R. 827, held that the clerk's mailing of a copy of the order was the triggering event for purposes of the statute. Former C.R.C., Rule 309 (now C.R.C., Rule 3.1109) dealing with notification by the clerk, may be reconciled with *Schmidt* by the following analysis: If the clerk serves an unfiled copy of an order (or any order that does not indicate that it has been entered) on a party, the rule would apply, and that order would not constitute "notice of entry of the order" under the statute. However, if the clerk mails a copy of an order that indicates that it has been entered, the rule would not apply. When the clerk serves such a copy, it has the same practical effect as a notice of entry of judgment in that it informs the party of the order and the fact that it has been entered and is effective. (208 C.A.3d 1355.)

(4) *Writ Is Not Routinely Granted*. Although C.C.P. 437c(m) authorizes a party to petition for the writ on denial of a motion for summary judgment, these applications are not routinely granted whenever error of any kind is found. (*Continental Ins. Co. v. Superior Court* (1985) 165 C.A.3d 1069, 1072, 212 C.R. 140 ["We grant the writ here to emphasize for the bar and bench the requirement of subdivision (g) and to highlight some patently insufficient orders"; referring to specificity required by C.C.P. 437c(g), *supra*, §§250, 251]; on discretion to deny extraordinary writs, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §157 et seq.)

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

(4) *Writ Is Not Routinely Granted*. See *Starbucks Corp. v. Superior Court* (2008) 168 C.A.4th 1436, 1453, 86 C.R.3d 482 [size of class in action by job applicants and potential monetary exposure to defendant justified writ relief from order denying summary judgment for defendant].



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H. Review.

3. Scope of Review.

a. Independent Review Standard.

6 *Witkin Cal. Proc. PWT* § 262

[§ 262] Independent Review Standard.

Independent review of the evidence is the appropriate standard in reviewing a summary judgment. Generally, any error made by the trial court in considering a motion for summary judgment is one of law, and the reviewing court employs the same process as the trial court in determining whether, as a matter of law, summary judgment was appropriate. (See *Schrader v. Scott* (1992) 8 C.A.4th 1679, 1683, 11 C.R.2d 433 [appeal]; *FSR Brokerage v. Superior Court* (1995) 35 C.A.4th 69, 72, 41 C.R.2d 404 [mandamus]; *Romero v. American President Lines, Ltd.* (1995) 38 C.A.4th 1199, 1202, 45 C.R.2d 421 [independent review standard was applicable in discrimination case, despite shifting burden of producing evidence].)

The only exception to application of the independent review standard is when the appellate court reviews the trial court's exercise of discretion, as under the "sole witness" and "state of mind" provisions of C.C.P. 437c(e) (supra §246); otherwise application of an abuse of discretion standard is incorrect. (*South Pasadena v. Department of Trans.* (1994) 29 C.A.4th 1280, 1288, 35 C.R.2d 113; see *Saldana v. Globe-Weis Systems Co.* (1991) 233 C.A.3d 1505, 1512, 285 C.R. 385 [references in opinions to "abuse of discretion" standard are inaccurate and outdated]; *Prata v. Superior Court* (2001) 91 C.A.4th 1128, 1135, 111 C.R.2d 296 [claim that unfair competition law cause of action was not proper representative action under B. & P.C. 17200 et seq. called for equitable determination for which exercise of judicial discretion was proper; thus, abuse of discretion was proper standard of review where trial court granted summary adjudication terminating unfair competition cause of action].)

In *AARTS Productions v. Crocker Nat. Bank* (1986) 179 C.A.3d 1061, 225 C.R. 203, the court, citing many decisions, described the process of review as "applying the same three-step analysis required of the trial court." (179 C.A.3d 1064.)

(a) First, "we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading." (179 C.A.3d 1064.)

(b) Secondly, "we determine whether the moving party's showing has established facts which negate the opponent's

claim and justify a judgment in movant's favor. ... A party cannot succeed without disproving even those claims on which the opponent would have the burden of proof at trial." (179 C.A.3d 1064.)

(c) Thirdly, when "a summary judgment motion prima facie justifies a judgment, the ... final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. ... Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue." (179 C.A.3d 1065.) (See *Barisich v. Lewis* (1990) 226 C.A.3d 12, 15, 275 C.R. 331 [discussing *AARTS Productions*]; *Heredia v. Farmers Ins. Exchange* (1991) 228 C.A.3d 1345, 1353, 279 C.R. 511 [citing *AARTS Productions*]; *Hansra v. Superior Court* (1992) 7 C.A.4th 630, 638, 9 C.R.2d 216 [citing *AARTS Productions*].)

The following cases are also instructive:

Lyons v. Security Pac. Nat. Bank (1995) 40 C.A.4th 1001, 1012, 48 C.R.2d 174 [applying "three-step analysis"].

WYDA Associates v. Merner (1996) 42 C.A.4th 1702, 1709, 50 C.R.2d 323 [court reviewing summary judgment for defendant will "review the record de novo to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial"].

Addy v. Bliss & Glennon (1996) 44 C.A.4th 205, 214, 51 C.R.2d 642 [de novo review was required; citing *AARTS Productions*].

People v. \$ 4,503 United States Currency (1996) 49 C.A.4th 1743, 1747, 57 C.R.2d 467 [appellate court must "determine anew whether there is a triable issue of material fact or whether the moving party is entitled to summary judgment as a matter of law"].

Ojavan Investors v. California Coastal Com. (1997) 54 C.A.4th 373, 385, 62 C.R.2d 803 [de novo review was required; citing *AARTS Productions*].

Kelsey v. Waste Management of Alameda County (1999) 76 C.A.4th 590, 597, 90 C.R.2d 510, citing the text [de novo review of trial court's decision to apply judicial estoppel in granting summary judgment motion].

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

See *Kasparian v. AvalonBay Communities* (2007) 156 C.A.4th 11, 24, 66 C.R.3d 885 [appellate review of photos relied on by trial court in granting summary judgment motion is subject to de novo standard; thus, reviewing court must examine photos and make its own determinations].



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b. Issue Not Raised Below.

6 *Witkin Cal. Proc. PWT* § 263

[§ 263] Issue Not Raised Below.

In *Sacks v. FSR Brokerage* (1992) 7 C.A.4th 950, 9 C.R.2d 306, plaintiff, who had failed to oppose a summary judgment motion in the trial court, attempted to argue the merits of his substantive claim for the first time on appeal. In his arguments he referred extensively to his deposition transcript, which had been lodged with the trial court but had not been received as an exhibit. *Held*, plaintiff was precluded from arguing his claim on appeal. Although the deposition was also lodged with the Court of Appeal on plaintiff's motion, it was not among the items requested by the parties for inclusion in the clerk's transcript, and it contained no superior court stamp. Plaintiff's failure to argue any matters that may have been supported by his deposition before the trial court precluded his arguing these matters on appeal. (7 C.A.4th 962, 963; on nonreviewability of matters outside record, see 9 Cal. Proc. (5th), *Appeal*, §§334, 335.)

In *North Coast Business Park v. Nielsen Const. Co.* (1993) 17 C.A.4th 22, 21 C.R.2d 104, an action alleging defective design and construction of a business park, defendant contractor was granted summary judgment based on expiration of the statute of limitations. On appeal, plaintiff argued for the first time that the limitations period commenced as of the date plaintiff discovered a defective footing. *Held*, plaintiff could not identify a new defect on appeal as the basis for its claim.

(a) The point was waived under general principles of waiver and theory of the trial (see 9 Cal. Proc. (5th), *Appeal*, §394 et seq.). (17 C.A.4th 28, 29.)

(b) Furthermore, plaintiff had not mentioned the footing defect in its separate statement of material facts (see *supra*, §216). Mention of the defect in an exhibit was insufficient; all material facts must be set forth in the separate statement. (17 C.A.4th 30.) "That the fact *could have been found* in the filed documents is of no value, because this would have imposed on the trial court the impossible burden of determining both the existence and significance of facts unmentioned by the parties." (17 C.A.4th 31.)

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



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3. Scope of Review.

c. Supplemental Briefing.

6 *Witkin Cal. Proc. PWT* § 264

[§ 264] Supplemental Briefing.

Prior to affirming an order granting summary judgment or summary adjudication on a ground not relied on by the trial court, the reviewing court must permit supplemental briefing. In the brief, a party may argue that additional evidence exists as to the new ground but that there has been inadequate opportunity to present the evidence or to conduct the necessary discovery. Based on the briefing, the court may reverse or remand to allow the parties to present additional evidence or to conduct discovery. If the court fails to allow supplemental briefing, a rehearing must be ordered on a timely petition. (*C.C.P. 437c(m)(2)*.)

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4. Granting Reversed.

6 *Witkin Cal. Proc. PWT* § 265

[§ 265] Granting Reversed.

The appellate courts have not, on the whole, been favorably inclined to the use of this "drastic" remedy, which deprives a party whose pleading is sufficient of the right to a trial on the issues thus raised. The remedy is designed to terminate an action promptly where the purported cause of action or defense is sham or otherwise wholly unfounded. But it is futile to seek the order where any basis for a cause of action or defense can be shown. In other words, the moving party should not confuse an opponent's weak case with no case at all. The court, construing the moving party's affidavits strictly and the counteraffidavits liberally (*supra*, §244), should reverse the summary judgment if any kind of case is shown.

The most common illustration of this view is found in cases in which the motion was made on the ground that the rights of the parties were wholly dependent on the construction of an instrument, thus presenting a question of law for decision by the court, and not an issue of fact to be tried. Usually the judgment is reversed on the theory that the terms of an agreement may be explained by evidence of the surrounding circumstances, and that its meaning then becomes a question of fact. (See *Walsh v. Walsh* (1941) 18 C.2d 439, 444, 116 P.2d 62 [parol evidence was admissible to explain ambiguous support provision of property settlement agreement]; *Gibson v. De La Salle Institute* (1944) 66 C.A.2d 609, 625, 152 P.2d 774 [sufficiency of telegrams as memoranda to satisfy statute of frauds; extrinsic evidence was admissible to fill in details]; *Travelers Indem. Co. v. McIntosh* (1952) 112 C.A.2d 177, 181, 245 P.2d 1065; *Gale v. Wood* (1952) 112 C.A.2d 650, 654, 247 P.2d 67; 53 A.L.R.4th 561 [sufficiency of evidence to support grant of summary judgment in will probate or contest cases].)

Instructive cases illustrating the tendency to reverse summary judgments include the following:

House v. Lala (1960) 180 C.A.2d 412, 418, 4 C.R. 366 [specific performance; plaintiffs' affidavits failed to establish by facts adequacy of consideration and fairness].

Callahan v. Chatsworth Park (1962) 204 C.A.2d 597, 600, 22 C.R. 606 [defective affidavit, triable issue of fact].

Kramer v. Barnes (1963) 212 C.A.2d 440, 446, 27 C.R. 895 [affidavit contained conclusions and inadmissible hearsay].

Colvig v. KSFO (1964) 224 C.A.2d 357, 369, 36 C.R. 701 [affidavit was mainly hearsay and conclusions].

Orange County Air Pollution Control Dist. v. Superior Court (1972) 27 C.A.3d 109, 112, 103 C.R. 410 [judgment had been granted before answer was filed].

Civic Western Corp. v. Zila Industries (1977) 66 C.A.3d 1, 15, 18, 19, 135 C.R. 915 [order affirmed as to one cause of action, reversed as to others].

Andalon v. Superior Court (1984) 162 C.A.3d 600, 605, 208 C.R. 899 [in wrongful life action, defendant's request to adjudicate conclusions of law concerning damages was "not appropriate" for summary judgment where only undisputed fact demonstrated by defendant--that parents did not perceive child's condition at birth--had no bearing on damages].

Zeilman v. Kern (1985) 168 C.A.3d 1174, 1178, 214 C.R. 746 [triable issues of fact concerning plaintiff's status precluded summary judgment based on immunity defense].

Witchell v. De Korne (1986) 179 C.A.3d 965, 978, 979, 225 C.R. 176, citing the text [moving party relied on "complete files and records of this action"; record revealed two triable issues of fact].

Pultz v. Holgerson (1986) 184 C.A.3d 1110, 1115, 1117, 229 C.R. 531 [defendant failed to negate all theories of liability raised by complaint].

American Nat. Bank v. Stanfill (1988) 205 C.A.3d 1089, 1096, 252 C.R. 861 [triable issues concerning defendants' status as "customers" of plaintiff bank and their entitlement to offset for plaintiff's mismanagement].

Twain Harte Associates, Ltd. v. Tuolumne (1990) 217 C.A.3d 71, 80, 265 C.R. 737 [defendant did not negate all theories of liability raised].

Kirby v. Albert D. Seeno Const. Co. (1992) 11 C.A.4th 1059, 1067, 14 C.R.2d 604 [motion based on ambiguous allegation in complaint showed only that action might be barred by statute of limitations].

Shively v. Dye Creek Cattle Co. (1994) 29 C.A.4th 1620, 1632, 35 C.R.2d 238 [in action arising from collision between plaintiffs' automobile and defendant's bull, defendant was not entitled to summary judgment on showing that it was not required to "fence in" cattle under open range law; showing did not establish as matter of law that it had not breached duty of ordinary care].

Donchin v. Guerrero (1995) 34 C.A.4th 1832, 1839, 41 C.R.2d 192 ["false exculpatory statements" by defendant in dog bite case were sufficient to create triable issue].

Hagen v. Hickenbottom (1995) 41 C.A.4th 168, 48 C.R.2d 197 [defendant failed to show that plaintiffs' case could not be established].

Brantley v. Pisaro (1996) 42 C.A.4th 1591, 1601, 50 C.R.2d 431 [defendant failed to show that plaintiff's negligence cause of action could not be established].

WYDA Associates v. Merner (1996) 42 C.A.4th 1702, 1710, 50 C.R.2d 323 [ambiguity in contract on which action was based].

Lopez v. Superior Court (1996) 45 C.A.4th 705, 713, 52 C.R.2d 821 [failure to disprove, or provide affirmative defense against, all causes of action].

Kulesa v. Castleberry (1996) 47 C.A.4th 103, 111, 54 C.R.2d 669, *supra*, §219 [plaintiff's papers filed in opposition to defense summary judgment motion based on statute of limitations demonstrated triable issue whether statute was

tolled].

Wright v. Stang Mfg. Co. (1997) 54 C.A.4th 1218, 1228, 63 C.R.2d 422 [strict products liability action; error to grant motion because (a) triable issues existed regarding design defect; (b) defendants failed to overcome warning defect theory; (c) motion failed to address or negate successor liability].

Lowe v. California League of Professional Baseball (1997) 56 C.A.4th 112, 124, 65 C.R.2d 105 [evidence was neither relevant nor competent to resolve prima facie dispositive issue of primary assumption of risk].

Tully v. World Savings & Loan Assn. (1997) 56 C.A.4th 654, 661, 65 C.R.2d 545 [parties' contradictory statements raised triable issue whether lender agreed to terminate pending foreclosure sale].

Binder v. Aetna Life Ins. Co. (1999) 75 C.A.4th 832, 853, 89 C.R.2d 540 [in wrongful termination action, employer's evidence failed to eliminate possible inference that termination was pretextual and not for good cause].

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



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H. Review.

5. Granting Upheld.

6 *Witkin Cal. Proc. PWT* § 266

[§ 266] Granting Upheld.

The tendency in the early days of the summary judgment statute to reverse orders granting the motion (see *supra*, §265) resulted in few affirmances. However, later cases have treated the motion with greater favor, and instances of orders standing on appeal have become more numerous. Moreover, the mandatory language of *C.C.P.* 437c that the motion "shall be granted" (*supra*, §243) seems to encourage more affirmances.

The following cases are illustrative:

Hardy v. Hardy (1943) 23 C.2d 244, 247, 143 P.2d 701 [no facts to establish cause of action].

Coyne v. Krempels (1950) 36 C.2d 257, 261, 223 P.2d 244 [no counteraffidavit].

Miller v. Bechtel Corp. (1983) 33 C.3d 868, 874, 191 C.R. 619, 663 P.2d 177 [action to set aside property settlement and dissolution decree approving it; declarations established failure to inquire, statute of limitations was not tolled by lack of knowledge of facts].

Atchison v. McGee (1956) 141 C.A.2d 515, 519, 296 P.2d 860 [for plaintiff; no counteraffidavit].

Enos v. Foster (1957) 155 C.A.2d 152, 157, 317 P.2d 670 [issue of law only--construction of lease covenants].

Doyle v. Hibernia Bank (1957) 156 C.A.2d 16, 20, 319 P.2d 412 [issue of law was properly determined by trial judge].

Estate of Kelly (1960) 178 C.A.2d 24, 30, 2 C.R. 634 [affidavits of will proponents on personal knowledge showing no revocation; affidavits of opponents entirely on information and belief and not positive on the issue].

Nini v. Culberg (1960) 183 C.A.2d 657, 661, 7 C.R. 146 [plaintiff seeking recovery from defendant employer of independent contractor for latter's negligence; no facts to bring case under any exceptional situations].

Newport v. Los Angeles (1960) 184 C.A.2d 229, 236, 7 C.R. 497 [plaintiff's own admissions completely negated

cause of action].

Keylon v. Kelley (1961) 188 C.A.2d 490, 493, 10 C.R. 549 [uncontradicted affidavit showed defenses of public officer immunity and good faith and probable cause for filing criminal complaint against plaintiff].

Weir v. Snow (1962) 210 C.A.2d 283, 295, 26 C.R. 868 [plaintiff's affidavit disclosed knowledge of facts to put him on inquiry and start running of statute of limitations; defendants' motion was granted].

Hatch v. Bush (1963) 215 C.A.2d 692, 702, 30 C.R. 397 [for defendants; plaintiffs' affidavits were insufficient].

Hayward Union High School Dist. of Alameda v. Madrid (1965) 234 C.A.2d 100, 128, 44 C.R. 268 [for plaintiff; defense was barred by limitations].

People v. Lynam (1967) 253 C.A.2d 959, 965, 61 C.R. 800 [defendants' admission and judicial notice of the law].

Larsen v. Johannes (1970) 7 C.A.3d 491, 507, 86 C.R. 744 [cross-defendant's proof of mutual release defeated cross-complainant's action].

MCA v. Universal Diversified Enterprises Corp. (1972) 27 C.A.3d 170, 177, 103 C.R. 522 [defendant failed to prove offer to do equity; alleged stipulation was not controlling on issue].

Keniston v. American Nat. Ins. Co. (1973) 31 C.A.3d 803, 812, 107 C.R. 583 [counteraffidavits went outside pleadings; no evidentiary facts were stated].

Cullincini v. Deming (1975) 53 C.A.3d 908, 913, 126 C.R. 427 [claimed issues of fact "no more than a statement of plaintiff's legal contentions on appeal"].

Scherer v. Mark (1976) 64 C.A.3d 834, 843, 135 C.R. 90 [improper attempt to add new party in place of "Doe" after statute of limitations had run].

Terry v. Atlantic Richfield Co. (1977) 72 C.A.3d 962, 967, 971, 140 C.R. 510 [defendant's declarations established complete defense to plaintiffs' cause of action for breach of contract].

Wilson v. Wilson (1978) 78 C.A.3d 226, 231, 144 C.R. 180 [issue determined by statutory conclusive presumption].

Goodall's Charter Bus Service v. San Diego Unified School Dist. (1981) 125 C.A.3d 194, 198, 178 C.R. 21 [declaration on issue of reasonable expectation of privacy was not controverted by opposing declaration establishing merely subjective expectation of privacy].

Brejcha v. Wilson Machinery (1984) 160 C.A.3d 630, 637, 206 C.R. 688 [defendant auctioneer's affidavits, and absence of plaintiff's counteraffidavits, established defendant's nonliability for selling defective machine].

Powell v. Standard Brands Paint Co. (1985) 166 C.A.3d 357, 367, 212 C.R. 395 [product liability defendant's showing that plaintiff was using another manufacturer's product at time of injury refuted plaintiff's theory of causation].

Bassett v. Attebery (1986) 180 C.A.3d 288, 292, 225 C.R. 399 [wrongful termination action based on alleged federal labor law violations within exclusive jurisdiction of NLRB].

Kirschner Bros. Oil v. Natomas Co. (1986) 185 C.A.3d 784, 790, 229 C.R. 899 [action by preferred shareholders challenging merger; existence and scope of fiduciary duty are questions of law].

Advanced Micro Devices v. Great Amer. Surplus Lines Ins. Co. (1988) 199 C.A.3d 791, 795, 245 C.R. 44, citing the text [summary judgment in favor of defendant pollution hazard insurer that policy exclusion applied].

Olson v. Federal Ins. Co. (1990) 219 C.A.3d 252, 264, 268 C.R. 90 [liability insurance policy did not cover attorneys' fees incurred by corporate director in four actions involving corporation].

Perkins v. Howard (1991) 232 C.A.3d 708, 715, 283 C.R. 764 [absolute defense of immunity under B. & P.C. 2396 to plaintiff's claim of medical malpractice].

Western Mut. Ins. Co. v. Yamamoto (1994) 29 C.A.4th 1474, 1487, 35 C.R.2d 698 [interpretation of insurance policy].

Villa v. McFerren (1995) 35 C.A.4th 733, 749, 41 C.R.2d 719 [defendant's proof that essential element of plaintiff's cause of action for conspiracy to deprive him of disability benefits, i.e., existence of conspiracy of which defendant was member, could not be established; discovery admissions].

Truck Ins. Exchange v. Amoco Corp. (1995) 35 C.A.4th 814, 828, 41 C.R.2d 551 [motion granted and cross-motion denied].

Banks v. Dominican College (1995) 35 C.A.4th 1545, 1551, 42 C.R.2d 110 [evidence demonstrated without dispute of material fact that teacher's dismissal was result of unacceptable academic performance].

Scolinos v. Kolts (1995) 37 C.A.4th 635, 640, 44 C.R.2d 31 [defendants sued for breach of fee-splitting agreement were not required to meet unpleaded allegations].

Romero v. American President Lines, Ltd. (1995) 38 C.A.4th 1199, 1202, 45 C.R.2d 421 [no competent evidence to support employment discrimination claims].

Lyons v. Security Pac. Nat. Bank (1995) 40 C.A.4th 1001, 1012, 48 C.R.2d 174 [failure to file affidavits in opposition to motion].

Addy v. Bliss & Glennon (1996) 44 C.A.4th 205, 215, 51 C.R.2d 642 [no triable issue of material fact respecting alleged employment discrimination].

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IX. SUMMARY JUDGMENT

I. Summary Adjudication.

1. Nature of Remedy.

6 *Witkin Cal. Proc. PWT* § 267

[§ 267] Nature of Remedy.

Even when there are some triable issues, a party "may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in *Section 3294 of the Civil Code*, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." (*C.C.P. 437c(f)(1)*; cf. *F.R. Civ. P., Rule 56(b)-(d)*; 10B Federal Practice & Procedure (Wright, Miller & Kane) §§2736, 2737; 27A Federal Procedure, L.Ed., §62:634 et seq.; on matters subject to summary adjudication, see *infra*, §§269, 270.)

Unlike a *summary judgment*, which terminates the entire action and results in an immediate, appealable judgment (see *supra*, §§256, 260), *summary adjudication orders* do not terminate the action but merely eliminate the need to prove or disprove at the subsequent trial the particular claim or defense that has been adjudicated. The final judgment must, in addition to any matters determined at trial, "award judgment as established by the summary proceeding." (*C.C.P. 437c(k)*; see *C.E.B., 2 Civil Proc. Before Trial* 4th, §36:6.) The term "partial summary judgment" has sometimes been used in reference to this procedure. (See *Fisher v. Larsen* (1982) 138 C.A.3d 627, 635, 188 C.R. 216; 73 Am.Jur. 2d (2001 ed.), *Summary Judgment* §63 et seq.; 23 Am.Jur. P.P. Forms (2001 ed.), *Summary Judgment* §90 et seq.) This is a misnomer because no judgment is entered in connection with the procedure, and the preferred terminology is that used in the Code of Civil Procedure, "summary adjudication." (*Santee v. Superior Court* (1991) 228 C.A.3d 713, 720, footnote 5, 279 C.R. 22.)

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



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CHAPTER VII - Proceedings Without Trial

Witkin Summary of California Law

IX. SUMMARY JUDGMENT

I. Summary Adjudication.

2. Statutory Development.

6 *Witkin Cal. Proc. PWT* § 268

[§ 268] Statutory Development.

(1) *Former Law.* C.C.P. 437c formerly provided that, if a defense applied to only a part of the plaintiff's claim, or if any part of the plaintiff's claim was admitted, the court should declare that the claim was deemed established in part and sever the cause of action accordingly, allowing the action to proceed as to the remaining issues. (See *Slobojan v. Western Travelers Life Ins. Co.* (1969) 70 C.2d 432, 74 C.R. 895, 450 P.2d 271; 40 Cal. L. Rev. 221.) The statute originally made no provision for partial summary judgment for the defendant. (See *De Echeguren v. De Echeguren* (1962) 210 C.A.2d 141, 152, 26 C.R. 562; *Chohon v. Farmers & Merchants Bank of Long Beach* (1964) 231 C.A.2d 538, 547, 41 C.R. 888; 39 Cal. L. Rev. 309.) This unreasonable restriction was eliminated by a 1965 amendment to C.C.P. 437c. (See 40 Cal. L. Rev. 221.)

(2) *1973 Revision.* The statutory revision of 1973 broadened the scope of partial summary judgment. The former provision authorized summary judgment only with respect to a claim or cause of action. (See 59 Cal. L. Rev. 476; 25 *Hastings L. J.* 159.) Revised C.C.P. 437c(f) allowed issues to be severed. (See *Beech Aircraft Corp. v. Superior Court* (1976) 61 C.A.3d 501, 516, 132 C.R. 541 [summary adjudication might be sought "on any single material issue, such as whether, in a breach of contract case, there is a contract, a breach, a release, etc." and there was "nothing inherently unique about a conflict of laws issue which would preclude a court, upon a proper showing, from determining by summary judgment procedure which law should be applied"]; *Niederer v. Ferreira* (1983) 150 C.A.3d 219, 222, 197 C.R. 685; *Laible v. Superior Court* (1984) 157 C.A.3d 44, 46, 203 C.R. 513.)

The statute provided for orders by the court specifying the issues that were and were not in controversy. (See *Tera Pharmaceuticals v. Superior Court* (1985) 170 C.A.3d 530, 532, 215 C.R. 923 [order failing to indicate issues substantially without controversy did not satisfy requirements of C.C.P. 437c(f)]; *Homestead Savings v. Superior Court* (1986) 179 C.A.3d 494, 499, 224 C.R. 554 [trial court adjudicated subissues not specifically covered by defendant's notice; order adjudicating subissues was vacated; statute's failure to address notice issue did not justify departure from rule of C.C.P. 1010 that notice of motion must state ground on which it is made].)

(3) *1990 and 1993 Revisions.* In 1990, former C.C.P. 437c(f) was replaced by a new subdivision (f). The enacting statute states: "It is ... the intent of this legislation to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense." (Stats. 1990, Chap. 1561, §1.) In 1993 C.C.P. 437c(f)

was amended and subdivided, and the legislative intent was codified. Summary adjudication is permitted "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*C.C.P.* 437c(f)(1); see *DeCastro West Chodorow & Burns v. Superior Court* (1996) 47 C.A.4th 410, 418, 54 C.R.2d 792, *infra*, §273 [1993 amendment did not alter prior rule limiting summary adjudication of damages issues that are not dispositive of a cause of action to punitive damages claims]; on complete disposition of issues, see *infra*, §271 et seq.)

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



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CHAPTER VII - Proceedings Without Trial

Witkin Summary of California Law

IX. SUMMARY JUDGMENT

I. Summary Adjudication.

3. Matters Subject to Summary Adjudication.

a. In General.

6 *Witkin Cal. Proc. PWT* § 269

[§ 269] In General.

Under *C.C.P. 437c(f)(1)* a party may move for summary adjudication as to one or more of the following:

- (1) That a cause of action has no merit.
- (2) That there is no affirmative defense to any cause of action.
- (3) That there is no merit to an affirmative defense to any cause of action.
- (4) That there is no merit to a claim for punitive damage under *C.C. 3294*.
- (5) That one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs.

A cause of action has no merit if either of the following exists:

(a) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded. (*C.C.P. 437c(o)(1)*.)

(b) A defendant establishes an affirmative defense to that cause of action. (*C.C.P. 437c(o)(2)*; see *Emeryville v. Superior Court* (1991) 2 *C.A.4th* 21, 23, 25, 2 *C.R.2d* 826 [reaffirming as established rule that court has jurisdiction to grant summary adjudication when defendant presents valid defense].)

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3. Matters Subject to Summary Adjudication.

b. Distinct Wrongful Acts in Same Pleaded Cause of Action.

6 *Witkin Cal. Proc. PWT* § 270

[§ 270] Distinct Wrongful Acts in Same Pleaded Cause of Action.

A party may move for summary adjudication as to one or more causes of action within an action on the ground that the cause of action has no merit. (*C.C.P. 437c(f)(1)*, supra, §§268, 269.) The term "cause of action" is not defined in the statute, and it has often been used indiscriminately to mean the invasion of a primary right, or a group of related paragraphs or counts in the complaint reflecting a separate theory of liability. (See 4 *Cal. Proc.* (5th), *Pleading*, §34 et seq.) For purposes of summary adjudication, separate and distinct wrongful acts give rise to separate causes of action, regardless of the manner of pleading. A party may move for summary adjudication challenging a separate and distinct wrongful act, even if that act is combined with other wrongful acts alleged in the same pleaded "cause of action" or count. (*Lilienthal & Fowler v. Superior Court* (1993) 12 *C.A.4th* 1848, 1851, 1853, 16 *C.R.2d* 458.)

In *Lilienthal*, plaintiffs filed a complaint for legal malpractice against defendant law firm arising from legal services that defendant provided at different times on two separate and distinct matters. Defendants sought summary adjudication, and the trial court denied the motion on the ground that it would not dispose of an entire cause of action. *Held*, mandamus issued directing the trial court to vacate its order and reconsider the motion on its merits.

(a) In this case, "plaintiffs seek to recover damages based on two separate and distinct obligations. Each obligation creates a separate and distinct claim. ... There is no dispute that the two matters have no relation to each other and involve legal services performed at different times, with different and distinct obligations, and distinct and separate alleged damages. Under California law, the allegations ... involve two separate and distinct causes of action" regardless of how pleaded. (12 *C.A.4th* 1854.)

(b) In amending *C.C.P. 437c(f)*, "the Legislature wished to narrow summary adjudication from its broad focus on 'issues' ... to a more limited focus on causes of action, affirmative defenses, claims for punitive damages, and claims that defendants did not owe plaintiffs a duty." (12 *C.A.4th* 1854.)

(c) Thus, the clearly articulated legislative intent of *C.C.P. 437c(f)* "is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and

cost saving purposes of the amendment and allow a cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication." Accordingly, under *C.C.P. 437c(f)*, "a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (12 *C.A.4th* 1854.) (See *Edward Fineman Co. v. Superior Court* (1998) 66 *C.A.4th* 1110, 1116, 78 *C.R.2d* 478 [in action against bank for honoring 83 checks with unauthorized signature, bank was permitted to assess whether each check as separate claim was time-barred and obtain summary adjudication for 23 checks; following *Lilienthal*]; *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 *C.A.4th* 1509, 1526, footnote 2, 80 *C.R.2d* 94, 3 *Cal. Proc.* (5th), *Actions*, §645 [for purposes of summary adjudication, when cause of action for legal malpractice alleges single injury, fact that attorney's conduct involved discrete negligent acts or omissions does not create separate causes of actions with separate statute of limitations for each act or omission; distinguishing *Lilienthal*]; *Mathieu v. Norrell Corp.* (2004) 115 *C.A.4th* 1174, 1188, 10 *C.R.3d* 52 [harassment and retaliation claims constituted separate causes of action for purposes of summary adjudication].)

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I. Summary Adjudication.

4. Complete Disposition of Matter Adjudicated.

a. In General.

6 *Witkin Cal. Proc. PWT* § 271

[§ 271] In General.

A motion for summary adjudication may be granted only if "it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*C.C.P.* 437c(f)(1); on former law, see *supra*, §268.) In fact, it has been suggested that *C.C.P.* 437c(f)(1), in light of its legislative history and the general policy behind *C.C.P.* 437c, limits summary adjudication to *issues* that completely dispose of a particular cause of action or defense. (See *Lilienthal & Fowler v. Superior Court* (1993) 12 *C.A.4th* 1848, 1853, 16 *C.R.2d* 458, *supra*, §270 [quoting Report of the Senate Committee on the Judiciary comments as follows: "According to the sponsor, it is a waste of court time to attempt to resolve issues if the resolution of those issues will not result in summary adjudication of a cause of action or affirmative defense. Since the cause of action must still be tried, much of the same evidence will be reconsidered by the court at the time of trial"]; *DeCastro West Chodorow & Burns v. Superior Court* (1996) 47 *C.A.4th* 410, 418, 54 *C.R.2d* 792, *infra*, §273 [summary adjudication of single item of compensatory damage only is proper where it is dispositive of entire cause of action]; *Hindin v. Rust* (2004) 118 *C.A.4th* 1247, 1255, 13 *C.R.3d* 668 [in malicious prosecution action, trial judge erred in granting defendant summary adjudication on ground that defendant had probable cause to bring one of its two claims in underlying case; that determination did not dispose of plaintiff's entire cause of action].)

In *Catalano v. Superior Court* (2000) 82 *C.A.4th* 91, 97 *C.R.2d* 842, plaintiff properly alleged instances of conduct supporting a claim for punitive damages. Defendant's motion for summary adjudication of the punitive damage claim presented five separate issues. The trial court followed the format of defendant's motion and granted summary adjudication on four of the five issues. *Held*, mandamus issued directing the trial court to vacate the order granting partial summary adjudication and to enter an order denying summary adjudication. Although a claim for punitive damages is a proper subject for summary adjudication, a grant of summary adjudication must cover the entire claim. Here, the trial court's piecemeal adjudication of certain factual allegations without disposing of the entire claim for punitive damages was prohibited by *C.C.P.* 437c(f)(1). (82 *C.A.4th* 97; relying on *Lilienthal*.)

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4. Complete Disposition of Matter Adjudicated.

b. Issue of Duty Not Dispositive of Cause of Action.

6 *Witkin Cal. Proc. PWT* § 272

[§ 272] Issue of Duty Not Dispositive of Cause of Action.

Disagreement exists whether the issue of duty may be adjudicated without regard to the dispositive effect on other issues.

In *Regan Roofing Co. v. Superior Court* (1994) 24 C.A.4th 425, 29 C.R.2d 413, the requirement in C.C.P. 437c(f) that the motion be granted only if it "completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty" (see supra, §268) was interpreted to preclude the resolution of an issue of duty that did not fully dispose of any part of the action. A condominium association sued the developer of the project to recover for alleged construction defects, and the developer cross-complained against numerous subcontractors. The developer moved for summary adjudication as to (a) the nature of an indemnity clause included in the subcontracts, and (b) whether the indemnity clause required the subcontractors to defend the developer in the action. The trial judge granted the motion in part and denied it in part, ruling that (a) the indemnification clause in the exemplar subcontract submitted by the developer was the type that would cover the developer's own negligence, and (b) the developer was owed a duty to defend, but that (c) the subcontractors' liability could not be determined because the developer had not shown that each subcontractor had executed a contract including the indemnification clause, and (d) the developer was not entitled to indemnification until it was subjected to liability. *Held*, mandamus issued directing the trial court to vacate its order and deny the summary adjudication motion in full.

(a) *Emeryville v. Superior Court* (1991) 2 C.A.4th 21, 2 C.R.2d 826, supra, §269, and *Lilienthal & Fowler v. Superior Court* (1993) 12 C.A.4th 1848, 16 C.R.2d 458, supra, §270, interpreted C.C.P. 437c(f)(1) in light of its legislative history and the general policy behind C.C.P. 437c, and concluded that the statute limits summary adjudication to issues that completely dispose of a cause of action or defense. Hence, in this case the trial court's ruling should be analyzed "with a view to whether it promotes the evident legislative purpose ... to prevent adjudication of issues which fail to dispose completely of a particular cause of action or defense, even where 'an issue of duty' is involved." (24 C.A.4th 433, 434.)

(b) The Legislature did not define what it meant by "an issue of duty" in C.C.P. 437c(f). "Where a tort duty is involved, as in a negligence cause of action, a finding that a defendant does not owe a duty to the plaintiff may

effectively terminate an action or a portion thereof and is thus clearly an example of a proper subject of summary adjudication." However, "[i]n actions arising out of contract, such as this action for contractual indemnity, the concept of duty is more far-reaching. ... [T]he concept of duty in contract law may refer both to an overall contractual obligation or to a requirement of performance under an agreement." (24 C.A.4th 434.) In the context of insurance contract law, a duty to defend is contractual, and is a matter of law appropriate for summary adjudication in a declaratory relief action. This case, though, arose in the context of contractual indemnity, and the developer's cross-complaint sought not only declaratory relief, but also damages and other relief under the contractual indemnity provision and related theories. (24 C.A.4th 435.) An insurance company has a broad duty to defend, due to the possibility of coverage under the policy, but a contract of indemnity is not construed in precisely the same manner, because it is not necessarily an adhesion contract as is an insurance policy. (24 C.A.4th 436.)

(c) The ruling on the developer's summary adjudication motion did not adjudicate the specific contractual duties, rights, and liabilities of the individual subcontractors; it was essentially an advisory interpretation of contract provisions that did not terminate any part of the action with its determination of an issue of duty. (24 C.A.4th 436.)

(d) As to the duty to defend, the ruling attempted to resolve certain elements of the cause of action for breach of contract, but left unresolved the issues of the subcontractors' breach and the developer's damages. The indemnity clause was limited to those liabilities or expenses connected with performance of the subcontracts. No determination had been made whether the subcontractors were negligent in their performance, and the developer had not clearly established that under this indemnity clause the duty to defend was independent of the duty to indemnify for liability arising out of a subcontractor's negligence. (24 C.A.4th 436.) It was unclear whether the subcontractors were being asked to defend the developer against claims for which the developer alone might be strictly liable. As a practical matter the ruling did not finally resolve the issue of duty to defend, which under the indemnity clause appeared to be fragmented among the subcontractors according to the type of work they did. This posed no problems as to the ultimate division of the costs of defense, but it did pose problems as to the subcontractors' immediate duty to defend. The ruling was thus preliminary or advisory in character, and did not fully dispose of any part of the action, which was inconsistent with the legislative intent of C.C.P. 437c(f). (24 C.A.4th 437.)

(e) As to the type of indemnity provision at issue, the ruling was also essentially advisory in nature, and was premature in the sense that other elements of the cause of action for breach of indemnity contract (the developer's performance or excuse from performance, breach, and damages) remained unresolved. A trial court is authorized to interpret a contractual provision as a matter of law, but where the interpretation of contractual duties does not fully dispose of any part of the action it is not a proper subject of summary adjudication. (24 C.A.4th 437.)

Linden Partners v. Wilshire Linden Associates (1998) 62 C.A.4th 508, 73 C.R.2d 708, sharply disagreed with *Regan Roofing Co.* and held that, on a motion for summary adjudication, the court may determine whether a defendant owes a duty to plaintiff without regard to the dispositive effect of the ruling on other issues in the litigation. However, the ruling must completely dispose of the duty issue. (62 C.A.4th 522.) *Linden Partners* involved the sale of an office building and whether the defendant seller had a duty to deliver to plaintiff buyer an accurate statement of a subtenant's current monthly rent. Plaintiff's motion for summary adjudication on that issue was granted. *Held*, affirmed.

(a) The "issue of duty" under C.C.P. 437c(f) does not apply only to negligence claims. If, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of duty in the nature of a contractual obligation, it may properly do so by a ruling on that issue presented by a motion for summary adjudication. (62 C.A.4th 519.)

(b) *Regan Roofing Co.*, relying on *Lilienthal*, took the position that summary adjudication under C.C.P. 437c(f) is permitted only if the resolution of the issue of duty completely disposed of a cause of action or defense. (62 C.A.4th 517.) However, the language of C.C.P. 437c(f) is in the disjunctive, so that the substantive areas that may be challenged by motion for summary adjudication are "a cause of action, an affirmative defense, a claim for damages or an issue of duty." The plain meaning of that language is that the motion may be granted or denied as to any of these substantive

areas standing alone, and "without reference to the dispositive effect of such ruling on any of the companion substantive areas." (62 C.A.4th 520.)

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

See *Crawford v. Weather Shield Mfg.* (2008) 44 C.4th 541, 565, 79 C.R.3d 721, 187 P.3d 424, 5 Summary (10th), Torts, Supp., §120 [disapproving *Regan Roofing Co. v. Superior Court* (1994) 24 C.A.4th 425, 29 C.R.2d 413, text, p. 722, to extent *Reagan Roofing Co.* concluded that, under agreements there at issue, subcontractors' defense duties arose only if subcontractors became liable for indemnity].



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I. Summary Adjudication.

4. Complete Disposition of Matter Adjudicated.

c. Compensatory Damage Claim Not Dispositive of Cause of Action.

6 *Witkin Cal. Proc. PWT* § 273

[§ 273] Compensatory Damage Claim Not Dispositive of Cause of Action.

DeCastro West Chodorow & Burns v. Superior Court (1996) 47 C.A.4th 410, 54 C.R.2d 792, considered the effect of the 1993 amendment to C.C.P. 473c(f)(1) (*supra*, §268) on summary adjudication of damages claims. In a legal malpractice action brought by owners of a resort hotel against their law firm and two members of the firm, defendants moved for summary adjudication of the issue whether plaintiffs' claim for damages for an alleged lost opportunity to sell or refinance the hotel based on defendants' malpractice could be established. *Held*, summary adjudication of the issue was properly denied. C.C.P. 473c(f)(1) does not allow summary adjudication of a single item of compensatory damage that does not dispose of an entire cause of action.

(a) Although a substantial change in the language of a statute by an amendment indicates an intention to change its meaning, a mere change in phraseology, incident to a revision of the statute, does not result in a change of meaning unless the intent to make that change clearly appears. Surrounding circumstances may indicate that an amendment was merely the result of a legislative attempt to clarify the true meaning of the statute. (47 C.A.4th 418.)

(b) The amended statute provides that a party may move for summary adjudication as to "one or more claims for damages" if that party contends that "there is no merit to a claim for damages, as specified in *Section 3294 of the Civil Code*." (C.C.P. 473c(f)(1).) Defendants maintain essentially that the 1993 amendment was intended to enable the courts to dispose of claims for compensatory damages by summary adjudication, whether or not dispositive of a cause of action, and that the summary adjudication of damages claims not dispositive of a cause of action is no longer limited to those specified in C.C. 3294, i.e., punitive damages claims. This argument must be rejected. Nothing in the legislative history of the 1993 amendment supports the contention that the scope of the statute was intended to be expanded to include summary adjudication of a single item of compensatory damage that is not dispositive of an entire cause of action. (47 C.A.4th 420.) The reference to "one or more claims for damages" in the first part of the sentence must be construed to be qualified by, and limited to, punitive damages. There is no other reasonable interpretation of the sentence that gives effect to all of its words. (47 C.A.4th 421.)

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4. Complete Disposition of Matter Adjudicated.

d. Declaratory Relief Claim Asserting Issues Disputed in Other Causes of Action.

6 *Witkin Cal. Proc. PWT* § 274

[§ 274] Declaratory Relief Claim Asserting Issues Disputed in Other Causes of Action.

An added claim for declaratory relief may not be used to subvert the requirement of *C.C.P. 437c(f)(1)* that summary adjudication completely dispose of a cause of action or defense. (*Hood v. Superior Court* (1995) 33 *C.A.4th* 319, 39 *C.R.2d* 296.)

Hood involved an action for breach of a noncompetition clause in an agreement between plaintiff insurer and defendant insurance agents. The case involved "a complicated factual context." (33 *C.A.4th* 321.) When plaintiff learned that defendants had begun marketing a competing insurance plan, it terminated defendants' services, based on the noncompetition clause and a clause permitting termination for its breach, and brought this action for damages and injunctive relief alleging breach of the noncompetition clause. Defendants cross-complained seeking injunctive relief and asserting breach of contract and certain torts inflicted by plaintiff. Defendants' second amended cross-complaint disputed plaintiff's right to terminate the contract, alleged that plaintiff failed to pay commissions and service fees, and alleged that plaintiff fraudulently induced defendants to enter into the agency agreement. Plaintiff then filed a motion for summary adjudication with respect to the cross-complaint, which was denied because it failed to completely dispose of any of the causes of action. Plaintiff then amended its complaint to add a new cause of action for declaratory relief, seeking a determination that (a) defendants' activities violated the noncompetition clause, and (b) the termination provision entitled plaintiff to immediately end the agreement. Defendants filed their answer and affirmative defenses, and plaintiff moved for summary adjudication of the declaratory relief cause of action. This motion was granted. *Held*, mandamus issued directing the trial judge to set aside the order and deny the motion.

(a) The policy underlying motions for summary adjudication of issues is to "promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials." (33 *C.A.4th* 323, citing *Lilienthal & Fowler v. Superior Court* (1993) 12 *C.A.4th* 1848, 1854, 16 *C.R.2d* 458, *supra*, §270.) The summary judgment statute was amended to restrict summary adjudication to motions that would adjudicate an entire cause of action or affirmative defense, or the issues of duty or punitive damages and to end the practice of adjudicating facts or issues that do not completely dispose of a cause of action or defense. (33 *C.A.4th* 323.)

(b) Plaintiff's addition of a declaratory relief claim to assert issues already disputed in the underlying action was

insufficient to overcome *C.C.P. 437c(f)(1)*. The declaratory relief claim did not relate to a separate and distinct wrongful act. All of plaintiff's causes of action arose from the same operative facts (breach of the noncompetition clause) and were intertwined with one another. The adjudication of the declaratory relief cause of action did not purport, by itself, to adjudicate the entirety of any cause of action, or any of the specific matters (duty or punitive damages) within the scope of summary adjudication. Also, because the issues invoked in the declaratory relief cause of action were fully engaged by other causes of action, declaratory relief was unnecessary and superfluous. (33 *C.A.4th* 323, 324.)

(c) The declaratory relief statute should not be used for the purpose of anticipating and determining an issue that can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues. (33 *C.A.4th* 324.)

Hood was distinguished in *Southern Calif. Edison Co. v. Superior Court* (1995) 37 *C.A.4th* 839, 44 *C.R.2d* 227, an action for declaratory relief, specific performance, and breach of contract arising from a dispute over the meaning of a term in a contract. The Court of Appeal found that the trial judge did not lack authority to grant summary adjudication of a cause of action for declaratory relief merely because the issue concerning the interpretation of the contract term was also raised in specific performance and breach of contract claims: "In our view, *Hood* does not stand for the proposition the trial court cannot grant summary adjudication of a properly pled cause of action for declaratory relief merely because the controversy between the parties spills over into other causes of action. Rather, the plain lesson of *Hood* is that parties will not be allowed to misuse the declaratory relief cause of action in an attempt to subvert the requirement a summary adjudication must completely dispose of a cause of action." (37 *C.A.4th* 846.)

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

See *Supervalu v. Wexford Underwriting Managers* (2009) 175 *C.A.4th* 64, 83, 96 *C.R.3d* 316 [summary adjudication was proper on insurer's cause of action for declaratory relief where insurer "merely requested contract interpretation," as permitted under *C.C.P. 1060*, and insurer was not attempting to subvert *C.C.P. 437c*; following *Southern Calif. Edison Co. v. Superior Court* (1995) 37 *C.A.4th* 839, 44 *C.R.2d* 227, text, p. 727].



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I. Summary Adjudication.

5. Procedure.

a. Motion By Itself or In Alternative.

6 *Witkin Cal. Proc. PWT* § 275

[§ 275] Motion By Itself or In Alternative.

(1) *In General.* A motion for summary adjudication may be made either by itself or as an alternative to a summary judgment motion. (*C.C.P. 437c(f)(2)*.) However, a court cannot grant summary adjudication when the only motion noticed for hearing is one for summary judgment. (*Gonzales v. Superior Court* (1987) 189 C.A.3d 1542, 235 C.R. 106; *Maryland Cas. Co. v. Reeder* (1990) 221 C.A.3d 961, 974, footnote 4, 270 C.R. 719; see *Jimenez v. Protective Life Ins. Co.* (1992) 8 C.A.4th 528, 534, 535, 10 C.R.2d 326 [trial court erred in entering nonappealable partial judgment in response to motion for summary judgment heard by stipulation]; *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 C.A.4th 97, 114, 18 C.R.3d 562 [although partial grant of summary adjudication was improper where defendant had moved solely for summary judgment, error was harmless because trial court's action was in effect grant of motion for judgment on pleadings on cause of action having no legal basis].)

The motion made in the alternative may refer to and depend on the same evidence submitted in support of the summary judgment motion. Whether sought separately or in the alternative, the notice of motion must specifically state the cause of action, affirmative defense, claims for damages, or issues of duty. Moreover, these items must be repeated verbatim in the separate statement of undisputed material facts. (*C.R.C.*, Rule 3.1350(b).)

(2) *Supporting Documents.* Under *C.R.C.*, Rule 3.1350(c), the motion must contain and be supported by the following documents:

- (a) Notice of motion.
- (b) Separate statement of undisputed material facts.
- (c) Supporting memorandum.
- (d) Supporting evidence.
- (e) Request for judicial notice, if appropriate.

An opposition to the motion must contain and be supported by similar documents. (See C.R.C., Rule 3.1350(e).)

The statement of undisputed material facts must separately identify each cause of action, claim, issue of duty, or affirmative defense and each supporting material fact claimed to be without dispute with regard to these items. (C.R.C., Rule 3.1350(d); on format requirements, see C.R.C., Rule 3.1350(d) and (h).)

(3) *Relation to Summary Judgment Procedure.* A summary adjudication motion "shall proceed in all procedural respects as a motion for summary judgment." (*C.C.P.* 437c(f)(2); on summary judgment procedure, see *supra*, §213 et seq.) Thus, *C.C.P.* 437c(b), providing that evidentiary objections not made are waived (see *supra*, §233), applies to motions for summary adjudication under *C.C.P.* 437c(f). (*Haskell v. Carli* (1987) 195 C.A.3d 124, 130, 240 C.R. 439.)

However, a party may not move for summary judgment based on issues asserted in a prior, denied summary adjudication motion, unless he or she establishes to the court's satisfaction newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion. (*C.C.P.* 437c(f)(2).) (See *Bagley v. TRW* (1999) 73 C.A.4th 1092, 1096, 86 C.R.2d 909 [following denial of summary judgment and grant of partial summary adjudication of issues, second motion for summary judgment heard by different judge and granted was improper because it was not based on new facts or new law]; *Patterson v Sacramento City Unified School Dist.* (2007) 155 C.A.4th 821, 827, 66 C.R.3d 337 [subsequent motion for summary judgment was proper where it involved different legal theory and was based on change in law].)

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IX. SUMMARY JUDGMENT

I. Summary Adjudication.

5. Procedure.

b. Practice Suggestions.

6 *Witkin Cal. Proc. PWT* § 276

[§ 276] Practice Suggestions.

In *United Community Church v. Garcin* (1991) 231 C.A.3d 327, 282 C.R. 368, the court said: "Properly conceived and executed, motions for summary adjudication ... encourage settlement, reduce trial time, save money for the parties and preserve limited judicial resources. Ill-conceived and improperly executed motions for summary adjudication have just the opposite effect--they waste time and money and, almost as certainly as night follows day, result in reversals and further litigation." (231 C.A.3d 329.) The opinion makes a number of suggestions to attorneys and trial judges mainly drawn from recent articles by commentators:

(a) A motion for summary adjudication may be visualized as a pyramid: At the top is the matter the moving party wants adjudicated. "[T]he moving party must show that it is supported by undisputed facts, a showing made by way of the next step down the pyramid, the *separate statement* of undisputed facts. At the base of the pyramid is admissible evidence supporting the facts listed in the separate statement. Upon descending to the base of the pyramid, the moving party shifts the burden to the opponent who must then, by use of a responsive separate statement and admissible evidence, establish that there are triable issues of material fact." (231 C.A.3d 333.)

(b) The manner in which the matter sought to be adjudicated is framed is critical. Thus, it should be phrased in language appropriate for adoption by the court if the motion is granted, and its scope should be apparent. (231 C.A.3d 333.)

(c) Separate statements are required to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions. (231 C.A.3d 335.) "This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*. Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*." (231 C.A.3d 337.)

(d) "On a motion for summary judgment or [summary adjudication], the burden is *always* on the moving party to show there is no triable issue of material fact. ... When the moving party is the plaintiff, the burden is to prove every element necessary to establish its right to the relief it seeks and to disprove every affirmative defense asserted against it. Until this is done, the defendant has no burden to produce opposing evidence or to disprove anything at all. ... It is

immaterial that at trial the burden to prove an affirmative defense or some other fact might be on the defendant. On a plaintiff's motion for summary judgment or [summary adjudication], the burden is on the plaintiff, not the defendant." (231 C.A.3d 338.)

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IX. SUMMARY JUDGMENT

I. Summary Adjudication.

6. Effect of Ruling on Motion.

6 *Witkin Cal. Proc. PWT* § 277

[§ 277] Effect of Ruling on Motion.

If a motion for summary adjudication is granted, at the trial of the action, the causes of action, affirmative defenses, claims for damages, or issues of duty as to which the motion has been granted are deemed established, and the action proceeds as to the remaining causes, defenses, claims, or issues. (*C.C.P. 437c(n)(1)*; see *Conway v. Bughouse* (1980) 105 C.A.3d 194, 202, 164 C.R. 585 [when summary adjudication is granted by one judge, and remaining issues are tried by different judge, second judge is bound by first judge's determination, and losing party may not seek relitigation of decided issues before second judge]; *Rooz v. Kimmel* (1997) 55 C.A.4th 573, 592, 64 C.R.2d 177 [under *Conway*, party has duty to inform second judge of prior adjudication in order to preserve matter for appeal should second judge ignore prior adjudication].) The fact that the motion is granted does not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied. (*C.C.P. 437c(n)(2)*.)

In the trial of the action, a party, a witness, and the court may not comment to a jury on the grant or denial of a motion for summary adjudication. (*C.C.P. 437c(n)(3)*.)

In *Raghavan v. Boeing Co.* (2005) 133 C.A.4th 1120, 35 C.R.3d 397, plaintiff alleged multiple causes of action that included wrongful termination and defamation. Central to plaintiff's case was a written reprimand that plaintiff contended falsely accused him of misconduct and ethical violations and was retaliatory for his whistleblowing. Defendant sought and was granted summary adjudication of all but the wrongful termination cause of action. As to the defamation claim, the trial judge concluded that the statements in the written reprimand were true. Prior to taking evidence on the wrongful termination claim, the trial judge instructed the jury that facts supporting the written reprimand were already established and true, an instruction defense counsel emphasized in argument. The jury found for defendant. *Held*, judgment reversed.

(a) *C.C.P. 437c* precludes adjudication of general issues and requires that a summary adjudication motion dispose of an entire cause of action or defense. Thus, the adjudication of one claim has no preclusive effect on remaining claims. Although defendant prevailed on plaintiff's defamation claim, nothing else was deemed established for purposes of plaintiff's remaining wrongful termination claim, and it should have proceeded unaffected. (133 C.A.4th 1137.)

(b) The jury instruction was highly prejudicial. *C.C.P. 437c(n)* prohibits comment to a jury regarding the grant or denial of a motion for summary adjudication. Here, prior to trial, the trial judge instructed the jury that plaintiff had engaged in the conduct that formed the basis of the written reprimand, in essence telling the jury that plaintiff would not be a credible witness. Also, central to plaintiff's wrongful termination claim was his contention that the reprimand was pretextual and retaliatory for his whistleblowing. Because the jury was instructed that the accusations in the reprimand were true, the jury was more likely to find that the reprimand was issued for legitimate disciplinary reasons. (133 *C.A.4th 1138.*)

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IX. SUMMARY JUDGMENT

I. Summary Adjudication.

7. Review.

a. On Appeal.

6 *Witkin Cal. Proc. PWT* § 278

[§ 278] On Appeal.

(1) *Review on Immediate Appeal.* Generally, no final judgment may be entered on a summary judgment motion prior to termination of the action. The one final judgment rule is subject to an exception "where a separate judgment may properly be awarded in the action." (*C.C.P.* 437c(k), *supra*, §256.) Thus, the nonappealability of summary adjudications is not absolute. (*Niederer v. Ferreira* (1983) 150 C.A.3d 219, 223, 197 C.R. 685.) An immediate appeal is available, for example, where the summary adjudication order effectively terminates the case against one or more of the parties, and the only remaining causes of action involve different parties. (*DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 431, 160 C.R. 899 [referring to additional, possible exception where causes of action not disposed of are "separate and distinct" from cause on which judgment is rendered].)

Summary judgment is also appealable where all issues necessary to a disposition of the remaining causes of action have been decided by the trial court or can be decided as a matter of law on the basis of the record. (*De Grandchamp v. Texaco, supra*, 100 C.A.3d 435 [referring to additional, possible exception where causes of action not disposed of are "separate and distinct" from cause on which judgment is rendered]; *Niederer v. Ferreira, supra*, 150 C.A.3d 223.)

In *Belio v. Panorama Optics* (1995) 33 C.A.4th 1096, 39 C.R.2d 737, an action by the shareholder of a close corporation against the corporation and others, the plaintiff alleged three causes of action: the first seeking involuntary dissolution of the corporation due to shareholder deadlock, the second seeking plaintiff's share of his ownership interest and an accounting, and the third seeking an order directing defendants to maintain the financial status quo of the corporation during the pendency of the action. The trial judge granted defendant corporation's motion for summary adjudication on the first cause of action, and plaintiff appealed. Defendant corporation contended that the appeal was improper because the order granting summary adjudication had disposed of only one of the three causes of action. Contemplating further proceedings, the trial court specifically directed its summary adjudication as to the first cause of action to be "carried into any final judgment subsequently entered in this proceeding." No final judgment had been entered. *Held*, appeal was proper. The trial court's order granting summary adjudication as to the first cause of action "effectively disposed of the case."

(a) In determining whether a particular order is essentially interlocutory and nonappealable, or whether it is final

and appealable, it is not the form of the order but the substance and effect of the adjudication that is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the order, that order is final, but where "anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties," the order is interlocutory. (33 C.A.4th 1101.)

(b) Here, the second and third causes of action were purely ancillary to the first. In the second cause of action, plaintiff pleaded that, on dissolution of the corporation, he desired to receive his share of the ownership interest and requested an accounting. The accounting claim became moot when dissolution was disallowed. Plaintiff's third cause of action sought an order directing defendants to maintain the financial status quo of the corporation during the pendency of the action. This claim likewise became moot once plaintiff was precluded from dissolving the corporation. (33 C.A.4th 1101.)

(c) Thus, there was nothing further in the nature of judicial action essential to a final determination of the action. Accordingly, the appeal from the order granting summary adjudication is construed to be an appeal from a final judgment, and the matter is properly before the appellate court. (33 C.A.4th 1101.)

(2) *Review on Appeal From Final Judgment.* A summary adjudication order relating to one of multiple, related causes of action involving a single party generally does not come within the exception stated in C.C.P. 437c(k). The appeal will be dismissed, and the order may be reviewed on appeal from the ultimate final judgment. (See C.C.P. 437c(k), supra, §256; *Trani v. R.G. Hohman Enterprises* (1975) 52 C.A.3d 314, 315, 125 C.R. 34 [trial court's granting of plaintiff's motion for partial summary judgment on one cause of action and entering separate judgment "was patently void"]; *DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 436, 160 C.R. 899 [partial summary judgment on one of nine causes of action was, in effect, an order specifying that particular issue was "without substantial controversy"].)

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7. Review.

b. By Mandamus.

6 *Witkin Cal. Proc. PWT* § 279

[§ 279] By Mandamus.

Orders granting or denying summary adjudication are reviewable by mandamus, in the appellate court's discretion. (See *C.C.P. 437c(m)(1)*, *supra*, §261.)

In *Nazaroff v. Superior Court* (1978) 80 C.A.3d 553, 145 C.R. 657, plaintiff mother, whose child died from the effects of nearly drowning in defendant's pool, filed a complaint for wrongful death and emotional distress suffered from witnessing the tragic event. The trial court granted defendant's motion for partial summary judgment on the cause of action for emotional distress. Because the wrongful death cause was unaffected, no final appealable judgment could be entered. However, the order barred a hearing on the merits for a substantial part of plaintiff's case; mandamus was therefore held proper to review the order, and the writ was granted. (80 C.A.3d 557, 558.) (On nature of mandamus review, see *LaRosa v. Superior Court* (1981) 122 C.A.3d 741, 744, 176 C.R. 224; *Laible v. Superior Court* (1984) 157 C.A.3d 44, 46, footnote 2, 203 C.R. 513.)

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X. DISMISSAL OF ACTION GENERALLY

A. In General.

6 *Witkin Cal. Proc. PWT* § 280

[§ 280] In General.

Dismissal of an action or proceeding is a complicated subject, governed by a number of statutes prescribing different procedures and having varying effects. (On ordinary dismissals, see *C.C.P.* 581, 581d, and 583.110 et seq.; on special statutes, see *C.C.P.* 1268.510 (abandonment of proceeding in eminent domain) and *C.C.P.* 1268.610 (payment of costs and attorneys' fees to defendant after abandonment of proceeding in eminent domain); 8 *Summary* (10th), *Constitutional Law*, §§1264, 1265; on dismissals generally, see C.E.B., 3 Civil Proc. Before Trial 4th, Chap. 39; C.E.B., 1 Civil Proc. During Trial 3d, §6.79 et seq.; C.E.B., Civil Lit. Forms §35.1 et seq.; Cal. Civil Practice, 3 Procedure, Chap. 22; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §15.1 et seq.; 24 *Am.Jur.2d* (1998 ed.), *Dismissal, Discontinuance, and Nonsuit* §1 et seq.; Rutter Group, 3 Civil Proc. Before Trial, Chap. 11.)

Dismissals fall into three main classes:

- (1) *Voluntary dismissal*, by the plaintiff alone (infra, §283 et seq.) or by the consent of both parties (infra, §314).
- (2) *Involuntary dismissal* for some default or delay in the prosecution of the action. (See infra, §315 et seq.)
- (3) *Involuntary dismissal* for other reasons. (See infra, §474 et seq.)

A dismissal, which terminates the proceeding, is clearly distinguishable from an order that a cause go "off-calendar." (*Guardianship of Walters* (1951) 37 C.2d 239, 244, 231 P.2d 473; *Guardianship of Lyle* (1946) 77 C.A.2d 153, 155, 174 P.2d 906.) However, a *nonsuit* is a form of involuntary dismissal. (*Costa v. Regents of Univ. of Calif.* (1951) 103 C.A.2d 491, 493, 229 P.2d 867; see 7 *Cal. Proc.* (5th), *Trial*, §408.)

Because a voluntary dismissal may be partial, i.e., a dismissal of less than all parties or causes of action (infra, §§286, 287), the statutory procedure is not exclusive. The plaintiff may sometimes accomplish the same effects by filing an amended complaint. (*Butchart v. Moorhead* (1929) 101 C.A. 659, 282 P. 23; see *Kuperman v. Great Republic Life Ins. Co.* (1987) 195 C.A.3d 943, 947, 241 C.R. 187 [dismissal by failure to name one defendant in second amended complaint was without prejudice; that defendant was properly reinstated when named in third amended complaint]; 5 *Cal. Proc.* (5th), *Pleading*, §1187.)

SUPPLEMENT: [This section is current through the latest supplement]
See 24 *Am.Jur.2d* (2008 ed.), *Dismissal, Discontinuance, and Nonsuit* §1 et seq.



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X. DISMISSAL OF ACTION GENERALLY

B. Local Rules.

6 *Witkin Cal. Proc. PWT* § 281

[§ 281] Local Rules.

Each superior court is authorized to adopt local rules providing for dismissal of an action where those rules are not inconsistent with statutory provisions or with rules adopted by the Judicial Council. (See *C.C.P.* 575.1, 583.150.) In counties employing a master calendar, each case transferred to a trial department must either be tried, ordered off the calendar, or dismissed unless the judge, for good cause arising after commencement of trial, continues the case or reassigns it to the judge supervising the master calendar. (C.R.C., Rule 10.910(a).) Thus, in a county with a master calendar, the trial court may dismiss an action based on the plaintiff's unpreparedness and failure to proceed when called, particularly when the mandatory 5-year deadline for bringing the case to trial is near. (*Hurtado v. Western Med.Center* (1990) 222 C.A.3d 1198, 272 C.R.324.) Counties that are subject to Fast Track rules under the Trial Court Delay Reduction Act (*Govt.C.* 68600 et seq.) are further empowered to adopt local rules providing for dismissal as one of several available sanctions for failure to comply with the rules. (See *Govt.C.* 68608(b).) (On Trial Court Delay Reduction Act, see 2 *Cal. Proc.* (5th), *Courts*, §257 et seq.)

Dismissals in federal court are governed by *F.R. Civ. P.*, *Rule 41*. (See 9 *Federal Practice & Procedure* (Wright & Miller) §2361 et seq.; 27A *Federal Procedure*, L.Ed., §§62:527 et seq., 62:575 et seq.)

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X. DISMISSAL OF ACTION GENERALLY

C. Inherent Power of Court.

6 *Witkin Cal. Proc. PWT* § 282

[§ 282] Inherent Power of Court.

Independent of specific statutory grounds for dismissal (see *supra*, §280), the court possesses an underlying inherent discretionary power to dismiss claims. Thus, nothing in *C.C.P. 583.110* et seq. (governing dismissal for delay in prosecution) limits or affects "the authority of a court to dismiss an action or impose other sanctions ... under inherent authority of the court." (*C.C.P. 583.150*.) Also, *C.C.P. 581* (governing dismissal generally) "shall not be deemed to be an exclusive enumeration of the court's power to dismiss." (*C.C.P. 581(m)*.) (On court's inherent power, see *People v. Jefferds* (1899) 126 C. 296, 58 P. 704; *Romero v. Snyder* (1914) 167 C. 216, 138 P. 1002; *Gray v. Times-Mirror Co.* (1909) 11 C.A. 155, 160, 104 P. 481; *Oberkotter v. Spreckels* (1923) 64 C.A. 470, 473, 221 P. 698; *Massey v. Bank of America* (1976) 56 C.A.3d 29, 33, 128 C.R. 144; 465; 3 A.L.R.5th 237 [dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties].)

However, the trial court's inherent power to dismiss is circumscribed. There are two important inquiries to be made when determining whether a plaintiff's actions warrant a dismissal with prejudice. First, the court must discern whether the plaintiff's pattern of conduct was so severe and deliberate as to constitute extreme circumstances. Second, the court must look to see whether alternatives less severe than dismissal are available. The sound exercise of discretion requires the judge to consider and use lesser sanctions unless the court's authority "cannot possibly be otherwise vindicated." (*Lyons v. Wickhorst* (1986) 42 C.3d 911, 917, 231 C.R. 738, 727 P.2d 1019, citing the text.)

In *Craghill v. Ford* (1932) 127 C.A. 661, 16 P.2d 343, it appeared during the trial that plaintiff's bill of particulars was insufficient, and the court gave him a 30-day continuance to file an amplified bill. He neglected to do so and over a year later defendant moved to dismiss. *Held*, dismissal was proper for plaintiff's failure to expedite the trial. (127 C.A. 667.)

In *Cohn v. Rosenberg* (1943) 62 C.A.2d 140, 144 P.2d 399, a case was tried and submitted for decision, but later an order was made setting aside the submission for further proceedings. Some 3 1/2 years later, the trial judge retired, shortly thereafter plaintiff's attorney became a member of the bench, and about 3 years later, new counsel moved to reset the case for trial. *Held*, dismissal was properly ordered. Even if some excuse might be offered for the delay during the first period, the judge's retirement automatically set the case at large for a new trial, and the 3 years of delay in obtaining new counsel and bringing the case to trial could not be justified. (62 C.A.2d 143.)

In *Karras v. Western Title Ins. Co.* (1969) 270 C.A.2d 753, 76 C.R. 141, citing the text, plaintiffs sued in 1950, and defendant had judgment. This was reversed in 1953, and plaintiffs brought the case to retrial in 1956. When the trial was nearly completed, plaintiffs objected to certain proffered evidence and the judge called for authorities. Nothing further was done. Defendant's counsel died in 1960 and plaintiffs' counsel died in 1962. In 1963, plaintiffs, by new attorneys, noticed a motion to resume trial. Defendant moved to dismiss, showing these facts and also that the court reporter had died and his notes were not available, and that a witness could not be located. *Held*, dismissal was not an abuse of discretion. (270 C.A.2d 757.)

In *Pearlson v. Does 1 to 646* (1999) 76 C.A.4th 1005, 90 C.R.2d 787, plaintiff, in pro. per., sued Does 1 to 646 for numerous acts of trespass and invasion of privacy allegedly occurring in commercial and public locations in various counties beginning in 1987. There were no named defendants, and plaintiff sought discovery to learn the identities of defendants. The trial court denied the request for lack of good cause, and after granting plaintiff more time to prepare, dismissed the complaint for lack of prosecution and failure to timely serve the parties. *Held*, affirmed. Even though the 2-year period for service of summons had not yet run and plaintiff still had time to amend and add Doe defendants, the trial court properly exercised its inherent power under C.C.P. 583.150 to dismiss because defendant failed to demonstrate that he had a significant chance of determining the identity of a viable defendant. (76 C.A.4th 1009.)

In *Stephen Slesinger v. Walt Disney Co.* (2007) 155 C.A.4th 736, 66 C.R.3d 268, to assist in prosecuting an action for breach of contract, fraud, and declaratory relief, plaintiff hired an investigator to surreptitiously obtain privileged and confidential documents belonging to defendant. The investigator took thousands of pages belonging to defendant by breaking into a number of defendant's offices and secure trash receptacles, and by trespassing onto a secure facility of a company defendant used to destroy defendant's confidential documents. After learning of the activity, defendant brought a terminating sanction motion. After a full evidentiary hearing, the trial court concluded that no lesser sanction could protect defendant against plaintiff's use of illicitly obtained information and dismissed the action with prejudice. *Held*, the terminating sanction was proper. The trial court's inherent power to terminate litigation is not confined to cases involving plaintiff's delay in prosecuting the action or to sham or fictitious claims. "When a plaintiff's deliberate and egregious misconduct in the course of the litigation renders any sanction short of dismissal inadequate to protect the fairness of the trial, California courts necessarily have the power to preserve their integrity by dismissing the action." (155 C.A.4th 762.) Moreover, the exercise of the power need not be preceded by violation of a court order. (155 C.A.4th 763.)

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XI. VOLUNTARY DISMISSAL

A. Before Commencement of Trial.

1. Plaintiff's Right To Dismiss.

a. Complete Dismissal.

1. In General.

6 *Witkin Cal. Proc. PWT* § 283

[§ 283] In General.

The plaintiff may dismiss an action with or without prejudice by "written request ... to the clerk, filed with the papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any." (*C.C.P. 581(b)(1)*.) (See *C.E.B.*, 2 Civil Proc. Before Trial 4th, §39.95 et seq.; *C.E.B.*, 1 Civil Proc. During Trial 3d, §6.79 et seq.; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §15.3 et seq.; Rutter Group, 3 Civil Proc. Before Trial §11:1 et seq.; *Cal. Civil Practice*, 3 Procedure, §22:1 et seq.; 34 *A.L.R.4th* 778 [construction of state statutes and rules concerning voluntary dismissal].)

Subject to a few exceptions (*infra*, §288 et seq.) and to the condition of timeliness (*infra*, §293 et seq.), the plaintiff has an *absolute right* to dismiss an action or special proceeding by following the procedure of *C.C.P. 581*, and neither the clerk nor the court has any discretion in the matter. (*Kaufman v. Superior Court* (1896) 115 C. 152, 155, 46 P. 904 [statute is applicable to action in interpleader "as well as to other forms and causes of action"]; *Los Angeles Gas & Elec. Corp. v. Superior Court* (1921) 53 C.A. 701, 704, 200 P. 811 [dismissal by plaintiff in one of two consolidated actions]; *Estate of Cook* (1928) 205 C. 581, 588, 271 P. 1083 [probate proceedings]; *Cook v. Stewart McKee & Co.* (1945) 68 C.A.2d 758, 761, 157 P.2d 868; *Wilson v. Los Angeles County Civil Service Com.* (1954) 126 C.A.2d 679, 683, 273 P.2d 34; *Eddings v. White* (1964) 229 C.A.2d 579, 583, 40 C.R. 453, 2 Cal. Proc. (5th), *Jurisdiction*, §326; *Malick v. American Savings & Loan Assn.* (1969) 273 C.A.2d 171, 175, 79 C.R. 499; *Egly v. Superior Court* (1970) 6 C.A.3d 476, 479, 86 C.R. 18, citing the text; *Roski v. Superior Court* (1971) 17 C.A.3d 841, 845, 95 C.R. 312; see *Conservatorship of Martha P.* (2004) 117 C.A.4th 857, 866, 12 C.R.3d 142, *infra*, §289 [public conservator is "plaintiff" for purposes of Lanterman-Petris-Short Act proceeding (*Welf.C. 5000* et seq.; 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.), and may utilize *C.C.P. 581(b)(1)* to voluntarily dismiss petition to reestablish conservatorship]; 16 *A.L.R.3d* 283 [divorce or annulment].)

In *Simpson v. Superior Court* (1945) 68 C.A.2d 821, 158 P.2d 46, plaintiff filed dismissals and tendered costs in compliance with the statute, but the trial court, on defendant's motion, attempted to set them aside. A writ of prohibition was granted to prevent this act in excess of the lower court's jurisdiction. "The privilege of dismissing an action as provided by section 581 is designed to afford to the plaintiff a certain freedom of action within the limits prescribed that

cannot be circumscribed indirectly. Any attempt to wrest such control in any manner except as provided and clearly intended by its provisions, is ineffective for all purposes." (68 C.A.2d 825.)

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

In *321 Henderson Receivables Origination LLC v. Tomahawk* (2009) 172 C.A.4th 290, 91 C.R.3d 232, H was a "factoring company," i.e., a company that pays successful tort litigants a lump sum for a structured settlement annuity, and thus becomes a transferee. The practice is governed by the Structured Settlement Transfer Act (SSTA), and requires court approval based on a petition filed by the transferee. H, on learning that a number of its petitions were going to be denied, including the present one, requested dismissal without prejudice. The trial court denied the request, concluding that H was not a "plaintiff" for purposes of C.C.P. 581. *Held*, order denying dismissal reversed and case remanded to enter dismissal without prejudice.

(a) C.C.P. 581 does not clearly define "plaintiff." However, under C.C.P. 1063 a party prosecuting a special proceeding may be known as the plaintiff. This creates "an inference that the party prosecuting a special proceeding is a plaintiff that may request dismissal" under C.C.P. 581. (172 C.A.4th 301.)

(b) A hearing on an SSTA petition is a special proceeding. Under the SSTA and the Insurance Code, a petition for the transfer of structured settlement payment rights must be made by the transferee. "Thus, the transferee is the person to whom the right to prosecute the matter is given by statute, and the transferee, therefore, is the plaintiff for the purposes of seeking dismissal of a SSTA petition." (172 C.A.4th 302.) (See *321 Henderson Receivables Origination LLC v. Ramos* (2009) 172 C.A. 4th 305, 314, 91 C.R.3d 222 [similar issue; companion case to *Tomahawk*]; on denial of request for voluntary dismissal of petition after SSTA proceeding has begun, see Supp., *infra*, §311.)



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XI. VOLUNTARY DISMISSAL

A. Before Commencement of Trial.

1. Plaintiff's Right To Dismiss.
 - a. Complete Dismissal.
2. Effect of Fast Track Rules.

6 *Witkin Cal. Proc. PWT* § 284

[§ 284] Effect of Fast Track Rules.

A plaintiff's right to voluntarily dismiss an action before trial without prejudice (i.e., without res judicata effect) is not impaired by local "fast track" rules regulating the progress of the case. In *Harris v. Billings* (1993) 16 C.A.4th 1396, 20 C.R.2d 718, plaintiff's action involving rights in a parcel of property was assigned to the trial court's fast track program. In order to continue settlement negotiations, the parties agreed to plaintiff's voluntary dismissal of the action without prejudice, which was duly entered by the clerk. When the parties failed to appear at a status conference, the trial court, on its own motion and without notice, vacated the dismissal without prejudice and ordered the case dismissed with prejudice under C.C.P. 575.2 (dismissal sanction for violation of local rule; see 7 Cal. Proc. (5th), Trial, §60). The trial court deemed the voluntary dismissal an attempt to obtain a stay or continuance in contravention of the purpose and rules of the delay reduction program. *Held*, reversed; there is "no discord between the delay reduction program and a plaintiff's statutory right to dismiss her action, with or without prejudice." (16 C.A.4th 1403.)

(a) A plaintiff's right to voluntarily dismiss an action before the commencement of trial is not absolute. C.C.P. 581 recognizes some exceptions, and others, developed by the courts through the construction of the term "commencement of trial," generally arise where the action has proceeded to a determinative adjudication or a decision that is tantamount to an adjudication (*infra*, §295 et seq.). (16 C.A.4th 1402.) However, none of these exceptions applies to this case. (16 C.A.4th 1403.)

(b) Exercise of a plaintiff's statutory right to voluntarily dismiss an action is consistent with the mission of the delay reduction program, which is concerned with management of cases currently in the court system, not those the parties wish to remove from the system. Dismissal constitutes a final disposition of the action without delay, removing it from the court's inventory and allowing other cases to move ahead. (16 C.A.4th 1404.)

(c) The trial judge apparently did not learn of the voluntary dismissal before the date of the status conference. "While it would have been better practice for counsel to have informed the judge's clerk of the dismissal before that date, the failure to extend that courtesy cannot have the effect of nullifying the dismissal." (16 C.A.4th 1406, footnote 2.)

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A. Before Commencement of Trial.

1. Plaintiff's Right To Dismiss.

a. Complete Dismissal.

3. Federal Practice.

6 *Witkin Cal. Proc. PWT* § 285

[§ 285] Federal Practice.

Under federal practice, an action may generally be dismissed by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. (*F.R. Civ. Proc., Rule 41(a)(1)*; see 9 Federal Practice & Procedure (Wright & Miller) §2362 et seq.; Federal Procedure, L.Ed., §62:477 et seq.)

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A. Before Commencement of Trial.

1. Plaintiff's Right To Dismiss.

b. Partial Dismissal.

1. Fewer Than All Defendants.

6 *Witkin Cal. Proc. PWT* § 286

[§ 286] Fewer Than All Defendants.

"A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial." (*C.C.P. 581(c)*.) (See *Rogers v. Transamerica Corp.* (1935) 6 C.A.2d 340, 44 P.2d 635 [dismissal against defendants who had given notice of motion for change of venue]; *Lori, Ltd. v. Wolfe* (1948) 85 C.A.2d 54, 61, 192 P.2d 112; *Eddings v. White* (1964) 229 C.A.2d 579, 40 C.R. 453, 2 Cal. Proc. (5th), *Jurisdiction*, §326; *Sanabria v. Embrey* (2001) 92 C.A.4th 422, 425, 111 C.R.2d 837 [under *C.C.P. 581(c)*, plaintiff may unilaterally dismiss complaint before trial regardless of pending complaint-in-intervention and cross-complaint]; but see *Townsend v. Driver* (1907) 5 C.A. 581, 90 P. 1071 [plaintiff cannot dismiss *against intervenors* while proceeding to judgment against other defendants]; *infra*, §290.)

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A. Before Commencement of Trial.

1. Plaintiff's Right To Dismiss.
 - b. Partial Dismissal.
2. Fewer Than All Causes.

6 *Witkin Cal. Proc. PWT* § 287

[§ 287] Fewer Than All Causes.

"A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, ... with or without prejudice prior to the actual commencement of trial." (*C.C.P. 581(c)*.)

In *Steele v. Litton Industries* (1968) 260 C.A.2d 157, 68 C.R. 680, plaintiff sued defendants on (a) legal counts for damages based on fraud and breach of contract, and (b) equitable counts seeking specific performance, constructive trust, and declaratory relief. Trial on the legal counts resulted in a verdict for plaintiff for over \$ 5 million, and the judge then made a "decision" (without signing findings) that plaintiff was not entitled to equitable relief. To save his verdict, plaintiff filed a document electing his alternative remedy of damages and dismissing his counts for equitable relief with prejudice. The clerk entered the dismissal, and defendants moved to set it aside or to order a dismissal as to all counts. *Held*, denial of the motion was proper. "The plaintiff here dismissed the counts wherein he sought equitable relief. These were alternative remedies. The dismissal of these alternative remedies did not constitute a dismissal of plaintiff's entire cause of action. We believe the intent of the Legislature in amending section 581 ... was to prevent a plaintiff from dismissing as of right without prejudice after actual commencement of the trial. ... It is our further opinion that the Legislature in using the words 'action' and 'cause of action' in section 581 ... intended such words to include a count or counts in a single pleading wherein alternative remedies are sought." (260 C.A.2d 172, citing the text.)

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A. Before Commencement of Trial.

2. Limitations on Right.

a. Cross-Complaint Filed.

1. In General.

6 *Witkin Cal. Proc. PWT* § 288

[§ 288] In General.

(1) *Former Law on Affirmative Relief Sought by Defendant.* *C.C.P. 581* formerly limited the right to dismiss by the proviso "that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or *answer* of the defendant." Accordingly, where the defendant sought affirmative relief by any of these three forms of pleading, the plaintiff could not dismiss without prejudice. (See *Acock v. Halsey* (1891) 90 C. 215, 219, 27 P. 193; *Islais & Salinas Water Co. v. Allen* (1901) 132 C. 432, 434, 64 P. 713; *Swanson v. Siem* (1936) 7 C.2d 267, 268, 60 P.2d 281; *Montgomery v. Neilon* (1919) 41 C.A. 184, 191, 182 P. 456; *Hough v. Wright* (1932) 127 C.A. 689, 691, 16 P.2d 301; *Aten v. Aten* (1945) 69 C.A.2d 589, 159 P.2d 672; *In re Mercantile Guaranty Co.* (1968) 263 C.A.2d 346, 350, 69 C.R. 361.)

(2) *Current Statute.* Abolition of the counterclaim and substitution of the cross-complaint as the sole method of seeking affirmative relief (see 5 *Cal. Proc.* (5th), *Pleading*, §1158) made the decisions on counterclaim and affirmative relief sought by answer obsolete. The statute was accordingly amended to delete references to counterclaim and answer, and the exception now precludes dismissal without prejudice "where affirmative relief has been sought by the cross-complaint of a defendant." (*C.C.P. 581(i)*; cf. *F.R. Civ. P., Rule 41(a)(2)* [action may not be dismissed against objection of defendant who has pleaded counterclaim prior to service on defendant of plaintiff's motion to dismiss unless counterclaim can remain pending for independent adjudication by court].) (See *Sanabria v. Embrey* (2001) 92 C.A.4th 422, 425, 111 C.R.2d 837 [under *C.C.P. 581(i)* plaintiff may not unilaterally dismiss entire action if cross-complaint or complaint-in-intervention is pending, but under *C.C.P. 581(c)* plaintiff may unilaterally dismiss *complaint* before trial regardless of other pending pleadings].)

(3) *Multiple Defendants.* Where a cross-complaint has been filed by only one of several defendants, the plaintiff is not precluded from dismissing as to those defendants who are not parties to the cross-complaint. (*Lori, Ltd. v. Wolfe* (1948) 85 C.A.2d 54, 60, 192 P.2d 112.)

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2. Limitations on Right.

a. Cross-Complaint Filed.

2. Form of Affirmative Relief Sought.

6 *Witkin Cal. Proc. PWT* § 289

[§ 289] Form of Affirmative Relief Sought.

As used in *C.C.P. 581(i)* (supra, §288), "affirmative relief" means "the allegation of new matter which in effect amounts to a counterattack. In other words, the relief sought, if granted, operates not as a defense but, affirmatively and positively to defeat plaintiff's cause of action." (*Simpson v. Superior Court* (1945) 68 C.A.2d 821, 825, 158 P.2d 46.)

Aetna Cas. & Surety Co. v. Humboldt Loaders (1988) 202 C.A.3d 921, 249 C.R. 175, involved the right to dismiss an action for declaratory relief where a defendant's answer seeks a declaration in defendant's favor. Aetna issued a comprehensive general liability policy to Humboldt. A fire destroyed a building owned by Anderson, and Anderson sued Humboldt for damages allegedly caused by Humboldt's negligence in conducting welding operations in the building. Aetna then filed a complaint for declaratory relief against Humboldt and Anderson, seeking a declaration that it was not obligated to defend or indemnify Humboldt. Humboldt answered seeking a judgment that Aetna be required to defend and pay damages, and Anderson answered with a prayer for a declaration that the Aetna policy covered the Anderson action. At a settlement conference in the Anderson action, it was revealed that Anderson and Humboldt had stipulated that Anderson's recovery would be limited to the Aetna policy coverage. The settlement judge then on his own motion consolidated the coverage and damage actions, and set a trial date without giving Aetna the customary notice or time to complete discovery. Aetna then attempted to dismiss the declaratory relief action without prejudice. The judge refused to allow the request to be filed, on the ground that the answers sought affirmative relief. At the trial, judgment was entered in favor of defendants. *Held*, reversed.

(a) The plaintiff's right to dismiss where no affirmative relief is sought is absolute. (202 C.A.3d 926, quoting the text.) Under the revised statute, affirmative relief can only be sought by cross-complaint; under the former law, it could be sought by answer. However, even under the old law, an allegation in the defendant's answer that merely "parrots the plaintiff's prayer for a declaration of rights and liabilities" did not amount to a claim for affirmative relief. (202 C.A.3d 928.)

(b) Because the right to dismiss on request is absolute, the trial court was without jurisdiction to proceed in the action, and the plaintiff's right was not lost by the failure of the clerk to perform his plain duty. (202 C.A.3d 931, citing

the text.)

On the other hand, the designated name of the pleading is not determinative. *In re Marriage of Tamraz* (1994) 24 C.A.4th 1740, 30 C.R.2d 233, presented a situation in which the exception was applied to prevent a voluntary dismissal even though no cross-complaint had been filed. Husband filed a dissolution proceeding in which the parties reached a marital settlement agreement. Husband, an attorney, never prepared the stipulation for default and the judgment contemplated by the agreement. Thirteen years later, Wife filed for dissolution and moved for entry of judgment nunc pro tunc on the settlement agreement in the prior proceeding, or in the alternative for a judgment in the present proceeding incorporating the agreement. Husband, who opposed the entry of a judgment based on the agreement, obtained a voluntary dismissal of his proceeding from the clerk. The trial judge consolidated the two proceedings, and granted the motion for entry of judgment nunc pro tunc. *Held*, affirmed; Husband's attempted dismissal was ineffective.

(a) There is no such thing as a cross-complaint in a dissolution proceeding, but former C.R.C., Rule 1206 (now C.R.C., Rule 5.21) specifies that provisions of law apply regardless of nomenclature if they would otherwise apply under the Family Law Rules. Hence, when a response seeking affirmative relief has been filed, the petitioner is barred from requesting a dismissal without the respondent's consent. (24 C.A.4th 1747.)

(b) The sine qua non of preventing voluntary dismissal is the opposing party's claim for affirmative relief, regardless of the form that claim may take. In this case, Wife did not file a responsive pleading in Husband's proceeding, but she did respond by moving for entry of judgment based on the settlement agreement. This motion plainly requested affirmative relief different from what Husband was seeking, so Husband could not unilaterally dismiss his proceeding. (24 C.A.4th 1747, 1748.)

In *Conservatorship of Martha P.* (2004) 117 C.A.4th 857, 12 C.R.3d 142, the public conservator filed a petition to reestablish M's conservatorship under the Lanterman-Petris-Short Act (Welf.C. 5000 et seq.; 3 Cal. Proc. (5th), Actions, §80 et seq.). While the matter was continued, M's common law husband, C, filed a petition requesting that he be substituted as conservator. Subsequently, the public conservator requested dismissal of the reestablishment petition under C.C.P. 581(b)(1), and after protracted proceedings the trial court granted the petition, holding that the public conservator could properly utilize C.C.P. 581(b)(1). Relying on C.C.P. 581(i) and *Guardianship of Lyle* (1946) 77 C.A.2d 153, 174 P.2d 906, *infra*, §292, M argued that C's petition essentially sought affirmative relief, thus barring the trial court from dismissing the reestablishment petition. *Held*, dismissal affirmed. C's petition did not present new matter attacking the reestablishment of the conservatorship, but merely sought a conservatorship with a different conservator. In addition, only the public conservator, not C, had standing to file a petition in the proceeding and request a different conservator. "Thus, unlike the situation in *Lyle*, where two petitions were found to be properly filed and both asked for affirmative relief, here there was only one proper petition before the court." (117 C.A.4th 870.)

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

See *Schwartz v. Schwartz* (2008) 167 C.A.4th 733, 743, 84 C.R.3d 387 [trustee's petition to invoke trust's no contest provision in response to beneficiary's petition to order distribution of assets constituted affirmative relief under C.C.P. 581(i), and court properly exercised jurisdiction over beneficiary's petition even though beneficiary sought to withdraw it].



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2. Limitations on Right.

b. Complaint in Intervention Filed.

6 *Witkin Cal. Proc. PWT* § 290

[§ 290] Complaint in Intervention Filed.

A complaint in intervention that seeks affirmative relief against either the plaintiff or a third party has the same effect as a cross-complaint under *C.C.P. 581(i)* (supra, §§288, 289) and may not be dismissed without the consent of the intervenor. (*Bogardus v. Santa Ana Walnut Growers Assn. (1940) 41 C.A.2d 939, 951, 108 P.2d 52; Roski v. Superior Court (1971) 17 C.A.3d 841, 845, 95 C.R. 312.*) However, until leave to intervene is granted (see *O'Dell v. Freightliner Corp. (1992) 10 C.A.4th 645, 658, 12 C.R.2d 774*) and a pleading in intervention is filed (see *Klinghoffer v. Barasch (1970) 4 C.A.3d 258, 260, 84 C.R. 350*), the plaintiff may freely dismiss the complaint.

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2. Limitations on Right.

c. Motion To Change Venue Pending.

6 *Witkin Cal. Proc. PWT* § 291

[§ 291] Motion To Change Venue Pending.

An action may not be dismissed without prejudice if there is a motion pending for transfer of the action to another court under *C.C.P. 396b* (motion for change of venue where action commenced in the wrong court; see 3 *Cal. Proc.* (5th), *Actions*, §922 et seq.). (*C.C.P. 581(i).*)

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2. Limitations on Right.

d. Plaintiff Not Sole Party in Interest.

6 *Witkin Cal. Proc. PWT* § 292

[§ 292] Plaintiff Not Sole Party in Interest.

In addition to the express provision governing affirmative relief or transfer (see *C.C.P. 581(i)*, supra, §288 et seq.), the courts have recognized other necessary limitations on the supposed absolute right to dismiss. The underlying principle is that, in some actions or proceedings, the plaintiff or petitioner is not the sole party in interest on plaintiff's side and, though the plaintiff has instituted the proceeding, is not entitled to terminate it.

(1) *Probate of Will*. In *Estate of Raymond* (1940) 38 C.A.2d 305, 100 P.2d 1085, opposition was filed to a petition for probate of a lost will. *Held*, petitioner could not dismiss. The court, after pointing out the reasons of policy that prevented withdrawal of the proceeding (interests of other parties and the state), expressed the result in terms of jurisdiction, as follows: "When anyone files a petition for the probate of an alleged will he institutes a proceeding *in rem* and the court thereupon becomes vested with jurisdiction to determine whether the proposed will has been properly executed and, if it be found valid, to settle the affairs of the estate in accordance with its provisions. Neither the proponent of a will nor a party filing a contest to the petition for probate can divest the court of its jurisdiction to settle the issues presented by the petition." (38 C.A.2d 308.) (See *Voyce v. Superior Court* (1942) 20 C.2d 479, 487, 127 P.2d 536.)

(2) *Custody or Guardianship*. In *Ford v. Superior Court* (1959) 171 C.A.2d 228, 340 P.2d 296, petitioner brought an action in Los Angeles against his former wife to obtain exclusive custody of his child. This was contrary to the terms of a Nevada decree awarding custody to the wife, but pursuant to her later agreement waiving custody. She filed a demurrer, a motion to strike, and a motion for an order for fees and costs to defend. The husband then took the child out of the state, and filed a request for dismissal of the action. The wife moved to vacate the dismissal, the motion was granted, and the wife then filed an answer and cross-complaint based on the Nevada decree and seeking custody. The husband sought prohibition. *Held*, writ denied. The action brought the child under the protection of the court, and the husband was in the same position as a guardian ad litem without power to dismiss except by consent of the court. (171 C.A.2d 231.) (See *Guardianship of Lyle* (1946) 77 C.A.2d 153, 157, 174 P.2d 906 [one of two petitioners for guardianship of alleged incompetent was not entitled to stop proceeding by dismissing his petition; citing *Estate of Raymond* as additional ground for holding].)

(3) *Indispensable Party Defendant*. In *Wilson v. Frakes* (1960) 178 C.A.2d 580, 3 C.R. 434, the court, in a strong dictum, declared that, where the plaintiff fails to join an indispensable party, and the trial judge at the instance of that person orders him joined, the plaintiff cannot thwart the order by voluntary dismissal. "If the right of the plaintiff to dismiss may prevail over the duty of the court to order that an indispensable party be brought in, then a persistent plaintiff would eventually have his way and the court would have to give way, a conclusion that is so unthinkable that it must be rejected." (178 C.A.2d 584.)

(4) *Class Action*. A class action may not be dismissed "unless and until notice that the court deems adequate has been given and the court orders the dismissal." (C.C.P. 581(k); see, C.R.C., Rule 3.770 [dismissal of class actions]; on required court approval under prior law, see *Marcarelli v. Cabell* (1976) 58 C.A.3d 51, 55, 129 C.R. 509, 4 Cal. Proc. (5th), *Pleading*, §328, citing and discussing the text; *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 C.A.3d 573, 578, 165 C.R. 1, citing the text [although court approval is required, trial judge should have given it to protect class].) Also, a class action under the Consumers Legal Remedies Act (see C.C. 1750 et seq., 4 Cal. Proc. (5th), *Pleading*, §302) cannot be dismissed, settled, or compromised without approval of the court, and notice of the proposed dismissal, etc., must be given to members of the class as the court directs. (C.C. 1781(f).)

(5) *Shareholders' Derivative Suit*. The plaintiff in a shareholders' derivative suit cannot dismiss as to the corporation without the consent of the trial court. (*Spellacy v. Superior Court* (1937) 23 C.A.2d 142, 146, 72 P.2d 262 [additional ground of decision]; *Ensher v. Ensher, Alexander & Barsoom* (1960) 187 C.A.2d 407, 410, 9 C.R. 732.)

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A. Before Commencement of Trial.

3. Time of Request.

a. Statutory Rule.

1. In General.

6 *Witkin Cal. Proc. PWT* § 293

[§ 293] In General.

(1) *Former Rule: Before Submission.* Former C.C.P. 581 authorized dismissal "at any time before the trial." It was early decided by cases construing the same language in the Practice Act that this codified the common law rule allowing dismissal during the trial, before submission of the case. (See *Westbay v. Gray* (1897) 116 C. 660, 667, 48 P. 800; *Goldtree v. Spreckels* (1902) 135 C. 666, 668, 67 P. 1091; *MacDermot v. Grant* (1919) 181 C. 332, 334, 184 P. 396; *Strupelle v. Strupelle* (1922) 59 C.A. 526, 529, 211 P. 248; *Provencher v. Los Angeles* (1935) 10 C.A.2d 730, 732, 52 P.2d 983; *King v. Superior Court* (1936) 12 C.A.2d 501, 506, 56 P.2d 268.)

The foregoing rule led to the grave abuse thus described in the dissenting opinion in *Casner v. Daily News Co.* (1940) 16 C.2d 410, 421, 106 P.2d 201: "If the proposition were baldly stated that a plaintiff may bring a cause to trial, and go through the entire presentation of the case for both sides, and then, suspecting or learning of a probably adverse decision, may with impunity dismiss the suit and commence all over again, it would cause the greatest astonishment among the bench and the bar. The gross injustice to the defendant in such a situation is obvious: he is amenable to an adverse judgment, but a judgment in his favor may be snatched away from him by alert counsel for his opponent after all the effort and expense of a trial. But the injustice to the defendant is not the greatest evil of such a practice; the wasting of the time and money of the people in a fruitless proceeding in the courts is something far more serious."

Despite this unanswerable criticism, the practice of dismissal after learning of an impending adverse decision was tolerated until the legislative changes in 1947. (See *Casner v. Daily News Co.*, *supra*, 16 C.2d 421 [dismissal after judge in chambers said that he would grant defendant's motion for directed verdict]; *Jalof v. Robbins* (1941) 19 C.2d 233, 120 P.2d 19 [dismissal after both parties rested and judge stated his intentions as to judgment, but continued trial to have additional party defendant brought in]; *Allen v. Policy Holders Life Ins. Assn.* (1933) 129 C.A. 734, 19 P.2d 253 [dismissal after argument on defendant's motion for judgment on pleadings and for nonsuit]; *King v. Superior Court*, *supra*, 12 C.A.2d 506 [judge announced decision for defendant, plaintiffs had case reopened for further evidence and dismissed after calling one witness]; *Reynolds v. Vidor* (1941) 45 C.A.2d 685, 114 P.2d 617 [dismissal after reopening for argument on one issue]; 30 *Cal. L. Rev.* 76.)

(2) *Present Rule: Before Commencement.* C.C.P. 581 now reads "at any time before the actual commencement of trial." (C.C.P. 581(b)(1).) A further provision specifies the steps that constitute "actual commencement." (See *infra*, §295.) (On right to dismiss after defendant's motion for summary judgment or judgment on the pleadings, see *infra*, §294.) A dismissal by the plaintiff thereafter can only be made *with prejudice*, unless by consent of all affected parties or by order of court on a showing of good cause. (C.C.P. 581(e), *infra*, §313; see *Carvel v. Arents* (1954) 126 C.A.2d 776, 778, 272 P.2d 858; *Steele v. Litton Industries* (1968) 260 C.A.2d 157, 171, 68 C.R. 680, *supra*, §287 [citing the text].)

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

(2) *Present Rule: Before Commencement.* In *Cardiff Equities v. Superior Court* (2008) 166 C.A.4th 1541, 83 C.R.3d 699, the trial court granted defendant's motion to compel arbitration and ordered trial proceedings stayed. Prior to commencement of arbitration, the trial court granted plaintiff's request to dismiss without prejudice. *Held*, dismissal was proper.

(a) Defendant's reliance on *Blake v. Ecker* (2001) 93 C.A.4th 728, 113 C.R.2d 422, text, §§520, 528, is misplaced. *Blake* held that, because arbitration had been ordered and the trial proceedings had been stayed, the trial court was without jurisdiction to consider defendant's motion to dismiss the action for plaintiff's failure to prosecute, and that the motion should have been brought in arbitration. However, despite broad language suggesting otherwise, *Blake* does not support the notion that a *plaintiff* may not voluntarily dismiss an action once the case is ordered to arbitration and trial proceedings are stayed. To so construe *Blake* under the circumstances here would require plaintiff to open arbitration proceedings and pay all associated fees merely to seek dismissal of the case. "Moreover, construing *Blake* to preclude a plaintiff from voluntarily dismissing a case ordered to arbitration before the arbitration has commenced would be at odds with the right of plaintiff to dismiss a case voluntarily and without prejudice" under C.C.P. 581(b)(1) and (c). (166 C.A.4th 1549.)

(b) Even if arbitration is considered a "trial" within the meaning of C.C.P. 581, no trial had commenced and no dispositive motion had been ruled on prior to plaintiff's voluntary dismissal of the action. Thus, plaintiff had an absolute right to dismiss the case after the trial court granted defendant's motion to compel arbitration. (166 C.A.4th 1550.)



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3. Time of Request.

a. Statutory Rule.

2. Right To Dismiss After Motion For Summary Judgment.

6 *Witkin Cal. Proc. PWT* § 294

[§ 294] Right To Dismiss After Motion For Summary Judgment.

Whether a trial judge has the power to grant summary judgment after a request for dismissal without prejudice has been filed and entered was addressed in *Cravens v. State Bd. of Equalization* (1997) 52 C.A.4th 253, 60 C.R.2d 436. Defendants moved for summary judgment and reserved a hearing date. Rather than file an opposition, plaintiff requested dismissal without prejudice under C.C.P. 581(c) 1 day before the scheduled hearing, and the clerk entered the dismissal. Having no notice of the dismissal, the defendants appeared for the hearing and were granted summary judgment. *Held*, summary judgment affirmed. A plaintiff's right under C.C.P. 581 is not absolute where the action has proceeded to a determinative adjudication, or to a decision that is tantamount to an adjudication. (52 C.A.4th 256, 257, discussing *Mary Morgan v. Melzark* (1996) 49 C.A.4th 765, 57 C.R.2d 4, *infra*, §302.) Here, plaintiff failed to file an opposition after defendant's moving papers met the burden of negating plaintiff's claims. Under C.C.P. 437c(b) (*supra*, §217), failure to timely file an opposition may constitute sufficient ground for the trial judge to grant summary judgment. Thus, once defendants met their burden of negating plaintiff's claims, and plaintiff failed to file an opposition, entry of summary judgment for defendants "became a formality" that plaintiff could not avoid by filing a last minute request for dismissal without prejudice. (52 C.A.4th 257.) (See *Miller v. Marina Mercy Hosp.* (1984) 157 C.A.3d 765, 204 C.R. 62, *infra*, §298.)

However, in *Mossanen v. Monfared* (2000) 77 C.A.4th 1402, 92 C.R.2d 459, plaintiff brought a medical malpractice action on behalf of her minor child as his guardian ad litem and also in her individual capacity. The trial court later granted plaintiff counsel's motion to withdraw. While plaintiffs were attempting to retain new counsel, defendants moved for summary judgment. Unable to obtain new counsel, plaintiffs filed a dismissal without prejudice. Then the trial court granted defendants' motion to vacate the dismissal, granted the motion for summary judgment, and entered judgment for defendants. *Held*, reversed. *Cravens* is distinguishable. Here, without counsel, the minor's guardian ad litem was powerless to oppose the motion for summary judgment. "[N]either the common law nor guardianship statutes sanction an exception to the State Bar Act prohibition against the unauthorized practice of law in favor of guardians acting for their wards. The plaintiff in *Cravens* suffered from no such disability." (77 C.A.4th 1409.) Once plaintiffs' counsel was permitted to withdraw, the minor was left with no means to resist the motion for summary

judgment. The only fair remedy was to allow the dismissal to remain in effect. (77 C.A.4th 1410.)

Similarly, in *Zapanta v. Universal Care* (2003) 107 C.A.4th 1167, 132 C.R.2d 842, plaintiffs filed a request for dismissal without prejudice 1 day before their opposition to defendants' motion for summary judgment was due. The clerk entered the dismissal the same day. On defendants' request, the clerk placed the summary judgment motion back on calendar and both parties appeared at the hearing. The court granted defendants' summary judgment motion. *Held*, reversed.

(a) *Cravens* is distinguishable. Here, plaintiffs did not fail to file an opposition to defendant's motion for summary judgment, but filed the request for dismissal prior to their deadline for filing the opposition, albeit by only 1 day. Thus, unlike *Cravens*, judgment on the motion was not a mere formality. (107 C.A.4th 1172.)

(b) *Groth Bros. Oldsmobile v. Gallagher* (2002) 97 C.A.4th 60, 118 C.R.2d 405, *infra*, §300, and *Mary Morgan, supra*, involved a plaintiff's request for dismissal in the face of tentative rulings favoring defendants and are also distinguishable. Here, there was no tentative ruling at the time plaintiffs filed their request for dismissal. Nor was there manipulation by plaintiffs of the judicial process as noted in *Mary Morgan* (delaying court ruling on defense motion to "sneak in" voluntary dismissal). (107 C.A.4th 1172.) Plaintiffs' request was valid, and the trial court exceeded its jurisdiction in granting defendants' motion for summary judgment. (107 C.A.4th 1173.)

In *Tire Distributors v. Cobrae* (2005) 132 C.A.4th 538, 33 C.R.3d 761, plaintiff and defendant D entered into a settlement agreement that plaintiff believed included G, codefendant and father of D. When D reneged and D and G filed motions for summary judgment, plaintiff moved to enforce the agreement. Plaintiff's supporting declaration stated that the agreement was intended to resolve the lawsuit. In order to obtain the ruling before the hearing on the summary judgment motions, plaintiff requested that the hearing date be advanced and argued that enforcement would resolve the litigation with D and leave plaintiff free to dismiss G and proceed merely to enforce the agreement. Plaintiff did not file a separate opposition to G's summary judgment motion, but in opposition to D's motion plaintiff argued that he had settled as to both defendants, that by filing motions for summary judgment the defendants had breached the agreement, and that filing substantive oppositions would be unnecessarily costly. Although the trial court concluded that the agreement was unenforceable, the Court of Appeal stayed all proceedings and ultimately granted plaintiff's writ petition holding that the agreement was enforceable. When the stay was lifted G, relying on *Cravens*, sought to vacate plaintiff's dismissal and also an order granting his unopposed summary judgment motion. The trial court granted G's motions, finding that G was not a party to the settlement agreement and that G's unopposed summary judgment motion established his right to judgment. *Held*, summary judgment and order vacating dismissal reversed. *Cravens* does not apply. The only inference to be drawn from the objective circumstances and common sense was that D intended to settle as to both himself and G. Nothing indicated that D intended to leave his father as sole defendant. That was plaintiff's understanding, and there was ample evidence that plaintiff's dismissal of G was intended to effectuate the settlement with D, not to evade the consequences of summary judgment. Thus, "the trial court erred in vacating the dismissal. As a result, the court lacked jurisdiction to grant summary judgment." (132 C.A.4th 547.)

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b. What Constitutes Commencement of Trial.

1. Statutory Definition.

6 *Witkin Cal. Proc. PWT* § 295

[§ 295] Statutory Definition.

(1) *In General.* Under *C.C.P. 581(a)(6)*, a trial is "deemed to actually commence" as follows:

(a) At the beginning of the opening statement or argument of a party or counsel.

(b) If there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of evidence.

(2) *Nature and Scope of Restriction.* The statutory language has been held to be illustrative rather than exclusive of the circumstances under which a trial has begun, and a trial of the issues may take place earlier in a lawsuit than the events listed in the statute. (*Miller v. Marina Mercy Hosp. (1984) 157 C.A.3d 765, 768, 204 C.R. 62* [all issues in case were deemed admitted on plaintiff's failure to answer request for admissions]; *Gray v. Superior Court (1997) 52 C.A.4th 165, 173, 60 C.R.2d 428* [trial was deemed commenced when parties appeared and presented evidence before referee in partition proceeding].) A trial is not limited, for these purposes, to one on the merits after answer; there may be a trial when there has been an effective disposition of an issue of law or fact that effectively disposes of the case, such as by a pretrial motion. (See *Goldtree v. Spreckels (1902) 135 C. 666, 668, 67 P. 1091*, *infra*, §296 [ruling sustaining general demurrer]; *M & R Properties v. Thomson (1992) 11 C.A.4th 899, 14 C.R.2d 579* [mandatory dismissal].)

(3) *Distinction: Pretrial Proceedings.* On the other hand, pretrial procedures not determinative of the case do not preclude voluntary dismissal. (*Gherman v. Colburn (1971) 18 C.A.3d 1046, 96 C.R. 424*; *Cal-Vada Aircraft v. Superior Court (1986) 179 C.A.3d 435, 444, 224 C.R. 809* [summary adjudication of some but not all issues raised in cross-complaint did not constitute "trial" and voluntary dismissal of that cross-complaint was not barred]; *Franklin Capital Corp. v. Wilson (2007) 148 C.A.4th 187, 193, 210, 55 C.R.3d 424* [plaintiff's voluntary dismissal without prejudice 1 day before hearing on order to show cause on "dismissal or other sanctions" for plaintiff counsel's failure to appear at mandatory settlement conference was permissible; neither settlement conference nor show cause hearing constituted commencement of trial].)

In *Gherman v. Colburn*, *supra*, the case was assigned to Judge M for trial. Defendants objected to a jury on the ground that the action was wholly equitable. The judge heard extended argument in chambers, and continued the matter to the next day for further research. When court reconvened, the judge denied plaintiffs' demand for a jury and suggested that plaintiffs might want to exercise their peremptory challenge and disqualify her. Shortly thereafter, plaintiffs filed a dismissal. *Held*, all of these proceedings were pretrial in nature, no trial had commenced, and the dismissal was effective. (18 C.A.3d 1050.)

A plaintiff also may voluntarily dismiss an action after a motion to dismiss is filed under C.C.P. 426.16, a special procedure designed to prevent lawsuits brought primarily to chill the valid exercise of constitutional rights (SLAPP suits) (5 Cal. Proc. (5th), *Pleading*, §1042). In *Kyle v. Carmon* (1999) 71 C.A.4th 901, 84 C.R.2d 303, the trial judge held a hearing following defendant's motion to strike under C.C.P. 426.16(b)(1), and took the matter under submission. Before the judge ruled on the motion, plaintiff voluntarily dismissed the action with prejudice. The trial judge subsequently entered an order striking plaintiff's complaint. *Held*, reversed. A C.C.P. 426.16 motion is not a "trial" within the meaning of C.C.P. 581. It is in the nature of a pretrial proceeding, such as a motion for nonsuit, directed verdict, or summary judgment. There is no weighing of evidence, and a trial judge, in ruling on a SLAPP motion, does not find facts. Thus, the submission of evidence does not constitute "commencement of trial," and the plaintiff retains the right to a voluntary dismissal at any time before a ruling by the trial judge. (71 C.A.4th 910, 912.)

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(3) *Distinction: Pretrial Proceedings.* See *Gogri v. Jack in the Box* (2008) 166 C.A.4th 255, 267, 82 C.R.3d 629

[plaintiff's motion for voluntary dismissal filed after defendant's motion for summary judgment and before trial court issued tentative ruling was timely and should have been granted where there had been no pretrial proceedings determinative of case]; *Lewis C. Nelson & Sons v. Lynx Iron Corp.* (2009) 174 C.A.4th 67, 78, 94 C.R.3d 468 [plaintiff's motion for voluntary dismissal filed 1 day after plaintiff's opposition was due to defendant's motion to enforce pretrial settlement agreement was timely; trial had not commenced, there had been no tentative rulings by court or procedural derelictions by plaintiff that would have made judgment in defendant's favor inevitable].



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2. Demurrer Sustained Without Leave To Amend.

6 *Witkin Cal. Proc. PWT* § 296

[§ 296] Demurrer Sustained Without Leave To Amend.

In *Goldtree v. Spreckels* (1902) 135 C. 666, 67 P. 1091, the court took the position that there may be a "trial" on issues of law, by a hearing on demurrer. Hence, while dismissal was clearly proper before the hearing on the demurrer, it was clearly improper after submission of the demurrer for a decision that ultimately consisted of an order sustaining it without leave to amend. (135 C. 668.)

In *United Shippers v. Superior Court* (1980) 104 C.A.3d 359, 162 C.R. 871, the court held that the 1947 amendment to C.C.P. 581, specifying the steps constituting "actual commencement" of a trial, was intended to nullify the holding of *Goldtree*. The "plain meaning of the statute is that a plaintiff has a right to dismiss his action even though a demurrer to the complaint has been argued and submitted. At a hearing on a demurrer, there is no 'opening statement' as that phrase is understood in law. Certainly, no witness is sworn nor evidence offered. We do not see how the Legislature reasonably could have made it more plain than it did." (104 C.A.3d 362.)

United Shippers was disapproved in *Wells v. Marina City Properties* (1981) 29 C.3d 781, 789, 176 C.R. 104, 632 P.2d 217, *infra*, §297. The mere filing of a demurrer does not affect the plaintiff's right to dismiss without prejudice. At least until the court's ruling on the demurrer, the right to dismiss remains absolute. (29 C.3d 790.)

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6 *Witkin Cal. Proc. PWT* § 297

[§ 297] Demurrer Sustained With Leave To Amend.

If a demurrer has been sustained with leave to amend, the plaintiff retains the right to voluntarily dismiss until expiration of the time to amend. The order in effect sets aside the submission and reopens the case for further pleading; the plaintiff need not elect to amend, and may dismiss during the time allowed for that purpose. (*Wells v. Marina City Properties* (1981) 29 C.3d 781, 176 C.R. 104, 632 P.2d 217; *Parsons v. Umansky* (1994) 28 C.A.4th 867, 871, 34 C.R.2d 144.) If, however, the plaintiff fails to amend within the time permitted, he cannot thereafter dismiss without prejudice. (*Wells v. Marina City Properties*, *supra*, 29 C.3d 785.)

In *Wells*, defendants' general demurrer was sustained with leave to amend, plaintiff failed to amend within the time allowed, and on October 5, defendant filed and served a motion to dismiss with prejudice under former C.C.P. 581(3) (now C.C.P. 581(f)(2)). On October 6, plaintiff filed a request for voluntary dismissal without prejudice under former C.C.P. 581(1) (now C.C.P. 581(b)(1)). The judge first granted defendants' motion; then, deeming himself without jurisdiction after filing of the voluntary dismissal, set aside his order of dismissal. *Held*, reversed; the dismissal with prejudice was proper.

(a) *Goldtree v. Spreckels* (1902) 135 C. 666, 668, 67 P. 1091, *supra*, §296, construing the statute before the 1947 amendment, permitting voluntary dismissal "at any time before trial," held that the term "trial" included a trial on an issue of law raised by demurrer; and, if the demurrer was sustained and the plaintiff stood on his or her pleading, there was a trial, and the plaintiff could no longer voluntarily dismiss without prejudice. (29 C.3d 785.) *Berri v. Superior Court* (1955) 43 C.2d 856, 279 P.2d 8, *infra*, §379, decided after the amendment, followed the *Goldtree* analysis. (29 C.3d 787, citing the text.)

(b) The amendment, changing the phrase "at any time before trial" to "at any time before the actual commencement of trial," was considered in *United Shippers v. Superior Court* (1980) 104 C.A.3d 359, 162 C.R. 871, *supra*, §296, and *Parenti v. Lifeline Blood Bank* (1975) 49 C.A.3d 331, 122 C.R. 709. In *United Shippers*, defendant's demurrer had been argued and submitted but not yet decided; the court held that plaintiff could voluntarily dismiss. In *Parenti*, defendant's demurrer had been sustained, but, at plaintiff's request (presumably to expedite appeal), it was sustained without leave

to amend; plaintiff later filed a voluntary dismissal, and the appellate court opinion contains dicta to the effect that this dismissal was effective. Both decisions proceeded on the assumption that the amendment erased or diluted the *Goldtree* analysis. (29 C.3d 787.)

(c) The *Goldtree* holding is still correct. The purpose of the amendment was not to change the *Goldtree* rule, and practical considerations are opposed to such a result. "Permitting a plaintiff to exercise an absolute right to dismiss his action without prejudice to recommencing suit based upon the same allegations, even after the trial court has ruled definitely and adversely on the sufficiency of those allegations, makes neither good sense nor good law." (29 C.3d 788.) These tactics would expose defendants to duplicative annoying and continuous litigation, and burden the courts with fruitless proceedings. (29 C.3d 789, disapproving contrary language in *United Shippers* and *Parenti*.)

(d) The following rule and qualification govern this situation: If a general demurrer is sustained with leave to amend, and the plaintiff does not amend in time, the plaintiff can no longer voluntarily dismiss even if the trial court has not entered a judgment of dismissal. If, however, no decision sustaining the demurrer has yet been made, voluntary dismissal is still proper. (29 C.3d 789, 790.) (See *Christensen v. Dewor Dev.* (1983) 33 C.3d 778, 785, 191 C.R. 8, 661 P.2d 1088, *infra*, §548 [demurrer had been sustained to original complaint, but not to amended complaint; hence, voluntary dismissal was proper; following *Wells*].)

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4. Default on Request for Admissions.

6 *Witkin Cal. Proc. PWT* § 298

[§ 298] Default on Request for Admissions.

Deemed admissions that effectively dispose of the case by resolving all the issues constitute "a trial of the issues" for purposes of *C.C.P. 581*; accordingly, a plaintiff's default on a request for admissions terminates his or her right to dismiss without prejudice. In *Miller v. Marina Mercy Hosp. (1984) 157 C.A.3d 765, 204 C.R. 62*, plaintiffs sued defendants on several causes of action, and defendants sent requests for admissions under former *C.C.P. 2033* (now *C.C.P. 2033.010*; see *2 Cal. Evidence (4th), Discovery, §157*). Plaintiffs did not respond within the statutory time as extended by stipulation, and defendants notified plaintiffs that the matters were deemed admitted. Plaintiffs' motion for relief under *C.C.P. 473* was denied, and defendants moved for summary judgment. One week before the date of hearing on that motion, plaintiffs sought to dismiss. The trial judge nevertheless granted summary judgment. *Held*, affirmed.

(a) The statutory reference to "opening statement" and "introduction of evidence" (*supra*, §295) has been held illustrative rather than exclusive of the circumstances under which a trial has begun. Thus, "trial" includes a general demurrer, which effectively disposes of the case. (*157 C.A.3d 768*, citing *Wells v. Marina City Properties (1981) 29 C.3d 781, 176 C.R. 104, 632 P.2d 217, supra, §297*.) Similarly, the deemed admissions resolved the factual issues of this case in favor of defendants. (*157 C.A.3d 769*.)

(b) To allow a plaintiff to dismiss without prejudice after deemed admissions would frustrate the purpose of *C.C.P. 2033*. "Plaintiff would have the opportunity to refile the lawsuit at a cost of time and resources to the judicial system that the statute is intended to prevent. Refiling likewise burdens defendant, and removes the express benefit provided to the requesting party when the served party defaults. If the default is excusable, plaintiff is given an opportunity to admit or deny after the 473 hearing. But if the default is not excusable, the party must concede the admissions, no matter how damaging. A plaintiff whose default is not excusable would of course prefer to begin the suit anew, thus circumventing the statutory scheme. Finally, it should be noted that a defendant who defaults on requested admissions has no opportunity to wipe the slate clean unless his default is excusable." (*157 C.A.3d 769*.)

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5. Summary Adjudication.

6 Witkin Cal. Proc. PWT § 299

[§ 299] Summary Adjudication.

A summary adjudication (or partial summary judgment; *supra*, §267) is not commencement of a trial so as to preclude dismissal without prejudice. In *Cal-Vada Aircraft v. Superior Court* (1986) 179 C.A.3d 435, 224 C.R. 809, a declaratory relief action by plaintiff insurer to determine the scope of a liability policy, defendant insured filed a cross-complaint against plaintiff and its ostensible agent. On plaintiff's motion for summary judgment, the trial court granted summary adjudication on some of the issues in the cross-complaint, but found that there was a factual dispute on the agent's ostensible authority, which could not be resolved by summary judgment. Defendant then attempted to dismiss the cross-complaint against the agent without prejudice, but the trial court ruled that the trial had commenced and dismissed the agent with prejudice. *Held*, mandamus granted, directing the trial court to vacate both the order setting aside the voluntary dismissal and the order dismissing the agent with prejudice.

(a) Under *Wells v. Marina City Properties* (1981) 29 C.3d 781, 176 C.R. 104, 632 P.2d 217, *supra*, §297, "it is the hearing and *determination* of a question of law which constitutes a trial of the question of law for purposes of the voluntary dismissal statute." (179 C.A.3d 443.) And voluntary dismissal is barred "when a question of law which leads to the final determination, i.e., which will effectively dispose of the case, has been heard and determined." (179 C.A.3d 444.)

(b) The holdings in *Wells* and *Miller v. Marina Mercy Hosp.* (1984) 157 C.A.3d 765, 770, 204 C.R. 62, *supra*, §298, "specifically limit the power to voluntarily dismiss by construing the term 'commencement of trial' to include hearings and determinations on questions of law, such as demurrers and deemed admissions," thus protecting defendants from repeated suits based on the same allegations. But allowing voluntary dismissal after a partial adjudication of issues is not inconsistent with these decisions. "As to those issues remaining for trial, the defendant, once dismissed, need not face the issues more than once at trial, and perhaps not at all. The plaintiff is given the opportunity to save all the parties from the expense and time of additional judicial proceedings. As to the issues which have been summarily adjudicated adversely to the plaintiff as 'without controversy,' the defendant may be able to defend in any future action on the basis of collateral estoppel or *res judicata*, although we do not determine that question here." (179 C.A.3d 446.)

(c) Former C.C.P. 437c(f) (now *C.C.P. 437c(n)(1)*) confirms the conclusion that partial summary adjudication is not commencement of a trial. By providing that "at the trial of the action" the adjudicated matters "shall be deemed established and the action shall proceed as to [those] remaining," the statute clearly contemplates future trial of the action. (*179 C.A.3d 447.*) (On *C.C.P. 437c(n)*, see *supra*, §277.)

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6. Tentative Rulings on Dispositive Matters.

aa. Tentative Ruling To Sustain Demurrer.

6 *Witkin Cal. Proc. PWT* § 300

[§ 300] Tentative Ruling To Sustain Demurrer.

A merely tentative ruling to sustain a demurrer has been held no bar to voluntary dismissal. In *Datner v. Mann Theatres Corp.* (1983) 145 C.A.3d 768, 193 C.R. 676, defendant filed a demurrer and notice of hearing on September 21, and plaintiff filed a request for dismissal on October 22. The clerk filed the dismissal and cancelled the hearing on demurrer, but the court set aside the dismissal and sustained the demurrer, for the following reason: At a conference in chambers, the judge indicated that he had tentatively decided that the demurrer was good. *Held*, order setting aside dismissal reversed. "We take judicial notice of the fact that many judges presiding in the law departments of superior and municipal courts issue tentative rulings on calendared cases prior to the time of hearing. This procedure is helpful to counsel and tends to expedite judicial administration. Respondent's argument, when analyzed, urges us to declare a new rule of law to the effect that a tentative ruling of the trial court issued during the pendency of a hearing upon a demurrer negates the statutory authority conferred by section 581. ... We decline to so declare." (145 C.A.3d 771.)

However, *Groth Bros. Oldsmobile v. Gallagher* (2002) 97 C.A.4th 60, 118 C.R.2d 405, concluded that under certain circumstances a trial court's tentative ruling against plaintiff sustaining defendant's demurrer without leave to amend will bar plaintiff's right to a voluntary dismissal. G, a former corporate officer and defendant in a derivative action, demurred to plaintiff's first amended complaint. On April 18 the trial court issued a tentative ruling sustaining G's demurrer without leave to amend and directed that G be dismissed from the action. Plaintiff's counsel appeared at the demurrer hearing on April 19 and advised the court that plaintiff earlier that day had filed a dismissal without prejudice of the entire action as to G. G objected, requesting the court to vacate the dismissal and enter a judgment of dismissal after sustaining the demurrer. The trial court concluded that it lacked jurisdiction to do so given the voluntary dismissal by plaintiff before the hearing on the demurrer. Sustaining the demurrer and granting dismissal with prejudice would have entitled G to indemnity from the corporation under *Corp.C. 317(d)*, which requires "success on the merits" to trigger mandatory indemnification. In the order denying G's request for indemnity, the trial court reasoned that a voluntary dismissal was not success on the merits. *Held*, reversed; the trial court erred in concluding that it lacked jurisdiction to vacate the dismissal and to rule on the demurrer.

(a) The right of a plaintiff to voluntarily dismiss an action before commencement of trial is not absolute. There are statutory exceptions, and judicial limitations have evolved through the courts' construction of the term "commencement of trial" to include not only jury or court trials on the merits, but other procedures that effectively dispose of the case. These procedures include a general demurrer sustained without leave to amend, a general demurrer sustained with leave to amend where no amendment is made within the allotted time, and where all issues have been deemed admitted in defendant's favor. (97 C.A.4th 66.)

(b) Here, the voluntary dismissal fell within judicially created exceptions. Permitting plaintiff to file a voluntary dismissal without prejudice "in the face of a tentative ruling that the court will sustain the demurrer without leave to amend" will waste the time and resources of the court and other parties. Additionally, allowing the dismissal "undermines both the tentative ruling system and the statutory scheme providing for mandatory indemnity of corporate officers in specific situations." (97 C.A.4th 70.)

(c) "We conclude that in these circumstances, where no opposition to a pending demurrer has been filed, where the court has made a tentative ruling against the plaintiff sustaining the demurrer without leave to amend, and where the allowance of a voluntary dismissal without prejudice during the time between issuance of the tentative ruling and the ruling becoming final would make a mockery of the tentative ruling procedure and would also frustrate the statutory scheme for indemnification of corporate officers," a court may vacate the voluntary dismissal and grant a demurrer dismissing the action. (97 C.A.4th 73.) (On tentative ruling procedure, see *supra*, §37.)

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bb. Tentative Ruling for Mandatory Dismissal.

6 *Witkin Cal. Proc. PWT* § 301

[§ 301] Tentative Ruling for Mandatory Dismissal.

In *M & R Properties v. Thomson* (1992) 11 C.A.4th 899, 901, 14 C.R.2d 579, plaintiffs filed a complaint for breach of contract. Plaintiffs did not bring the matter to trial within 5 years, and defendants moved for mandatory dismissal. The court issued a tentative ruling on September 11 granting the motion and stating that any oral argument would be heard on September 12. Local rules required the hearing to be scheduled by 4:30 p.m. on September 11. Plaintiffs did not request oral argument, but instead, on September 12, filed a request for voluntary dismissal, and the clerk entered the dismissal on the same day. Defendants discovered what had happened when they sent plaintiffs a proposed order for dismissal, and, on defendants' motion, the trial court vacated the voluntary dismissal and entered an order of mandatory dismissal. *Held*, affirmed.

(a) When plaintiffs failed to schedule a hearing on the motion to dismiss by 4:30 p.m. on September 11, the tentative ruling became a ruling of the court determining the rights of the parties. However, it was not an actual dismissal, which unquestionably would have taken precedence over the September 12 voluntary dismissal. (11 C.A.4th 901.) The present case therefore involves the conflicting rights of a defendant to mandatory dismissal and of a plaintiff to voluntary dismissal. "We determine that the defendant's right to a mandatory dismissal is the stronger, and conclude that plaintiff's right to seek a voluntary dismissal is cut off by a ruling granting a defendant's motion to dismiss the action for lack of prosecution." (11 C.A.4th 902.)

(b) Plaintiffs argue that their right to obtain a voluntary dismissal prior to commencement of trial is "absolute." But a defendant's right to a mandatory dismissal for failure to prosecute is no less "absolute." "In plaintiffs' view, a plaintiff will always be able to defeat a defendant's right to obtain a determination on the merits--no matter how meritless the action--by simply requesting a voluntary dismissal after failing to commence trial within the statutory period. ... We decline to balance the competing rights in such a fashion as to render a defendant's motion for mandatory dismissal pointless, and the ruling of the court on that motion a nullity." (11 C.A.4th 903.)

(c) No case has been found considering the effect of a ruling on a motion to dismiss on a plaintiff's right to a

voluntary dismissal; but there is abundant authority for the general proposition that a plaintiff's right to a voluntary dismissal is cut off "as of the moment there is a ruling which effectively disposes of the case." (11 C.A.4th 903, discussing *Wells v. Marina City Properties* (1981) 29 C.3d 781, 176 C.R. 104, 632 P.2d 217, supra, §297.) The answer to plaintiff's argument is found in the *Wells* court's citation of *London v. Morrison* (1950) 99 C.A.2d 876, 222 P.2d 941, in which the situation "perhaps most closely parallels our own." (11 C.A.4th 904.)

(d) The court in *London* held that the plaintiffs' right to a voluntary dismissal was cut off once the defendants' right to a mandatory dismissal had become fixed, whether or not by an actual ruling of the court, and irrespective of whether that ruling in any way adjudicated the merits of the case. The *Wells* court did not fully adopt this holding, but did approve by implication that no adjudication of the merits is necessary. "Thus, the opinion in *Wells* supports the conclusion that a plaintiff's right to a voluntary dismissal is cut off no later than the time of a ruling effectively disposing of the case (or at the end of a time period specified in that ruling), whether or not that disposition involves an adjudication of the actual merits of the action. We adopt that conclusion. In addition, we conclude, as have all other courts which considered the matter, that when there is a conflict between a plaintiff's right to voluntary dismissal and a defendant's right to a mandatory dismissal, the defendant's right prevails." (11 C.A.4th 905.) (On involuntary dismissal, see infra, §315 et seq.)

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cc. Tentative Ruling for Summary Judgment.

6 *Witkin Cal. Proc. PWT* § 302

[§ 302] Tentative Ruling for Summary Judgment.

In *Mary Morgan v. Melzark* (1996) 49 C.A.4th 765, 57 C.R.2d 4, the trial judge issued a tentative ruling granting defendants' summary judgment motions, commenced a hearing on the matter, and continued the matter to permit plaintiff to file additional evidence on the motions. When plaintiff failed to present controverting evidence and instead used the continuance time period to file a request to dismiss the action without prejudice to reasserting the same claims challenged on the summary judgment motions, the trial judge struck plaintiff's request for dismissal and entered summary judgment for defendants. *Held*: "We affirm the judgment, holding that a plaintiff may not dismiss an action without prejudice after an adverse tentative summary judgment ruling has been announced and the hearing has commenced and is continued for the express and exclusive purpose of permitting the plaintiff an opportunity to produce opposition evidence it claims was previously unavailable." (49 C.A.4th 767.)

(a) Under C.C.P. 437c, a defendant who meets the initial burden of establishing that an action has no merit is entitled to summary judgment unless the plaintiff demonstrates the existence of a triable issue of material fact. A plaintiff generally cannot defeat a well-founded summary judgment motion without setting forth specific facts controverting the motion. However, if an opposing party has not had an opportunity to marshal the evidence, a summary judgment motion may be continued. (49 C.A.4th 770.) But the continuance is for a particular purpose--production of opposition evidence--and does not entitle the opposing party to defeat the motion by collateral maneuvers. (49 C.A.4th 771.)

(b) A plaintiff's right to voluntarily dismiss an action before the commencement of trial is limited by the dismissal procedure's conjunction with other judicial procedures. "We will not eviscerate the summary judgment procedure by permitting a plaintiff to voluntarily dismiss his or her action after commencement of a summary judgment hearing and continuation for the express and exclusive purpose of permitting the plaintiff an opportunity to present opposition evidence." (49 C.A.4th 771.) (On right to dismissal following defendant's motion for summary judgment but before hearing commences, see *supra*, §294.)

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7. Pending Motion for Discovery Sanction.

6 *Witkin Cal. Proc. PWT* § 303

[§ 303] Pending Motion for Discovery Sanction.

In *Hartbrodt v. Burke* (1996) 42 C.A.4th 168, 49 C.R.2d 562, plaintiff's right to dismiss without prejudice was cut off where a dispositive sanctions motion was pending, although the trial judge had yet to make *any* ruling. Defendants moved for terminating sanctions on plaintiff's noncompliance with a discovery order, requesting that the action be dismissed with prejudice. Just prior to the hearing on the motion, plaintiff filed a request for voluntary dismissal. *Held*, the trial judge properly rejected plaintiff's voluntary dismissal and dismissed the action with prejudice. Plaintiff's "tactic would simply defeat the trial court's power to enforce its discovery orders." (42 C.A.4th 175.) A "plaintiff cannot defeat a defendant's right to obtain a determination on the merits by simply filing a voluntary dismissal when statutory authority entitles the defense to a final judgment." (42 C.A.4th 176, citing *M & R Properties v. Thomson* (1992) 11 C.A.4th 899, 14 C.R.2d 579, *supra*, §301.)

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8. Retrial After Reversal.

6 *Witkin Cal. Proc. PWT* § 304

[§ 304] Retrial After Reversal.

The absolute right to dismiss before trial includes the right to dismiss after the defendant obtains a reversal of a judgment and *before a retrial*; the reversal restores the parties to their original position as if the case had not been tried. However, this right cannot be exercised by the plaintiff so as to defeat the right of the defendant to restoration of benefits lost by virtue of the erroneous judgment. (See *Schubert v. Bates* (1947) 30 C.2d 785, 788, 185 P.2d 793; 9 Cal. Proc. (5th), Appeal, §900.)

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4. Procedure.

a. Request and Clerk's Entry.

6 *Witkin Cal. Proc. PWT* § 305

[§ 305] Request and Clerk's Entry.

(1) *In General.* The normal method of voluntary dismissal, which preserves the absolute right, is "upon written request of the plaintiff to the clerk, filed with the papers in the case, or by oral or written request to the court, upon payment of the costs, if any." (*C.C.P. 581(b)(1)*); see *C.E.B.*, 2 Civil Proc. Before Trial 3d, §39.113 et seq.; *Cal. Civil Practice*, 3 Procedure, §22:9 et seq.; 8B *Am.Jur. P.P. Forms* (2006 ed.), Dismissal, Discontinuance, and Nonsuit, §1 et seq.)

(2) *Request Filed.* The written request is filed with the clerk. (*C.C.P. 581(b)(1)*.) If the request is made by the client or by counsel not of record, the written consent of the attorney of record is required, unless the dismissal is made by order of the court after notice to the attorney. (*C.C.P. 581(j)*); see *Boca & Loylton R. Co. v. Superior Court* (1907) 150 C. 153, 155, 88 P. 718 [dismissal by client alone is insufficient].) The Judicial Council has adopted a mandatory form for a request for dismissal. (See Judicial Council Form No. CIV-110 [Request for Dismissal].)

(3) *Clerk's Entry.* "A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered." (*C.C.P. 581d.*) No judgment, order, or other act of the court is necessary; the clerk makes the only required entry. (*Hopkins v. Superior Court* (1902) 136 C. 552, 555, 69 P. 299 [construing similar language in earlier statute].)

(4) *Notice.* The plaintiff must file notice of entry of the dismissal and serve copies of the notice on all parties. (C.R.C., Rule 3.1390.) The Judicial Council has adopted for mandatory use Judicial Council Form No. CIV-120 [Notice of Entry of Dismissal and Proof of Service].

(5) *Application for Costs.* To recover court costs, a judgment in the defendant's favor must be entered and the defendant must apply for a costs award. (*MacLeod v. Tribune Publishing Co.* (1958) 157 C.A.2d 665, 668, 321 P.2d 881; *Foreman Roofing v. United Union of Roofers, Waterproofers & Allied Workers, Local 36 et al.* (1983) 144 C.A.3d 99, 108, 192 C.R. 439; see C.R.C., Rule 3.1700; *C.E.B.*, 2 Civil Proc. Before Trial 3d, §39.121; 7 *Cal. Proc.* (5th), *Judgment*, §139 et seq.)

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b. Clerk's Refusal To Enter Dismissal.

6 *Witkin Cal. Proc. PWT* § 306

[§ 306] Clerk's Refusal To Enter Dismissal.

(1) *Clerk's Duty As Ministerial*. The clerk's duty is ministerial only, and, if the statutory conditions are met, the clerk must make the entry. (*Hopkins v. Superior Court* (1902) 136 C. 552, 554, 69 P. 299; *Rosen v. Robert P. Warmington Co.* (1988) 201 C.A.3d 939, 247 C.R. 635.) If the clerk refuses, he or she can be compelled to act by the court, on motion, and it is unnecessary to resort to the remedy of mandamus against the clerk. (*Hopkins v. Superior Court*, *supra*, 136 C. 554 [prohibition granted to restrain trial where judge refused to order entry]; cf. *Silverton v. Free* (1953) 120 C.A.2d 389, 390, 261 P.2d 17 [mandamus granted against clerk to compel dismissal].)

If the trial court upholds the clerk in refusing entry of the dismissal on the ground that the defendant seeks affirmative relief, the plaintiff has another method of review by risking nonparticipation in the trial and appeal from the eventual judgment in favor of defendant, thus obtaining review of the judge's ruling against the effectiveness of the dismissal. (See *Wilson v. Los Angeles County Civil Service Com.* (1954) 126 C.A.2d 679, 273 P.2d 34 [trial court exceeded jurisdiction in hearing merits after dismissals were filed but clerk refused entry; plaintiff was entitled to dismiss action]; on trial court's lack of jurisdiction to proceed, see *infra*, §307.)

(2) *Filing As Dismissal*. A number of decisions have also held that, because the clerk is under a positive duty to act when the request is filed, the filing operates as a dismissal of the case, regardless of the clerk's failure to enter it. In *Kaufman v. Superior Court* (1896) 115 C. 152, 156, 46 P. 904, plaintiff filed the request, the clerk did not enter it, and subsequently defendant filed a cross-complaint. *Held*, dismissal is effective when the request is filed, and, to preserve the plaintiff's right, the dismissal relates back and is deemed to have taken effect at the time of the request, prior to the defendant's demand for affirmative relief. (See *Provencher v. Los Angeles* (1935) 10 C.A.2d 730, 733, 52 P.2d 983 [after filing of request, court lost jurisdiction to enter judgment on merits and was restrained by prohibition]; *Long v. Superior Court* (1936) 14 C.A.2d 753, 58 P.2d 952 [same].) In *Hauptman v. Heebner* (1939) 34 C.A.2d 600, 601, 94 P.2d 48, the court held without discussion that a dismissal filed but not entered was ineffective; but the decision is clearly contrary to the cited controlling authorities.

In *Nickola v. Superior Court* (1952) 111 C.A.2d 620, 245 P.2d 20, an order was made on January 28 changing venue from San Mateo County to Sutter County. On February 4, before the file was transferred, plaintiff filed a

dismissal in San Mateo County. When the file arrived in Sutter County, defendant filed an answer and cross-complaint on the theory that, after the order changing venue, the San Mateo court no longer had any jurisdiction and the dismissal there was ineffective. *Held*, the dismissal was good, and it was immaterial whether it became effective at once in San Mateo County or only on arrival of the file in Sutter County. Nor was it defective because addressed to the clerk of the San Mateo court; it was a direction to dismiss *the action*. (111 C.A.2d 622.)

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a. Trial Court's Jurisdiction After Dismissal.

6 *Witkin Cal. Proc. PWT* § 307

[§ 307] Trial Court's Jurisdiction After Dismissal.

Following a plaintiff's voluntary dismissal, the trial court lacks jurisdiction to act further in the action except for the limited purpose of awarding costs and statutory attorneys' fees. A plaintiff does not waive this jurisdictional defect by pursuing relief in the trial court. (*Harris v. Billings* (1993) 16 C.A.4th 1396, 1405, 20 C.R.2d 718, *supra*, §284.)

Entry of the dismissal in the clerk's register terminates the action. (*King v. Superior Court* (1936) 12 C.A.2d 501, 507, 508, 56 P.2d 268; *Cook v. Stewart McKee & Co.* (1945) 68 C.A.2d 758, 761, 157 P.2d 868; *Biggs v. Biggs* (1951) 103 C.A.2d 741, 230 P.2d 32; *Parenti v. Lifeline Blood Bank* (1975) 49 C.A.3d 331, 335, 122 C.R. 709.)

If the dismissal is of less than all defendants, they become strangers to the action. (*Lori, Ltd. v. Wolfe* (1948) 85 C.A.2d 54, 61, 192 P.2d 112; *Coburg Oil Co. v. Russell* (1950) 100 C.A.2d 200, 204, 223 P.2d 305.)

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b. Res Judicata and Collateral Estoppel.

6 *Witkin Cal. Proc. PWT* § 308

[§ 308] Res Judicata and Collateral Estoppel.

(1) *Dismissal As Res Judicata*. Dismissal by request to the clerk may be with or without prejudice. (*C.C.P. 581(b)(1)*.) A dismissal by request *without prejudice* is not an admission of compromise, satisfaction, or abandonment of the cause of action. Hence, unless it is shown that the claim was actually released, the dismissal is not a bar to bringing a new action within the period of the statute of limitations. (*Lewis v. Johnson* (1939) 12 C.2d 558, 563, 86 P.2d 99; *Crosswhite v. American Ins. Co.* (1964) 61 C.2d 300, 302, 38 C.R. 412, 392 P.2d 5; *Breznikar v. T.J. Topper Co.* (1937) 23 C.A.2d 298, 303, 72 P.2d 895; *Burke v. W.R. Chamberlin & Co.* (1942) 51 C.A.2d 419, 429, 125 P.2d 120; *Kuperman v. Great Republic Life Ins. Co.* (1987) 195 C.A.3d 943, 947, 241 C.R. 187; *Troche v. Daley* (1990) 217 C.A.3d 403, 412, 266 C.R. 34; see 7 *Cal. Proc.* (5th), Judgment, §378.)

However, a request for dismissal *with prejudice* operates as a retraxit and bars a new action. (*Ghiringhelli v. Riboni* (1950) 95 C.A.2d 503, 505, 213 P.2d 17; *Wouldridge v. Burns* (1968) 265 C.A.2d 82, 84, 71 C.R. 394; *Kronkright v. Gardner* (1973) 31 C.A.3d 214, 219, 107 C.R. 270, citing the text; *Roybal v. University Ford* (1989) 207 C.A.3d 1080, 1086, 255 C.R. 469, quoting the text; *Lama v. Comcast Cablevision* (1993) 14 C.A.4th 59, 64, 17 C.R.2d 224; cf. *Wells v. Marina City Properties* (1981) 29 C.3d 781, 789, 176 C.R. 104, 632 P.2d 217, supra, §297 [judgment on dismissal after sustaining of demurrer is of limited scope; if "new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint"].)

In *Roger H. Proulx & Co. v. Crest-Liners* (2002) 98 C.A.4th 182, 119 C.R.2d 442, subcontractor R sued sub-subcontractor C, C's insurer, and C's insurance broker, J, for failing to make a specific request to have R added to C's coverage as an additional insured. R settled with C. In seeking summary judgment, one ground argued by J was that R's dismissal with prejudice in favor of C operated as a retraxit that barred R's action against J. *Held*, J failed to establish a retraxit for purposes of summary judgment. A retraxit is equivalent to a judgment on the merits and bars further litigation on the same causes of action between the same parties. "Even if a retraxit can arise from a dismissal when there is some privity between the parties and some similarity of issues warranting issue preclusion," J failed to establish that J and C should be treated as the same party, or that issues resolved between R and C precluded adjudication of issues between R and J. (98 C.A.4th 201, citing the text.)

Voluntary dismissal in federal court, unless otherwise stated in the notice of dismissal or stipulation, is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any federal or state court an action based on or including the same claim. (*F.R. Civ. P., Rule 41(a)(1).*)

(2) *Collateral Estoppel Effect of Dismissal.* In *Torrey Pines Bank v. Superior Court* (1989) 216 C.A.3d 813, 265 C.R. 217, the court held that a voluntary dismissal with prejudice not only operated as a bar (*res judicata*), but also as a collateral estoppel, barring litigation of affirmative defenses. (216 C.A.3d 821, 822, 824.) A strong dissent challenged this holding. "In my judgment, there is no reason in policy or logic, and no requirement in authority, to apply the doctrine of issue preclusion to bar the assertion of a defense where there has been no actual litigation of the underlying issues and where the facts disclose no consideration was given in return for a party's dismissal of the complaint with prejudice." (216 C.A.3d 829.)

In *Walsh v. West Valley Mission Community College Dist.* (1998) 66 C.A.4th 1532, 78 C.R.2d 725, plaintiff construction company sued defendant for breach of contract. Defendant filed a general denial and asserted 35 affirmative defenses. Defendant also filed a cross-complaint against plaintiff, plaintiff's bonding company, and plaintiff's general liability insurer. The cross-complaint was settled prior to trial and defendant dismissed the cross-complaint with prejudice. Plaintiff sought summary judgment arguing that, because defendant had dismissed the cross-complaint with prejudice, under *Torrey Pines Bank* defendant could no longer assert affirmative defenses in the main action. Thus, a trial was unnecessary and a hearing to prove up plaintiff's damages was all that was required. The trial judge denied the motion and a jury returned judgment for defendant. *Held*, affirmed.

(a) *Torrey Pines Bank* does not preclude a party who dismisses an action with prejudice from contesting the allegations in the plaintiff's complaint. "Rather, that opinion held that a party who dismisses his or her lawsuit with prejudice may not assert affirmative defenses *in the nature of new matter* where those affirmative defenses concern the same nucleus of operative facts as were alleged in the dismissed action." (66 C.A.4th 1545.) However, the dismissing party is not precluded from contesting the allegations in the plaintiff's complaint. (66 C.A.4th 1545.)

(b) Here, although defendant could not argue new matter (affirmative defenses), defendant was properly allowed to defend against the allegations in plaintiff's complaint pursuant to defendant's general denial. (66 C.A.4th 1545, 1548.)

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c. Legal Malpractice Action and Underlying Case.

6 *Witkin Cal. Proc. PWT* § 309

[§ 309] Legal Malpractice Action and Underlying Case.

Whether a settlement and dismissal with prejudice of a legal malpractice action bars a future action against a party in the underlying action is unsettled. In *Arciniega v. Bank of San Bernardino* (1997) 52 C.A.4th 213, 60 C.R.2d 495, plaintiff operated a check-cashing business and maintained a commercial account with defendant. Following a bogus check-passing scheme that affected both plaintiff and defendant, defendant debited plaintiff's account and later refused plaintiff's demands to credit her account for the amount of the bogus checks. Plaintiff sued and, unknown to plaintiff, the action was dismissed without prejudice. With new counsel, plaintiff brought another action against defendant, now alleging additional damages. Plaintiff then sued her former attorneys for malpractice but settled that case and dismissed it while this underlying action against defendant was pending. The trial court granted summary judgment for defendant on the ground that plaintiff's recovery in her legal malpractice action barred her from further recovery against defendant because the attorneys' liability was predicated on recovery in the underlying case (case-within-a-case doctrine; see 1 Cal. Proc. (5th), Attorneys, §311 et seq.). *Held*, affirmed. Plaintiff's settlement and dismissal with prejudice of her legal malpractice action operated to bar further action against defendant. The malpractice action was "precisely the same as that pleaded currently by plaintiff against defendant in ... the underlying action" and was therefore the same cause of action. (52 C.A.4th 229.) Thus, the dismissal with prejudice of the malpractice action acted as a retraxit. Moreover, because damages for an attorney's negligence are those that would have been recovered but for the malpractice and because the offending attorney stands in the shoes of the original defendant, plaintiff was fully compensated and made whole by her settlement in the malpractice action and was barred from further recovery. (52 C.A.4th 231.)

Rice v. Crow (2000) 81 C.A.4th 725, 97 C.R.2d 110, sharply disagreed, concluding that *Arciniega* wrongly attempted to meld the retraxit and case-within-a-case doctrines. In *Rice*, the trial court granted summary judgment for defendants on the ground that plaintiff's settlement and dismissal with prejudice of a legal malpractice action arising from representation of plaintiff in a prior action against defendant constituted a retraxit. *Held*, reversed. After discussing res judicata and collateral estoppel, the court stated that *Arciniega*, with no analysis of these doctrines and overlooking the legal hurdle that the original defendant was not a party to the malpractice action, wrongly concluded that because of the "proxy" status of the legal malpractice defendants, there was no logical reason why judgment in their favor should not extend to the benefit of the defendants in the underlying action. But contrary to *Arciniega*, no case in California or

elsewhere supports the proposition that settlement and dismissal with prejudice of a legal malpractice case operate to bar a plaintiff from prosecuting an action against the original wrongdoers in the underlying action. (*81 C.A.4th* 739.) "As between an injured plaintiff and a wrongdoing defendant, we see no cogent reason to allow the defendant off-the-hook simply because the plaintiff recovered in a legal malpractice action against the attorneys representing him or her against the wrongdoer." (*81 C.A.4th* 740.)

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d. Relief and Review.

6 *Witkin Cal. Proc. PWT* § 310

[§ 310] Relief and Review.

(1) *Relief Under C.C.P. 473*. The plaintiff may obtain relief under *C.C.P. 473* from the plaintiff's own voluntary dismissal entered by mistake, inadvertence, or excusable neglect. (*C.C.P. 473(b)*; *Isaacs v. Jones* (1933) 135 C.A. 47, 48, 26 P.2d 533; *Romadka v. Hoge* (1991) 232 C.A.3d 1231, 1327, 283 C.R. 878 [attorney, with no authority to dismiss action with prejudice, mistakenly marked the dismissal with prejudice box on the dismissal form]; on motion for relief under *C.C.P. 473*, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court* §144 et seq.) However, because setting aside the dismissal means bringing the defendant back into the case, the motion must be made on notice to the defendant, whether or not the defendant has appeared. (*McDonald v. Severy* (1936) 6 C.2d 629, 59 P.2d 98.) Where no timely application or sufficient showing of excuse is made, the application will be denied. (*Bruskey v. Bruskey* (1935) 4 C.A.2d 472, 479, 41 P.2d 203 [insufficient showing]; *Lavaysse v. Superior Court* (1944) 63 C.A.2d 223, 225, 146 P.2d 686 [attorney for plaintiff was not entitled to seek relief]; *Biggs v. Biggs* (1951) 103 C.A.2d 741, 743, 230 P.2d 32 [belated motion by plaintiff based on affidavit that *defendant's pleading* sought affirmative relief]; *Basinger v. Rogers & Wells* (1990) 220 C.A.3d 16, 23, 269 C.R. 332 [defendant's alleged lateness in making payments under settlement agreement was insufficient showing of excuse].)

(2) *Appeal*. Ordinarily, there is no right to appeal from entry of a request for dismissal, which is a ministerial rather than a judicial act. (*Parenti v. Lifeline Blood Bank* (1975) 49 C.A.3d 331, 122 C.R. 709.) A plaintiff "obviously" may not appeal his or her own voluntary dismissal. (*Yancey v. Fink* (1991) 226 C.A.3d 1334, 1343, 277 C.R. 415.) The same is true of a defendant, who is not an aggrieved party. (See *Cook v. Stewart McKee & Co.* (1945) 68 C.A.2d 758, 762, 157 P.2d 868; 9 *Cal. Proc.* (5th), *Appeal*, §144.)

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B. After Commencement of Trial.

1. Dismissal on Request of Plaintiff.

6 *Witkin Cal. Proc. PWT* § 311

[§ 311] Dismissal on Request of Plaintiff.

A plaintiff may request the dismissal of a complaint after the commencement of trial. The complaint may be dismissed either in its entirety or as to any cause of action stated in it and as to any defendants. (*C.C.P. 581(e)*; see *C.E.B.*, 2 Civil Proc. Before Trial 3d, §39.110; *Cal. Civil Practice*, 3 Procedure, §22:10.) However, once trial has thus commenced (*supra*, §295 et seq.), the plaintiff no longer has an absolute right to dismiss the action without prejudice. (*C.C.P. 581(b)(1)*, (e); *supra*, §293 and *infra*, §313.)

In federal court, an action may not be dismissed at trial "at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." (*F.R. Civ. P., Rule 41(a)(2)*; see 9 Federal Practice & Procedure (Wright & Miller) §2362 et seq.; 27A Federal Procedure, L.Ed., §62:553 et seq.)

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In *321 Henderson Receivables Origination LLC v. Sioteco (2009) 173 C.A.4th 1059, 93 C.R.3d 321*, H was a "factoring company," i.e., a company that pays successful tort litigants a lump sum for a structured settlement annuity. The practice is governed by the Structured Settlement Transfer Act (SSTA), and requires court approval based on a petition filed by the factoring company. H filed petitions on which hearings were held. Following the trial court's tentative ruling to deny one of the petitions, H sought unilateral voluntary dismissal of 11 petitions. The trial judge ruled that H could not voluntarily dismiss the petitions under *C.C.P. 581* because H was not a "plaintiff" and the SSTA petition was not a "complaint," as those terms apply to the statute. *Held*, SSTA petition is not a "complaint" for purposes of the statute.

(a) SSTA proceedings are "actions" for purposes of *C.C.P. 581*, and H as a petitioner is a proper plaintiff (see *Supp.*, *supra*, §283). (*173 C.A.4th 1071*.) However, neither *C.C.P. 581* nor statutes governing SSTA proceedings include "petition" in the definition of "complaint." Moreover, statutes that govern special proceedings, which includes SSTA proceedings, do not address the term "petition." Thus, an SSTA petition is not a "complaint" for purposes of *C.C.P. 581*. (*173 C.A.4th 1072*.)

(b) Although the trial court erred in concluding that H was not a "plaintiff," the result was not prejudicial. Prior to

H's request for dismissal, "trial" had commenced because there had been hearings on numerous petitions. Thus, H could not voluntarily dismiss the petitions without the written consent of the payees (see text, §314). (*173 C.A.4th 1072.*)



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B. After Commencement of Trial.

2. Dismissal on Abandonment.

6 *Witkin Cal. Proc. PWT* § 312

[§ 312] Dismissal on Abandonment.

The action may be dismissed by the court "when upon the trial and before the final submission of the case, the plaintiff abandons it." (*C.C.P. 581(d)*.) Although this ineptly worded statute appears to grant to the court a power to dismiss, the reported cases interpreting it have all proceeded on some affirmative action by the plaintiff in abandoning his cause of action. (See *Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970)* 10 C.A.3d 206, 212, 88 C.R. 858 [citing numerous cases and the text].) In other words, *C.C.P. 581(d)* has traditionally been a mechanism by which a plaintiff (and not the court) voluntarily dismissed an action that has been expressly and intentionally abandoned. (See *Burnett v. Burnett (1948)* 88 C.A.2d 805, 807, 199 P.2d 685.) (On current express statutory authorization for dismissal at trial on plaintiff's request, see *C.C.P. 581(e)*, *supra*, §311.)

Voluntary dismissal under *C.C.P. 581(d)* "must be predicated upon a clear, unequivocal and express intent to abandon an action. Such intent must be demonstrated to the court by way of a motion to dismiss, stipulation of the parties or some other form of express intent on the record." (*Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.*, *supra*, 10 C.A.3d 213.)

A motion to dismiss under *C.C.P. 581(d)* cannot be used to circumvent the condition of *C.C.P. 581(b)(1)* against voluntary dismissal where the defendant seeks affirmative relief (*supra*, §§288, 289). (*Kershaw v. Hogan (1932)* 127 C.A. 89, 15 P.2d 535; for comparable federal practice, see *F.R. Civ. P.*, *Rule 41(a)(2)* [action may not be dismissed against objection of defendant who has pleaded counterclaim prior to service of plaintiff's motion to dismiss unless the counterclaim can remain pending for independent adjudication by court]; 9 Federal Practice & Procedure (Wright & Miller) §2364 et seq.; 27A Federal Procedure, L.Ed., §62:553 et seq.)

Dismissal by request filed with the clerk under *C.C.P. 581(b)(1)* is ordinarily an absolute right (*supra*, §283), while a motion to dismiss under *C.C.P. 581(d)* is addressed to the court's discretion. The court may deny the motion and proceed to a determination of the cause on the merits. The theoretical basis of this distinction is not entirely clear (see 24 Cal. L. Rev. 743), but it is established by a number of decisions. (See *Huntington Park Imp. Co. v. Superior Court (1911)* 17 C.A. 692, 694, 121 P. 701; *Estate of Matthiessen (1935)* 10 C.A.2d 323, 328, 52 P.2d 248; *Spellacy v. Superior Court (1937)* 23 C.A.2d 142, 146, 72 P.2d 262.)

Although most of the cases uphold the denial of such a motion, *Broadwell v. Ryerson* (1948) 85 C.A.2d 352, 192 P.2d 797, held that denial of the motion was a gross abuse of discretion. Plaintiff's attorney was unable to proceed because an essential witness, without fault, was late. The trial judge refused a continuance, then denied a motion to dismiss and allowed the case to go to trial, and the next morning refused to reopen to allow plaintiff to put on the witness. In reversing judgment for defendants, the court said: "Plaintiff had an absolute right and the power to dismiss the action by filing a request with the clerk, but made the mistake of assuming that the court would grant his motion. He had a right to indulge in this assumption. We cannot understand why the court would deny such a motion, in circumstances which allowed plaintiff's counsel to dismiss the action by the simple expedient of handing to the clerk a written request for dismissal. In the difficulties of the situation, this available procedure evidently was overlooked, and we overlook the omission, since it is the mistakes of the court and not the mistakes of counsel that are under review." (85 C.A.2d 358.)

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



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B. After Commencement of Trial.

3. Effect of Dismissal.

6 *Witkin Cal. Proc. PWT* § 313

[§ 313] Effect of Dismissal.

Under both *C.C.P. 581(d)* and (e), the dismissal will be *with prejudice* except under the following conditions:

(1) Where there is consent to dismissal without prejudice by all affected parties to the trial. (On dismissal by consent generally, see *infra*, §314.)

(2) On order of the court dismissing the case without prejudice on a showing of good cause.

Hence, despite the fact that the plaintiff seeks a dismissal at trial without prejudice, the court, in the absence of a showing of just cause or of consent by the affected parties, must order the dismissal with prejudice. (See *Burnett v. Burnett* (1948) 88 C.A.2d 805, 807, 199 P.2d 685; *Carvel v. Arents* (1954) 126 C.A.2d 776, 779, 272 P.2d 858 [judgment modified on appeal by striking out words "without prejudice"]; *Hehr v. Swendseid* (1966) 243 C.A.2d 142, 151, 52 C.R. 107.)

In *Fisher v. Eckert* (1949) 94 C.A.2d 890, 212 P.2d 64, plaintiff, after commencement of the trial and during the session, handed a written request for dismissal to the courtroom clerk. The court directed it to be filed and dismissed the jury. *Held*, this was a final judgment in favor of defendants, despite the absence of an order of dismissal, and defendants were entitled to costs. "It therefore should and will be presumed that the words 'with prejudice' were inferentially attached to the form of dismissal as presented when it was made at a time when plaintiff had no right to make an unqualified dismissal and where the plaintiff abandoned further proceedings and the court dismissed the jury and, for all intents and purposes, did, in effect, allow a dismissal of the action, without the consent of all the parties and without a showing of just cause therefor. A dismissal, 'with prejudice,' should and does, *ipso facto*, result." (94 C.A.2d 893.)

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C. By Consent of Adverse Party.

6 *Witkin Cal. Proc. PWT* § 314

[§ 314] By Consent of Adverse Party.

An action may be dismissed "[w]ith or without prejudice, by any party upon the written consent of all other parties." (*C.C.P. 581(b)(2)*); on comparable federal practice, see *F.R. Civ. Proc., Rule 41(a)(1)* [filing of stipulation of dismissal signed by all parties appearing in action]; 9 Federal Practice & Procedure (Wright & Miller) §2363; 27A Federal Procedure, L.Ed., §§62:549, 62:550.) The dismissal is subject to the written consent of the attorney of the party seeking the dismissal; but, if consent of the attorney is not obtained, dismissal may be ordered by the court after notice to the attorney. (*C.C.P. 581(j)*.) (See Cal. Civil Practice, 3 Procedure, §22:1; 8B Am.Jur. P.P. Forms (1996 ed.), Dismissal, Discontinuance, and Nonsuit, §31 et seq.)

A dismissal by consent of the parties following a compromise or settlement is intended to operate as a retraxit. Thus, the judgment, entered with prejudice, will be res judicata. (See *Manning v. Wymer* (1969) 273 C.A.2d 519, 526, 78 C.R. 600 [agreement that dismissal *not* operate as retraxit]; 7 Cal. Proc. (5th), *Judgment*, §378.)

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XII. INVOLUNTARY DISMISSAL FOR DELAY

A. In General.

1. Governing Law.

6 *Witkin Cal. Proc. PWT* § 315

[§ 315] Governing Law.

(1) *In General.* Involuntary dismissals for delay in prosecution are primarily governed by *C.C.P. 583.110* et seq., which set forth the various grounds for dismissal and the applicable exceptions. (See *C.E.B.*, 2 *Civil Proc. Before Trial* 4th, §39.8 et seq.; *C.E.B.*, 1 *Civil Proc. During Trial* 3d, §6.86; *C.E.B.*, *Civil Lit. Forms* §35.1 et seq.; *Cal. Civil Practice*, 3 *Procedure*, §22:21 et seq.; *Rutter Group*, 3 *Civil Proc. Before Trial* §11:45 et seq.; 24 *Am.Jur.2d* (1998 ed.), *Dismissal, Discontinuance, and Nonsuit* §63 et seq.) The dismissal may be *mandatory*, i.e., required unless some express statutory exception applies (see *C.C.P. 583.210* et seq., *583.310* et seq.), or *discretionary*, i.e., entered by the court when deemed appropriate under the circumstances (see *C.C.P. 583.410* et seq.). An action is also subject to dismissal, in certain situations, without regard to delay. (See *infra*, §474 et seq.)

C.C.P. 583.110 "does not limit or affect the authority of a court to dismiss an action or impose other sanctions" under court rules "or otherwise under inherent authority of the court." (*C.C.P. 583.150*.)

Federal practice regarding dismissal for delay is governed by *F.R. Civ. P.*, *Rule 41(b)*. (See 9 *Federal Practice & Procedure* (Wright & Miller) §2370 et seq.; 27A *Federal Procedure*, L.Ed., §§62:575 et seq.)

(2) *Statutory Framework.* The statutes governing dismissal for delay in prosecution consist of the following:

(a) *C.C.P. 583.110* et seq. (definitions and general provisions).

(b) *C.C.P. 583.210* et seq. (mandatory dismissal for delay in service of summons). (See *infra*, §319 et seq.)

(c) *C.C.P. 583.310* et seq. (mandatory dismissal for delay in bringing action to trial or new trial). (See *infra*, §§358 et seq., 428 et seq.)

(d) *C.C.P. 583.410* et seq. (discretionary dismissal for delay). (See *infra*, §438 et seq.)

(3) *Preference for Trial on Merits.* It is the policy of California "that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring

the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter." (C.C.P. 583.130.)

Numerous decisions reflect the preference for trial on the merits. (See *Weeks v. Roberts* (1968) 68 C.2d 802, 805, 69 C.R. 305, 442 P.2d 361, *infra*, §424; *Denham v. Superior Court* (1970) 2 C.3d 557, 86 C.R. 65, 468 P.2d 193, *infra*, §453; *General Ins. Co. v. Superior Court* (1975) 15 C.3d 449, 453, 124 C.R. 745, 541 P.2d 289; *Hocharian v. Superior Court* (1981) 28 C.3d 714, 719, 170 C.R. 790, 621 P.2d 829; *cf. Blank v. Kirwan* (1985) 39 C.3d 311, 331, 216 C.R. 718, 703 P.2d 58 [policy of disposing of litigation on merits, though "generally viewed as more compelling" than policy seeking to promote prompt prosecution, "will not prevail unless the plaintiff meets [the] burden of establishing excusable delay"].)

(4) *Definitions.* The following definitions govern involuntary dismissal for delay in prosecution unless the provision or context otherwise requires:

(a) "Action" includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief. (C.C.P. 583.110(a).) This provision implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. However, "action" does not include a statement of interest in or claim to property made solely in a responsive pleading. (Law Rev. Com. Comment to C.C.P. 583.110.)

(b) "Complaint" includes a cross-complaint or other initial pleading. (C.C.P. 583.110(b).)

(c) "Court" means the court in which the action is pending. (C.C.P. 583.110(c).)

(d) "Defendant" includes a cross-defendant or other person against whom an action is commenced. (C.C.P. 583.110(d).)

(e) "Plaintiff" includes a cross-complainant or other person by whom an action is commenced. (C.C.P. 583.110(e).)

(f) "Service" includes return of summons. (C.C.P. 583.110(f).)

(5) *Waiver and Estoppel Doctrines Are Applicable.* Nothing in C.C.P. 583.110 et seq. "abrogates or otherwise affects the principles of waiver and estoppel." (C.C.P. 583.140.)

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

In General. See 24 Am.Jur.2d (2008 ed.), *Dismissal, Discontinuance, and Nonsuit* §1 et seq.



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A. In General.

2. Application to Special Proceedings.

6 *Witkin Cal. Proc. PWT* § 316

[§ 316] Application to Special Proceedings.

C.C.P. 583.110 et seq. apply to civil actions and do not apply to special proceedings "except to the extent incorporated by reference in the special proceeding." (*C.C.P. 583.120(a)*.) However, the court may, by rule or otherwise under the court's inherent authority, apply *C.C.P. 583.110* et seq. to all or part of a special proceeding "except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding." (*C.C.P. 583.120(b)*.)

In *Binyon v. California* (1993) 17 C.A.4th 952, 21 C.R.2d 673, plaintiff sought a writ of administrative mandamus (see 8 Cal. Proc. (5th), *Extraordinary Writs*, §258 et seq.) to challenge the termination of his employment by the State Personnel Board. However, he failed to serve the petition on the Board, and the superior court consigned the file to its archives. After plaintiff noticed the matter for hearing, the court dismissed the case on its own motion for failure to bring it to trial within 5 years of filing. Plaintiff appealed, arguing that under *C.C.P. 583.120(a)* the dismissal statutes do not apply to administrative mandamus proceedings. *Held*, judgment of dismissal affirmed.

(a) *C.C.P. 583.120(b)* permits the application of the dismissal statutes to a special proceeding *unless* that application would be inconsistent with the character of that proceeding or the statute governing it. As examples of when the dismissal statutes should not be applied to a special proceeding, the Law Revision Commission Comment to *C.C.P. 583.120* cites *Horney v. Superior Court* (1948) 83 C.A.2d 262, 188 P.2d 552, *infra*, §321, which held that a general dismissal statute did not apply to a will contest, and C.C. 3147, providing for dismissal of actions to foreclose mechanics' liens not brought to trial within 2 years. (17 C.A.4th 955, 956.) "What links both examples is an underlying concern that the general dismissal statutes ... should not apply to special proceedings where their application would permit, rather than prevent, dilatory prosecution because of the longer time periods specified in the general dismissal statutes." (17 C.A.4th 956.) Because no special statute governs dismissal of administrative mandamus proceedings, it is not inconsistent to apply the general dismissal statutes. (17 C.A.4th 956.)

(b) Plaintiff argued that because administrative mandamus proceedings are normally decided on the record of the administrative hearing, without the need for factual determinations, they are inconsistent with dismissal for lack of prosecution. However, the purpose served by dismissal is not solely to avoid prejudice to the defendant caused by dissipation of evidence; it is also to expedite the administration of justice by compelling the plaintiff to prosecute the

action with promptness and diligence. (17 C.A.4th 956.) In this case, plaintiff offered no excuse for his lack of diligence, and no authority or analysis to support his claim that the court's inherent authority to dismiss a special proceeding for lack of diligence should apply only to proceedings requiring a trial of issues. (17 C.A.4th 957.) (See *Oskooi v. Fountain Valley Regional Hosp. & Med. Center* (1996) 42 C.A.4th 233, 238, 49 C.R.2d 769 [discretionary dismissal statutes applied in administrative mandamus proceeding; following *Binyon*].)

C.C.P. 583.110 et seq. do not apply to proceedings under the Sexually Violent Predators Act (Welf.C. 6600 et seq., 3 Cal. Crim. Law (3d), *Punishment*, §193 et seq.). Proceedings under the Act are special proceedings, not actions, and the Act does not incorporate the dismissal provisions of C.C.P. 583.110 et seq. (*People v. Evans* (2005) 132 C.A.4th 950, 956, 34 C.R.3d 35 [defendant's petition to dismiss proceedings for commitment as sexually violent predator based on untimely prosecution was properly denied].)

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A. In General.

3. Proceedings for Dissolution or Legal Separation.

6 *Witkin Cal. Proc. PWT* § 317

[§ 317] Proceedings for Dissolution or Legal Separation.

C.C.P. 583.161 precludes dismissal of a petition for dissolution of marriage or legal separation under *C.C.P. 583.110* et seq. in the following circumstances:

(1) An order for child support has been issued and has not been terminated or revoked. (*C.C.P. 583.161(a)*); see *Family C. 3601* [child support order remains in full force and effect until terminated or revoked even though proceeding has not been brought to trial within limits provided by *C.C.P. 583.110* et seq.]; on child support, see 10 *Summary* (10h), *Parent and Child*, §375 et seq.)

(2) A spousal support order has been issued and not terminated. (*C.C.P. 583.161(b)*); on spousal support, see 11 *Summary* (10th), *Husband and Wife*, §174 et seq.)

(3) A separate trial on the status of the marriage has been conducted under *Family C. 2337*. (*C.C.P. 583.161(c)*); on bifurcation of status issue, see 11 *Summary* (10th), *Husband and Wife*, §104 et seq.)

In re Marriage of Hinds (1988) 205 C.A.3d 1398, 1403, 253 C.R. 170, held that *C.C.P. 583.161* applied to prevent dismissal for delay in bringing an action to trial within 3 years after an order declaring a mistrial (infra, §429). The dissolution proceeding was bifurcated to allow entry of the decree of dissolution with the remaining issues reserved for trial. The trial resulted in a mistrial, the wife allowed the 3-year period to expire, and the husband moved to dismiss. The wife contended that there was reasonable cause for her delay, without relying on *C.C.P. 583.161*. Held, order of dismissal reversed. Where a pure question of law is raised and an important issue of public policy is involved, the issue may be considered on appeal despite the failure to raise it below. (205 C.A.3d 1483; see 9 Cal. Proc. (5th), *Appeal*, §406.) "The provisions of the new enactments are consistent with an intent that no family law actions that encompass child support orders be dismissed for failure to prosecute. Recognition of such an intent provides a full opportunity for reconciliations to occur between spouses who have children. It also satisfies the frequent need of children and spouses for the continuing protection and jurisdiction of the court. It is reasonable to conclude that the Legislature incorporated the view that counsel's neglect is never of such magnitude as to require termination of that protection and jurisdiction." (205 C.A.3d 1404.)

In *Lakkees v. Superior Court* (1990) 222 C.A.3d 531, 271 C.R. 845, after obtaining a judgment of dissolution in a bifurcated proceeding, the wife petitioned for judgment on the reserved property issues. This petition was filed more than 6 years after the action was commenced, but within 6 months of the expiration of a child support order. In response to the husband's motion to dismiss, the wife argued that, under C.C.P. 583.161 and 583.350 (infra, §423), she had 6 months from the date the support order expired in which to file the petition. *Held*, motion to dismiss properly denied.

(a) Provisions tolling or extending the 5-year period for bringing an action to trial (infra, §382 et seq.) usually involve situations in which it is not possible to bring the action to trial. (222 C.A.3d 538.) Here, nothing actually prevented plaintiff from bringing the property issues to trial, but the language of C.C.P. 583.161 and 583.350 is clear: C.C.P. 583.161, "by forbidding dismissal of a family law action involving child support, effectively extends the period in which it may be brought to trial." This extension applies to *all* issues. Once it terminates, C.C.P. 583.350 allows a further 6 months in which to bring the action to trial. (222 C.A.3d 539.)

(b) This construction is reasonable. Although the wife was able to bring the property issues to trial, there may have been factors making it impracticable or unwise to do so, or at least such factors may exist in other cases; e.g., keeping the matter open may result in a reconciliation before irrevocable steps are taken, or may allow one spouse and any minor children to remain in a home that is a community asset. (222 C.A.3d 539.)

In *re Marriage of Dunmore* (1996) 45 C.A.4th 1372, 53 C.R.2d 450, involved a wife who petitioned for dissolution of her marriage in 1988. In 1991, the status of the parties' marriage was heard in an uncontested, bifurcated proceeding, authorized by *Family C. 2337*, and judgment was entered dissolving the marriage. There remained to be resolved issues of child support, spousal support, and property rights. In 1994, the husband requested that the matter be dismissed under C.C.P. 583.310 et seq., as not brought to trial within 5 years. The trial judge dismissed the action, ruling that the bifurcated proceeding did not constitute a "trial" within the meaning of the dismissal statutes because it was uncontested and that the 5-year statute had therefore run. *Held*, reversed. Dismissal was barred under C.C.P. 583.161(c).

(a) "Trial," as used in C.C.P. 583.161(c), includes an adjudication of the status of the marriage in a judgment, whether the proceeding for dissolution of the status of the marriage is contested or uncontested. *Family C. 2337* does not distinguish between contested and uncontested proceedings. Contested proceedings under that statute are rare, and it is not likely that the Legislature would use the unqualified term "trial" to exclude the ordinary form of a *Family C. 2337* proceeding. (45 C.A.4th 1380.)

(b) Although the dissolution judgment was entered prior to enactment of C.C.P. 583.161(c), the statute applied retroactively. Under antecedent law, the right to dismissal in these circumstances was unclear. This warrants deference to the Legislature's determination of the question in pending cases. (45 C.A.4th 1381.)

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A. In General.

4. Nondissolution Proceedings Involving Child Support Order.

6 *Witkin Cal. Proc. PWT* § 318

[§ 318] Nondissolution Proceedings Involving Child Support Order.

In *Orange v. Quinn* (2002) 97 C.A.4th 956, 118 C.R.2d 833, 5 years after a nonmarital child began receiving public assistance, the father, D, was served with a complaint to establish child support and for reimbursement of payments. D did not respond to the complaint, and the court entered an expedited child support order. Approximately 12 years later, D sought and was granted a dismissal of the reimbursement action for failing to bring it to trial within 5 years. *Held*, reversed; dismissal under the 5-year rule was error.

(a) Although a statutory exception to the 5-year rule exists in *C.C.P. 583.161* (supra, §317) for *dissolution* actions where a child support order is issued during pendency of the proceedings, the Code of Civil Procedure contains no express exception for actions involving child support that do not arise from dissolution petitions. (97 C.A.4th 959.)

(b) This anomalous disparity between dissolution actions and other actions in which child support might be obtained while the proceedings are pending has a statutory solution in *Family C. 3601* (see 10 *Summary* (10th), *Parent and Child*, §385). The statute provides that a child support order made under Family Code provisions governing support is effective until terminated by the court or by operation of law, notwithstanding the time limits of *C.C.P. 583.110* et seq. (97 C.A.4th 961.) Thus, *Family C. 3601* "sets forth an express exception to the five-year rule for any case in which a pendente lite child support order is obtained." (97 C.A.4th 963.)

However, *Orange v. Rosales* (2002) 99 C.A.4th 1214, 121 C.R.2d 788, distinguished and limited *Quinn*. (99 C.A.4th 1219.) In the early 1990s, plaintiff county filed a complaint for reimbursement of assistance expended on defendant's children. Defendant filed no answer and the county obtained a preliminary (expedited) child support order. Defendant made no payments. In 1995, defendant's parental rights were terminated, and in 1999 the county obtained a default judgment. In 2001, the trial court granted defendant's motion to dismiss based on the 5-year rule. *Held*, affirmed. "The rationale of *Quinn* was that a case in which a child support order has been made should continue as long as the order itself must continue." (99 C.A.4th 1220.) Here, the support order ceased as a matter of law when defendant's parental rights were terminated. Thus, *Quinn* is not applicable here, and the trial court properly dismissed the action under the 5-year rule. (99 C.A.4th 1219, 1221.)

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B. Mandatory Dismissal for Delay in Service.

1. In General.

a. Authority.

6 *Witkin Cal. Proc. PWT* § 319

[§ 319] Authority.

(1) *General Statute.* Generally, dismissal is mandatory if the defendant is not served with the summons and complaint within 3 years after the action is commenced, or proof of service is not filed within 60 days after the time the summons and complaint must be served. An action is deemed commenced when the complaint is filed. (*C.C.P.* 583.210, 583.250; on time for service and return generally, see *infra*, §322 et seq.; on dismissal for delay in service generally, see *infra*, 355 et seq.) (See *C.E.B.*, 3 Civil Proc. Before Trial §39.8 et seq.; *Cal. Civil Practice*, 3 Procedure, §22:21 et seq.; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §15.22 et seq.; *Rutter Group*, 3 Civil Proc. Before Trial §11:51 et seq.)

(2) *Special Statute Governing Tax Actions.* A special statute governs actions for the refund of taxes and to recover taxes paid under protest: Issuance, service, and return must be made within 1 year. (*Rev.C.* 5147.)

In *Emberton v. San Diego* (1986) 186 *C.A.3d* 268, 230 *C.R.* 572, the court rejected equal protection and due process challenges to *Rev.C.* 5147. "Clearly, by setting forth one year service and return statutes in the area of property tax refunds, the Legislature has determined judicial action should be more expeditious in such cases than in other civil matters." (186 *C.A.3d* 271.)

Originally, *Rev.C.* 5147 did not contain an express exception for general appearance like that stated in *C.C.P.* 583.220 (*infra*, §330). In *Ford Motor Co. v. Tulare* (1983) 145 *C.A.3d* 688, 193 *C.R.* 511, the court held that the absence of this express exception indicated a legislative intent to compel return of process despite a timely general appearance. This reasoning was rejected in *Southern Pac. Trans. Co. v. State Bd. of Equalization* (1985) 175 *C.A.3d* 438, 221 *C.R.* 12. "When the plaintiff embarks upon service of process and the defendant responds by a general appearance within one year, every reasonable objective of section 5147 has been satisfied. The completion of service of process and the making of a return thereon within one year are then rendered, a fortiori, mere technicalities, forms which should give way to the substance of compliance." (175 *C.A.3d* 442.)

Rev.C. 5147 now provides an exception to the 1-year period where the parties stipulate in writing to extend the time, or the defendant has made a general appearance. (*Rev.C.* 5147(a).) However, "general appearance" does not

include (a) a stipulation under *C.C.P.* 583.230 (*infra*, §338) extending the time for service; (b) a motion to quash, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise; or (c) an extension of time to plead after a motion to dismiss. (Rev.C. 5147(b).)

(3) *Local Rules*. Additional time requirements for service of the complaint may be imposed by "fast track" case management rules. (See *Govt.C.* 68600 et seq. [Trial Court Delay Reduction Act]; on fast track rules generally, see 2 *Cal. Proc.* (5th), *Courts*, §257 et seq.)

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B. Mandatory Dismissal for Delay in Service.

1. In General.

b. Purpose of Statute.

6 *Witkin Cal. Proc. PWT* § 320

[§ 320] Purpose of Statute.

In *People v. Kings County Dev. Co.* (1920) 48 C.A. 72, 191 P. 1004, the court pointed out that former C.C.P. 581a, relating to dismissal for delay in prosecution, was not a statute of limitations specifying the time of commencement of actions but a rule of procedure requiring litigants, after commencing actions, to press them to issue and trial with proper diligence; and that the statute carried out the existing inherent power of the court to dismiss actions for inexcusable delay in prosecution. "The object intended to be attained ... is, obviously, to compel reasonable diligence in the prosecution of an action after it has been commenced, and thus afford the party or parties against whom it is brought an opportunity to present such evidential support to any defense he or they may have thereto as may be available at the time the action is instituted, but which may be lost or destroyed through the death of witnesses or otherwise before the action is brought to issue by reason of an unreasonably long delay in serving the defendant or defendants with appropriate legal process notifying him or them of the pendency of the action." (48 C.A. 76.) (See *Hocharian v. Superior Court* (1981) 28 C.3d 714, 719, 170 C.R. 790, 621 P.2d 829; *Atchison, Topeka & Santa Fe Ry. Co. v. Rollaway Window Screen Co.* (1951) 101 C.A.2d 763, 765, 226 P.2d 763; *Davis v. Allstate Ins. Co.* (1989) 217 C.A.3d 1229, 1232, 266 C.R. 668.)

Another purpose was suggested in *Davis v. Hart* (1899) 123 C. 384, 55 P. 1060. "It was intended to prevent the indefinite extension of the life of an obligation in spite of the statute of limitations by simply commencing an action. Such obligations should not be kept alive without the knowledge of the debtor, lying in wait for him in case he should acquire further property. It is a matter of general interest that a debtor should know whether the debt is kept alive or not. Uncertainty upon this matter hampers enterprise." (123 C. 386.)

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B. Mandatory Dismissal for Delay in Service.

1. In General.

c. Scope of Statute.

6 *Witkin Cal. Proc. PWT* § 321

[§ 321] Scope of Statute.

(1) *State as Plaintiff*. Like most rules of procedure, the delay-in-service statute operates against the state as well as a private party plaintiff. (See *People v. Kings County Dev. Co.* (1920) 48 C.A. 72, 77, 191 P. 1004.)

(2) *Adult and Minor Plaintiffs in Wrongful Death Action*. In *J.A. Thompson & Sons v. Superior Court* (1963) 215 C.A.2d 719, 30 C.R. 471, plaintiff widow filed a wrongful death action as sole plaintiff. After a demurrer was sustained, she filed an amended complaint, with her son as a coplaintiff, and served it on defendant more than 3 years after the original complaint had been filed. Defendant moved to dismiss. *Held*, the motion was properly granted as to the widow, and properly denied as to the minor. Defendant relied on the formerly viable statute of limitations cases holding that the cause of action was indivisible and that the limitation period was therefore not extended by the disability of a minor heir. The court distinguished these cases, invoking the analogy of bringing in a new party plaintiff by amended complaint. (215 C.A.2d 721.) The distinction, however, is no longer necessary; the statute of limitations rule has been abrogated, and the right of the minor heir to sue on reaching majority has been secured. (See 3 *Cal. Proc.* (5th), *Actions*, §707.)

(3) *Intervenors*. After the 3-year period has run, the court must dismiss, and can take "no further proceedings" in the action. (*C.C.P.* 583.250, *infra*, §§356, 357.) Hence, it lacks the power to order the filing of a third party's complaint in intervention. (*Floyd Neal & Associates v. Superior Court* (1977) 72 C.A.3d 734, 739, 140 C.R. 301; *Chambers v. Santa Cruz City School Dist.* (1987) 193 C.A.3d 518, 523, 238 C.R. 356 [following *Floyd Neal & Associates*].)

(4) *Incompetents*. In *Tzolov v. International Jet Leasing* (1989) 214 C.A.3d 325, 262 C.R. 606, plaintiff's head injury rendered him incompetent, and the action was commenced by his guardian ad litem. After the time for service had expired, defendant's motion to dismiss was granted. On appeal, plaintiff contended that the statute should be tolled because he was legally incompetent at the time his complaint was filed. *Held*, dismissal affirmed. "If we were concerned with a statute of limitations for *commencing* an action, clearly appellant's incompetency would result in tolling of the limitations period. ... However, there is neither statutory nor case authority for the proposition that once an action is commenced, the time within which the action must be *served and prosecuted* is similarly tolled." (214 C.A.3d 327.)

(5) *Special Proceedings*. *C.C.P.* 583.110 et seq. apply to civil actions, but not to special proceedings except where incorporated by reference in the special proceeding or applied by the court under its inherent authority. (*C.C.P.* 583.120(a), supra, §316; see *Dresser v. Superior Court* (1964) 231 C.A.2d 68, 78, 41 C.R. 473 [delay-in-service statute applies to action in eminent domain].) Thus, the delay-in-service statute has been held not applicable to the following special proceedings:

(a) Proceeding under *Corp.C.* 1800 et seq. for involuntary dissolution of a corporation (see 9 *Summary* (10th), *Corporations*, §215 et seq.). (*Rosner v. Benedict Heights* (1963) 219 C.A.2d 1, 6, 32 C.R. 764.)

(b) Will contest, in which the probate citation differs from a summons. (*Horney v. Superior Court* (1948) 83 C.A.2d 262, 266, 188 P.2d 552.)

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B. Mandatory Dismissal for Delay in Service.

2. Time for Service and Return.

a. Service Within 3 Years.

6 *Witkin Cal. Proc. PWT* § 322

[§ 322] Service Within 3 Years.

(1) *In General.* The summons and complaint must be served on a defendant within 3 years after the action is commenced against that defendant. An action is "commenced" at the time the complaint is filed. (*C.C.P. 583.210(a)*.) Issuance of an additional summons does not affect the running of the period. (See *Kelly v. Ferbrache* (1932) 119 C.A. 529, 532, 6 P.2d 987 [loss of summons and issuance of alias summons under former law].)

(2) *Extension for Holiday.* *C.C.P. 12a* (extension where last day is holiday; see 2 *Cal. Proc.* (5th), *Courts*, §50) applies to *C.C.P. 583.210*; hence, when the last day of the 3-year period falls on Saturday, plaintiff has until the following Monday to complete service. (*Ystrom v. Handel* (1988) 205 C.A.3d 144, 147, 252 C.R. 110.)

(3) *Substantial Compliance.* Defects in form that do not frustrate the statutory purpose of timely notice to the defendant do not invalidate service. Where a reasonable attempt has been made to comply with the statute in good faith, with no attempt to mislead or conceal, the doctrine of substantial compliance applies. (*Davis v. Allstate Ins. Co.* (1989) 217 C.A.3d 1229, 1232, 266 C.R. 668.)

In *Torgersen v. Smith* (1979) 98 C.A.3d 948, 159 C.R. 781, plaintiff unsuccessfully attempted service, then returned the original summons for filing, and finally, still within the 3-year period, successfully served all defendants. Defendants' contention that return and filing of the original summons rendered it ineffective to support personal service was rejected. The process server no longer has to have the original summons in his or her possession at the time of service, and the statutes on process are to be liberally construed to uphold jurisdiction if actual notice has been received by the defendant. Hence, service was effective, and because the return of summons and proof of service occurred within the prescribed period, dismissal was improper. (98 C.A.3d 952.)

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2. Time for Service and Return.

b. Return Within 3 Years and 60 Days.

6 Witkin Cal. Proc. PWT § 323

[§ 323] Return Within 3 Years and 60 Days.

(1) *Requirement.* "The purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary. The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The requirement has been called 'a vintage anachronism in California law' that does not coincide with public policy." (17 Cal. Law Rev. Com. Reports, p. 911.)

Accordingly, *C.C.P. 583.210*, while requiring service within the 3-year period, allows a brief period after service for the return: "Proof of service of the summons shall be filed within 60 days after the time the summons and complaint must be served upon a defendant." (*C.C.P. 583.210(b)*); see Comment to *C.C.P. 583.210* ["Unlike the former provisions, Section 583.210 extends the time for return of summons until 60 days after the time for service in order to allow for delays that could occur"].)

(2) *Form of Return.* Return of the original summons is not essential; return of a copy is sufficient. (See *Courtney v. Abex Corp.* (1986) 176 C.A.3d 343, 347, 221 C.R. 770 [decided under former statute].)

In *Johnson & Johnson v. Superior Court* (1985) 38 C.3d 243, 211 C.R. 517, 695 P.2d 1058, a case decided under the former law, the question was whether a return receipt must be obtained and filed within the statutory period when a summons and complaint are served by mail on a person outside California. Service was by mail, and the return consisted of the summons and complaint and an affidavit of service by mail. The court held that an effective return need not satisfy all of the requirements for proof of service under *C.C.P. 417.20* (filing of signed return receipt as proof of service), and that the return of summons with an affidavit of service within the statutory time period was sufficient. (38 C.3d 254, 256.)

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2. Time for Service and Return.

c. Agreement for Shorter Time.

6 *Witkin Cal. Proc. PWT* § 324

[§ 324] Agreement for Shorter Time.

The parties to a contract may agree that, in the event of litigation, service must be effected within a shorter period of time than that dictated by the statute. However, the agreement is subject to judicial scrutiny for "fundamental fairness." (See *Hayman v. Sitmar Cruises* (1993) 14 C.A.4th 1499, 1505, 1506, 18 C.R.2d 412 [cruise ship contract requiring passengers' personal injury actions to be filed and served within 1 year was unreasonable and unfair in violation of federal public policy; time for service of process, in absence of federal provision, was controlled by C.C.P. 583.210(a)].)

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2. Time for Service and Return.

d. Effect of Filing Amended or Supplemental Complaint.

1. General Rule.

6 *Witkin Cal. Proc. PWT* § 325

[§ 325] General Rule.

The 3-year period ordinarily runs from the filing of the original complaint; time is not extended by filing an amended or supplemental complaint. (*Perati v. Atkinson* (1964) 230 C.A.2d 251, 40 C.R. 835 [dismissal under former statute].) It is immaterial that the original complaint is defective. The period begins to run from the time the defendant is named in the complaint filed, even though the complaint does not state a cause of action against the named defendant until a later date. (*Elling Corp. v. Superior Court* (1975) 48 C.A.3d 89, 94, 123 C.R. 734.)

However, service of a superseded complaint instead of the amended complaint within the 3-year period complies with C.C.P. 583.210(a) where each complaint contains essentially similar allegations. (*Davis v. Allstate Ins. Co.* (1989) 217 C.A.3d 1229, 1234, 266 C.R. 668.)

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d. Effect of Filing Amended or Supplemental Complaint.

2. Claim Based on Different Operative Facts.

6 *Witkin Cal. Proc. PWT* § 326

[§ 326] Claim Based on Different Operative Facts.

Ordinarily, the 3-year period runs from the filing of the original complaint, not the filing of the amended complaint. (See *supra*, §325.) However, when the amended complaint is based on different operative facts, the defendant does not become a party and the statutory period does not commence until the amended complaint is filed. (*Barrington v. A.H. Robins Co.* (1985) 39 C.3d 146, 216 C.R. 405, 702 P.2d 563; *Hennessey's Tavern v. American Air Filter Co.* (1988) 204 C.A.3d 1351, 1360, 251 C.R. 859, *infra*, §327.)

In *Barrington v. A.H. Robins Co.*, plaintiff filed a complaint on July 3, 1979, against Dr. T, Darvon Manufacturer, and many Does, for medical malpractice and negligent failure to warn of the dangers involved in taking the prescription drug Darvon. The complaint was never served on any defendants. In October 1979, plaintiff substituted A.H. Robins Co. for Doe 40, and on February 29, 1980, she filed an amended complaint adding a new cause of action to the earlier causes. The new cause alleged that her injury, an infection, was a result of her use of a defective Dalkon Shield intrauterine device manufactured by Robins. The service and return of the summons on the amended complaint was made on July 19, 1982, more than 3 years after the filing of the original complaint, but within 3 years after the filing of the amended complaint. The lower court granted defendant Robins' motion to dismiss under former C.C.P. 581a. *Held*, reversed.

(a) *Relation back doctrine: statute of limitations.* Where an amended complaint is filed after the statute of limitations has run on the cause of action, it is not barred even though it substitutes a named party for a fictitious defendant, so long as it rests on the same general facts as the original complaint and refers to the same accident and injuries; the amended complaint "relates back" to the original complaint, and the timely filing of that original complaint avoids the bar of the statute. If, however, the amended complaint is not based on the same operative facts, but involves separate and distinct accidents and instrumentalities, it does not relate back and the statute is a bar. (39 C.3d 151.)

(b) *Relation back doctrine: dismissal statute.* Defendant and the trial court took the position that the statute of limitations relation back doctrine and its test do not apply to the statute relating to dismissal for delay in service; but the purposes of that statute and the statute of limitations are virtually identical, and the doctrine should apply. (39 C.3d 152,

153.) The language of decisions upholding dismissals under former C.C.P. 581a where the amended complaints were based on the same operative facts as the original complaints "suggests that in a case where the amended complaint is based on different operative facts, the defendant does not become a party until the date of filing the amendment." (39 C.3d 154.) Current C.C.P. 583.210, although not applicable to the present action, takes no position and states no policy on the relation back doctrine, and "our reasoning would apply to the new statute." (39 C.3d 156.)

(c) *Avoidance of harsh results.* Plaintiff could have filed her Dalkon Shield cause of action as a separate lawsuit; she should not face dismissal by reason of having elected to join it with her other causes of action in the interests of judicial economy. And, because the original complaint and summons were never served, Dr. T and Darvon Manufacturer are now immune from suit under C.C.P. 581a; hence dismissal of Robins would leave plaintiff without a remedy. (39 C.3d 157.)

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d. Effect of Filing Amended or Supplemental Complaint.

3. New Defendant Added.

6 *Witkin Cal. Proc. PWT* § 327

[§ 327] New Defendant Added.

(1) *Commencement on Date of New Pleading.* If an amended or supplemental complaint joins a new defendant (not simply substituting a true name for a fictitious name), the action "commences" as to that defendant on the date of the amended or supplemental pleading. (*Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 C.A.3d 24, 38, 96 C.R. 317.)

(2) *Addition of Alter Ego Defendant.* In *Hennessey's Tavern v. American Air Filter Co.* (1988) 204 C.A.3d 1351, 251 C.R. 859, plaintiff filed a complaint against Air Filter and Elliot Air on June 30, 1982. On June 20, 1985, he filed an amended complaint adding as defendants Allan Elliot and Air Temperature, alleging that Elliot Air and Air Temperature were alter egos of Allan Elliot. Summons was issued on the amended complaint, and the newly named defendants were served with the summons and amended complaint on July 16, 1985. Allan Elliot and Air Temperature moved to dismiss on the theory that the 3-year period ran from the time the action was commenced. *Held*, judgment of dismissal reversed.

(a) Allan Elliot and Air Temperature were not named as defendants in the original complaint, and service on them would have been meaningless at the time the action was commenced. (204 C.A.3d 1357.)

(b) The nature and purpose of the 3-year service of process statute and the statute of limitations are virtually identical; and an action may be brought against an alter ego defendant after the statute of limitations on the original complaint has run. (204 C.A.3d 1359.)

(c) "When a defendant is first named in an amended complaint, and is alleged to be the alter ego of a defendant named in the original complaint, he is brought into the action as a new defendant and the action is commenced as to him at the time the amended complaint naming him is filed. It is necessary that the new defendant be named in the amended complaint and summons issued thereon, and that they be served upon him, in order for the court to acquire jurisdiction over him and he be afforded his due process rights to notice and the opportunity to be heard." (204 C.A.3d 1359.) Hence, the 3-year period does not begin to run until the filing of the amended complaint naming the alter ego defendant.

(204 C.A.3d 1360.)

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d. Effect of Filing Amended or Supplemental Complaint.

4. Joinder of Defendant by Order of Court.

6 *Witkin Cal. Proc. PWT* § 328

[§ 328] Joinder of Defendant by Order of Court.

An exception to the rule that the statutory period runs from the filing of the original complaint (*supra*, §325) is recognized where the amended complaint joins necessary or indispensable parties by order of court. In *Taliaferro v. Riddle* (1959) 167 C.A.2d 567, 334 P.2d 950, an action was commenced in 1950 (apparently against a number of persons), defendants H were served in 1954, and the action was later dismissed as to them. Instead of filing a new complaint against defendants H, plaintiff in June 1954 obtained an order of court under C.C.P. 389 joining them as necessary parties. *Held*, this joinder had the same effect as a new action in starting a new 3-year period running, and service in March 1957 was timely. (See *Dresser v. Superior Court* (1964) 231 C.A.2d 68, 77, 41 C.R. 473 [*Taliaferro* holding applies where new parties are brought in by order of court, not where original parties named as Does and served after period runs]; *Monrovia Hosp. Co. v. Superior Court* (1967) 253 C.A.2d 607, 609, 61 C.R. 737 [indispensable party]; *Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 C.A.3d 24, 40, 96 C.R. 317 [order permitting plaintiffs to file "third amended and supplemental complaint was tantamount to an order joining the defendants newly named therein as necessary or indispensable parties"].)

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3. Extensions, Excuses, and Exceptions.

a. Statutory Basis.

6 *Witkin Cal. Proc. PWT* § 329

[§ 329] Statutory Basis.

(1) *Implied Exceptions Under Former Statute.* Many cases dealing with former C.C.P. 581a recognized implied exceptions, comparable to those developed in the application of former C.C.P. 583 (dismissal for delay in trial; *infra*, §395). (See *Wyoming Pac. Oil Co. v. Preston* (1958) 50 C.2d 736, 740, 329 P.2d 489 [We are therefore of the view that notwithstanding the mandatory language of section 581a, the trial court is vested with discretion in applying the exceptions comparable to the discretion with which it is vested in applying the exceptions to section 583]; *Hocharian v. Superior Court* (1981) 28 C.3d 714, 719, 170 C.R. 790, 621 P.2d 829; *Flamer v. Superior Court* (1968) 266 C.A.2d 907, 912, 72 C.R. 561, *infra*, §352, quoting the text [rule recognized, but excuse rejected]; *Smith v. Herzer* (1969) 270 C.A.2d 747, 750, 76 C.R. 77, quoting the text [same]; *Highlands Inn v. Gurries* (1969) 276 C.A.2d 694, 697, 81 C.R. 273 [same].)

(2) *Statutory Exceptions Are Exclusive.* The current statute codifies the recognized exceptions and excuses, including a general appearance by the defendant (see C.C.P. 583.220, *infra*, §330 et seq.) and a stipulation extending the time for service (see C.C.P. 583.230, *infra*, §338). The service requirements "are not subject to extension, excuse, or exception except as expressly provided by statute." (C.C.P. 583.250(b).)

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3. Extensions, Excuses, and Exceptions.

b. General Appearance.

1. Nature and Scope of Exception.

6 *Witkin Cal. Proc. PWT* § 330

[§ 330] Nature and Scope of Exception.

A general appearance cures the defect of failure to serve, and prevents dismissal. "The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action." (*C.C.P.* 583.220.)

The appearance is normally made by answer, demurrer, or written notice thereof; and it can also be made by other conduct amounting to a request for affirmative relief, or showing the purpose of obtaining a ruling on the merits of the case. (See *Cooper v. Gordon* (1899) 125 C. 296, 301, 57 P. 1006 [written stipulation that plaintiff could take judgment at any time was equivalent to answer admitting allegations of complaint, and sufficient as appearance]; *Union Savings Bank v. Barrett* (1901) 132 C. 453, 64 P. 713 [appearance of executor after death of defendant]; *Pacific Paving Co. v. Vizelech* (1903) 141 C. 4, 8, 74 P. 352; *Lindsey v Superior Court* (1929) 100 C.A. 37, 41, 279 P. 837; *O'Keefe v. Miller* (1965) 231 C.A.2d 920, 42 C.R. 343 [stipulation extending defendants' time to plead, waiving personal service of plaintiff's amended pleadings, and conduct of parties showing that these and other proceedings were directed to merits; general appearance]; 19 Cal. Western L. Rev. 36; on what constitutes general appearance generally, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §208 et seq.)

A conflict exists over whether a defendant's general appearance after 3 years but during the added 60-day period for return of the summons prevents involuntary dismissal. The question was answered affirmatively in *Wong v. Armstrong World Industries* (1991) 232 C.A.3d 1032, 1034, 283 C.R. 870, in which the defendant filed an answer 3 years and 24 days after issuance of the summons. Reading the provisions of the delay in service statute together, "it is clear that the time limitation within which return of summons must be made is inapplicable when a defendant makes a general appearance within three years and sixty days of commencement of the action." (232 C.A.3d 1034.) "A return of summons is required to inform the court that the defendant has received jurisdictional notice. ... This purpose is fulfilled in a case such as this one where the defendant files its answer to the complaint. ... Under the former law ... , a general appearance during the three-year time period for return of summons prevented dismissal. It is axiomatic that a general appearance during the extended three-year-and-sixty-day time period under section 583.210 would also prevent dismissal." (232 C.A.3d 1035.)

A contrary conclusion was reached in *Weatherby v. Van Diest* (1991) 233 C.A.3d 506, 509, 284 C.R. 622, on almost identical facts, where the summons was not returned until 3 years and 10 months after being issued. In upholding dismissal, the court stated that to allow an answer within 3 years and 60 days to excuse the failure to return summons within that period would enable a plaintiff to ignore the requirement that the summons and complaint must be served within 3 years under C.C.P. 583.210(a). (233 C.A.3d 511.)

However, *Biss v. Bohr* (1995) 40 C.A.4th 1246, 1249, 47 C.R.2d 692, agreed with *Wong* and found *Weatherby* wrongly decided. *Weatherby* mistakenly equated the term "served" in C.C.P. 583.210(a) to describe what must be accomplished within 3 years, with "service," which includes return of summons under C.C.P. 583.110(f) and must be accomplished within 3 years and 60 days under C.C.P. 583.210(b). "Recognizing this distinction in the terms used, the statutes are easily harmonized. Because the summons and complaint must be 'served' within three years, an answer will excuse the failure to do so only if it is filed within that period. ... Similarly, because the summons must be returned within three years, sixty days, an answer during that period likewise excuses compliance. This interpretation does no violence to the three-year limitation for serving the summons and complaint, but allows the 'general appearance' exception to apply to the return of summons." (40 C.A.4th 1251.)

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b. General Appearance.

2. Acts Not Constituting General Appearance.

aa. Motion To Dismiss for Delay in Prosecution.

6 *Witkin Cal. Proc. PWT* § 331

[§ 331] Motion To Dismiss for Delay in Prosecution.

A special appearance solely for the purpose of moving to dismiss for untimely service has been held neither a submission to personal jurisdiction nor a waiver of the objection. (*Brock v. Fouchy* (1946) 76 C.A.2d 363, 370, 371, 172 P.2d 945; *Frohman v. Bonelli* (1949) 91 C.A.2d 285, 291, 204 P.2d 890; *Pease v. San Diego* (1949) 93 C.A.2d 706, 711, 209 P.2d 843; *Palmer v. Superior Court* (1961) 192 C.A.2d 302, 305, 13 C.R. 301 [stipulation to continue hearing of motion to dismiss is not general appearance].)

Under C.C.P. 583.220, a motion to dismiss for delay in prosecution is not a general appearance, "whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise." (C.C.P. 583.220(b); see C.C.P. 418.10(a) [motion to quash].)

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2. Acts Not Constituting General Appearance.

bb. Extension of Time To Plead.

6 *Witkin Cal. Proc. PWT* § 332

[§ 332] Extension of Time To Plead.

By statute, an extension of time to plead made either after a motion to dismiss for delay or in connection with a motion to quash service or stay or dismiss an action on grounds of inconvenient forum does not constitute a general appearance. (*C.C.P.* 418.10(a), (d); *C.C.P.* 583.220(c).) (See *Busching v. Superior Court* (1974) 12 *C.3d* 44, 51, 115 *C.R.* 241, 524 *P.2d* 369 ["party who merely seeks an extension of time to plead cannot reasonably be deemed to make a general appearance" in that "purpose may be to obtain adequate time to determine whether or not to object to the jurisdiction of the court"; same is true of extension to seek legal representation]; *Chilcote v. Pacific Air Transport* (1937) 24 *C.A.2d* 32, 35, 74 *P.2d* 300 [stipulation extending time to plead is not general appearance]; cf. *General Ins. Co. v. Superior Court* (1975) 15 *C.3d* 449, 453, 124 *C.R.* 745, 541 *P.2d* 289 [stipulation by defendant agreeing to accept service and requesting extension of time constituted recognition of jurisdiction of court over parties and was therefore general appearance]; *RCA Corp. v. Superior Court* (1975) 47 *C.A.3d* 1007, 1009, 121 *C.R.* 441 [stipulation extending defendant's time "to appear" in action to date within 3-year period met test of general appearance: defendant agreeing to some step or proceeding in cause beneficial to himself].)

In *Woodruff v. McDonald's Restaurants* (1977) 75 *C.A.3d* 655, 142 *C.R.* 367, the court held that, to constitute a general appearance, the stipulation to extend must be made between attorneys. Hence, a stipulation entered into by plaintiff's attorney and an agent of defendant's insurer did not amount to an appearance; to treat such a stipulation as equivalent to one between attorneys would in effect allow unauthorized practice of law by the insurance company. (75 *C.A.3d* 657.)

In *Knapp v. Superior Court* (1978) 79 *C.A.3d* 799, 145 *C.R.* 154, *infra*, §353, the court, as one ground of its decision, concluded that such a stipulation did amount to a general appearance, and described the *Woodruff* holding as preferring form rather than substance, and as departing from the liberal view of cases such as *General Ins. Co. v. Superior Court*, *supra*. (79 *C.A.3d* 802.) "Keeping in mind the import of 'sub-serving, rather than defeating, the ends of substantial justice,' we should take a realistic view of the customs and practices of plaintiffs' attorneys and insurance company claims adjusters. They cooperate in the interests of avoiding litigation, and in hopes of settling the case. We

should recognize the reality that the claims adjuster is representing the insured's interests during certain stages of the proceedings. He is not representing the insured as a lawyer, but rather in a business sense. They have a substantially identical interest. Just as a party could personally sign a valid stipulation to extend time, so could her representative. ... It is utterly anomalous to deny the insurance carrier any standing and to disparage its involvement in the case, as was impliedly done in *Woodruff*, and then to give it beneficial relief by dismissing the case against its insured." (79 C.A.3d 803.)

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6 *Witkin Cal. Proc. PWT* § 333

[§ 333] Responding to Cross-Complaint or Complaint in Intervention.

(1) *Answering or Demurring to Cross-Complaint.* In *Botsford v. Pascoe* (1979) 94 C.A.3d 62, 156 C.R. 177, plaintiffs sued H & S, H & S filed a cross-complaint for indemnity against P and others, and P and the other cross-defendants filed demurrers and an answer to the cross-complaint. P and the others (who had not been named as defendants in the original complaint) were made defendants by amendment and personally served shortly before the end of the 3-year period; but return of summons did not take place until 3 days after the time for return expired. *Held*, dismissal affirmed. For most purposes, a complaint and a cross-complaint initiate independent actions. (94 C.A.3d 67, citing the text.) The statutory language suggests that this is true for the purposes of dismissal. P and the others appeared and participated only in the proceedings between the cross-complainants and themselves; they took no steps in response to the complaint, and hence did not make a general appearance. (94 C.A.3d 68.) (See *Glenwood Homeowners Assn. v. Prosher Dev., Ltd.* (1980) 111 C.A.3d 1002, 1005, 169 C.R. 48 [following *Botsford*].)

(2) *Answering Complaint in Intervention.* In *Duckett v. Superior Court* (1989) 207 C.A.3d 1419, 255 C.R. 733, plaintiff did not serve his personal injury complaint on defendant until after the 3-year period had elapsed. However, within the period, a complaint in intervention had been filed and defendant had filed his answer to it. Thereafter, the intervenor voluntarily dismissed the complaint in intervention. *Held*, defendant's answer to the complaint in intervention was not a general appearance in the personal injury action.

(a) A number of cases recognize the separate and independent nature of a complaint in intervention. (207 C.A.3d 1422.) *Rhode v. National Med. Hosp. of Monterey Park* (1979) 93 C.A.3d 528, 155 C.R. 797, 4 Cal. Proc. (5th), *Pleading*, §228, holding timely service on intervention excused by defendant's appearance in action on the original complaint, is distinguishable. (207 C.A.3d 1424.)

(b) In *Rhode*, the complaint in intervention was filed in an ongoing action being diligently prosecuted by an injured worker; here, the case was not being diligently prosecuted and the complaint in intervention had been dismissed with prejudice. The *Rhode* court declared that dismissing the complaint in intervention for failure to serve within the 3-year

period would not advance the purposes of the statute. (207 C.A.3d 1424.)

(c) "We disagree with *Rhode* to the extent it views a complaint in intervention as inextricably linked to the main action. Its dictum that 'the vitality of an action in intervention is linked to the vitality of the main action' ... may be applicable in the *Rhode* facts where, as petitioner points out, the complaint in intervention was served while the prosecution was continuing in the main action. This dictum, however, is inaccurate if used to describe the nature of a complaint in intervention." (207 C.A.3d 1424.)

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dd. Appearance After Period Has Run.

6 *Witkin Cal. Proc. PWT* § 334

[§ 334] Appearance After Period Has Run.

Appearing belatedly after the statutory period has run does not constitute a general appearance. (See *Grant v. McArthur* (1902) 137 C. 270, 271, 70 P. 88; *Swortfiguer v. White* (1904) 141 C. 576, 579, 75 P. 172; *Busching v. Superior Court* (1974) 12 C.3d 44, 53, 115 C.R. 241, 524 P.2d 369; *Watson v. Superior Court* (1972) 24 C.A.3d 53, 59, 100 C.R. 684; *Ippolito v. Municipal Court* (1977) 67 C.A.3d 682, 688, 136 C.R. 795.)

In *Mannesmann DeMag, Ltd. v. Superior Court* (1985) 172 C.A.3d 1118, 218 C.R. 632, no proper service was made during the 3-year period, but plaintiff contended that defendant made a general appearance. The basis for the contention was that, after the period had run and after defendant had moved to dismiss, defendant's counsel took the deposition of a percipient witness to the accident involved. *Held*, mandamus issued to compel dismissal. "Assuming, however, without deciding, that appearance at the deposition and questioning the witness amounted to a general appearance by petitioner, such an appearance after the expiration of the three-year statute did not affect petitioner's prior motion to dismiss." (172 C.A.3d 1125, citing *Busching*.) While *Busching* was decided under former C.C.P. 581a, there was nothing in new C.C.P. 583.210 et seq. that would alter this result. (172 C.A.3d 1125.) (See *Tires Unlimited v. Superior Court* (1986) 180 C.A.3d 974, 982, 226 C.R. 25; *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 C.A.3d 502, 267 C.R. 76; *Weatherby v. Van Diest* (1991) 233 C.A.3d 506, 511, 284 C.R. 622.)

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ee. Appearance in Action Consolidated With Present Action.

6 *Witkin Cal. Proc. PWT* § 335

[§ 335] Appearance in Action Consolidated With Present Action.

Appearance in an action consolidated for trial with a second action in which the defendant is not timely served is not a general appearance in the latter action. In *Sanchez v. Superior Court* (1988) 203 C.A.3d 1391, 250 C.R. 787, involving two consolidated actions brought by separate sets of plaintiffs for wrongful deaths arising from a single traffic accident, defendant petitioned to the Court of Appeal for mandamus after the trial court denied his motions to dismiss one of the actions for failure of timely service of process. *Held*, writ granted.

(a) "There are two types of consolidation: a complete consolidation resulting in a single action, and a consolidation of separate actions for trial. Under the former procedure, which may be utilized where the parties are identical and the causes could have been joined, the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered. In a consolidation for trial, the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy." (203 C.A.3d 1396.)

(b) Where two cases are consolidated for the purpose of being tried together only, a general appearance in one does not constitute an appearance in the other. (203 C.A.3d 1396.)

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ff. Submitting Affidavit in Support of Codefendant's Motion.

6 *Witkin Cal. Proc. PWT* § 336

[§ 336] Submitting Affidavit in Support of Codefendant's Motion.

In *Slaybaugh v. Superior Court* (1977) 70 C.A.3d 216, 138 C.R. 628, plaintiff filed an action against S, A. Co., and C. Co. The two corporate defendants moved for a change of venue, and defendant S submitted an affidavit in support of their motion, stating that he had not yet been served, that he made the affidavit at their request, and that he did not intend by this act to appear in the action. *Held*, this was not a general appearance, and mandamus issued to compel dismissal of the action against him.

(a) The statement that he did not intend a general appearance was not controlling (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §207), but "it does tend to reinforce the conclusion that he himself was not moving for a change of venue or asking for any relief from the court." (70 C.A.3d 222.)

(b) Although filing an affidavit by a person in support of some relief sought for himself may be a general appearance (70 C.A.3d 223), this was not done here. Just as a witness presenting himself in court in response to a subpoena does not thereby appear as a party, a person who voluntarily gives evidence for another's benefit by affidavit does not make a general appearance. (70 C.A.3d 224.)

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gg. Other Acts.

6 Witkin Cal. Proc. PWT § 337

[§ 337] Other Acts.

Various other acts have been designated by statute or held by the courts not to amount to a general appearance and therefore do not to prevent the delay in service statute from operating:

(1) *Extension of Time for Service*. A stipulation pursuant to C.C.P. 583.230 (infra, §338) extending the time within which service must be made is expressly specified not to be a general appearance. (C.C.P. 583.220(a).)

(2) *Motion To Quash Service*. A motion to quash service of summons for lack of personal jurisdiction is not a general appearance. (C.C.P. 418.10(a)(1), (d).)

(3) *Motion To Stay or Dismiss for Inconvenient Forum*. A motion to stay or dismiss the action on the ground of inconvenient forum does not constitute a general appearance. (C.C.P. 418.10(a)(2), (d).)

(4) *Simultaneous Motions Under C.C.P. 418.10*. When moving under C.C.P. 418.10 to quash service or stay or dismiss the action, a defendant or cross-defendant may simultaneously answer, demur, or move to strike the complaint or cross-complaint, and this will not be considered an appearance unless the C.C.P. 418.10 motion is denied. Once the order denying the motion is entered, the defendant will be deemed to have generally appeared. (C.C.P. 418.10(e).)

(5) *Responding to Discovery Directed to Another*. An employee defendant, answering interrogatories directed to his employing corporation and not to himself individually, does not make a general appearance. (*Semole v. Sansoucie* (1972) 28 C.A.3d 714, 723, 104 C.R. 897, distinguishing *Chitwood v. Los Angeles* (1971) 14 C.A.3d 522, 92 C.R. 441, 2 Cal. Proc. (5th), *Jurisdiction*, §212 [involving interrogatories directed to the answering defendant].)

(6) *General Appearance of Other Defendants*. The appearance of other defendants does not affect a particular nonappearing defendant's right to a dismissal. (*Watson v. Superior Court* (1972) 24 C.A.3d 53, 57, 100 C.R. 684.)

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c. Stipulation Extending Time for Service.

6 *Witkin Cal. Proc. PWT* § 338

[§ 338] Stipulation Extending Time for Service.

(1) *In General.* The parties may extend the time within which service must be made either by a written stipulation, which need not be filed, or by an oral agreement made in open court. (*C.C.P. 583.230.*) However, an unfiled written stipulation must be brought to the court's attention if relevant to the motion for dismissal. (*C.C.P. 583.230(a).*) If the agreement is made orally in open court, it must be entered in the minutes of the court or a transcript must be made. (*C.C.P. 583.230(b).*)

(2) *Form of Stipulation.* The stipulation must expressly extend the time for return of summons or expressly waive the right of dismissal. A stipulation merely extending time to plead to the complaint is insufficient. (*Miles & Sons v. Superior Court* (1960) 181 *C.A.2d* 151, 153, 5 *C.R.* 73; see *infra*, §383.)

(3) *Time of Stipulation.* The stipulation need not be filed or even signed before the period expires, or before the motion to dismiss. It is effective if filed after the period has run and the motion has been made, but before the court's order of dismissal. (*Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 *C.A.2d* 919, 923, 75 *C.R.* 580 [citing cases decided under former *C.C.P.* 583 (dismissal for delay in trial)]; *infra*, §382 et seq.; cf. *McDonagh v. Gournau* (1969) 2 *C.A.3d* 1033, 1041, 83 *C.R.* 63 [unnecessary to decide validity of stipulation filed after expiration of period where it was made by defendant personally and held invalid by judge on sufficient evidence of defendant's lack of understanding].)

(4) *Stipulation Is Not General Appearance.* The stipulation does not constitute a general appearance. (See *C.C.P.* 583.220(a), *supra*, §337.)

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1. Defendant Not Amenable to Process.

aa. Statutory Development.

6 *Witkin Cal. Proc. PWT* § 339

[§ 339] Statutory Development.

(1) *Original Statute.* Originally, former C.C.P. 581a included a limited extension where the defendant was absent from the state or "secreted himself" within the state to prevent service. The purpose of this provision was twofold: (a) to cover the situation where a resident defendant, by fraudulently concealing or absenting himself or herself, could prevent personal jurisdiction; and (b) to avoid forcing the plaintiff to serve a nonresident defendant by publication, where the defendant had no property in the state to constitute a basis for quasi in rem jurisdiction, and no personal judgment could be obtained. (See *Carmichael v. Superior Court* (1942) 55 C.A.2d 406, 408, 130 P.2d 725; *Sylvestre v. King Mfg. Co.* (1967) 256 C.A.2d 236, 239, 64 C.R. 4 [nonresident unincorporated company].) Absence or concealment were, of course, questions of fact to be determined by the trial court. (*Wilson v. Leo* (1912) 19 C.A. 793, 796, 127 P. 1043; *Kelly v. Ferbrache* (1932) 119 C.A. 529, 534, 6 P.2d 987; *Obergfell v. Obergfell* (1955) 134 C.A.2d 541, 546, 286 P.2d 462.)

(2) *Statutory Expansion of Substituted Service.* The Jurisdiction and Service of Process Act, enacted in 1969, expanded the methods of substituted service to permit service on a defendant outside the state, to authorize service by mail and by leaving process at the defendant's home or office (see 3 *Cal. Proc.* (5th), *Actions*, §1001), and to authorize service by publication when the defendant cannot with reasonable diligence be served in another authorized manner (see 3 *Cal. Proc.* (5th), *Actions*, §1033). Thus, the "absence" part of the original statute was outmoded and the "secreted himself" part became less significant. The only reason for tolling the dismissal statute today is when it is not practicable to obtain personal jurisdiction of the defendant. A 1970 amendment substituted language excluding the time during which the defendant was "not amenable to the process of the court." (See *Ostrus v. Price* (1978) 82 C.A.3d 518, 523, 146 C.R. 922; *Buchanan v. Buchanan* (1979) 99 C.A.3d 587, 593, 160 C.R. 577; cf. *People v. Bonelli* (1971) 15 C.A.3d 129, 133, 135, 92 C.R. 828 [amendment was not retroactive].)

(3) *Current Statute.* In computing the time for required service, the time during which the defendant "was not amenable to the process of the court" must be excluded. (C.C.P. 583.240(a).)

Time is extended not only to serve but to make the return. (*Carter v. Superior Court* (1960) 187 C.A.2d 1, 4, 9 C.R.

140 [summons served day before end of 3-year period but not returned in time].)

The period of absence is merely deducted. Thus, if 3 years pass before service on the defendant, excluding the time of absence, dismissal is mandatory. (*Lambert v. Raney* (1966) 239 C.A.2d 659, 661, 49 C.R. 126.)

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1. Defendant Not Amenable to Process.

bb. Defendant Outside California.

6 *Witkin Cal. Proc. PWT* § 340

[§ 340] Defendant Outside California.

The fact that a defendant may be outside California does not mean that the defendant is not amenable to service within the meaning of the statute, because other statutory provisions allow for service of process outside the state. (*Evartt v. Superior Court* (1979) 89 C.A.3d 795, 802, 152 C.R. 836.) Likewise, the fact that the defendant is in another country does not render service impracticable within the meaning of the statute (*Adelson v. Hertz Rent-A-Car* (1982) 133 C.A.3d 221, 226, 183 C.R. 779 [service was possible at defendant's Canadian address]), unless service through established means cannot be effected (see *Quaranta v. Merlini* (1987) 192 C.A.3d 22, 27, 237 C.R. 179 [attempted service in Italy under Hague Convention was unsuccessful]).

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1. Defendant Not Amenable to Process.

cc. Corporate Defendant.

6 *Witkin Cal. Proc. PWT* § 341

[§ 341] Corporate Defendant.

The exclusion for time that the defendant is not amenable to process does not apply to domestic corporations or foreign corporations doing business in California. They are subject to constructive service, and therefore the dismissal statute is not tolled. (See *Coates Capitol Corp. v. Superior Court* (1967) 251 C.A.2d 125, 129, 59 C.R. 231 [domestic corporation could not "secrete itself" within meaning of original delay-in-service statute]; *Rios v. Torvald Klaveness* (1969) 2 C.A.3d 1077, 1080, 83 C.R. 150 ["Due process does not permit holding even a foreign corporation in limbo at the whim of a plaintiff if the plaintiff has available an effective method of substituted service"].)

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1. Defendant Not Amenable to Process.

dd. Marriage or Death of Defendant.

6 *Witkin Cal. Proc. PWT* § 342

[§ 342] Marriage or Death of Defendant.

(1) *Effect of Defendant's Marriage.* A defendant's marriage and subsequent change of name and address did not make her not amenable to process within the meaning of the statute where, through the exercise of reasonable diligence, the possibility of effecting service existed. (*Adelson v. Hertz Rent-A-Car* (1982) 133 C.A.3d 221, 226, 183 C.R. 779.)

(2) *Effect of Defendant's Death.* The period is tolled, however, during the period between the death of the defendant and the appointment of a personal representative. In *Polony v. White* (1974) 43 C.A.3d 44, 117 C.R. 341, plaintiff filed a complaint for personal injuries against defendant father and defendant son in October 1968. Defendant father died in June 1969. Defendant son, though served, was obviously not liable; no service could be made on the deceased defendant until probate proceedings were commenced. An administrator was appointed in October 1971, and service was made on her in December 1971. In January, 1973, the lower court ordered dismissal. *Held*, reversed; when the defendant is dead and probate has not yet begun, former C.C.P. 581a(d) (now C.C.P. 583.240(a)) applies. It is immaterial that a creditor could commence probate by seeking appointment of an administrator; the statute does not define a duty or impose an obligation, but merely deals with facts and their legal consequence. The heirs or nominated executor of a decedent can terminate dilatory conduct of the plaintiff by probating the estate. (43 C.A.3d 48.)

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1. Defendant Not Amenable to Process.

ee. Amenability to Service Only By Publication.

6 *Witkin Cal. Proc. PWT* § 343

[§ 343] Amenability to Service Only By Publication.

Formerly, a conflict existed on the issue whether a trial judge's finding that a defendant "cannot with reasonable diligence be served" other than by publication--a finding required for an order authorizing service of summons by publication pursuant to *C.C.P. 415.50(a)* (see 3 *Cal. Proc.* (5th), *Actions*, §1033)--is the equivalent of a determination that the defendant "was not amenable to the process of the court" for purposes of the tolling provision of *C.C.P. 583.240(a)*. *Quaranta v. Merlini* (1987) 192 C.A.3d 22, 27, 237 C.R. 179, held that a finding that the defendant could not with reasonable diligence be served by means other than publication established that the defendant was not amenable to process within the meaning of *C.C.P. 583.240(a)*. On the other hand, *Perez v. Smith* (1993) 19 C.A.4th 1595, 1599, 1600, 24 C.R.2d 186, held that there is a significant difference between the two concepts, and that a trial judge's order, authorizing service by publication, was insufficient to establish that the defendant was not amenable to process under *C.C.P. 583.240(a)*.

This conflict was resolved in *Watts v. Crawford* (1995) 10 C.4th 743, 42 C.R.2d 81, 896 P.2d 807, disapproving *Quaranta* and approving *Perez*. One day before expiration of the 3-year period following the filing of the complaint, plaintiffs obtained an order for publication of summons, based on a finding under *C.C.P. 415.50(a)* that defendant could not be served with reasonable diligence in any other manner. However, service by publication did not commence until 20 days after expiration of the 3-year period and would not have been completed until 4 weeks thereafter. Defendant moved to dismiss the action, based on plaintiffs' failure to effect service within 3 years. The trial judge granted the motion and ordered dismissal. *Held*, affirmed; the finding that defendant could not be served with reasonable diligence in any manner other than by publication was not the equivalent of a finding that defendant was not amenable to the process of the court within the meaning of *C.C.P. 583.210(a)*.

(a) An examination of appellate opinions in this state predating the Legislature's employment of the phrase "amenable to process" in *C.C.P. 583.210(a)* reveals that this and related phrases commonly were employed to refer to the state's jurisdictional authority with regard to a particular defendant. (10 C.4th 755.) This usage of the phrase by the California Courts of Appeal was in turn derived from similar usage by the United States Supreme Court in referring to

the authority of a state to exercise personal jurisdiction over a party. (*10 C.4th* 756, 757.) The statutory history and common usage of the phrase likewise indicate that it refers to the state's authority to exercise jurisdiction over a defendant, i.e., the determination whether the defendant is subject to being served, rather than to the reasonable availability of that defendant for service of process. "Accordingly, we hold that the finding that defendant was not reasonably available for service of process, other than by publication, was not the equivalent of a finding that defendant was not amenable to the process of the court" within the meaning of *C.C.P. 583.240(a)*. (*10 C.4th* 761.)

(b) Because amenability to process under *C.C.P. 583.240(a)* may not be equated with reasonable availability for service under *C.C.P. 415.50(a)*, the trial judge's finding that defendant could not with reasonable diligence be served by means other than publication did not constitute a binding adjudication that defendant was not amenable to the process of the court, thereby tolling the 3-year dismissal statute. The express language of the two statutes is not readily susceptible of the interpretation that any factual determination made pursuant to the first would be identical to that made pursuant to the second. (*10 C.4th* 761.)

(c) In the present case, it appears that defendant had been a resident of the state during the 3-year period following the filing of the complaint. Even were she considered a nonresident, however, defendant allegedly entered into a contract within the state for the sale of property, and allegedly owned other property within the state, thus creating the minimum contacts constitutionally necessary to the court's exercise of personal jurisdiction over her. In addition, *C.C.P. 415.50* expressly authorized plaintiffs to serve defendant by publication (once the other means had been exhausted)--a method deemed by that statute to confer jurisdiction. That method might have been completed prior to the conclusion of the statutory 3-year period. Therefore, defendant's amenability to process--dependent not only on the court's exercise of personal jurisdiction over her in a manner comporting with standards of due process and adequate notice, but also on the existence of a statute or rule authorizing service--was established. (*10 C.4th* 762.)

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2. Stay Affecting Service.

6 *Witkin Cal. Proc. PWT* § 344

[§ 344] Stay Affecting Service.

In computing the time for service under the dismissal statute, the time must be excluded during which the "prosecution of the action or proceedings in the action was stayed and the stay affected service." (*C.C.P. 583.240(b)*; see *Highland Stucco & Lime v. Superior Court* (1990) 222 *C.A.3d* 637, 644, 272 *C.R.* 60 [order in complex litigation staying all proceedings on nonabatement issues was a stay affecting service under *C.C.P. 583.240(b)*, because it precluded service on additional defendants].)

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3. Validity of Service Disputed.

6 *Witkin Cal. Proc. PWT* § 345

[§ 345] Validity of Service Disputed.

The time during which the validity of service is "the subject of litigation by the parties" is excluded in computing the time for service. (*C.C.P. 583.240(c)*.) This exception is applicable where the defendant is aware of the action but challenges the jurisdiction of the court or the sufficiency of service. (See Law Rev. Com. Comment to *C.C.P. 583.240*.)

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aa. Judicial Rule and Codification.

6 Witkin Cal. Proc. PWT § 346

[§ 346] Judicial Rule and Codification.

(1) *Judicial Development.* The impracticability exception, developed in cases applying former C.C.P. 583 (dismissal for delay in trial; *infra*, §395), was later applied to cases dealing with delay in service under former C.C.P. 581a. (See *Hocharian v. Superior Court* (1981) 28 C.3d 714, 720, 721, 170 C.R. 790, 621 P.2d 829.)

Ippolito v. Municipal Court (1977) 67 C.A.3d 682, 136 C.R. 795, recognizing but holding the exception inapplicable, stressed the different policies underlying the two statutes. "Section 581a concerns itself with the detriment accruing to a *defendant* insofar as his ability to institute discovery, preserve evidence and locate witnesses is concerned, when he is not given *timely notice* of the institution of an action. ... Section 583 focuses upon the detriment to the *judicial system* as well as to a defendant attendant upon the tardy litigation of a claim. We therefore cannot apply with rubberstamp symmetry decisional criteria interpreting section 583 and the implied exceptions thereunder to section 581a." (67 C.A.3d 687.)

In *Ippolito*, W filed an action against I in September 1969. In June 1970, W's process server, unable to locate I, filed a false return of service. In July 1970, W had a default entered, and in April 1971, took a default judgment. W then did nothing until September 1975, when he garnished I's wages. I moved to vacate the default judgment, to quash the service, and to dismiss the action. The trial judge granted the motion to vacate the judgment but denied the motion to dismiss, and the superior court denied a petition for mandamus to compel dismissal. *Held*, reversed; I was entitled to a dismissal. W contended that, under *Maquire v. Collier* (1975) 49 C.A.3d 309, 313, 122 C.R. 510, *infra*, §404, the time of the default should be excluded from the 3-year period. However, the impracticability exception of former C.C.P. 583 comes into play only where a party is unable to bring the case to trial from causes beyond his control. (67 C.A.3d 688.) Here, W selected his own agent for service, and could not, as against an innocent adversary, rely on the agent's false return. (67 C.A.3d 688.)

(2) *Codification.* The judicial exclusion was codified in former C.C.P. 581a. C.C.P. 583.240(d) now provides: The time is excluded during which "[s]ervice, for any other reason, was impossible, impracticable, or futile due to causes

beyond the plaintiff's control." (See *Highland Stucco & Lime v. Superior Court* (1990) 222 C.A.3d 637, 645, 272 C.R. 60 [even if order staying all proceedings on nonabatement issues was improper, it was a facially valid order requiring compliance, and hence made service "improper, impracticable, or futile" under C.C.P. 583.240(d)].) However, failure "to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision." (C.C.P. 583.240(d).)

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bb. Strict Construction.

6 *Witkin Cal. Proc. PWT* § 347

[§ 347] Strict Construction.

The Law Revision Commission Comment to *C.C.P. 583.240* observes that the "excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence." In contrast, the Comment to *C.C.P. 583.340* states that the computation of time for bringing an action to trial "must be interpreted liberally." This difference in treatment is consistent with one aspect of the policy announced in *C.C.P. 583.130*--plaintiff must exercise diligence--and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff. (On illustrations of strict construction, see *infra*, §348 et seq.; on *C.C.P. 583.130*, see *supra*, §315.)

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cc. Improper Entry of Default.

6 *Witkin Cal. Proc. PWT* § 348

[§ 348] Improper Entry of Default.

In *Dale v. ITT Life Ins. Corp.* (1989) 207 C.A.3d 495, 255 C.R. 8, plaintiff, a former employee of defendant ITT, filed a complaint against ITT and N, one of ITT's general agents. In June 1978, plaintiff served the summons and complaint on N at N's business address, despite the fact that N was not the corporation's designated agent for service of process. N was discharged by ITT 8 days after he was served, and he never informed ITT of the action. In December 1978 plaintiff filed a request to enter ITT's default, sending notice in care of N at N's previous address. In May 1981, plaintiff obtained a default judgment for \$ 100,000. In late 1983, plaintiff attempted to levy against ITT assets, and ITT for the first time learned of the action. ITT moved to set aside the judgment, and the trial judge denied the motion. In January 1986, the Court of Appeal reversed the order of denial with directions to set aside the default and vacate the default judgment. The remittitur issued in April 1986, and 2 months later ITT moved to dismiss for failure to serve summons within 3 years or to bring the case to trial within 5 years. The trial judge granted the motion. *Held*, affirmed, on the 3-year dismissal statute.

(a) Because it is impracticable to bring a case to trial when the defendant is already in default, the period during which he or she is in default and the period during which a default judgment is in effect are excluded from the 5-year period. (207 C.A.3d 498, citing *Maguire v. Collier* (1975) 49 C.A.3d 309, 122 C.R. 510, *infra*, §404.) Deducting these periods, 4 years remained to bring the action to trial and the 5-year period had not run. (207 C.A.3d 499.)

(b) Dismissal for failure to serve was proper.

(1) The only exception to the running of the 3-year period that could be urged under the facts is that it was impossible, impracticable, or futile to serve the process due to causes beyond plaintiff's control. (207 C.A.3d 499.) In *Ippolito v. Municipal Court* (1977) 67 C.A.3d 682, 136 C.R. 795, *supra*, §346, involving a false return of service, the court refused to transplant the *Maguire* tolling exception to the 5-year rule for bringing a case to trial to the 3-year rule for serving of process. (207 C.A.3d 500.) In *Hocharian v. Superior Court* (1981) 28 C.3d 714, 170 C.R. 790, 621 P.2d 829, the court recognized "reasonable diligence" as a separate exception to the rule of mandatory dismissal for lack of

service, and disapproved *Ippolito* and other cases requiring circumstances beyond the party's control. (207 C.A.3d 501.)

(2) The 1982 Legislature amended the statute to codify the pre-*Hocharian* implied exceptions, omitting reasonable diligence, and adopting *Ippolito*'s language on causes beyond the plaintiff's control. (207 C.A.3d 501, 502, citing *Barrington v. A.H. Robins Co.* (1985) 39 C.3d 146, 216 C.R. 405, 702 P.2d 563, supra, §326.)

(3) Under *Ippolito*'s holding, entry of the default and default judgment against ITT tolled the dismissal period only if the claimed impracticability of service was due to causes beyond plaintiff's control; but the facts show that it was not. Plaintiff must bear responsibility for his lawyer's failure to effect proper service, and his deliberate avoidance of giving ITT actual notice of the suit; and if plaintiff had exercised reasonable diligence in prosecuting the case, instead of delaying the default judgment and attempted satisfaction of it, the invalidity of service could have been discovered before the period had run. (207 C.A.3d 502.)

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dd. Improper Dismissal of Action.

6 *Witkin Cal. Proc. PWT* § 349

[§ 349] Improper Dismissal of Action.

In *Graf v. Gaslight* (1990) 225 C.A.3d 291, 274 C.R. 759, the trial judge dismissed plaintiff's action. Six months later the dismissal was set aside after plaintiff's attorney, who had not received notice of dismissal at his current address, moved for relief under C.C.P. 473. Defendants then moved to dismiss under C.C.P. 583.210 for failure to serve the complaint within 3 years of its filing. The complaint had been filed on January 17, 1986, and service had occurred on February 9 and 28, 1989. The trial judge granted defendants' motion. *Held*, affirmed.

(a) Service during the entire 6-month period of dismissal was not "impossible, impracticable, or futile due to causes beyond the plaintiff's control" under C.C.P. 583.240(d). A substantial portion of the dismissal period passed without plaintiff's awareness of the dismissal, due to plaintiff's attorney having failed to file a notice of change of address with the court. Notifying the court of the change of address was within plaintiff's control as an obligation of his counsel. (225 C.A.3d 297.) Plaintiff's attorney had contracted with another attorney to make most of plaintiff's attorney's court appearances. It was within plaintiff's attorney's control to establish procedures to determine the result of those appearances. Here, he had incorrectly assumed that the attorney had successfully opposed the original motion to dismiss. (225 C.A.3d 297.)

(b) Plaintiff's attorney filed the motion for relief from the dismissal on January 9, 1989, about 7 weeks after he had received confirmation of it. The dismissal was set aside on January 25, 1989. Thus, "it is reasonable in this case to toll the three-year statute of limitations for effecting service of process for the period of time between the date that appellant requested relief from the initial dismissal (Jan. 9, 1989) and the date on which the court granted relief by setting aside the dismissal (Jan. 25, 1989), a period of sixteen days, as being due to causes beyond appellant's control. However, this 16-day period of tolling is of no assistance to appellant in this instance. Since appellant filed his complaint on January 17, 1986, tolling the time for service by 16 days would only extend the time for service until February 1, 1989. Even taking into consideration the tolling period of 16 days, appellant still failed to effect timely service because respondents were not served until February 9 and 28, 1989." (225 C.A.3d 298.)

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ee. Other Illustrations of Strict Construction.

6 *Witkin Cal. Proc. PWT § 350*

[§ 350] Other Illustrations of Strict Construction.

(1) *Change in Law.* In *Lopa v. Superior Court* (1975) 46 C.A.3d 382, 120 C.R. 445, the asserted impracticability was based on the fact that a Doe defendant was the host-driver of an automobile and under the then existing guest law could not be held liable; when the guest law was declared unconstitutional, plaintiffs first became aware of their cause of action. The court rejected the argument, pointing out that plaintiffs were in no way prevented from asserting a cause of action, even though they faced the possibility of rebuff under the existing law, as did the successful plaintiff in *Brown v. Merlo* (1973) 8 C.3d 855, 106 C.R. 388, 506 P.2d 212, 8 Summary (10th), *Constitutional Law*, §795, holding the statute unconstitutional. (46 C.A.3d 390.)

(2) *Pendency of Related Action.* In *Valerio v. Boise Cascade Corp.* (1986) 177 C.A.3d 1212, 223 C.R. 592, plaintiff filed nearly identical actions in state and federal courts. Defendant's motion to dismiss the state action for failure to serve the complaint and summons within 3 years was granted. Plaintiff contended that it would be impracticable or futile to proceed with the state action during the pendency of the federal action. *Held*, judgment of dismissal affirmed.

(a) "The problem with appellants' argument is that it is directed to the difficulties of bringing a case to trial rather than to whether it was impracticable or futile to serve and return process." The pendency of the federal action placed no legal or practical obstacle to serving process and did not make service either impracticable or futile. (177 C.A.3d 1219.)

(b) Here, plaintiff did nothing to attempt timely service and failed to seek a written stipulation extending the time to serve. Under these circumstances, the impracticability exception is not applicable. (177 C.A.3d 1221.) (See *Paul v. Drost* (1986) 186 C.A.3d 1407, 1411, 231 C.R. 361 [quoting *Valerio* and holding that pendency of related action was no excuse].)

(3) *Process Server's Mistake.* In *Bishop v. Silva* (1991) 234 C.A.3d 1317, 1321, 285 C.R. 910, a third-party tort action for injuries plaintiff sustained during the course and scope of his employment, the trial court dismissed the action for failure to effect timely service, rejecting plaintiff's claim of excuse of counsel's diligence, but impossibility due to

loss of the summons. *Held*, affirmed. The excuse of impossibility is to be strictly construed and plaintiff's problems were within his own control, having selected his own agent to effect service so as to be charged with the agent's acts and declarations. Moreover, counsel failed to follow the affidavit procedure of *C.C.P. 417.30(b)*, in the case of a lost summons. (234 *C.A.3d* 1321.) Neither was failure to effect timely service excused by defendant's actual notice of the lawsuit. (234 *C.A.3d* 1323.)

(4) *Attorney's Misconduct*. In *Shipley v. Sugita* (1996) 50 *C.A.4th* 320, 57 *C.R.2d* 750, the trial judge dismissed a breach of contract action for plaintiff's failure to effect timely service. Defendant was a citizen and resident of a foreign country and plaintiff had been erroneously informed by his attorney that defendant had been properly served. *Held*, affirmed. When the Legislature fashioned the exceptions in *C.C.P. 583.240*, it did not include the long-established doctrine of positive attorney misconduct. Thus, it is reasonable to conclude that the Legislature did not intend that attorney misconduct could excuse failure to complete service within the mandatory statutory period. If dismissal results, a plaintiff's redress is through a malpractice action against the attorney. A defendant should not be penalized by an extension of the mandatory limitations period due to the misconduct of plaintiff's attorney. (50 *C.A.4th* 327.)

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e. Estoppel and Waiver.

1. Development of Estoppel Exception.

6 *Witkin Cal. Proc. PWT* § 351

[§ 351] Development of Estoppel Exception.

(1) *Former Law: Doctrine Rejected.* The doctrine of estoppel was held inapplicable in the early cases. Thus, it was not an objection to dismissal that the delay was caused by or even requested by the defendant for the defendant's own benefit. (See *White v. Superior Court* (1899) 126 C. 245, 247, 58 P. 450 [petitioner's conduct "is wholly indefensible," but "he is only claiming what the law commands, and his case is no worse than that of any debtor who pleads the statute of limitations against a just demand"]; *Siskiyou County Bank v. Hoyt* (1901) 132 C. 81, 84, 64 P. 118 [defendants solicited delay, assured plaintiff that it could take judgment at any time]; *Sauer v. Superior Court* (1925) 74 C.A. 580, 584, 241 P. 570 [oral stipulation for continuance, with statement that defendants would not take advantage of delay].)

(2) *Judicial Approval of Doctrine.* *Flamer v. Superior Court* (1968) 266 C.A.2d 907, 72 C.R. 561, *infra*, §352, placed *White*, *Siskiyou County Bank*, and *Sauer* in the class of cases outmoded by the rule developed in *Wyoming Pac. Oil Co. v. Preston* (1958) 50 C.2d 736, 329 P.2d 489, *supra*, §329. (266 C.A.2d 912, 914, citing the text.) After reviewing many decisions under both dismissal statutes, the court concluded that the doctrine was available as an exception. "We hold, therefore, that neither the apparently mandatory language of sections 581a and 583 nor decisional law preclude the court from refusing to dismiss an action under those sections upon the ground of a claim of estoppel in an appropriate case." (266 C.A.2d 917.) (See *Hill v. Superior Court* (1967) 251 C.A.2d 746, 750, 59 C.R. 768 [assuming that estoppel might be invoked, record did not support defense].)

Tresway Aero v. Superior Court (1971) 5 C.3d 431, 96 C.R. 571, 487 P.2d 1211, *infra*, §353, reaffirmed the *Wyoming Pacific* approach, approved the *Flamer* holding, and disapproved the *Siskiyou*, *White*, and *Sauer* cases. (5 C.3d 439.)

(3) *Codification.* The availability of estoppel as an exception to dismissal was codified in 1982. C.C.P. 583.140 (*supra*, §315) now provides that nothing in the delay-in-service statute "abrogates or otherwise affects the principles of estoppel."

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2. Nature of Estoppel Defense.

6 *Witkin Cal. Proc. PWT* § 352

[§ 352] Nature of Estoppel Defense.

Estoppel is a defense to a motion to dismiss where the defendant has, by words or conduct, caused the plaintiff reasonably to forebear from serving the defendant within the statutory period. (*Tresway Aero v. Superior Court* (1971) 5 C.3d 431, 437, 96 C.R. 571, 487 P.2d 1211, *infra*, §353; *State Air Resources Bd. v. Superior Court* (1979) 93 C.A.3d 803, 808, 155 C.R. 726; *cf. Lesko v. Superior Court* (1982) 127 C.A.3d 476, 179 C.R. 595, *infra*, §356 [no estoppel under facts]; *Synanon Foundation v. Marin* (1982) 133 C.A.3d 607, 614, 184 C.R. 129 [applying estoppel exception, by analogy, in tax refund action governed by Rev.C. 5147]; *Adoption of Matthew B.* (1991) 232 C.A.3d 1239, 1271, 284 C.R. 18.)

No estoppel arises from allegedly misleading acts taking place after the 3-year period has run. (*Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 C.A.3d 502, 511, 512, 267 C.R. 76.)

In *Flamer v. Superior Court* (1968) 266 C.A.2d 907, 72 C.R. 561, plaintiff O sued defendants for malpractice. The complaint was filed February 15, 1965, and summons was issued but was never returned. On March 5, 1968, defendants moved for dismissal. The judge refused to determine the issue of estoppel, but denied the motion to dismiss to enable the parties to obtain speedy review by mandamus to compel dismissal, which defendants promptly sought. *Held*, writ issued, not to compel dismissal but to compel exercise of jurisdiction to determine the claim of estoppel (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §360).

(a) Plaintiff's declaration showed that her attorney was suspended from practice about a year after the action was commenced, and was subsequently disbarred; that he had advised her that the case was on the trial calendar and he was attempting to settle it; that she had difficulty in reaching him and did not learn of his disbarment until November 1967 from D, the general agent of defendants' insurer; that D urged settlement discussions and advised her not to get an attorney; and that she did not retain one until D's letter of February 9, 1968. (266 C.A.2d 910.)

(b) These facts, if true, established a good defense to the motion. If plaintiff "was induced by the defendants to refrain from seeing an attorney, under circumstances which justify the application of the doctrine of equitable estoppel,

and the conduct of the defendants was the cause of plaintiff's delay in filing return of service, the period during which plaintiff was induced to delay should not be counted as part of the three-year period." (266 C.A.2d 918.)

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3. Extension of Time As Estoppel.

6 *Witkin Cal. Proc. PWT* § 353

[§ 353] Extension of Time As Estoppel.

In *Tresway Aero v. Superior Court* (1971) 5 C.3d 431, 96 C.R. 571, 487 P.2d 1211, plaintiff, on August 2, 1966, filed a wrongful death action against defendant corporation. After waiting for the conclusion of a related test case, plaintiff engaged C, a process server, to serve an officer of defendant. W, defendant's officer and attorney, accepted the summons on July 22, 1969, and said he would take care of it. After defendant received the summons and complaint, defendant's attorney requested and obtained from plaintiff's attorney a 20-day extension of time to answer. However, the 3-year period for service expired on August 4, 1969; and, on August 11, 1969, defendant moved to quash the summons as defective and to dismiss the action under the delay-in-service statute. The trial judge denied both motions. *Held*, mandamus issued to compel quashing of summons for failure to include in the notice that the person was served on behalf of the corporation (C.C.P. 412.30; see 3 *Cal. Proc.* (5th), *Actions*, §989). But dismissal was unwarranted.

(a) Two circumstances were previously recognized as giving rise to an estoppel: (1) The defendant makes a statement to a plaintiff not represented by counsel; (2) the defendant stipulates in open court to an extension of the statutory period. (5 C.3d 439.) "We perceive no logical reason why the doctrine of estoppel should be so restricted. Stipulations in open court are not the only words or conduct which reasonably and commonly induce reliance by counsel. When the defendant induces the plaintiff to delay service of summons, or to overlook errors in service, and the plaintiff's reliance is reasonable, an estoppel is essential to prevent the defendant from profiting from his deception. In such a case, any distinction between words spoken in open court or over the telephone, or between words spoken to an attorney or to a layman would be purely arbitrary." (5 C.3d 439.)

(b) If defendant had moved to quash summons before the time to answer under the summons, plaintiff would have been alerted to the defect in time to have made valid service within the 3-year period; and if defendant had done nothing and plaintiff had sought to enter its default, the clerk would have refused to enter it and again plaintiff would have been alerted in time. Thus, "defendant's maneuver in getting additional time to plead" resulted in the failure to serve the summons in time; by requesting the extension, defendant "led plaintiff to believe that further service of process on defendant would be duplicatory and redundant." (5 C.3d 441.) This conduct "lulled plaintiff" into a "false sense of security" and "probably prevented plaintiff from discovering her error and effecting valid service within the statutory

period." The ends of justice would therefore be best served by an estoppel to dismiss. (5 C.3d 442.)

In *Knapp v. Superior Court* (1978) 79 C.A.3d 799, 145 C.R. 154, plaintiff's counsel served defendant about 2 months before the end of the 3-year period, but did not file the return of service within the statutory period. His excuse for this omission was that he had relied on an agreement, made with an adjuster for defendant's insurer, giving defendant an open extension of time to plead. After the period had run, plaintiffs' counsel requested that defendant answer within 10 days, and defendant moved to dismiss. The trial court denied the motion and the Court of Appeal refused to issue mandamus to compel dismissal. The first ground of the opinion was that the agreement constituted a general appearance (*supra*, §330). The second was that, applying the test of *Tresway Aero*, an estoppel arose. Defendant, through her representative, "induced the real parties' attorney to overlook the return of service, by asking for the extension of time. In view of the well-known custom of the industry honoring such extensions, real parties' attorney's reliance was reasonable." (79 C.A.3d 804.)

In *Owen v. Niagara Machine & Tool Works* (1977) 68 C.A.3d 566, 137 C.R. 378, the court rejected a claim of estoppel. Plaintiff, after much difficulty, served defendant in New York on August 29, 17 days before the end of the 3-year period (September 20). On September 5, defendant's counsel telephoned plaintiff's counsel and obtained an agreement extending time "to plead" until September 30; this agreement was then confirmed by a letter dated September 5. When the period expired, defendant moved to dismiss, and the trial court granted the motion. *Held*, affirmed. *RCA Corp. v. Superior Court* (1975) 47 C.A.3d 1007, 121 C.R. 441, *supra*, §332, is distinguishable in that it involved a written stipulation extending time "to appear" rather than merely "to plead." *Tresway Aero* is also distinguishable in that plaintiff had 10 days to protect himself against the defendant's tactics. (68 C.A.3d 568.) (See *Biss v. Bohr* (1995) 40 C.A.4th 1246, 1251, 47 C.R.2d 692 [defendant's request for extension of time to answer was not ground for estoppel where extension was granted to date still within 3 years and 60 days after complaint was filed, plaintiff on that date had time to file return but failed to do so, and failure was not attributable to any conduct by defendant].)

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B. Mandatory Dismissal for Delay in Service.

3. Extensions, Excuses, and Exceptions.

e. Estoppel and Waiver.

4. Waiver of Right To Dismiss.

6 *Witkin Cal. Proc. PWT* § 354

[§ 354] Waiver of Right To Dismiss.

The principles of waiver, like those of estoppel, may excuse untimely service of process. (*C.C.P.* 583.140, *supra*, §315.) A defendant may waive the right to dismiss where, knowing service to be untimely, the defendant voluntarily elects to litigate by answering the complaint and participating in the litigation. (*Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 C.A.3d 502, 512, 267 C.R. 76.)

Waiver is based on the intentional relinquishment of a known right, by either actual intent to do so or conduct so inconsistent with intent to enforce the right as to induce a reasonable belief that it has been relinquished. The burden is on the plaintiff to make a clear showing of that intent or conduct. The defendant is under no duty to inform the plaintiff that it has not been timely served. (*Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview*, *supra*, 218 C.A.3d 512 [defendant, merely by filing answer, participating in pretrial discovery, and filing cross-complaint, was not waiving right of dismissal].)

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B. Mandatory Dismissal for Delay in Service.

4. Procedure.

a. Motion To Dismiss.

6 *Witkin Cal. Proc. PWT* § 355

[§ 355] Motion To Dismiss.

If service is not made within the time prescribed, dismissal must be granted by the court on its own motion or on the motion of any person interested in the action, whether named as a party or not. Notice must first be given to the parties. (*C.C.P. 583.250(a)(2)*.) (See *C.E.B., Civil Lit. Forms* §35.1 et seq.)

Notice of a motion to dismiss for delay in service may be served and filed on or before the last day of the defendant's time to plead, or within any further time allowed by the court for good cause. (See *C.C.P. 418.10(a)(3)* [referring broadly to motions to dismiss "pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8"].) The motion does not constitute a general appearance. (See *supra*, §331.) The procedural requirements for the motion are the same as those for motions to quash and motions to stay or dismiss on the ground of inconvenient forum. (See *C.C.P. 418.10(b), (c), (d), 2 Cal. Proc. (5th), Jurisdiction*, §217 et seq.)

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4. Procedure.

b. Ruling on Motion.

6 *Witkin Cal. Proc. PWT* § 356

[§ 356] Ruling on Motion.

(a) *Original Jurisdictional Rule.* In a long line of decisions, the original statutory language ("must be dismissed") was construed as jurisdictional. In a case coming within its terms, the court had no authority except to dismiss, and prohibition would lie to prevent it from trying the case. (See *Davis v. Hart* (1899) 123 C. 384, 55 P. 1060; *Modoc Land & Livestock Co. v. Superior Court* (1900) 128 C. 255, 60 P. 848; *Ransome-Crummey Co. v. Wood* (1919) 40 C.A. 355, 357, 180 P. 951; *Sauer v. Superior Court* (1925) 74 C.A. 580, 583, 241 P. 570; *Kelly v. Ferbrache* (1932) 119 C.A. 529, 531, 6 P.2d 987; *San Jose v. Wilcox* (1944) 62 C.A.2d 224, 226, 144 P.2d 636; *Cahn v. Jones* (1950) 101 C.A.2d 345, 347, 225 P.2d 570; *Palmer v. Superior Court* (1961) 192 C.A.2d 302, 13 C.R. 301; *Dresser v. Superior Court* (1964) 231 C.A.2d 68, 73, 41 C.R. 473; *Coates Capitol Corp. v. Superior Court* (1967) 251 C.A.2d 125, 126, 59 C.R. 231; *Bernstein v. Superior Court* (1969) 2 C.A.3d 700, 703, 82 C.R. 775; *Watson v. Superior Court* (1972) 24 C.A.3d 53, 58, 100 C.R. 684; *Semole v. Sansoucie* (1972) 28 C.A.3d 714, 722, 104 C.R. 897, citing the text; cf. *Cooper v. Gordon* (1899) 125 C. 296, 300, 57 P. 1006 [suggesting that if defendant appeared after 3 years, objected to dismissal, and demanded trial, court could not properly dismiss over protests of both parties].)

(2) *Current Statutory Requirements.* The current delay-in-service statute provides that its requirements "are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (*C.C.P.* 583.250(b).)

The Law Revision Commission describes the purpose of *C.C.P.* 583.250 as follows: "Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional; 1982 legislation declares that it is. The 1982 legislation was intended to limit the ability of the courts to develop exceptions and excuses not prescribed by statute. Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack. The proposed law makes clear the service requirement is mandatory (not jurisdictional), and provides expressly that the courts may not develop exceptions and excuses not prescribed by statute." (17 Cal. Law Rev. Com. Reports, p. 912.)

The provisions of *C.C.P. 583.250* are subject to waiver and estoppel. Court action in violation of the terms of *C.C.P. 583.250* is voidable and subject to direct review but is not void and hence not subject to collateral attack. (Law Rev. Com. Comment to *C.C.P. 583.250*.)

Where a motion to dismiss under *C.C.P. 583.210* is denied, the court must allow the defendant to file a pleading. (*C.C.P. 472a(e)*.)

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4. Procedure.

c. Effect of Dismissal.

6 *Witkin Cal. Proc. PWT* § 357

[§ 357] Effect of Dismissal.

Once a dismissal for failure to serve has been granted, the action may not be prosecuted further and no further proceedings may be held in the action. (*C.C.P. 583.250(a)(1)*.) A defendant who successfully obtains dismissal is entitled to recover costs as the prevailing party. (*C.C.P. 1032(a)(4)*, (b).)

The court may dismiss the complaint without prejudice. (*C.C.P. 581(g)*, (h).) If not barred by the statute of limitations, a new action can be brought. (*Gonsalves v. Bank of America* (1940) 16 *C.2d* 169, 172, 105 *P.2d* 118; *Wood v. Elling Corp.* (1977) 20 *C.3d* 353, 359, 142 *C.R.* 696, 572 *P.2d* 755 [statute of limitations is restored as if no action had been brought]; *Atchison, Topeka & Santa Fe Ry. Co. v. Rollaway Window Screen Co.* (1951) 101 *C.A.2d* 763, 766, 226 *P.2d* 763 [dictum]; 7 *Cal. Proc.* (5th), *Judgment*, §379.)

Under federal practice, a dismissal for failure to prosecute operates as an adjudication on the merits unless the court specifies otherwise in its order. (*F.R. Civ. P., Rule 41(b)*); see 9 *Federal Practice & Procedure* (Wright & Miller) §2373; 27A *Federal Procedure*, L.Ed., §§62:601 et seq.)

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C. Mandatory Dismissal for Delay in Trial.

1. In General.

a. Statutory Framework.

6 *Witkin Cal. Proc. PWT* § 358

[§ 358] Statutory Framework.

Dismissal is mandatory where an action is not brought to trial within 5 years after it is commenced against the defendant. (*C.C.P.* 583.310, 583.360; see *C.E.B.*, 2 *Civil Proc. Before Trial* 4th, §39.25 et seq.; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §15.38 et seq.; Rutter Group, 3 *Civil Proc. Before Trial* §11:191 et seq.; *Cal. Civil Practice*, 3 *Procedure* §22:41 et seq.)

Dismissal for trial delay is also available in the following situations:

(1) *Discretionary* dismissal where the action is not brought to trial for 2 years after commencement. (See *infra*, §451 et seq.)

(2) *Mandatory* dismissal where the action is not brought to trial within 3 years (*infra*, §430), and *discretionary* dismissal where it is not brought within 2 years (*infra*, §464), after an order granting a new trial.

(3) *Mandatory* dismissal where the action is not brought to trial within 3 years (*infra*, §431 et seq.), and *discretionary* dismissal where it is not brought within 2 years (*infra*, §464), after the filing of the remittitur where an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial.

(4) *Mandatory* dismissal where the action is not brought to trial within 3 years (*infra*, §429), and *discretionary* dismissal where it is not brought within 2 years (*infra*, §464), after a mistrial or jury disagreement.

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1. In General.

b. Policy Considerations.

6 *Witkin Cal. Proc. PWT* § 359

[§ 359] Policy Considerations.

The aim of the 5-year requirement is to "promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed ... [and] to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time." (*General Motors Corp. v. Superior Court* (1966) 65 C.2d 88, 91, 52 C.R. 460, 416 P.2d 492, *infra*, §409; *Moran v. Superior Court* (1983) 35 C.3d 229, 237, 197 C.R. 546, 673 P.2d 216, *infra*, §415; *Westinghouse Elec. Corp. v. Superior Court* (1983) 143 C.A.3d 95, 102, 191 C.R. 549.)

The purposes served are somewhat analogous to those underlying statutes of limitations. However, the dismissal provisions "would appear to involve policy considerations somewhat less crucial" than those safeguarded by limitation statutes. "Once an action is filed and a defendant is served, he is then armed with notice of plaintiff's claim and may protect his interests by means which were generally unavailable to him before filing. For example, he may institute discovery processes in order to preserve evidence which might be destroyed, may locate material witnesses and take depositions if appropriate, and may move that a frivolous or sham action be dismissed." (*General Motors Corp. v. Superior Court*, *supra*, 65 C.2d 91.)

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1. In General.

c. Scope of Statute.

1. Parties.

6 *Witkin Cal. Proc. PWT* § 360

[§ 360] Parties.

(1) *Application to State.* The 5-year statute applies to the state as well as private litigants. (*Superior Oil Co. v. Superior Court* (1936) 6 C.2d 113, 118, 56 P.2d 950; *Bank of America v. Superior Court* (1948) 84 C.A.2d 34, 35, 189 P.2d 799.) The state may also claim the statutory exceptions; hence, the Attorney General may extend the time for trial by stipulation. (*Estate of Thatcher* (1953) 120 C.A.2d 811, 814, 262 P.2d 337; on extension by stipulation, see *infra*, §382 et seq.)

(2) *Dismissal As to Fewer Than All Defendants.* An action may be dismissed for delay in trial as to some but not all parties. (See *C.C.P. 583.110*; Law Rev. Com. Comment to *C.C.P. 583.110*; *supra*, §315.) Thus, a personal injury action against two defendants, which may be tried against one in the absence of the other, may likewise be dismissed as to one for lack of prosecution; i.e., each defendant is entitled to have his or her own right determined. (*Fisher v. Superior Court* (1958) 157 C.A.2d 126, 130, 320 P.2d 894.)

(3) *Filing Demurrer Does Not Waive Right to Dismissal.* A defendant who files a demurrer does not, by doing so, lose the right to move for dismissal. (*Jackson v. De Benedetti* (1940) 39 C.A.2d 574, 578, 103 P.2d 990; *Hibernia Savings & Loan Soc. v. Lauffer* (1940) 41 C.A.2d 725, 732, 107 P.2d 494.)

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1. In General.

c. Scope of Statute.

2. Cross-Complaint.

6 *Witkin Cal. Proc. PWT* § 361

[§ 361] Cross-Complaint.

A cross-complaint is regarded as the commencement of an independent action. (See 5 *Cal. Proc.* (5th), *Pleading*, §1167 et seq.) The courts have accordingly held that the mandatory 5-year period applies to a cross-complaint. (*Douglas v. Superior Court* (1949) 94 C.A.2d 395, 210 P.2d 853.) This rule is codified in C.C.P. 583.110(b) and (e) (*supra*, §315).

However, because the cross-complaint initiates an independent action, it is not subject to dismissal merely because the statutory period has run since the filing of the *complaint* if that period has not also run since the filing of the cross-complaint itself. (*Tomales Bay Oyster Corp. v. Superior Court* (1950) 35 C.2d 389, 393, 394, 217 P.2d 968.)

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1. In General.

c. Scope of Statute.

3. Coordinated Actions.

6 *Witkin Cal. Proc. PWT* § 362

[§ 362] Coordinated Actions.

Bank of America v. Superior Court (1988) 200 C.A.3d 1000, 246 C.R. 521, held that the 5-year rule of C.C.P. 583.310 applies to coordinated civil actions commenced in different courts and that the coordination trial judge has no authority to set the case for trial beyond the 5-year period where the plaintiff has not shown that it was impossible, impracticable, or futile to bring the action to trial within the 5-year period.

(a) C.R.C., Rule 1504(a) (now C.R.C., Rule 3.504(a)) states that provisions of law applicable to civil actions apply to coordinated actions except to the extent that they conflict with the coordination rules (see 4 *Cal. Proc.* (5th), *Pleading*, §354). (200 C.A.3d 1008.)

(b) C.R.C., Rule 1503 (now C.R.C., Rule 3.503) provides that the time for an act may be extended by the assigned judge; and it may be argued that the coordination trial judge has authority to set a coordinated action for trial beyond the 5-year period. However, the rule "was designed to govern time extensions for the doing of pretrial acts and not for the act of bringing a coordinated action to trial." (200 C.A.3d 1008.)

(c) C.R.C., Rule 1529 (now C.R.C., Rule 3.529) provides that when an order granting coordination is filed in an included action, all further proceedings in that action are automatically stayed, except as directed by the coordination trial judge (see 4 *Cal. Proc.* (5th), *Pleading*, §367). Literally construed, this rule suggests that the proceedings are stayed until the judge takes affirmative action to end it, and until the judge actually sets the case for trial, it cannot be tried. But a different result follows when the rule is read in conjunction with C.R.C., Rule 1540 (now C.R.C., Rule 3.540) and C.R.C., Rule 1541 (now C.R.C., Rule 3.541):

(d) C.R.C., Rule 1540 provides that the coordination judge on his or her assignment may exercise all the powers of a judge of the court in which the action is pending; this means that the judge has the power to dismiss an included action on his or her own motion or on motion of the parties. (200 C.A.3d 1009.)

(e) C.R.C., Rule 1541 requires the coordination trial judge to assume an active role in managing all steps of the trial

proceedings to expedite the just determination of the actions without delay. By reading these rules together, "we sense a clear Judicial Council intent to maintain the status quo in the included actions by continuing the automatic stay of the proceedings only so long as it takes to have a coordination trial judge assigned. Once the coordination trial judge is assigned, the automatic stay ends and the judge at this point is obligated to move the coordinated cases to trial as quickly as possible." (200 C.A.3d 1009.)

(f) "A further indication of the Judicial Council intent to expedite the trial of coordinated actions and thereby retain the statutory time limits for trying civil actions is the total absence of authority in the coordination trial judge to stay the proceedings in a coordinated action." C.R.C., Rule 1514 (now C.R.C., Rule 3.515) provides that only the presiding judge of a court in an included action in a pending coordination proceeding under Rule 1520(b) (now C.R.C., Rule 3.520) or the assigned coordination *motion* judge under Rule 1514 may issue stay orders and then only for specified time periods and upon proof of particular circumstances. (200 C.A.3d 1009.)

(g) C.R.C., Rule 1514(f) (now C.R.C., Rule 3.515(j)) provides that the time during which a stay of proceedings is in effect shall not be included in determining whether the action should be dismissed for lack of prosecution. This rule implies that where no stay has been issued in the coordination proceeding, the statutory 5-year rule is applicable. (200 C.A.3d 1010.)

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1. In General.

c. Scope of Statute.

4. Dissolution or Separation.

6 *Witkin Cal. Proc. PWT* § 363

[§ 363] Dissolution or Separation.

A petition for dissolution of marriage or legal separation is not subject to dismissal for delay in any of the following circumstances:

(1) An order for child support has been issued in connection with the proceeding and the order has not been terminated by the court or terminated by operation of law pursuant to *Family C. 3900, 3901, 4007, or 4013*. (*C.C.P. 583.161(a)*.)

(2) An order for spousal support has been issued in connection with the proceeding and the order has not been terminated by the court. (*C.C.P. 583.161(b)*.)

(3) The petition is for dissolution of the marriage and a separate trial on the issue of the status of the marriage has been conducted pursuant to *Family C. 2337*. (*C.C.P. 583.161(c)*); see *Lakkees v. Superior Court* (1990) 222 *C.A.3d* 531, 536, 271 *C.R. 845*; *In re Marriage of MacFarlane & Lang* (1992) 8 *C.A.4th* 247, 257, 10 *C.R.2d* 157 [application of 5-year statute to bifurcated dissolution proceedings under former law]; *In re Marriage of Dunmore* (1996) 45 *C.A.4th* 1372, 1375, 53 *C.R.2d* 450, *supra*, §317 [*C.C.P. 583.161(c)* precludes dismissal under 5-year statute].) (On dissolution and separation proceedings, see 11 *Summary* (10th), *Husband and Wife*, §67 et seq.)

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2. Procedure.

a. Motion To Dismiss.

6 *Witkin Cal. Proc. PWT* § 364

[§ 364] Motion To Dismiss.

If an action is not brought to trial within the time prescribed, dismissal may be granted by the court on its own motion or on motion of the defendant. Notice must first be given to the parties. (*C.C.P.* 583.360(a); see *C.C.P.* 583.110(d) [defining "defendant" to include a cross-defendant or other person against whom action is commenced]; *Harris v. Board of Education of San Francisco* (1957) 152 *C.A.2d* 677, 682, 313 *P.2d* 212 [if court does not purport to act on its own motion, a regularly noticed motion is required]; *C.E.B.*, 2 Civil Proc. Before Trial 4th, §39.71 et seq.; *C.E.B.*, Civil Lit. Forms §35.1 et seq.; *Cal. Civil Practice*, 3 Procedure, §§22:55, 22:61 et seq. [forms]; on *C.C.P.* 418.10 motions to dismiss for delay in prosecution brought prior to defendant's pleading, see *supra*, §355.)

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2. Procedure.

b. Ruling on Motion.

6 *Witkin Cal. Proc. PWT* § 365

[§ 365] Ruling on Motion.

The action "shall be dismissed" if not brought to trial within the time prescribed. (*C.C.P.* 583.360(a); see *McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 530, 105 C.R. 330, 503 P.2d 1338, *infra*, §432; *Fannin Corp. v. Superior Court* (1974) 36 C.A.3d 745, 749, 111 C.R. 920.) These requirements "are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (*C.C.P.* 583.360(b); see *Sacramento Trans. Co. v. California Reclamation Co.* (1928) 205 C. 42, 269 P. 640 [dismissal is mandatory on motion of either party or court's own motion]; *Turnbull v. Superior Court* (1932) 126 C.A. 141, 143, 14 P.2d 540 [dismissal is mandatory though moving party is in contempt of court: "the manner in which the facts are brought to the attention of the trial court is entirely immaterial"]; *Health Industries of America v. Los Angeles County Metropolitan Trans. Authority* (2002) 102 C.A.4th 1372, 1376, 126 C.R.2d 294 [commissioner was without jurisdiction to grant defendant's motion where parties stipulated to trial by retired judge, who properly tolled 5-year period where it appeared impossible to commence trial within deadline]; on extensions, excuses, and exceptions, see *infra*, §382 et seq.)

Dismissal is mandatory but not jurisdictional. (Law Rev. Com. Comment to *C.C.P.* 583.360, noting that the same rule applies to dismissal for delay in service; see *supra*, §356.)

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2. Procedure.

c. Review of Order.

1. Order Granting Dismissal.

6 *Witkin Cal. Proc. PWT* § 366

[§ 366] Order Granting Dismissal.

The aggrieved plaintiff has the following possible methods of review of an order granting dismissal:

(1) Move to vacate under *C.C.P.* 473 (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144). (See *Bergloff v. Reynolds* (1960) 181 *C.A.2d* 349, 355, 5 *C.R.* 461 [motion to reconsider construed as motion to vacate].)

(2) Appeal from the judgment of dismissal. (See *Daley v. Butte* (1964) 227 *C.A.2d* 380, 388, 38 *C.R.* 693, citing the text [plaintiff, after denial of motion to vacate, should appeal from judgment of dismissal, not from order refusing to vacate]; *Governale v. Bethlehem Pac. Coast Steel Corp.* (1965) 235 *C.A.2d* 837, 841, 45 *C.R.* 707 [affirmed]; *Clinton v. Joshua Hendy Corp.* (1966) 244 *C.A.2d* 183, 52 *C.R.* 875 [judgment affirmed; period was not tolled by appeal in an unrelated case or appeal from nonappealable order]; see also *C.C.P.* 581d [filed dismissal order constitutes judgment]; *Coe v. Los Angeles* (1994) 24 *C.A.4th* 88, 92, 29 *C.R.2d* 297 [abuse of discretion standard applies; dismissal was reversed where plaintiffs' counsel did everything in his power to bring action to trial within 5 years, and trial judge knowingly continued case to date beyond period, then denied two applications for relief]; 9 *Cal. Proc.* (5th), *Appeal*, §144.)

(3) Seek mandamus to compel the court to vacate its order of dismissal and reset the action for trial. (See *Derry v. Superior Court* (1968) 266 *C.A.2d* 556, 561, 72 *C.R.* 313; *Brown v. Superior Court* (1970) 7 *C.A.3d* 366, 370, 86 *C.R.* 670.)

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2. Procedure.

c. Review of Order.

2. Order Denying Dismissal.

6 *Witkin Cal. Proc. PWT* § 367

[§ 367] Order Denying Dismissal.

If the court denies the motion for dismissal, the defendant may renew it in the trial court on a different showing. (See *supra*, §46 et seq.)

Alternatively, the defendant may seek either *prohibition* to prevent the trial or *mandamus* to compel dismissal. Because no direct appeal lies from an order denying a motion to dismiss, submission to trial and subsequent appeal from the judgment is an inadequate remedy for the defendant whose motion is good. Hence, the duty to dismiss may be directly enforced by extraordinary writ. (*Andersen v. Superior Court* (1921) 187 C. 95, 97, 200 P. 963 [mandamus]; *Tomales Bay Oyster Corp. v. Superior Court* (1950) 35 C.2d 389, 392, 217 P.2d 968 [prohibition]; *J.C. Penney Co. v. Superior Court* (1959) 52 C.2d 666, 669, 343 P.2d 919, citing the text [either writ is appropriate]; *Tunis v. Superior Court* (1963) 59 C.2d 465, 467, 30 C.R. 135, 380 P.2d 823 [mandamus]; *McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 530, 105 C.R. 330, 503 P.2d 1338, *infra*, §432, citing the text [mandamus]; *Cruse v. Superior Court* (1929) 102 C.A. 290, 297, 283 P. 73 [prohibition]; *Continental Pac. Lines v. Superior Court* (1956) 142 C.A.2d 744, 752, 299 P.2d 417 [mandamus]; *Southern Pac. Co. v. Superior Court* (1958) 157 C.A.2d 168, 320 P.2d 911 [prohibition]; *Baccus v. Superior Court* (1989) 207 C.A.3d 1526, 1531, 255 C.R. 781; see C.C.P. 418.10(b), *supra*, §355 [mandamus review of motion to dismiss brought prior to defendant's pleading].)

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d. Effect of Dismissal.

6 *Witkin Cal. Proc. PWT* § 368

[§ 368] Effect of Dismissal.

The court may dismiss the complaint without prejudice. (*C.C.P.* 581(g), (h).) The dismissal is not on the merits and is consequently not res judicata on the issues. (*Mattern v. Carberry* (1960) 186 C.A.2d 570, 572, 9 C.R. 137; *Stephan v. American Home Builders* (1971) 21 C.A.3d 402, 406, 98 C.R. 354; see 7 *Cal. Proc.* (5th), *Judgment*, §379.) Thus, assuming that the statute of limitations has not expired on the claim, the plaintiff is not precluded from bringing a new action on the same cause of action. If a new action on the same claim is filed, it becomes subject to a new 5-year period within which it must be brought to trial. (*Nassif v. Municipal Court* (1989) 214 C.A.3d 1294, 1298, 263 C.R.195.)

In contrast, a dismissal in federal court for failure to prosecute operates as an adjudication on the merits unless the court specifies otherwise. (*F.R. Civ. P.*, *Rule 41(b)*; see 9 *Federal Practice & Procedure* (Wright & Miller) §2373; 27A *Federal Procedure*, L.Ed., §§62:601 et seq.)

A defendant who successfully obtains dismissal is entitled to recover costs as the prevailing party. (*C.C.P.* 1032(a)(4), (b).)

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3. Time for Bringing Action to Trial.

a. 5-Year Period.

6 *Witkin Cal. Proc. PWT* § 369

[§ 369] 5-Year Period.

"An action shall be brought to trial within five years after the action is commenced against the defendant." (*C.C.P.* 583.310.) (On tolling and calculation of 5-year deadline when case is submitted to mediation during last 6 months of 5-year period, see *Gonzalez v. Los Angeles* (2004) 122 *C.A.4th* 1124, 19 *C.R.3d* 381, *infra*, §490.)

The time for trial is also significantly dictated by local "fast track" rules. Case disposition goals adopted by the Judicial Council direct superior courts to dispose of *unlimited civil cases* at the rate of 75% within 12 months, 85% within 18 months, and 100% within 24 months, and for *limited civil cases* at the rate of 90% within 12 months, 98% within 18 months, and 100% within 24 months. (Standards of Judicial Administration, Standard 2.2(f); cf. Standards of Judicial Administration, Standard 2.2(g) [superior court case involving exceptional circumstances or requiring continuing review is exempt from time standards]; on limited civil case, see *C.C.P.* 85; on unlimited civil case, see *C.C.P.* 88; 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.)

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(New) *Application of relation back doctrine:* In *Brumley v. FDCC Calif.* (2007) 156 *C.A.4th* 312, 67 *C.R.3d* 292, B filed a complaint for asbestos injury in August 2000, but died from lung cancer in October 2004 before his action was brought to trial. In March 2005, B's spouse, C, successfully moved to be appointed successor in interest to pursue B's surviving claims and to file an amended complaint that joined claims for loss of consortium and wrongful death. The original 5-year period in which to bring B's action to trial was tolled between B's death and C's appointment, and a second trial date was set for April 2006. Plaintiff's counsel realized that the trial date would exceed the 5-year limit of *C.C.P.* 583.310, and sought either an earlier trial date or an extension of the period. Defendants opposed the motion and sought dismissal under *C.C.P.* 583.310, arguing that the 5-year period had already run. Plaintiff's counsel countered that even if B's surviving causes of action should be dismissed as beyond the 5-year period, C's claims should not because they arose later. The trial court granted the motion to dismiss, finding that C's amended complaint related back to the date that the original complaint was filed for purposes of calculating whether the case had been timely brought to trial. *Held*, reversed.

(a) C's claims should be dismissed only if the claims relate back to B's original complaint. Although *Barrington v.*

A.H. Robins Co. (1985) 39 C.3d 146, 216 C.R. 405, 702 P.2d 563, text, §326, applied the relation back doctrine in the context of former C.C.P. 581a (failure to serve complaint within 3 years of filing), its reasoning requires that the relation back doctrine be applied here. However, C's claims do not relate back, as the claims involve different plaintiffs and different damages. B sought recovery for injuries to B, whereas C's claims seek compensation for individualized injuries to family members as a result of B's death. Thus, under *Barrington*, C's claims should not have been dismissed under C.C.P. 583.360. (156 C.A.4th 320, 325.)

(b) Defendants are not prejudiced by the preservation of C's claims. The claims arose only after B's death, and if C had filed a separate complaint rather than choosing "the judicially more economical path" of amending the original complaint, the 5-year period would not have expired until 2010. (156 C.A.4th 320.) In addition, defendants have had the benefit of conducting discovery since 2000 on the nature of B's asbestos exposure and his injuries. (156 C.A.4th 322.)



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b. When Action Is Commenced.

1. In General.

6 *Witkin Cal. Proc. PWT* § 370

[§ 370] In General.

(1) *Filing of Original Complaint.* The time for bringing an action to trial begins to run when "the action is commenced against the defendant." (*C.C.P.* 583.310.)

An action commences on the date the original complaint is filed as to the defendants named in that complaint, either expressly or by fictitious name. (*Gray v. Firthe* (1987) 194 C.A.3d 202, 209, 239 C.R. 389.) The statutory period is not extended by filing an amended complaint that asserts the same cause of action against the defendant as the original complaint. (*Douglas v. Superior Court* (1949) 94 C.A.2d 395, 210 P.2d 853.)

If only a cross-complaint is pending, the 5-year period begins to run when the cross-complaint is filed. (*Tomales Bay Oyster Corp. v. Superior Court* (1950) 35 C.2d 389, 217 P.2d 968.)

(2) *Effect of C.C.P. 473.* C.C.P. 473 allows the amendment of pleadings (5 *Cal. Proc.* (5th), *Pleading*, §1194) and relief from a judgment, dismissal, order, or other proceeding taken against a party through mistake, inadvertence, surprise, or excusable neglect (8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144). The statute may not lengthen the time within which an action must be brought under C.C.P. 583.310. (*C.C.P.* 473(b).)

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2. Addition of New Parties.

6 *Witkin Cal. Proc. PWT* § 371

[§ 371] Addition of New Parties.

Under the language of former C.C.P. 583(b) ("after the plaintiff has filed his action"), there was no extension by reason of the subsequent filing of an amended complaint, even though new parties were brought in by the amendment or a new cause of action was stated. (See *Kowalski v. Cohen* (1967) 252 C.A.2d 977, 979, 60 C.R. 874; *Stults v. Thompson* (1969) 274 C.A.2d 733, 735, 79 C.R. 520.)

In *Gray v. Firthe* (1987) 194 C.A.3d 202, 239 C.R. 389, the court held that the new language of C.C.P. 583.310 ("after the action is commenced against the defendant") "manifests a clear intent to change the law." (194 C.A.3d 208.) In this case a trial date was set more than 5 years after the filing of the original complaint but less than 5 years after the filing of an amended complaint naming additional defendants and setting forth new causes of action against them. *Held*, dismissal reversed. "As to a defendant either expressly named in the original complaint, or named in the complaint by a fictitious name, the action commences on the date of filing the complaint. ... But when a new party is added to the action, the action commences as to that party on the date of the order adding him or her as a party or on the date of filing of the pleading naming him or her as a new party." (194 C.A.3d 209.)

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b. When Action Is Commenced.

3. Later Action on Same Claim.

6 *Witkin Cal. Proc. PWT* § 372

[§ 372] Later Action on Same Claim.

In *Nassif v. Municipal Court* (1989) 214 C.A.3d 1294, 263 C.R. 195, D filed an action against N for breach of a lease that was dismissed for failure to bring it to timely trial. D then filed a second action seeking damages for some of the same breaches as alleged in the first complaint. N moved to dismiss, contending that the 5-year period ran from the filing of the complaint in the first action. *Held*, the motion was properly denied. The word "action" generally means the proceeding or suit, not the cause of action; and a dismissal is not on the merits and therefore does not bar a second action on the same cause of action. "Accordingly, as the Legislature did not provide special definition of the word 'action' in the dismissal provisions, we must presume it intended action to mean a suit commenced by the filing of a complaint and did not intend the calculation of the five-year period to include multiple suits filed on the same cause of action." (214 C.A.3d 1298.)

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b. When Action Is Commenced.

4. Complaint in Intervention.

6 *Witkin Cal. Proc. PWT* § 373

[§ 373] Complaint in Intervention.

In *Bright v. American Termite Control Co.* (1990) 220 C.A.3d 1464, 269 C.R. 793, the court held that where a complaint in intervention by an insurer claiming property subrogation rights states essentially the same causes of action against the defendants as are stated in the plaintiff's original complaint, the dismissal period runs from the date the original action is commenced and not from the date the complaint in intervention is filed. (220 C.A.3d 1466.) If the period ran from the latter date, an intervenor could file his complaint near the end of the 5-year period for filing the original complaint, thereby extending the time during which the defendant would be subject to litigation to nearly 10 years. (220 C.A.3d 1469.)

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c. When Action Is Brought to Trial.

1. In General.

6 *Witkin Cal. Proc. PWT* § 374

[§ 374] In General.

(1) *Scope of Requirement.* Dismissal must be ordered unless the case is "brought to trial" within the 5-year period. (*C.C.P.* 583.310, 583.360.)

This means that the trial must have been actually begun. (*Boyd v. Southern Pac. R. Co.* (1921) 185 C. 344, 346, 197 P. 58; *Smith v. Wiget* (1946) 75 C.A.2d 591, 594, 171 P.2d 563.) When trial has in fact commenced the statute is satisfied even though the case is only partially tried. (*Kruly v. Superior Court* (1932) 122 C.A. 458, 10 P.2d 178; *Neil v. Gane* (1932) 124 C.A. 51, 56, 12 P.2d 131 ["This section only requires that the action be brought to trial within the five-year period, and places no limitation upon when the trial shall be completed"]; *Mercantile Inv. Co. v. Superior Court* (1933) 218 C. 770, 774, 25 P.2d 12; *Barton v. Pierce* (1933) 131 C.A. 33, 35, 20 P.2d 736; *Krasnow v. Superior Court* (1936) 15 C.A.2d 141, 59 P.2d 442; *Mussat v. Superior Court* (1936) 16 C.A.2d 291, 292, 60 P.2d 323 ["We are satisfied that these partial hearings were sufficient to take the case out of the statute though it may be conceded that, aside from the documentary evidence received, the proceedings may not have contributed materially to a final determination of the issues"]; see *In re Marriage of Dunmore* (1996) 45 C.A.4th 1372, 1377, 53 C.R.2d 450, supra, §317 [once trial is commenced, 5-year statute is satisfied regardless whether trial proceeds immediately and continuously to judgment]; 32 *A.L.R.4th* 840 [bringing action to trial so as to avoid dismissal]; on action being deemed brought to trial on pretrial disposition on merits, see *infra*, 378 et seq.)

However, the trial must be brought against the defendant who seeks to dismiss; the fact that it is brought against a codefendant does not preclude dismissal. (*Fannin Corp. v. Superior Court* (1974) 36 C.A.3d 745, 751, 111 C.R. 920.)

The trial may be held to have commenced even though no evidence is offered. Thus, an action is brought to trial when the jury is impaneled, or, in a nonjury case, when the first witness is sworn. (See *infra*, §375 et seq.)

(2) *Preliminary Steps That Do Not Constitute Commencement of Trial.* Preliminary steps short of commencement will not render the dismissal statute inapplicable. The following situations are illustrative:

(a) *Setting cause for trial.* Merely setting the cause for a trial at some future trial date beyond the statutory period does not meet the requirement. The trial of an action and setting it for trial "are quite distinct things, and an action is certainly not brought to trial until the trial is commenced." The responsibility for calling the court's attention to the necessity for an earlier date for trial is on the plaintiff, and if he does not do so, "he must be taken to have acquiesced in the date set." (*Boyd v. Southern Pac. R. Co.*, supra, 185 C. 346; see *Steinbauer v. Bondesen* (1932) 125 C.A. 419, 426, 14 P.2d 106; *Smith v. Wiget*, supra.)

(b) *Pretrial conference.* Although a pretrial conference is a vital step leading to trial, it is not a part of the trial; hence, holding a conference within the 5-year period does not satisfy the statute. (*J.C. Penney Co. v. Superior Court* (1959) 52 C.2d 666, 670, 343 P.2d 919; *Wright v. Groom Trucking Co.* (1962) 206 C.A.2d 485, 490, 24 C.R. 80; *Sherberne & Associates v. Vector Mfg. Co.* (1968) 263 C.A.2d 68, 71, 69 C.R. 284.)

(c) *Hearing on default judgment.* A hearing on entry of a default judgment after the defendant has failed to answer (supra, §169) does not resolve contested issues and is not a trial. (*Langan v. McCorkle* (1969) 276 C.A.2d 805, 808, 81 C.R. 535; cf. *Briley v. Sukoff* (1979) 98 C.A.3d 405, 410, 159 C.R. 452 [where defendant, having answered, does not appear at trial, hearing and judgment under C.C.P. 594 (infra, §475), based on taking of testimony and other evidence, is trial].)

(d) *Motion in limine.* A hearing on a motion in limine that does not involve a question of law or fact raised by the pleadings is not a trial. (*Hendrix v. Hendrix* (1985) 171 C.A.3d 859, 862, 217 C.R. 609 [defendant's motion in limine resulted in order excluding anticipated evidence on issue outside scope of pleadings; plaintiff elected to have case removed from civil active list and to amend complaint, rather than to proceed to trial on existing cause of action].)

(e) *Bifurcated dissolution proceeding.* A bifurcated dissolution proceeding involving only the issue of status is not a partial trial. (*Lakkees v. Superior Court* (1990) 222 C.A.3d 531, 536, 271 C.R. 845.)

(f) *Bifurcated causes of action.* In *Sagi Plumbing v. Chartered Const. Corp.* (2004) 123 C.A.4th 443, 19 C.R.3d 835, plaintiff subcontractor brought a breach of contract action against defendant general contractor. The complaint contained three causes of action, each representing a separate job. Because other plaintiffs had outstanding actions against defendant, the parties agreed to bifurcate the lawsuit and try the first cause of action in a consolidated trial, after which plaintiff did nothing to bring the other causes of action to trial. The trial court granted defendant's motion to dismiss the remaining causes of action under C.C.P. 583.310. *Held*, order of dismissal affirmed. Trial is commenced for purposes of the 5-year statute if there is a determination of a contested issue of fact or law so that a final disposition is possible. Here, none of the issues determined in the consolidated trial related to issues in plaintiff's remaining causes of action. Nor did resolution of the first cause of action assist in resolving the two that remained. Thus, the consolidated trial was not a partial trial of plaintiff's remaining two causes of action, and the bifurcation did not relieve plaintiff of the obligation to diligently prosecute his remaining claims and bring them to trial within 5 years. (123 C.A.4th 449.)

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2. Trial by Court.

6 *Witkin Cal. Proc. PWT* § 375

[§ 375] Trial by Court.

(1) *Swearing of One Witness.* In *Miller & Lux v. Superior Court* (1923) 192 C. 333, 219 P. 1006, the court offered this suggestion on how to avoid dismissals: "[I]f counsel had desired to avoid the bar of the statute it would have been a very simple matter, after calling the court's attention to the situation, to have requested that one witness be sworn in the cases and then the hearing of the cases continued until a time which would be convenient for the court and the parties to the action." (192 C. 342.) (On continued validity of this dictum, see *Hartman v. Santamarina* (1982) 30 C.3d 762, 180 C.R. 337, 639 P.2d 979, *infra*, §377.) However, if the only witness called testifies solely for the purpose of establishing grounds for a continuance, and no testimony is taken on the issues, the trial has not commenced. (*Adams v. Superior Court* (1959) 52 C.2d 867, 345 P.2d 466 [sole witness was defendant's attorney].)

(2) *Trial Commenced Even Though No Testimony Is Taken.* In *Clements v. Ragghianti* (1957) 155 C.A.2d 188, 317 P.2d 706, defendant's counsel moved for a nonsuit after the opening statement, and the trial judge suggested submission of briefs. Plaintiff's counsel pointed out that in 5 days the statutory period would elapse, and asked permission to introduce some evidence. The court observed, with the acquiescence of defendant's counsel, that "once I take hold," the action is brought to trial, and ordered the postponement. Subsequently, on defendant's motion, the action was dismissed. *Held*, reversed. The decision was in part based on the fact that counsel for plaintiff was prevented from following the procedure indicated in *Miller & Lux*, which would clearly have resulted in a partial trial. However, the court further declared that the rule on what constitutes a "trial" for purposes of a new trial motion was applicable; hence, where the plaintiff is prevented from introducing any evidence (as by a motion for nonsuit or objection that the complaint fails to state a cause of action), the action has nevertheless been brought to trial. (155 C.A.2d 191.)

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3. Trial by Jury.

aa. Impanelment.

6 Witkin Cal. Proc. PWT § 376

[§ 376] Impanelment.

(1) *Commencement of Examination of Jurors.* In *Kadota v. San Francisco* (1958) 166 C.A.2d 194, 333 P.2d 75, a stipulation extended the time to May 11; the case was called on May 9 and a jury was impaneled and sworn; on Friday, May 10, plaintiff's counsel was granted a continuance to Monday, May 13, for illness; on May 13, the motion was made and the case dismissed. *Held*, reversed. For various other purposes, in both civil and criminal cases, the impanelment of the jury has been held to constitute a part of the trial, and this is the common understanding among lawyers and judges. (166 C.A.2d 195.)

Although in *Kadota* the jury was impaneled and sworn, the question the court decided affirmatively was that the case is brought to trial "when the parties commence the examination of prospective jurors and the impanelment of the jury." (166 C.A.2d 195.) (See *Vecki v. Sorensen* (1959) 171 C.A.2d 390, 395, 340 P.2d 1020 [following *Kadota*; jury impaneled and sworn].)

In *Hilliard v. A.H. Robins Co.* (1983) 148 C.A.3d 374, 196 C.R. 117, the court, observing that the Supreme Court in *Hartman v. Santamarina* (1982) 30 C.3d 762, 180 C.R. 337, 639 P.2d 979, *infra*, §377, had referred to *Kadota* without disapproval, said: "[W]e can only conclude that a party can put a jury trial beyond the bar of [the 5-year statute] by commencing the jury selection process. A contrary result would invite an unscrupulous party to delay or prolong voir dire examination of prospective jurors until the expiration of the five-year period." (148 C.A.3d 390.)

(2) *Distinction: Case Not Called for Trial.* *Bella Vista Dev. Co. v. Superior Court* (1963) 223 C.A.2d 603, 36 C.R. 106, recognized the theory of *Clements v. Ragghianti* (1957) 155 C.A.2d 188, 317 P.2d 706, *supra*, §375, and *Kadota*, that there may be a commencement of trial without the taking of testimony (223 C.A.2d 611, citing the text), but held that, on the facts, dismissal was required. On the morning before the last day of the 5-year period (of which all parties seemed unaware), the judge asked whether the case was ready. Defendants replied "It is not," and plaintiffs were allowed some amendments on the face of the complaint with time to answer granted to defendants. The jury panel was then dismissed. *Held*, there was no trial. (223 C.A.2d 611, 612.)

(3) *Distinction: Jury Impaneled After Expiration of Period.* In *Estate of Anastasio* (1989) 215 C.A.3d 486, 263 C.R. 622, although the 5-year period for trial on plaintiff's cross-complaint had expired, a jury was impaneled and sworn. Defendant's motion to dismiss was granted, and plaintiff appealed, contending that once a trial has commenced, the motion to dismiss cannot be granted. *Held*, affirmed. *Kadota* and *Hilliard* are not controlling. Those cases "only stand for the proposition that a case is 'brought to trial' within the five-year statute if the jury is impaneled *before the five-year period has expired*. They do not hold that impanelment of the jury waives the mandatory provisions of *Code of Civil Procedure* section 583.360 or revives a case after the five-year period has expired. The only circumstance that will revive an action after the five-year period has expired is a stipulation between the parties." (215 C.A.3d 489, citing the text.)

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3. Trial by Jury.

bb. Selection and Discharge.

6 Witkin Cal. Proc. PWT § 377

[§ 377] Selection and Discharge.

In *Hartman v. Santamarina* (1982) 30 C.3d 762, 180 C.R. 337, 639 P.2d 979, plaintiff filed a complaint for medical malpractice on February 7, 1974, and defendant answered promptly. Thereafter, long delays occurred by reason of plaintiff's inability to complete the deposition of defendant, unavailability of a trial court, continuance on defendant's motion, and defendant's peremptory challenge of a judge followed by plaintiff's peremptory challenge of his replacement. The case was finally continued to January 15, 1979, with 23 days of the 5-year period remaining. On that date, counsel for plaintiff was engaged in a trial in another county, and on his suggestion the trial judge agreed to the following procedure: Twelve prospective jurors were put into the box, both sides passed for cause, the jury was sworn, and plaintiff moved for a continuance which was granted over defendant's objections. The judge then discharged the jury on his own initiative and continued the trial to August 6, 1979. On July 13, 1979, defendant moved to dismiss and the motion was granted. *Held*, reversed; the action was brought to trial by swearing the jury.

(a) The dictum in *Miller & Lux v. Superior Court* (1923) 192 C. 333, 219 P. 1006, supra, §375, that the bar of the statute can be avoided by having one witness sworn and the case continued, has been accepted by bench and bar and relied on in many cases for nearly half a century. *Miller & Lux* was a nonjury case, but in a jury case impaneling of the jury is the functional equivalent of swearing a witness. (30 C.3d 765, citing *Kadota v. San Francisco* (1958) 166 C.A.2d 194, 333 P.2d 75, supra, §376.)

(b) The *Miller & Lux* rule is a necessity. "Today's overcrowded dockets, which often make it touch and go whether even the most aggressive plaintiff can get to trial within five years, demand safety valves against unjust dismissals." (30 C.3d 766.) One is the rule that if the plaintiff has obtained a trial date within the 5-year period but is prevented from actually going to trial because no courtroom is open, the delay, under *Goers v. Superior Court* (1976) 57 C.A.3d 72, 129 C.R. 29, is "on the house." Where the facts, as here, do not fit the *Goers* mold, "the pro forma commencement of the trial ... plays a vital part in preserving the right to a trial on the merits." (30 C.3d 766.)

(c) *Adams v. Superior Court* (1959) 52 C.2d 867, 345 P.2d 466 (supra, §375) did not repudiate the *Miller & Lux*

dictum. In *Adams*, the sole purpose of putting on the witness was to obtain evidence relevant to a motion for continuance, which was granted; the holding was that testimony elicited for the sole purpose of not going to trial did not amount to bringing the case to trial. (30 C.3d 766.)

(d) Defendant suggests that the procedure adopted here was a "charade"--a "pretend" picking of a jury; but there are two answers to this criticism: (1) The defendant need not insist that the charade be played out; he can, saving his objections, "stipulate that the necessary ceremonial has been observed." (30 C.3d 766.) (2) From time immemorial "charades and fictions have played a vital role in helping courts over, around and under legal roadblocks which they were not quite ready to assault head-on." (30 C.3d 766.)

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aa. In General.

6 *Witkin Cal. Proc. PWT* § 378

[§ 378] In General.

In certain circumstances, the action may be "brought to trial" before the jury or any witness is sworn. An action is deemed brought to trial on a pretrial disposition on the merits, i.e., "the determination of an issue of fact or law which brings the action to the stage where final disposition can be made." (*Lemaire, Faunce & Katznelson v. Cox* (1985) 171 C.A.3d 297, 300, 217 C.R. 281 [stating rule but holding that summary adjudication under C.C.P. 437c did not constitute "trial" for purposes of 5-year statute].) Thus, if a judgment is granted pursuant to some pretrial motion, a "trial" is deemed to have occurred. (See, e.g. *McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 532, 105 C.R. 330, 503 P.2d 1338, *infra*, §432 [judgment of dismissal after demurrer sustained without leave to amend].)

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bb. Judgment on Demurrer.

6 Witkin Cal. Proc. PWT § 379

[§ 379] Judgment on Demurrer.

The Code of Civil Procedure recognizes a trial on issues of law as well as fact, and for some purposes a hearing on demurrer is a trial. (On demurrer rulings and voluntary dismissal before trial, see *supra*, §§296, 297.) However, in applying the 5-year statute, the following distinctions have been made:

(1) *Proceedings Prior to Determination of Dispositive Issue Are Not Trial.* The trial contemplated by the statute is a hearing and determination of issues of fact, and the mere argument of a demurrer and ruling on it do not prevent the statute from operating. (*Meier v. Superior Court* (1942) 55 C.A.2d 675, 676, 131 P.2d 554; *Breakstone v. Giannini* (1945) 70 C.A.2d 224, 231, 160 P.2d 887; *Ross v. George Pepperdine Foundation* (1959) 174 C.A.2d 135, 139, 344 P.2d 368; *California Ammonia Co. v. Macco Corp.* (1969) 270 C.A.2d 429, 432, 75 C.R. 753.)

(2) *When Trial Is Deemed To Have Been Brought.* Where the defendant's general demurrer is sustained without leave to amend, and judgment is rendered against the plaintiff, who takes an appeal and obtains a reversal, the determination of the issues of law presented by the demurrer is a trial within the meaning of the statute. (*McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 532, 105 C.R. 330, 503 P.2d 1338, *infra*, §432; *Smith v. Los Angeles* (1948) 84 C.A.2d 297, 301, 190 P.2d 943.)

An extremely liberal extension of the *Smith* rule was made in *Berri v. Superior Court* (1955) 43 C.2d 856, 279 P.2d 8. Less than 2 months before the end of the 5-year period, a demurrer to the fifth amended complaint was sustained without leave. No judgment was entered, and plaintiff's appeal, mistakenly taken from the nonappealable order sustaining the demurrer, was dismissed. After the period had expired, plaintiff attempted to have a judgment signed and entered, and defendant moved to dismiss. *Held*, mandamus granted to compel entry of judgment. Thus, although the court cited *Meier* and *Breakstone* without disapproval, the distinction between them and the *Smith* case is all but obliterated, for the ruling sustaining a demurrer, though without a judgment, prevents the statute from operating. After stating the *Smith* rule (a judgment finally determines the action and there is no pending undetermined action which can be dismissed), the court said: "It should also be clear that an action is not subject to dismissal where issues of law

leading to its final determination have been submitted. ... The essential thing is that the action be brought to a stage where final disposition is to be made of it. Actions can be finally disposed of by an order sustaining a demurrer and the entry of an ensuing judgment dismissing the action. ... Where a demurrer has been sustained without leave to amend, or the time given to amend has expired, the matter has reached such a stage that a final determination of the action is contemplated, and hence [the dismissal statute] does not require a dismissal because of the lapse of five years since the commencement of the action. There is nothing in the instant case to indicate other than that the case is to be finally disposed of on issues of law--by way of demurrer." (43 C.2d 859.)

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cc. Summary Judgment or Adjudication.

6 *Witkin Cal. Proc. PWT* § 380

[§ 380] Summary Judgment or Adjudication.

(1) *Summary Judgment.* The rule in *Smith v. Los Angeles* (1948) 84 C.A.2d 297, 190 P.2d 943, supra, §379, was applied to summary judgment in *Southern Pac. Co. v. Seaboard Mills* (1962) 207 C.A.2d 97, 24 C.R. 236. Defendants' motion for summary judgment was granted but reversed on appeal. Later they moved for dismissal. *Held*, order granting dismissal reversed. The mere hearing of the motion for summary judgment is not a partial trial; it is concerned only with issue finding. (207 C.A.2d 103.) However, granting of the motion is a determination of questions of law. Hence, "a 'trial' in a more fundamental sense has been accomplished on the granting of a motion for summary judgment than on the sustaining of a demurrer without leave to amend." (207 C.A.2d 104.) (Cf. *Bella Vista Dev. Co. v. Superior Court* (1963) 223 C.A.2d 603, 613, 36 C.R. 106 [mere hearing and denial of motion is not trial].)

(2) *Summary Adjudication.* *King v. California* (1970) 11 C.A.3d 307, 89 C.R. 715, narrows the rule of the *Southern Pacific* case by pointing out that in *Southern Pacific* a summary judgment was actually entered, and an appeal was taken from that judgment and a reversal ordered. In *King*, the complaint sought damages from the state for flooding of plaintiff's land allegedly resulting from negligent construction of a bridge and a levee. The answer alleged a conveyance of flowage rights and failure to file a timely claim for the levee-caused damages. The state then moved for summary adjudication as to this issue and the motion was granted. Thus, if the granting of the motion is a trial, as the *Southern Pacific* dictum suggests, a dismissal would be improper. But plaintiff did nothing to bring the other issue to trial, and no summary judgment was ever entered. *Held*, dismissal affirmed. The order granting summary adjudication is not a final disposition of the action; it permits the severed portion to proceed to trial or other disposition, and contemplates a single final judgment after all issues are determined. (11 C.A.3d 311; see supra, §§267, 277.) Thus, the order "was not a trial of the action because it left the action short of the stage where final disposition could be made." (11 C.A.3d 312.) (See *Lemaire, Faunce & Katznelson v. Cox* (1985) 171 C.A.3d 297, 300, 217 C.R. 281 [order granting partial summary judgment was not trial; following *King*].)

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5. Stipulation to Binding Arbitration.

6 *Witkin Cal. Proc. PWT* § 381

[§ 381] Stipulation to Binding Arbitration.

In *Dodd v. Ford* (1984) 153 C.A.3d 426, 200 C.R. 256, plaintiffs filed a complaint for damages in June 1977, and defendants cross-complained for breach of contract. In July 1980, counsel for the parties stipulated to "binding arbitration." Testimony before an arbitrator began in May 1982, but the arbitrator concluded that he could not devote sufficient time to the matter. The court then vacated the appointment, removed the matter from the arbitration list, and advised the parties that it would be restored to either the arbitration hearing list or the civil active list only on noticed motion and payment of the arbitrator's fees. In September 1982, defendants moved to restore the cases to the arbitration hearing list, but plaintiffs moved to dismiss and the motion was granted. *Held*, order dismissing defendants' cross-complaint reversed.

(a) *Brown v. Engstrom* (1979) 89 C.A.3d 513, 152 C.R. 628, held that an aborted *nonbinding* arbitration hearing was not a partial trial because any party could reject the award and obtain a trial de novo. Here, the stipulation for binding arbitration eliminated the right to a superior court trial, and the award in such a case would not be appealable. Thus, these abbreviated proceedings were equivalent to commencement of a trial. (153 C.A.3d 430.)

(b) The same result can be reached on another theory. The dismissal order did not affect the agreement for binding arbitration, which could be independently enforced within the period of the statute of limitations on petition to the superior court under the arbitration statute (C.C.P. 1281.2). "[O]nce the parties waived the right to seek a trial de novo by agreeing to binding arbitration, these proceedings became a true arbitration--under the auspices of the superior court instead of the American Arbitration Association. Thus, the dismissal, even if appropriate, merely reduced the court's involvement to hearing motions to compel arbitration and enforce any award." (153 C.A.3d 432.)

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a. Stipulation Extending Time.

1. In General.

6 *Witkin Cal. Proc. PWT* § 382

[§ 382] In General.

(1) *Written Stipulation.* The parties may extend the time within which the action must be brought to trial by written stipulation. The stipulation need not be filed but, if not, "shall be brought to the attention of the court if relevant to a motion for dismissal." (*C.C.P. 583.330(a).*)

(2) *Oral Agreement in Open Court.* The parties may also extend the time for trial "[b]y oral agreement made in open court, if entered in the minutes of the court or a transcript is made." (*C.C.P. 583.330(b)*); see *Govea v. Superior Court* (1938) 26 C.A.2d 27, 31, 78 P.2d 433; *Hunt v. United Artists Studio* (1947) 79 C.A.2d 619, 626, 180 P.2d 460.)

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a. Stipulation Extending Time.

2. Extension of Time To Bring Action.

aa. In General.

6 *Witkin Cal. Proc. PWT* § 383

[§ 383] In General.

(1) *Validity and Terms of Stipulation.* The statutory requirements for stipulations (*supra*, §382) are fulfilled by a stipulation that expressly extends the time for trial. This may be (a) for some definite period, or (b) to some definite future date, or (c) for an indefinite period. (See *Smith v. Bear Valley Milling & Lumber Co. (1945)* 26 C.2d 590, 592, 160 P.2d 1 [original valid written stipulation was extended by subsequent oral agreements and separate writings]; *Paillet v. Vroman (1942)* 52 C.A.2d 297, 300, 126 P.2d 419 [indefinite waiver]; C.E.B., 2 Civil Proc. Before Trial 4th, §39.36 et seq.)

(2) *Ineffective Stipulations.*

(a) A stipulation that does not extend the time, e.g., one that provides that the case may be dropped from the calendar to be reset on notice, is insufficient. (*Prudential Ins. Co. of America v. Superior Court (1931)* 117 C.A. 528, 4 P.2d 294; see *Anderson v. Erwyn (1966)* 247 C.A.2d 503, 507, 55 C.R. 634 [stipulation that pretrial conference be taken off calendar subject to being reset at mutually convenient time was not sufficient; following *Prudential Ins. Co.*]; *Miles v. Speidel (1989)* 211 C.A.3d 879, 884, 259 C.R. 582 [stipulation interpreted as *preserving* defendant's right to seek dismissal under 5-year statute].)

(b) A stipulation permitting the filing of an amended complaint does not extend the time, which runs from the filing of the *action* and not from the filing of the last amended complaint. (*Rosefield Packing Co. v. Superior Court (1935)* 4 C.2d 120, 124, 47 P.2d 716.)

(c) A stipulation that merely states a time when the case may be set for trial, does not contain any agreement to extend time, and does not prevent the plaintiff from bringing the case to trial is of questionable value. (See *Rosenfelt v. Scholtz (1936)* 17 C.A.2d 443, 444, 62 P.2d 381 [stipulation that case "may be set for trial at any time on or after" certain date was insufficient]; but see *Koehler v. Peckham (1936)* 11 C.A.2d 481, 54 P.2d 500 [holding such stipulation sufficient].)

(d) A stipulation extending the time to answer, followed by an answer *within* the statutory period, does not toll or waive the period. (*Gentry v. Nielsen* (1981) 123 C.A.3d 27, 30, 33, 176 C.R. 385 [defendant answered 2 years before expiration of 5-year period, and plaintiff had ample opportunity to bring case to trial within that time].)

(e) A stipulation postponing a pretrial conference to a date within the 5-year period is similar to a stipulation postponing the time for deciding preliminary motions or demurrers, and hence does not extend the time for trial beyond the period. (*J.C. Penney Co. v. Superior Court* (1959) 52 C.2d 666, 670, 671, 343 P.2d 919 [court did not determine effectiveness of stipulation setting date of pretrial conference after 5-year period].)

(f) A pretrial conference order setting a trial date beyond the 5-year period is not the equivalent of a written stipulation. Hence, if there is no reference to such a stipulation in the order or minutes, the time is not extended. (*Wright v. Groom Trucking Co.* (1962) 206 C.A.2d 485, 492, 24 C.R. 80; *Taylor v. Shultz* (1978) 78 C.A.3d 192, 196, 144 C.R. 114.)

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a. Stipulation Extending Time.

2. Extension of Time To Bring Action.

bb. Open-Ended Extension.

6 *Witkin Cal. Proc. PWT* § 384

[§ 384] Open-Ended Extension.

(1) *Five-Year Statute Is Extended.* In *Wheeler v. Payless Super Drug Stores* (1987) 193 C.A.3d 1292, 238 C.R. 885, defendant was served 19 months after the complaint was filed. Shortly thereafter, plaintiff orally granted defendant an open extension of time to answer and agreed that no default would be taken without notice. The extension agreement was confirmed in writing by defendant. Nearly 4 years later, defendant moved to dismiss for lack of prosecution under the 5-year statute. *Held*, dismissal reversed.

(a) A written agreement "extending time to answer reflects mutual intent to defer the proceedings and must be enforced. An agreement which expressly excuses the duty to answer impliedly stays the power of the plaintiff to take default. When the written agreement precludes plaintiff from taking a default judgment prior to expiration of the five-year period, the defendant may not rely on plaintiff's failure to take default to obtain dismissal of the action." (193 C.A.3d 1302, citing *General Ins. Co. v. Superior Court* (1975) 15 C.3d 449, 124 C.R. 745, 541 P.2d 289.)

(b) Defendant's contention that the sole intent of the extension was to explore settlement options is without merit; defendant's letter was not conditioned or qualified and any uncertainty in its terms must be construed against him. (193 C.A.3d 1302, 1303.)

(2) *Diligence in Prosecution Is Nevertheless Required.* There is an implied condition that suit be brought within a reasonable time. (See *Chapin v. Superior Court* (1965) 234 C.A.2d 571, 44 C.R. 496, *infra*, §388; *Waxman v. Boren, Elperin, Howard & Sloan* (1990) 221 C.A.3d 519, 270 C.R. 540, *infra*, §388.)

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a. Stipulation Extending Time.

3. Waiver of Right To Dismiss.

6 *Witkin Cal. Proc. PWT* § 385

[§ 385] Waiver of Right To Dismiss.

The statutory stipulation requirements (*supra*, §382) are also fulfilled by a stipulation that waives the right to compel a dismissal. (See *General Ins. Co. v. Superior Court* (1975) 15 C.3d 449, 455, 124 C.R. 745, 541 P.2d 289; *Bank of America v. Superior Court* (1937) 22 C.A.2d 450, 453, 71 P.2d 296 [defendant agreed that case might go off calendar and that this "shall not ... operate to your prejudice and disadvantage in any respect"]; *Lake v. Superior Court* (1940) 39 C.A.2d 247, 102 P.2d 1107 [mutual exchange of letters agreeing to continuances].)

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a. Stipulation Extending Time.

4. Parities to Stipulation.

6 *Witkin Cal. Proc. PWT* § 386

[§ 386] Parities to Stipulation.

(1) *Fewer Than All Defendants.* A stipulation with one defendant does not stop the period running in favor of other defendants, because *any* defendant may require a dismissal if the action is not brought to trial against that defendant within 5 years. (*Dowling v. Superior Court* (1932) 122 C.A. 443, 445, 10 P.2d 197.)

(2) *Personal Representative.* The policy that precludes waiver of the statute of limitations by an executor or administrator is subject to an exception where it is doubtful whether the claim is in fact barred by limitations. In such a case, the executor or administrator may enter into an agreement of compromise if it is of advantage to the estate to do so. The same is true where the dismissal statute is involved. "Since it may also be to the advantage of the estate, an administrator, before the period prescribed ... has expired, may enter into a stipulation extending the time within which an action against the estate must be brought to trial." (*Lewis v. Neblett* (1957) 48 C.2d 564, 568, 311 P.2d 489.)

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a. Stipulation Extending Time.

5. Stipulation After Expiration of 5-Year Period.

6 *Witkin Cal. Proc. PWT* § 387

[§ 387] Stipulation After Expiration of 5-Year Period.

The stipulation may be made after expiration of the 5-year period, so long as dismissal has not yet been ordered. In *Estate of Thatcher* (1953) 120 C.A.2d 811, 814, 262 P.2d 337, the 5-year period ended on May 24, 1952, and a stipulation was made on July 30, 1952, to try the matter on October 17, 1952. The court, citing *Rio Vista Mining Co. v. Superior Court* (1921) 187 C. 1, 5, 200 P. 616, and *Koehler v. Peckham* (1936) 11 C.A.2d 481, 483, 54 P.2d 500, held that the stipulation may be made after the period has expired. In other words, a stipulation may not only *extend* the time prior to the end of the 5-year period, but may also *revive* the right to try the case after it has been entirely lost. (See *Mustalo v. Mustalo* (1974) 37 C.A.3d 580, 585, 112 C.R. 594, citing the text.)

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a. Stipulation Extending Time.

6. Effect of Extension.

6 Witkin Cal. Proc. PWT § 388

[§ 388] Effect of Extension.

(1) *Stipulation That Trial Be Held on Particular Day.* A stipulation that the action may be tried on a particular date beyond the statutory period is not a permanent waiver of the right to compel dismissal. If the matter is not tried on that date and requires resetting, the force of the stipulation is exhausted and the action will be dismissed. (*Obergfell v. Obergfell* (1955) 134 C.A.2d 541, 544, 286 P.2d 462; *Fisher v. Superior Court* (1958) 157 C.A.2d 126, 130, 320 P.2d 894.) However, subsequent events may bring the case within the impracticability exception. (See *Woley v. Turkus* (1958) 51 C.2d 402, 334 P.2d 12.)

(2) *Open-Ended Extension.* An indefinite stipulation, while valid (*supra*, §384), is not permanently effective. It does not excuse the plaintiff from bringing the matter to trial with due diligence. (*Chapin v. Superior Court* (1965) 234 C.A.2d 571, 44 C.R. 496 [waiver was subject to implied condition that action be brought to trial with reasonable time]; *Waxman v. Boren, Elperin, Howard & Sloan* (1990) 221 C.A.3d 519, 270 C.R. 540 [cross-complaint].)

(3) *No Right To Amend Complaint.* A stipulation extending the time to bring a case to trial "does not open the gate for amendment to the complaint which necessitates proof of facts (and defense thereof) different or in addition to the facts necessary to the existing complaint." Cases dealing with the right to amend after the statute of limitations has run (see 5 Cal. Proc. (5th), *Pleading*, §1188) do not support the right to amend after expiration of the 5-year period. (*Avedissian v. Manukian* (1983) 141 C.A.3d 379, 383, 190 C.R. 291.)

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4. Extensions, Exceptions, and Excuses.

b. Conditions Preventing Running of 5-Year Period.

1. Jurisdiction of Court Is Suspended.

aa. In General.

6 *Witkin Cal. Proc. PWT* § 389

[§ 389] In General.

(1) *Statutory Provision.* In computing the time within which an action must be brought to trial, the time is excluded during which "[t]he jurisdiction of the court to try the action was suspended." (*C.C.P. 583.340(a)*; see *Hughes v. Portsmouth Square* (1982) 135 C.A.3d 170, 184 C.R. 926 [time during which defendant was in Chapter 11 bankruptcy proceedings].)

(2) *What Constitutes Jurisdiction.* The statutory reference to "jurisdiction" means jurisdiction in the strict sense of subject matter jurisdiction, and not mere excess of jurisdiction. Hence, the failure to appoint a guardian ad litem, which does not deprive the court of subject matter jurisdiction, does not call for exclusion of the period in which a minor plaintiff is not represented by a guardian ad litem. (*White v. Renck* (1980) 108 C.A.3d 835, 839, 840, 166 C.R. 701, quoting the text; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §§1, 2, 287.)

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4. Extensions, Exceptions, and Excuses.

b. Conditions Preventing Running of 5-Year Period.

1. Jurisdiction of Court Is Suspended.

bb. When Statute Is Told.

6 *Witkin Cal. Proc. PWT* § 390

[§ 390] When Statute Is Told.

(1) *Appeal Pending*. Appeal, which removes the cause to the appellate court, suspends the jurisdiction of the court to try the case and tolls the dismissal statute. (See *Christin v. Superior Court* (1937) 9 C.2d 526, 530, 71 P.2d 205 [dictum]; *Bergin v. Portman* (1983) 141 C.A.3d 23, 25, 190 C.R. 81 [tolling from filing of notice of appeal to filing of remittitur]; cf. *Westphal v. Westphal* (1943) 61 C.A.2d 544, 547, 550, 143 P.2d 405 [appeal by coplaintiffs; grave doubt as to power of trial court to proceed to trial without them].)

(2) *Death of Party*. In *Pham v. Wagner Litho Machinery Co.* (1985) 172 C.A.3d 966, 218 C.R. 476, the court, examining the legislative history of the former statute and quoting the text, concluded that the period of time between plaintiff's death and the substitution of her administrator as plaintiff should not be included in calculating the 5-year period.

(a) The tolling provision applies whenever a trial court lacks jurisdiction to proceed, in the broader meaning of the term as set forth in *Abelleira v. District Court of App., Third Dist.* (1941) 17 C.2d 280, 109 P.2d 942, 2 Cal. Proc. (5th), *Jurisdiction*, §340. (172 C.A.3d 971, footnote 6, 972, footnote 9.)

(b) The impossibility or impracticability exception (*infra*, §395 et seq.) is likewise applicable: "Since the authority of retained counsel generally does not survive the death of his client ... , plaintiff's death here left no person or entity to prosecute the underlying action on her behalf, and any proceedings taken in the absence of her personal representative would have been subject to being declared void. ... It was during this period of temporary impracticability and futility that [the suspension of jurisdiction provision] operated to toll the five-year statute." (172 C.A.3d 972.) (See *Herring v. Peterson* (1981) 116 C.A.3d 608, 612, 172 C.R. 240 [period between the date of *defendant's* death and appointment of personal representative was similarly held to toll statute].)

However, *Pham* was distinguished in *Ferk v. Lake* (1988) 205 C.A.3d 268, 252 C.R. 196. Plaintiffs L and P, husband and wife, owned property in joint tenancy, and brought the action in June 1982, against defendant county for

damages caused by interference with drainage. In April 1983, an amended complaint was filed, and the 5-year period then ran with no attempt to bring the action to trial. In opposition to defendant's motion to dismiss, P described the long illness of her husband, her preoccupation with his care, and his death in May 1987. *Held*, judgment of dismissal affirmed.

(a) On the death of L, the real property passed to P as the surviving joint tenant; it was never a part of L's estate. The cause of action for damages to that property was a joint tenancy asset and also passed to P, under the rule that the proceeds of joint tenancy property retain the character of the property from which they were acquired. (205 C.A.3d 275.)

(b) Death of the joint tenant did not result in loss of jurisdiction to try the case. This is consistent with cases holding that where one party acquires the interest of his coplaintiff during the litigation, there is no requirement that the surviving owner of that interest shall again be made a party in order to represent his own interest. (205 C.A.3d 276.) Thus, on L's death, the entire interest in the lawsuit passed to P, and jurisdiction of the court was never suspended. (205 C.A.3d 276.)

(3) *Voluntary Dismissal Induced by Fraud or Mistake*. In *Estate of Morrison* (1932) 125 C.A. 504, 14 P.2d 102, the statute was held tolled where the proceeding was voluntarily dismissed and then reinstated. Two parties filed will contests after probate, but then concluded that they could not overcome the testimony of the witnesses in favor of the will, and settled their claims and dismissed the contests. The witnesses were then convicted of perjury procured by the proponent of the will, and the contestants succeeded in having their contests reinstated on motion some 6 months after the dismissals. Delays in trial followed, and motions to dismiss were made. If the 6 months between the voluntary dismissals and the reinstatement were counted, the 5-year period had run; otherwise not. *Held*, dismissal was improper. "No logical distinction can be made between a temporary suspension of proceedings in the trial court, consequent upon a dismissal induced by fraud or mistake, and a suspension of the power of the trial court to proceed by reason of the pendency of an appeal. In either case, the action or proceeding is withdrawn from the cognizance of the court of first instance during the period of suspension." (125 C.A. 510.)

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1. Jurisdiction of Court Is Suspended.

cc. When Statute Is Not Tolded.

6 *Witkin Cal. Proc. PWT* § 391

[§ 391] When Statute Is Not Tolded.

(1) *Change of Venue*. Proceedings for a change of venue do not bring the case within the suspension of jurisdiction exclusion. The power of the trial court to act is suspended during the pendency of a motion for change of venue, but its jurisdiction is not suspended within the meaning of the statutory exclusion. The plaintiff has a duty to exercise diligence in bringing the case to trial, and the time consumed by ordinary incidents of proceedings is not excluded from the 5-year period. (*Moore v. Powell* (1977) 70 C.A.3d 583, 587, 589, 138 C.R. 914 [because all defendants resided outside county where action was brought, plaintiff should have foreseen that they would move to change venue; hence, normal time required for change is not extraordinary or unavoidable delay].)

(2) *Furnishing Security for Costs*. As in the case of a change in venue, a defendant's demand under C.C.P. 1030 against a nonresident plaintiff for security against costs and fees awarded, while it suspends the court's power to act until the plaintiff complies, does not suspend the court's jurisdiction. Hence, the time between the demand and compliance, the length of which is subject to the plaintiff's control, is not excluded from the 5-year period. (*Hunot v. Superior Court* (1976) 55 C.A.3d 660, 665, 127 C.R. 703.)

(3) *Noncompliance With Claims Statute*. In *Davalos v. Los Angeles* (1983) 142 C.A.3d 57, 190 C.R. 711, plaintiff filed a wrongful death action against defendant county on February 2, 1976, without complying with the claims statute. Plaintiff then sought relief from failure to file the claim, and the trial court granted relief by an order entered on September 24, 1976, authorizing a new action within 30 days under Govt.C. 946.6(f). She did not file a new complaint. On July 30, 1981, defendant's motion to dismiss was granted. Plaintiff appealed, contending that her action, filed February 2, 1976, could not be successfully prosecuted until September 24, 1976, when relief from compliance with the claims statute was granted, and hence that the time between those two dates should be excluded from the computation of the 5-year period. *Held*, order of dismissal affirmed.

(a) Compliance with the claims statute is a condition precedent to filing an action against a governmental entity (see 3 Cal. Proc. (5th), Actions, §231); and if an action can be prosecuted only after compliance with the statute, compliance

itself cannot prevent the running of the 5-year period. (142 C.A.3d 62.)

(b) The situation is the same whether a new complaint is filed or, as here, the plaintiff proceeds on the old complaint. That complaint was premature and subject to demurrer until compliance with the claims statute; and the relief granted under *Govt.C. 946.6* was equivalent to a right to amend the premature complaint. Any amendment would relate back to the date of the originally filed complaint, and the 5-year period would run from that date. (142 C.A.3d 62.)

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1. Jurisdiction of Court Is Suspended.

dd. Tolling on Transfer for Lack of Jurisdiction.

6 *Witkin Cal. Proc. PWT* § 392

[§ 392] Tolling on Transfer for Lack of Jurisdiction.

(1) *Statutory Basis.* When it appears, either from the verified pleadings or at the trial or hearing, that determination of the action (or cross-complaint) will necessarily involve questions not within the court's jurisdiction, the court "must suspend all further proceedings therein and transfer the action." (*C.C.P.* 396; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §399.) Costs and fees must be paid by the plaintiff before the transfer is made. (*C.C.P.* 399; see 3 *Cal. Proc.* (5th), *Actions*, §938.) Suspension of further proceedings under *C.C.P.* 396 is a suspension of jurisdiction tolling the dismissal statute. (*Schwenke v. J & P Scott* (1988) 205 *C.A.3d* 71, 75, 252 *C.R.* 91; *Wheeler v. Santa Monica* (1990) 219 *C.A.3d* 1554, 1560, 269 *C.R.* 175.)

(2) *Where Pleading Is Not Verified.* In *Schwenke v. J & P Scott*, plaintiff filed a verified complaint in the municipal court to foreclose a mechanics' lien in the amount of \$ 11,635. Defendants filed an unverified cross-complaint seeking damages for breach of contract in the amount of \$ 35,000, and moved to transfer the action to the superior court under *C.C.P.* 396. The motion was granted, the case was docketed in the superior court, and arbitration proceedings and subsequent inactivity took the case 6 months past the 5-year period. Plaintiff contended, however, that the municipal court lost jurisdiction at the time the cross-complaint was filed; that jurisdiction remained suspended until the case was transferred and refiled in the superior court--a period of over 8 months; and that, excluding this time, the 5-year period had not elapsed. The issue therefore was whether the *filing* of the unverified cross-complaint triggered the exclusion, or whether the time of suspension did not begin until the hearing on the motion to transfer, which would exclude less than 2 months and hence would not prevent dismissal. *Held*, judgment of dismissal affirmed. *C.C.P.* 396 imposes a duty to suspend proceedings when it "appears from the verified pleadings" or at trial or hearing that determination of the action will involve questions not within the court's jurisdiction. "Thus the filing of an unverified pleading by itself will not suffice under this statute to compel a court to transfer the action. In our case, since the cross-complaint was unverified, the lack of jurisdiction did not 'appear' until the hearing on the motion to transfer; hence the suspension of all further proceedings did not take place until that time." (205 *C.A.3d* 78.)

(3) *Where Delay Occurs in Payment of Transfer Fees.* In *Wheeler v. Santa Monica*, *supra*, a false arrest action

brought in the municipal court, plaintiff moved to amend his complaint and transfer the case to the superior court. However, due to plaintiff's delay in paying the transfer fees required by *C.C.P.* 399, the matter was not received in the superior court until 117 days later, and was subsequently dismissed under *C.C.P.* 583.360 for noncompliance with the 5-year requirement. Relying on the fact that his verified amended complaint was attached to his motion to amend and transfer, plaintiff argued that from the date the motion was filed there was the "appearance" of lack of jurisdiction in the municipal court, as discussed in *Schwenke*, and that jurisdiction was suspended under *C.C.P.* 583.340(a) for the 117-day period. *Held*, judgment of dismissal affirmed.

(a) Because the entire focus of the *Schwenke* decision was on when it appeared to the municipal court that it lacked jurisdiction, that decision is not relevant to the present case. The pivotal fact here is plaintiff's failure to pay the fees necessary to transfer the matter to superior court. (219 *C.A.3d* 1561.)

(b) Plaintiff's protest that he was unaware that the trial judge had ordered him to pay the transfer fees is unavailing, because *C.C.P.* 399 requires payment when the transfer "is sought solely, or is ordered," because the action was commenced in an improper court. (219 *C.A.3d* 1561.) Moreover, by providing that the fees must be paid "before such transfer is made," *C.C.P.* 399 establishes that the municipal court is not divested of jurisdiction until the fees are paid. To hold otherwise would allow a plaintiff to place his case in a state of jurisdictional limbo until he or she decided to pay the fees, thereby delaying prosecution of his case indefinitely and frustrating the intent of the 5-year statute. (219 *C.A.3d* 1562.)

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

(1) *Statutory Basis.* *C.C.P.* 396 was repealed in 2008.

C.C.P. 396, added in 2008, provides that an appeal or petition filed in superior court must not be dismissed solely because that court lacks jurisdiction. (*C.C.P.* 396(a).) Rather, if a Court of Appeal or the Supreme Court has jurisdiction, the matter must be transferred to that court "upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed in the court having jurisdiction." (*C.C.P.* 396(b).)



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aa. In General.

6 *Witkin Cal. Proc. PWT* § 393

[§ 393] In General.

The time during which "[p]rosecution or trial of the action was stayed or enjoined" is excluded in computing the time for bringing an action to trial. (*C.C.P. 583.340(b)*; see *Marcus v. Superior Court* (1977) 75 *C.A.3d* 204, 212, 141 *C.R. 890* [holding, prior to enactment of *C.C.P. 583.340(b)*, that impossibility or impracticability exception (*infra*, §395 et seq.) applied to cases in which prosecution of action is stayed].)

An action is stayed or enjoined during periods in which a stay has been expressly ordered. (See *Rosenthal v. Wilner* (1988) 197 *C.A.3d* 1327, 243 *C.R. 472* [stay ordered pending outcome of appeal in another case].)

The tolling provision is also applicable during periods of stay imposed by operation of law, such as the following:

(1) The period in coordinated actions prior to the assignment of a coordination judge. (See *Bank of America v. Superior Court* (1988) 200 *C.A.3d* 1000, 246 *C.R. 521*, *supra*, §362 [after assignment of coordination judge, coordinated proceedings are subject to mandatory dismissal statute].)

(2) Periods during which a party is in active military service. (See *Buttler v. Los Angeles* (1984) 153 *C.A.3d* 520, 200 *C.R. 372*; 50 *U.S.C. Appx.*, §522 [stay under Soldiers' and Sailors' Civil Relief Act].)

A "continuance" pending appeal from an order granting a motion to quash service is in effect a stay of the 5-year statute where trial is delayed indefinitely. A stay has been defined as "a temporary suspension of a procedure in a case until the happening of a defined contingency." (*Holland v. Dave Altman's R. V. Center* (1990) 222 *C.A.3d* 477, 482, 271 *C.R. 706*.)

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bb. Bankruptcy Filing.

6 *Witkin Cal. Proc. PWT* § 394

[§ 394] Bankruptcy Filing.

(1) *Action Against Debtor*. The filing of a petition in bankruptcy operates as a stay of the commencement or continuation of any action against the bankrupt party. Hence, the period is tolled during the time the bankruptcy proceedings are pending against the defendant. (*Hughes v. Portsmouth Square* (1982) 135 C.A.3d 170, 173, 184 C.R. 926.)

(2) *Action by Debtor*. In *Lauriton v. Carnation Co.* (1989) 215 C.A.3d 161, 263 C.R. 476, plaintiff filed a complaint against defendant in December 1983. In October 1987, plaintiff filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Act and received a discharge on August 18, 1988. On September 30, 1988, plaintiff filed an at-issue memorandum and trial was scheduled for February 17, 1989. On February 10, 1989, the case was dismissed. *Held*, judgment of dismissal affirmed.

(a) An action against a debtor is automatically stayed by the filing of a petition in bankruptcy, but an action by a debtor is not. The trustee may prosecute actions on behalf of the debtor. (215 C.A.3d 164.)

(b) Although the debtor no longer has the legal capacity to prosecute the action, he or she can take steps to bring it to trial within the 5-year period. "Appellant could have sought relief from the bankruptcy court, such as (1) an order permitting the trustee to prosecute this lawsuit in appellant's name, (2) an order compelling the trustee to maintain the action, (3) an order authorizing appellant to prosecute the action on his own behalf, or (4) a formal order of abandonment." (215 C.A.3d 165.) When discharged on August 18, 1988, more than 3 months before the expiration of the period, plaintiff could have moved to have the case specially set for trial. (215 C.A.3d 165.) (See *Shorr v. Kind* (1991) 1 C.A.4th 249, 253, 2 C.R.2d 192 [discussing and following *Lauriton*].)

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aa. Implied Exceptions Under Former Law.

6 *Witkin Cal. Proc. PWT* § 395

[§ 395] Implied Exceptions Under Former Law.

Antedating the judicial development of the impossibility and impracticability exceptions to former C.C.P. 583 was the older rule that the mandatory language did not permit creation of implied exceptions. (See *Miller & Lux v. Superior Court* (1923) 192 C. 333, 338, 219 P. 1006, supra, §375.) However, the net effect of the decisions appeared to be that no implied exceptions could be created, and no excuses for noncompliance with C.C.P. 583 would be accepted unless they could fairly be said to make a trial impossible, impracticable, or futile. (*Specht v. Los Angeles* (1962) 201 C.A.2d 457, 460, 20 C.R. 42, quoting the text; *Wright v. Groom Trucking Co.* (1962) 206 C.A.2d 485, 496, 24 C.R. 80, quoting the text; *Wiggins v. Washington Nat. Life Ins. Co.* (1966) 246 C.A.2d 840, 846, 55 C.R. 129, quoting the text; *Fannin Corp. v. Superior Court* (1974) 36 C.A.3d 745, 750, 111 C.R. 920 ["the time consumed by the delay caused by ordinary incidents of proceedings like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar or securing a jury are not within the contemplation of the implied exceptions"]; *Standard Oil Co. v. Superior Court* (1976) 61 C.A.3d 852, 857, 132 C.R. 761.)

The decisions made it clear that the running of the 5-year period was excused where it was impossible or impracticable for the plaintiff to bring an action to trial; e.g., where the jurisdiction of the court was suspended (supra, §389), where prosecution of the action was stayed (see supra, §393), or in other appropriate circumstances (see *Bank of America v. Superior Court* (1988) 200 C.A.3d 1000, 1014, 246 C.R. 521, supra, §362, citing the text [listing cases dealing with factual circumstances constituting impracticability or futility]).

Some of the opinions stated that the impossibility, impracticability, or futility must be due to causes beyond the plaintiff's control. (See *Crown Coach Corp. v. Superior Court* (1972) 8 C.3d 540, 548, 105 C.R. 339, 503 P.2d 1347; *Hunot v. Superior Court* (1976) 55 C.A.3d 660, 664, 127 C.R. 703.)

The later cases gave the impracticability and futility exceptions a liberal application. The following cases are illustrative:

Pasadena v. Alhambra (1949) 33 C.2d 908, 916, 207 P.2d 17 [reference ordered in complicated water case; referee took over 4 years to report].

Woley v. Turkus (1958) 51 C.2d 402, 404, 334 P.2d 12 [express stipulation extending time to date beyond period; then circumstances such as continuances at request and with acquiescence of defendant, resetting for trial, unavailability of trial department].

Reeves v. Hutson (1956) 144 C.A.2d 445, 453, 301 P.2d 264 [51/2 months during which default judgment for plaintiff was in existence].

Westinghouse Elec. Corp. v. Superior Court (1983) 143 C.A.3d 95, 105, 106, 191 C.R. 549 [plaintiff reasonably diligent, delay mainly due to defendants' failure to pursue discovery vigorously].

Alvarado Community Hosp. v. Superior Court (1985) 173 C.A.3d 476, 485, 219 C.R. 52, 1 Cal. Proc. (5th), Attorneys, §249 [action against defendant was dismissed without plaintiff's knowledge; 5-year period tolled from date of fraudulent, unauthorized settlement by plaintiff's attorney to date plaintiff learned of settlement].

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bb. Codification of Exceptions.

6 *Witkin Cal. Proc. PWT* § 396

[§ 396] Codification of Exceptions.

Excluded in computing the time for bringing an action to trial is the time during which "[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." (*C.C.P. 583.340(c)*.)

C.C.P. 583.340(c) "must be interpreted liberally, consistent with the policy favoring trial on the merits. ... Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff." (Law Rev. Com. Comment to *C.C.P. 583.340*; on *C.C.P. 583.240*, see *supra*, §346.) (See *Moss v. Stockdale, Peckham & Werner* (1996) 47 *C.A.4th* 494, 502, 54 *C.R.2d* 805, 3 *Cal. Proc.* (5th), *Actions*, §641 [*C.C.P. 583.340(c)* must be liberally construed, consistent with policy favoring trial on merits].)

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3. Trial Is Impossible, Impracticable, or Futile.

cc. Plaintiff's Burden.

6 *Witkin Cal. Proc. PWT* § 397

[§ 397] Plaintiff's Burden.

The burden is on the plaintiff to establish the existence of impossibility, impracticability, or futility. The following cases illustrate the rule:

Central Mut. Ins. Co. v. Executive Motor Home Sales (1983) 143 C.A.3d 791, 796, 192 C.R. 169 [no significant steps taken by plaintiff until trial setting conference, and clerk improperly set trial for time after expiration of period; reliance on clerk's mistaken date and participation of defendant's counsel in trial setting conference were no excuse].

Cannon v. Novato (1985) 167 C.A.3d 216, 222, 213 C.R. 132 [plaintiff's inadvertence in selecting trial date beyond 5-year period did not constitute impossibility or impracticability; clerk had no duty to check plaintiff's calculations].

Hoffman v. California (1985) 171 C.A.3d 1100, 1107, 217 C.R. 867 [loss of place on trial calendar due to plaintiff's lack of due diligence in relying on clerk's off-the-record remarks about availability of courtroom; plaintiff did not sustain burden of showing impossibility or impracticability].

Hill v. Bingham (1986) 181 C.A.3d 1, 10, 11, 225 C.R. 905, *infra*, §399 [plaintiff failed to call court's attention to necessity of setting trial within 5-year period; motion to advance would have cured delay].

Martin v. K & K Properties (1987) 188 C.A.3d 1559, 1567, 234 C.R. 161 [pendency of federal action did not make it impossible or impracticable to go to trial on cross-complaint].

Sizemore v. Tri-City Lincoln Mercury (1987) 190 C.A.3d 84, 89, 235 C.R. 243 [timely trial was not impossible or impracticable where plaintiff failed to act with reasonable diligence by failing to give notice of trial setting conference, miscalculating time, and giving court erroneous information regarding 5-year deadline].

Bank of America v. Superior Court (1988) 200 C.A.3d 1000, 1016, 246 C.R. 521, *supra*, §362 [ordinary pretrial delays, such as delays encountered in discovery, do not excuse failure to bring case to trial within the 5-year period].

Ferk v. Lake (1988) 205 C.A.3d 268, 278, 252 C.R. 196, supra, §390 [plaintiff wife's preoccupation with health of plaintiff husband was not excuse where no showing of diligence was made].

Wale v. Rodriguez (1988) 206 C.A.3d 129, 133, 253 C.R. 382 [plaintiff had duty to call chronology of case to court's attention].

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See *Perez v. Grajales* (2008) 169 C.A.4th 580, 594, 86 C.R.3d 784, 1 Cal. Proc. (5th), Attorneys, Supp., §231

[cross-plaintiff failed to establish that time consumed dealing with cross-defendant's motions was basis for impossibility in bringing action to trial].



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dd. Causation.

6 *Witkin Cal. Proc. PWT* § 398

[§ 398] Causation.

The plaintiff must also show a causal connection between the circumstances on which he or she relies and the failure to satisfy the 5-year requirement; bringing the action to trial must be impossible, impracticable, or futile for the reason offered. (*Sierra Nevada Memorial-Miners Hosp. v. Superior Court* (1990) 217 C.A.3d 464, 473, 266 C.R. 50, *infra*, §403; *Wilshire Bundy Corp. v. Auerbach* (1991) 228 C.A.3d 1280, 1287, 1289, 279 C.R. 488; see *Sanchez v. Los Angeles* (2003) 109 C.A.4th 1262, 1273, 135 C.R.2d 869 [there was no causal connection between defense counsel's suicide and plaintiffs' failure to meet 5-year deadline; failure was due to plaintiff counsel's oversight]; *Tamburina v. Combined Ins. Co. of America* (2007) 147 C.A.4th 323, 336, 54 C.R.3d 175 [causal connection was shown where plaintiff established that 424-day period of impracticability based on his illness and that of his counsel deprived him of substantial portion of 5-year period for preparation and moving action to trial].) The standard of proof is one of clear and convincing evidence. (*Hoffman v. California* (1985) 171 C.A.3d 1100, 1108, 217 C.R. 867.)

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ee. Diligence.

6 Witkin Cal. Proc. PWT § 399

[§ 399] Diligence.

(1) *Requirement of Reasonable Diligence.* Plaintiff must show that he or she exercised reasonable diligence in prosecuting the case. (*Moran v. Superior Court* (1983) 35 C.3d 229, 238, 197 C.R. 546, 673 P.2d 216, *infra*, §415; *Lauriton v. Carnation Co.* (1989) 215 C.A.3d 161, 164, 263 C.R. 476, *supra*, §394.) To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his or her duty to expedite the resolution of the case at all stages of the proceedings, including "the specific duty to use every reasonable effort to bring the matter to trial within the five-year period." (*Tejada v. Blas* (1987) 196 C.A.3d 1335, 1340, 242 C.R. 538.)

(2) *Effect of Approaching Deadline.* The level of diligence required increases as the 5-year deadline approaches. (*Sizemore v. Tri-City Lincoln Mercury* (1987) 190 C.A.3d 84, 235 C.R. 243; *Wale v. Rodriguez* (1988) 206 C.A.3d 129, 253 C.R. 382; see *Moss v. Stockdale, Peckham & Werner* (1996) 47 C.A.4th 494, 502, 54 C.R.2d 805, 3 Cal. Proc. (5th), *Actions*, §641 [duty of reasonable diligence applies "even during the last month" of statutory period]; *De Santiago v. D & G Plumbing* (2007) 155 C.A.4th 365, 374, 65 C.R.3d 882 [although continuances and courtroom unavailability established some initial impracticability, plaintiff lacked reasonable diligence in final 6 months of 5-year period by failing to alert trial court that selected trial date was beyond 5-year limit, thus acquiescing to that date].)

(3) *Duty To Monitor Performance of Official Duties.* The exercise of reasonable diligence includes an obligation to monitor the case in the trial court to ascertain whether filing, scheduling, or calendaring errors have occurred. (*Salas v. Sears, Roebuck & Co.* (1986) 42 C.3d 342, 228 C.R. 504, 721 P.2d 590, *infra*, §425; *Sizemore v. Tri-City Lincoln Mercury*, *supra* [plaintiff miscalculated time of 5-year statute and gave court erroneous information regarding deadline]; *Taylor v. Hayes* (1988) 199 C.A.3d 1407, 1410, 1411, 245 C.R. 613; *Berry v. Weitzman* (1988) 203 C.A.3d 351, 355, 249 C.R. 816; *Wilshire Bundy Corp. v. Auerbach* (1991) 228 C.A.3d 1280, 1287, 279 C.R. 488.)

In *Karubian v. Security Pac. Nat. Bank* (1984) 152 C.A.3d 134, 199 C.R. 295, plaintiffs filed a complaint in the Los Angeles superior court in September 1975, and an "at-issue memorandum" in December 1976. In February 1977 another law firm was substituted as counsel, and in March 1977 a second substitution occurred. In April 1979, 18

months prior to the running of the 5-year period, the clerk issued a "notice of eligibility" to file a certificate of readiness, and issued a second notice in June 1979. Both notices were mailed to the initial attorney of record, and he failed to forward the notice to plaintiffs or their counsel, but simply phoned the clerk's office to indicate to "someone" that he was no longer attorney of record. No certificate of readiness was filed and the case was removed from the "civil active list." When only 40 days of the 5-year period remained, plaintiff made a motion to specially set the matter for trial. The trial judge denied the motion on the ground that the matter was not at issue and that granting would cause substantial prejudice to defendants. *Held*, affirmed.

(a) Under the procedure for setting cases for trial in Los Angeles, if, after a notice of eligibility is issued in each of 2 months, no certificate of readiness is filed, the case is removed from the civil active list and is not restored to the list until a new at-issue memorandum is filed and served. (152 C.A.3d 137.)

(b) In *Moran*, *supra*, the court held that an otherwise diligent plaintiff was entitled to rely on the presumption that official duty would be performed, and that any delay occasioned by that reliance would be deducted from the 5-year period. *Moran* did not address the question whether a plaintiff "can be considered diligent in continuing to rely on official duty being performed after the passage of an amount of time sufficient to indicate to a reasonably knowledgeable attorney that official duty was *not* going to be performed and that the public official had obviously 'goofed.' " (152 C.A.3d 139.)

(c) Plaintiffs' ignorance of the status of the case, even though resulting from a misdirected notice by the clerk, did not render it impracticable to bring the matter to trial in time. In Los Angeles County, a case cannot get to trial within 6 months after the certificate of readiness is filed; hence, an attorney who has not received the clerk's notification of eligibility by the end of the fourth year must know that the case can come to trial only in the last 6 months available before the running of the 5-year period. Here, the notice was not received after 4 1/2 years, and plaintiffs' counsel waited until 40 days prior to the critical date before taking any action. (152 C.A.3d 139.)

(d) The failure of plaintiffs to move their case more expeditiously was not attributable to lack of receipt of the notice of eligibility, "unless one takes the position that the court has a duty generally to remind counsel of critical dates." (152 C.A.3d 140.) Counsel, by a single phone call, letter, or visit to the clerk's office after June 1979, could have discovered the inactive status of the case in ample time to remedy the situation. "It does not appear unreasonable or impracticable to require plaintiffs and their counsel to monitor their cases to the extent that the clerk's failure to issue a timely notice of eligibility to file a certificate of readiness will be detected in a reasonably prompt fashion." (152 C.A.3d 140.)

In *Hill v. Bingham* (1986) 181 C.A.3d 1, 225 C.R. 905, plaintiff agreed to a trial date beyond the 5-year period, he failed to move that trial be advanced to a date within the 5-year period, and trial was not commenced until the period had expired. The action was dismissed, but plaintiff's motion for reconsideration was granted in reliance on *Moran*. *Held*, judgment reversed.

(a) The court's duty under *Moran* did not excuse plaintiff "from exercising due diligence under the circumstances." (181 C.A.3d 11.) "[F]or the sua sponte duty to arise, not only must there be a timely request for trial de novo, but also the plaintiff must bring to the trial court's attention the time frame of the case. A contrary conclusion would completely shift responsibility for keeping track of all applicable dates and for moving cases forward from plaintiffs to an already overcrowded court system." (181 C.A.3d 11.)

(b) A requirement of continuing diligence by the plaintiff is not inconsistent with the rationale of *Moran* (to protect a plaintiff during the period that it is impossible to bring a matter to trial because official duty is not done). There was sufficient time to advance the case to trial within 5 years, and it was ultimately plaintiff's "manifest lack of diligence," not nonperformance of some official duty, that prevented a timely trial. (181 C.A.3d 12.)

In *Greene v. Howmedica* (1993) 13 C.A.4th 912, 16 C.R.2d 777, the action was dismissed, but reinstated after a

successful appeal by plaintiff. The remittitur ordered the action set for trial. More than 6 months later, defendant's motion to dismiss for failure to obtain trial setting within the 6-month period of *C.C.P. 583.350* was granted. *Held*, affirmed.

(a) The remittitur did not impose the burden of setting the case for trial on the trial judge. Even if plaintiff believed the case would be set for trial automatically on issuance of the remittitur, "there comes a time when plaintiff can no longer be considered 'diligent' " without taking some action to call the matter to someone's attention. (*13 C.A.4th 915.*)

(b) Plaintiff's reliance on *Moran* is misplaced. There, the trial judge had a specific statutory duty to recalendar. Here, there was no statutory duty. Plaintiff's obligation to see that the action is brought to trial within the 5-year period remains "even after the matter has been remanded to the trial court with directions to set it for trial." (*13 C.A.4th 915.*)

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3. Trial Is Impossible, Impracticable, or Futile.

ff. Duration of Tolling.

6 *Witkin Cal. Proc. PWT* § 400

[§ 400] Duration of Tolling.

(1) *Tacking of Periods.* There may be more than one kind of impossibility, impracticability, or futility in a single case, with the result that distinct periods are tacked together for an aggregate exclusion. Thus, in *Arnold v. California* (1969) 273 C.A.2d 575, 583, 78 C.R. 309, consolidated actions for wrongful death were brought against the state. (a) A pending appeal in a related case involving demurrers sustained on identical issues made it impossible to proceed effectively until the appeal was decided; this gave an extension of 19 months. (b) When the actions were commenced in 1959, liability of the state depended on the proprietary capacity exception to the old doctrine of sovereign immunity. *Muskopf v. Corning Hosp. Dist.* (1961) 55 C.2d 211, 11 C.R. 89, 359 P.2d 457, 5 Summary (10th), Torts, §215, repudiated the doctrine, but it was followed by a moratorium that prevented trials until the enactment of the new governmental liability act (see 5 Summary (10th), Torts, §216) gave an additional extension of 16 1/2 months. The total, 35 1/2 months, took the case out of the statute, and a dismissal was improper.

(2) *Tolling Despite Reasonable Time Remaining.* Formerly, several cases rejected the excuse where, although there was a period of impracticability, a reasonable time remained after that period to bring the action to trial. (See *Brown v. Superior Court* (1976) 62 C.A.3d 197, 199, 132 C.R. 916; *California v. Superior Court (Garner)* (1979) 98 C.A.3d 643, 649, 159 C.R. 650; *Khoury v. Comprehensive Health Agency* (1983) 140 C.A.3d 714, 717, 189 C.R. 653 [plaintiffs still had over 2 years to bring case to trial after arbitration was concluded].)

C.C.P. 583.340(c) repudiates these holdings by stating the excuse without any qualification. Hence, the time during which it was impracticable is excluded in all cases. (See Law Rev. Com. Comment to C.C.P. 583.340; *Holland v. Dave Altman's R. V. Center* (1990) 222 C.A.3d 477, 484, 271 C.R. 706, quoting the text; *Rose v. Scott* (1991) 233 C.A.3d 537, 542, 284 C.R. 487, citing the text; *Chin v. Meier* (1991) 235 C.A.3d 1473, 1476, 1478, 1 C.R.2d 499, citing the text.) The Commission explains: "This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run." (17 Cal. Law Rev. Com. Reports, p. 919.)

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aa. In General.

6 *Witkin Cal. Proc. PWT* § 401

[§ 401] In General.

"The determination whether it was 'impossible, impracticable, or futile' to bring a case to trial within a given time period is generally fact specific, depending on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles. ... Nonetheless, there are some circumstances in which it can be said almost invariably that the exception applies." (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 C.4th 424, 438, 41 C.R.2d 362, 895 P.2d 469, *infra*, §416 [exception applied where default judgment was entered in favor of plaintiff; effectively brought "litigation to a standstill"].)

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bb. No Courtroom or Judge.

6 *Witkin Cal. Proc. PWT § 402*

[§ 402] No Courtroom or Judge.

(1) *Court Congestion.* Although the normal time of waiting for a place on the court's calendar is not excluded from the 5-year period, where an action has been calendared before the expiration of 5 years, inability to proceed because of court congestion is not chargeable to the period. (*Goers v. Superior Court* (1976) 57 C.A.3d 72, 74, 129 C.R. 29; see *Bennett v. Bennett Cement Contractors* (1981) 125 C.A.3d 673, 677, 178 C.R. 633 [trial date 15 months in advance of expiration of period showed requisite diligence]; *Lazelle v. Lovelady* (1985) 171 C.A.3d 34, 40, 217 C.R. 145 [5-year period was tolled for 69 days while case was trailing on civil active list]; *Monzon v. Schaefer Ambulance Service* (1990) 224 C.A.3d 16, 29, 273 C.R. 615 [plaintiffs obtained a trial date within 5-year period, but court congestion caused trial judge to continue matter beyond 5-year deadline]; *Rose v. Scott* (1991) 233 C.A.3d 537, 542, 284 C.R. 487; *Chin v. Meier* (1991) 235 C.A.3d 1473, 1478, 1 C.R.2d 499 [citing the text; "for purposes of the five-year limitation period, a court-ordered continuance when both sides announce 'ready' and no courtroom is available is to be treated as a discrete tolling event"]; *Coe v. Los Angeles* (1994) 24 C.A.4th 88, 92, 29 C.R.2d 297 [5-year statute was tolled by aggregate period of court-ordered continuances based on courtroom unavailability].)

(2) *Exercise of Peremptory Challenge to Judge.* In *Nail v. Osterholm* (1970) 13 C.A.3d 682, 91 C.R. 908, a malpractice action, discovery was completed, a pretrial conference was held, and a trial date was assigned well within the 5-year period. However, on the day of trial, the judge informed counsel that the doctor defendant had treated his son. Plaintiff's attorney exercised a peremptory challenge under C.C.P. 170.6. No other judge was then available, and the trial judge dismissed the jurors. The case remained on the calendar for more than a year without being set for trial, and when the period ran, defendants moved to dismiss. *Held*, order granting dismissal reversed, applying the impracticability exception. "[W]e hold that [the 5-year statute] must be reconciled with the fundamental right of a litigant to disqualify a trial judge pursuant to the provisions of section 170.6. Accordingly, we also hold that if a case is timely set for trial, and if thereafter a challenge against the trial judge to whom it is assigned is allowed, not only is it the duty of the court to assign the case to another judge if one is available, or if none is available to procure the assignment of an outside judge through the Chairman of the Judicial Council, but the period that the trial is held in

abeyance pending the assignment of another judge is to be disregarded in considering a subsequent motion to dismiss." (13 C.A.3d 686.) (See *Hartman v. Santamarina* (1982) 30 C.3d 762, 768, 180 C.R. 337, 639 P.2d 979, supra, §377 [dismissal was premature after period of delay due to C.C.P. 170.6 challenge; following *Nail*].)

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cc. Death or Illness.

6 Witkin Cal. Proc. PWT § 403

[§ 403] Death or Illness.

(1) *Death or Illness of Party.* Under the former "limited exceptions" rule (supra, §395), death or illness of a party did not excuse compliance with the 5-year requirement. (See *Andersen v. Superior Court* (1921) 187 C. 95, 101, 200 P. 963 [death of plaintiff; duty of representatives of estate to have case brought to trial in time]; *Smith v. Bear Valley Milling & Lumber Co.* (1945) 26 C.2d 590, 602, 160 P.2d 1 [death of defendant]; *Singelyn v. Superior Court* (1976) 62 C.A.3d 972, 975, 133 C.R. 486 [illness of plaintiff].) It has since been held that death of a party tolls the statute, both on the ground that the court's jurisdiction is suspended until a personal representative is appointed (supra, §390) and because counsel's authority terminates on the client's death, making it impracticable and futile to bring the case to trial. (*Pham v. Wagner Litho Machinery Co.* (1985) 172 C.A.3d 966, 972, 218 C.R. 476.)

(2) *Death or Illness of Attorney.* It was formerly held that an attorney's death did not toll the 5-year statute. (See *Larkin v. Superior Court* (1916) 171 C. 719, 724, 154 P. 841.) It has subsequently been stated that death or illness of counsel may toll the statute, provided that plaintiff exercises reasonable diligence in prosecuting the case. However, the delay "is not necessarily excusable. Each case must be decided on its own peculiar features and facts." (*Him v. Superior Court* (1986) 184 C.A.3d 35, 39, 228 C.R. 839 [illness].)

In *Sierra Nevada Memorial-Miners Hosp. v. Superior Court* (1990) 217 C.A.3d 464, 266 C.R. 50, a medical malpractice action was not commenced within the 5-year period due to a computational error by plaintiffs' law firm in mistaking the date of service for the date of filing. However, the trial judge denied defendant's motion to dismiss, ruling that commencing the action was impossible, impracticable, or futile under C.C.P. 583.340(c) during the 77 days that the firm's only experienced trial attorney was disabled due to three bouts of surgery and recovery. *Held*, this was error.

(a) Merely establishing that counsel's illness interfered with trial preparation does not warrant tolling the statute. "In the course of five years it is reasonable to expect that counsel will suffer a number of days when illness will prevent his attendance to his practice. ... The five-year period contains an allowance for the time so consumed in the same manner as it allows for the usual and ordinary proceedings attendant to moving the case to trial. It would render the statute

utterly indeterminate, subjective, and unadministerable, and thus absurd, to read an open-ended sick leave program for counsel into the tolling provisions." (217 C.A.3d 472.)

(b) *C.C.P. 583.340* requires a causal connection between the circumstance on which plaintiff relies and the failure to commence trial within the 5-year period. Merely showing that counsel was ill does not satisfy this requirement. "Two kinds of circumstance occur to us in which it may be appropriate to say that the illness of counsel has *caused* the plaintiff to fail to bring the case to trial in compliance with the five-year requirement. The first is when an illness of counsel occurs at the end of the five-year period in circumstances in which it is likely that counsel, but for the illness, would have become aware of the impending deadline and taken the appropriate action to avert the transgression. The second is an unusually lengthy illness of sole counsel which deprives the plaintiff of a substantial portion of the five-year period for prosecution of the lawsuit, i.e., trial preparation and moving the case to trial." (217 C.A.3d 473.)

(c) This case does not fit either situation. (1) Although the last bout of surgery and recovery occurred approximately 2 months before the expiration of the 5-year period, there was no evidence that but for his illness the attorney would have discovered the impending deadline and taken appropriate action. His attention was devoted to another trial, and the pretrial work on plaintiffs' case had been assigned to a contract attorney. (217 C.A.3d 473.) (2) Even assuming that the pertinent time period was the 2 years during which the law firm handled plaintiffs' case, there were only 77 days of illness in a 723-day span. This period is not sufficient alone to warrant an inference that illness caused an appreciable delay in the prosecution of plaintiffs' case, and there is no other evidence supporting such an inference. Also, the basis for a finding of delay is undermined by the fact that the ill attorney was not a sole practitioner and had consigned the pretrial work to another attorney. (217 C.A.3d 474.) (See *Sanchez v. Los Angeles* (2003) 109 C.A.4th 1262, 1273, 135 C.R.2d 869 [suicide of defense counsel did not produce period of impracticability over which plaintiff had no control; plaintiff could have insisted on existing trial date or another date within 5-year limitations period that would have accommodated all parties].)

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dd. Defendant's Default.

6 Witkin Cal. Proc. PWT § 404

[§ 404] Defendant's Default.

(1) *Exclusion From Time of Entry of Default by Clerk.* Obviously the plaintiff cannot bring an action to trial while the plaintiff has a default judgment. Moreover, it has been held that the entire time from the date of entry of default until the default judgment is set aside is excluded rather than merely the period the default judgment is in effect. In *Vanyek v. Heard* (1971) 18 C.A.3d 467, 95 C.R. 750, the complaint was filed March 4, 1964, and the clerk entered a default on January 28, 1966, but the default judgment was not entered until January 31, 1967. Both were set aside on July 24, 1967, and defendant then moved to dismiss. If the period to be excluded ran only from the default judgment (175 days), it would not save the case. *Held*, the excluded period ran from entry of the default by the clerk (368 days), and dismissal was improper. (See *Maguire v. Collier* (1975) 49 C.A.3d 309, 313, 122 C.R. 510, citing the text ["Default time must be excluded and there is no discretion"].)

(2) *Rejection of Mandatory Rule Excluding Default Period: Necessity for Due Diligence.* In *Hughes v. Kimble* (1992) 5 C.A.4th 59, 6 C.R.2d 616, the court reexamined this issue, and on an analysis of the cases declined to follow the mandatory rule.

(a) "We note at the outset that the *Maguire* 'rule' is dictum, for as we explain below, it states a considerably broader and more rigid principle than was necessary to decide the issue in *Maguire*. Nor, in any case purporting to approve the *Maguire* rule, has the rule actually been applied to exclude from the five-year period time that could not just as well have been excluded under a more narrowly drawn, or more flexible, principle. Most crucially, although the *Maguire* rule is based upon the exception to the five-year statute that applies where bringing an action to trial was for a time 'impossible, impracticable, or futile' ... the rule is neither justified by the policy underlying that exception, nor consistent with controlling Supreme Court decisions governing the exception's application." (5 C.A.4th 66.)

(b) The reasoning in *Vanyek* is more in accord than that in *Maguire* with the general principles governing application of the impossibility exception. (5 C.A.4th 68, 69.) "A default does not render *further prosecution of the case* impossible. An exercise of reasonable diligence in prosecuting the case when the defendant is in default consists of

reasonable efforts to proceed to a hearing on damages and obtain a default judgment. Where such efforts by a plaintiff do not appear within a reasonable time, no principle of fairness forbids dismissal of the action." (5 C.A.4th 69.)

(c) Plaintiff "obtained a clerk's entry of default, then failed for over three years to obtain a judgment, until the court on its own motion at last acted to dismiss the case. Neither in *Maguire*, nor in similar cases preceding or following it, has default time been excluded from computation for the five-year time limit in such circumstances. Although we can imagine circumstances in which three years of default time might appropriately be excluded, it would be absurd, in our view, to *require* such exclusion in all cases, regardless of the reasonableness of the plaintiff's delay in having a judgment entered. Such a mandatory rule of exclusion would give to negligent or dilatory plaintiffs who have obtained clerk's defaults an unlimited time in which to apply for entry of a judgment. The results would include the clogging of court calendars with stale cases, and the exposure of defendants, albeit defaulting defendants, to liability in an unknown amount, on claims of unproven merit, potentially for all eternity." (5 C.A.4th 70.)

(d) Accordingly, "the time between entry of a default and entry of a default judgment should be excluded from the five-year time to bring a case to trial if and only if the court finds that the plaintiff used due diligence to obtain entry of the judgment, and that in spite of such due diligence, it was impossible, impracticable, or futile to obtain a judgment." (5 C.A.4th 71.)

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ee. Interlocutory Review.

6 Witkin Cal. Proc. PWT § 405

[§ 405] Interlocutory Review.

(1) *Pending Appeal From Order Changing Venue.* In *Christin v. Superior Court* (1937) 9 C.2d 526, 71 P.2d 205, the action was brought in Los Angeles and defendants twice moved for change of venue to San Francisco. The court erroneously granted the renewed motion. Plaintiff appealed; the appeal was pending for over 3 years, and the order was finally reversed. A trial date was then set, but prior to trial defendants moved to dismiss. *Held*, the time consumed by the appeal should not be counted as part of the 5-year period, and dismissal was unauthorized. (a) The prior cases where the court lost jurisdiction (*supra*, §389 et seq.) were not precisely in point, for an appeal from an order changing venue did not, without a writ of supersedeas, divest the lower court of jurisdiction to proceed. Theoretically, it was possible for plaintiff to bring the action to trial. (b) However, a trial was *impracticable*. If it were attempted in Los Angeles, the proper place as eventually determined by the appeal, it would have been futile, for the records had been sent to San Francisco, and there was no reasonable possibility of getting them back. If it were attempted in San Francisco, the success of the appeal from the order changing venue would have nullified the result, and all the expense and effort would have been wasted. (9 C.2d 531.)

(2) *Pending Writ Review of Summary Judgment Order.* In *Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 C.A.3d 1476, 252 C.R. 67, plaintiffs, owners of a condominium unit, discovered cracks in the walls and floor slabs, and after minor repair measures failed, they sought help from defendant board of governors of the homeowners association. Nothing was done, and plaintiffs sued the members of the governing board, and the other homeowners, for failure to provide lateral and subjacent support for their condominium unit and for diminution in the market value of their unit, emotional distress, and punitive damages. The association's demurrer to the cause of action for support was sustained, and a trial date of November 6, 1986, was set on the remaining causes of action, which would leave 2 weeks before the 5-year period expired. On August 13, 1986, the association and board members moved for summary adjudication of issues to eliminate the claims for punitive damages. After several continuances, the motion was granted on October 24, 1986. On November 6, plaintiffs informed the trial court of their election not to go to trial but to seek writ relief on the summary adjudication order, and the judge took the case off calendar. On November 21, 1986, with 1 business day of

the 5-year period remaining, the Court of Appeal issued a peremptory writ of mandamus, final immediately, reversing the summary adjudication of issues. On November 25, 1986, plaintiffs moved to specially set the case for trial, but the trial court denied the motion and dismissed the action. *Held*, reversed; the impracticability exception applied.

(a) Plaintiffs acted reasonably in deferring trial until their writ petition on the punitive damage issue had been resolved, and it was therefore "impracticable" to bring the matter to trial within the period. While *C.C.P.* 598 "would appear to allow for bifurcation of a punitive damages issue ... , a court must consider practical issues beyond the technical ability to conduct a separate trial. The record here suggests a separate trial of the punitive damage issue would require presentation of evidence already introduced in an earlier trial devoted to compensatory damages" making a separate trial on the punitive damage issue unnecessarily duplicative and wasteful. (204 *C.A.3d* 1485.)

(c) Defendants' suggestion that plaintiffs could have tried the case and pursued their writ petition simultaneously is not persuasive. The impracticability of proceeding to trial must be evaluated as of the time plaintiffs' counsel made his decision to give up his trial date and pursue the writ. "We do not think [*C.C.P.* 583.340] requires counsel to speculate on how quickly the Court of Appeal will decide a writ petition and whether it will issue a stay." (204 *C.A.3d* 1485.)

(d) The trial court was apparently influenced by there being no stay issued; but the question whether the 5-year statute is tolled by an exception is essentially a question of law "to be resolved after the fact rather than by means of a stay issued by the appellate court before anyone contends the five years has run." At the time the writ petition was filed, the case had been taken off calendar and there was nothing to stay; the trial court should have drawn no inference from a failure to act on plaintiffs' stay request. (204 *C.A.3d* 1486.)

In *New West Fed. Savings & Loan Assn. v. Superior Court* (1990) 223 *C.A.3d* 1145, 273 *C.R.* 37, the trial judge denied defendant's motion for summary judgment, defendant petitioned for mandamus, and the Court of Appeal stayed the proceeding pending entry of an order by the trial court in compliance with *C.C.P.* 473c. The trial judge again denied defendant's summary judgment motion, thereby dissolving the stay, and defendant filed a second petition for mandamus but did not seek a stay. Plaintiffs moved for such a stay, and the Court of Appeal denied both plaintiffs' motion and defendant's second petition for mandamus, which had been pending for 50 days. In then seeking and obtaining a trial date, plaintiffs misinterpreted *C.C.P.* 583.350 (*infra*, §423), and added the 6 months to the date the original 5-year period expired, rather than to the date the stay was lifted. Defendant's subsequent motion to dismiss was denied on the ground that, despite the miscalculation, the 5-year period had not expired. Under *Kaye*, the period was tolled for impracticability for the 50 days during which defendant's second petition for mandamus was pending. Relying on the fact that 4 months of the 5-year period remained after expiration of the 50-day period, defendant contended that plaintiffs' failure to obtain a timely trial date was not *caused* by the impracticability of commencing the action during the 50-day period, as required by *Sierra Nevada Memorial-Miners Hosp. v. Superior Court* (1990) 217 *C.A.3d* 464, 266 *C.R.* 50, *supra*, §403, but was the result of plaintiffs' misinterpretation of *C.C.P.* 583.350. *Held*, no causal connection is required; the motion to dismiss was properly denied.

(a) Once impracticability is established, *C.C.P.* 583.340(c) requires that the 5-year period be tolled even if there is ample time after the period of impracticability to bring the case to trial. (223 *C.A.3d* 1155.)

(b) While *Sierra Nevada* did discuss causation, it did so only with respect to whether the claimed disability, i.e., illness of counsel, constituted impracticability in the first instance. Applying causation principles, the court held that the illness did not constitute impracticability; it did not hold that impracticability, once established, had to be the cause for not bringing the case to trial on time. (223 *C.A.3d* 1156.)

(c) Even though plaintiffs had 4 months remaining (excluding the tolled period), plaintiffs were still entitled to have the 50-day period tolled. Because the trial date was within the 5-year period, "the fact that plaintiffs had erroneously calculated the last day for trial is irrelevant. The statutory period not having expired yet, the trial court did not abuse its discretion by denying the motion to dismiss." (223 *C.A.3d* 1156.)

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4. Particular Circumstances of Impossible, Impracticable, or Futile Exception.

ff. Absence of Party in Interest.

6 Witkin Cal. Proc. PWT § 406

[§ 406] Absence of Party in Interest.

An exception has been recognized where one of several defendants is unavailable and the trial cannot be successfully had in his or her absence. (See *Pacific Greyhound Lines v. Superior Court* (1946) 28 C.2d 61, 67, 168 P.2d 665 [absent defendant in military service could have obtained mandatory stay under Soldiers' and Sailors' Relief Act had he applied for it]; on exception when defendant is not amenable to process, see *infra*, §407.)

This exception was also applied where an assignment was made to plaintiff for collection only, and plaintiff's assignor, with a beneficial interest in the claim, was absent in military service for 3 years. The court's finding that his absence interfered with his ability to prosecute the case brought it within the impracticability exception. (*Rauer's Law & Collection Co. v. Higgins* (1946) 76 C.A.2d 854, 858, 174 P.2d 450.)

The effect of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. Appx., §525; see 3 Cal. Proc. (5th), Actions, §721) was more fully considered in *Buttler v. Los Angeles* (1984) 153 C.A.3d 520, 200 C.R. 372. In November 1976, V, D, and L filed suit against defendant county and eight police officers, charging false arrest, false imprisonment, and assault and battery. Plaintiffs proceeded with diligence, and the clerk issued a notice of eligibility to file a certificate of readiness in March 1979. However, at that time V was on active duty in the United States Navy in Spain, and remained there through June 1981. In January 1982, defendants moved to dismiss, and the trial judge granted the motion. *Held*, reversed.

(a) No prior California case has considered the question whether 50 U.S.C. Appx., §525 applies to a state dismissal statute, but there is no rational basis for applying it to statutes of limitations (see 3 Cal. Proc. (5th), Actions, §721) and not applying it to the limitations period for bringing an action to trial. To deny its application would discourage persons who had already filed lawsuits from enlisting in the armed services. (153 C.A.3d 524, 525.) Moreover, to dismiss the action of a plaintiff in military service would be an idle gesture in many cases because the statute of limitations on a second action would be tolled. Hence, under 50 U.S.C. Appx., §525, V was entitled to protection against dismissal. (153 C.A.3d 525.)

(b) As to D and L, who were not in military service, *50 U.S.C. Appx., §521* provides that the court has discretion to postpone a trial unless it is satisfied that the ability of the serviceman to prosecute or defend would not be materially affected by going to trial. Under *50 U.S.C. Appx., §521*, V may have been entitled to stay the other actions as well as his own because of prejudice to him from a separate trial of those actions. In that event, it would be impossible for the other plaintiffs to prosecute their actions. Thus it may have been "futile" for D and L to have sought a trial while V was in the service because he would have been entitled to stay that trial. (*153 C.A.3d 526.*) Hence, the order of dismissal as to D and L should be reconsidered by the trial court in the light of *50 U.S.C. Appx., §521. (153 C.A.3d 527.)*

The mere fact that one defendant is absent is not an excuse where the claims are several and independent, so that the plaintiff could readily have proceeded to trial against the remaining defendant. (*Ellsworth v. United States Metals Corp. (1952) 110 C.A.2d 727, 729, 243 P.2d 575; Continental Pac. Lines v. Superior Court (1956) 142 C.A.2d 744, 752, 299 P.2d 417.*)

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gg. Defendant Not Amendable to Process.

6 *Witkin Cal. Proc. PWT* § 407

[§ 407] Defendant Not Amendable to Process.

Under the former 5-year statute, the time in which the defendant was not amenable to process was excluded in computing the time for bringing the action to trial. (See *Ojeda v. Municipal Court* (1946) 73 C.A.2d 226, 232, 166 P.2d 49 [applying exception]; *Wurnitsch v. Nordvik* (1971) 14 C.A.3d 679, 681, 92 C.R. 518 [5-year period for bringing action to trial was tolled where defendant was absent from state, notwithstanding that she was amenable to process under *Veh.C.* 17460]; *Sanders v. Fuller* (1975) 45 C.A.3d 994, 998, 119 C.R. 902 [exception applied only to ordinary defendant against whom some relief was sought, not to person whose status was actually that of plaintiff and who was made defendant because of his failure to join as coplaintiff]; *Wills v. Williams* (1975) 47 C.A.3d 941, 946, 121 C.R. 420 [exception applied where, on death of defendant, court's jurisdiction was suspended until appointment of personal representative]; *Herring v. Peterson* (1981) 116 C.A.3d 608, 612, 615, 172 C.R. 240 [death of defendant].)

Lack of amenability to process is not an excuse under the current 5-year statute. (See *C.C.P.* 583.340 [not included among listed excuses]; cf. *C.C.P.* 583.240(a) [expressly including amenability to process exclusion in computing time for service of summons].)

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hh. Invalid Order Preventing Matter Going to Trial.

6 *Witkin Cal. Proc. PWT § 408*

[§ 408] Invalid Order Preventing Matter Going to Trial.

In *Levine v. Pollack* (1995) 37 C.A.4th 129, 43 C.R.2d 491, the trial judge dismissed the action for failure to bring it to trial within 5 years. Plaintiff had been granted a continuance, conditioned on payment of attorneys' fees to defendant, and plaintiff did not pay the fees. The statute the trial judge relied on in imposing the condition, *C.C.P. 1024* (payment of expenses on postponement of trial), did not authorize payment of attorneys' fees. *Held*, dismissal was improper. Plaintiff's agreement to the condition was immaterial, as she was given no option, was representing herself, and was apparently misled by the trial judge regarding his ability to order attorneys' fees as a condition for a continuance. It is clear that the judge intended to dismiss the action for plaintiff's failure to pay the fees ordered, and plaintiff did everything possible to bring the matter to trial before the 5-year period had expired, except pay the fees. Because the trial judge prevented the matter from proceeding to trial based on an invalid order, it was impossible for plaintiff to bring the matter to trial within 5 years. "The fault being attributable to the court, it was improper for the court to dismiss the action." (37 C.A.4th 139.)

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ii. Consolidated Actions.

6 Witkin Cal. Proc. PWT § 409

[§ 409] Consolidated Actions.

In *General Motors Corp. v. Superior Court* (1966) 65 C.2d 88, 52 C.R. 460, 416 P.2d 492, spouses M and B were injured in an automobile accident. In June 1960, they filed an action against GM alleging negligent design of their car. B died in August 1963, before trial preparations were completed, and M and the other heirs filed a wrongful death action, on the same theory, in February 1964. Their motion to consolidate (see 4 Cal. Proc. (5th), *Pleading*, §341 et seq.) was granted in December 1964, and they prepared for trial on the consolidated actions. On September 20, 1965, more than 5 years after the first action was filed, defendant moved for mandatory dismissal, and, on denial of the motion, sought prohibition. *Held*, writ denied.

(a) *Purposes of dismissal statutes.* The mandatory dismissal statutes, including former C.C.P. 583, are similar to statutes of limitation. However, policy considerations in dismissal are less critical, because once the action is filed and the defendant is served, the defendant has notice and can protect his or her interests. (65 C.2d 91.)

(b) *Purposes of consolidation statutes.* Consolidation decreases the backlog of cases and protects defendants from multiplicity of actions on related issues. C.C.P. 1048 gives the judge discretion, when it can be done without prejudice to a substantial right, but former C.C.P. 377 ("such actions shall be consolidated for trial on the motion of any interested party") is a legislative determination that the danger of prejudice is outweighed by the advantages of consolidation where a wrongful death and personal injury suit arise out of the same act. (65 C.2d 92.)

(c) *Reconciliation of statutes: wrongful death action.* It is not necessary for plaintiffs to waive their right to consolidate actions under penalty of dismissal. Consolidated actions should be treated as distinct (just as cross-actions are) for purposes of dismissal, and the time for bringing each to trial should be measured from the time of its filing. Hence, the wrongful death action is safe from dismissal. (65 C.2d 92.)

(d) *Impracticability exception: personal injury action.* The impracticability exceptions cannot be comprehensively or mechanically defined, and the circumstances of each case must be considered. (65 C.2d 93.) The two cases here

involve a single central issue, calling for extensive expert testimony, and substantial benefits would be gained by a single trial. "[I]t would have served no purpose and thus would have been futile for plaintiffs to have attempted to prosecute their actions in separate and successive trials. The facts also demonstrate that it was impracticable for them to bring the consolidated actions to trial within five years after the personal injury action had been filed." (65 C.2d 97.)

(e) *Amount of extension.* To give another full 5-year period from the time of filing the second action is unwarranted. The first action is excepted from the statutory provision on dismissal "only for that period of time during which it was or is impracticable to bring the consolidated action to trial." (65 C.2d 97.) The time is therefore extended for a reasonable period after filing of the wrongful death action during which trial preparation was required. The statutory provision on discretionary dismissal (2-year period) is an indication that in a typical case a 2-year delay is deemed unavoidable. (65 C.2d 98.) Following this theory, the delay in bringing the wrongful death action to trial was unavoidable at least until February 20, 1966, 2 years after filing; hence, these 2 years should be disregarded in computing the 5-year period. (65 C.2d 98.) Whether any additional time may be allowed is for the trial court to decide. (65 C.2d 98.)

General Motors Corp. was distinguished and a contrary result was reached in *Bolsinger v. Marr* (1969) 1 C.A.3d 267, 81 C.R. 498. Plaintiff sued in 1962, defendant filed a separate action involving the same subject matter in 1965, and the actions were consolidated in 1966. In 1968, defendant dismissed his 1965 action and moved to dismiss plaintiff's 1962 action. *Held*, order of dismissal affirmed. There was no impracticability; 22 months had elapsed between the order of consolidation and the motion to dismiss, more than ample to prepare for trial of consolidated actions involving closely related issues. (1 C.A.3d 271.)

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jj. Severable Causes of Action.

6 *Witkin Cal. Proc. PWT* § 410

[§ 410] Severable Causes of Action.

Impracticability as to severable causes of action (see 4 *Cal. Proc.* (5th), *Pleading*, §§376, 377) can be a sufficient excuse to avoid dismissal. In *Brunzell Const. Co. of Nevada v. Wagner* (1970) 2 C.3d 545, 86 C.R. 297, 468 P.2d 553, plaintiff contractor sued an owner, surety, architects, and engineers. As to the owner and surety, complicated legal steps made it impossible to get to trial. As to the architects and engineers, the 5-year period elapsed, and the trial judge ruled that, where causes of action are severable and it is possible to go to trial on them, dismissal is proper. *Held*, reversed.

(a) The fact that a plaintiff can sever causes and proceed separately against one of several defendants is an important factor but not always determinative. "In many situations in which it is impossible or impracticable to proceed against one codefendant it may be impracticable, in terms of the burden both to the parties and to judicial administrations as a whole, to proceed against other defendants in a separate suit. To require a plaintiff to sever causes of action against multiple defendants *whenever* it becomes impossible or impracticable to proceed against one defendant within the five-year period would be to require unproductive duplication of effort, compel the incurrence of excessive expense, and generally undermine all the policies served by modern theories of consolidation in a substantial number of cases." (2 C.3d 553.) *Ross v. George Pepperdine Foundation* (1959) 174 C.A.2d 135, 142, 344 P.2d 368, and *Langan v. McCorkle* (1969) 276 C.A.2d 805, 809, 81 C.R. 535, are disapproved on this point. (2 C.3d 555, footnote 13.)

(b) Impracticability is not an inevitable conclusion where there are multiple parties and causes and it is not possible to try them all. " 'Impracticability' may vary not only as to different proceedings but as to different parties within the same proceeding. Each individual is entitled to have his section 583 claim evaluated with respect to his own particular role in the litigation." (2 C.3d 555.)

(c) The trial judge did not consider the impracticability contention on its merits; i.e., he "did not examine the relationships between the causes of action, the expense and difficulty likely to be engendered by separate trials, the diligence and good faith efforts of the plaintiff, the prejudice or hardship to the instant defendants, or other relevant matters." (2 C.3d 555.) Accordingly, the dismissal orders are reversed and the case remanded "for proceedings in

accordance with this opinion." (2 C.3d 556.) (See *Holland v. Dave Altman's R. V. Center* (1990) 222 C.A.3d 477, 483, 271 C.R. 706 [severing action against one defendant and proceeding to trial against others was deemed "impracticable" where subsequent trial would involve same issues of negligence, causation, and damages; citing *Brunzell*].)

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kk. Related Proceeding Is Pending.

6 Witkin Cal. Proc. PWT § 411

[§ 411] Related Proceeding Is Pending.

(1) *Exception Applicable.* A number of cases have applied the impracticability exception where the trial could not be successfully held until the conclusion of a pending related proceeding. (See *Rose v. Knapp* (1951) 38 C.2d 114, 117, 237 P.2d 981 [quiet title action could not be pursued until issue of previous judgment was resolved]; *Neustadt v. Superior Court* (1952) 112 C.A.2d 825, 247 P.2d 569 [related action could probably have been basis of plea in abatement]; *Bosworth v. Superior Court* (1956) 143 C.A.2d 775, 779, 300 P.2d 155 [for 175 days, pending controlling decision on appeal in will contest, plaintiff's action could not have been usefully tried; period was tolled for that number of days and mandatory dismissal was refused]; *Arnold v. California* (1969) 273 C.A.2d 575, 584, 78 C.R. 309 [moratorium statute on governmental immunity suspended action]; *Pat Rose Associates v. Coombe* (1990) 225 C.A.3d 9, 17, 275 C.R. 1 [impracticability exception applied where motion to set matter for trial had been denied because of appointment of special referee].)

In *Vecki v. Sorensen* (1959) 171 C.A.2d 390, 340 P.2d 1020, plaintiffs filed an action in December 1950, seeking an injunction and damages for quarrying and excavating on land adjacent to theirs. Defendants answered and cross-complained to reform the deed to plaintiffs by reducing the area of their land to two-thirds. The case was called for trial in December 1952, a jury was impaneled and sworn, but the judge then ruled that defendants' pleading raised equitable issues and ordered a recess of the jury until they were decided. Later that month, the judge decreed reformation of the deed as requested by defendants, plaintiffs appealed, and the judgment was affirmed in November 1954. Subsequent steps in the trial court were delayed by the death of a defendant and substitution of his executor. In June 1957, on defendants' motion, the action was dismissed. *Held*, reversed, for two reasons: (a) There was a partial trial (*supra*, §374). (b) It was impracticable to try the case within the statutory period. Plaintiffs could not prove their damages without knowing the extent of their land, and a trial on the basis of the judge's decree would be nullified if plaintiffs prevailed on appeal. The dismissal statute "is not to be construed to require the plaintiff to proceed with a wasteful, abortive trial upon the peril of losing his day in court." (171 C.A.2d 396.)

In *Stella v. Great Western Savings & Loan Assn.* (1970) 13 C.A.3d 732, 91 C.R. 771, plaintiffs, purchasers of a

defective house, sued various persons including defendant savings and loan association. Many others brought similar actions, consolidated their cases against this defendant, were nonsuited, and appealed. These cases were eventually decided by the Supreme Court in favor of the homeowners, on the new point that the savings and loan association was not a mere lender but an active participant in the home construction enterprise, and therefore was liable for the negligent construction. *Held*, plaintiffs acted reasonably in taking no steps to go to trial in their action pending the determination of these consolidated actions. The substantive matters were the same, the legal issue was identical, and a prompt trial of their action would have involved unnecessary expense and the possibility of inconsistent judicial determinations. (13 C.A.3d 738.)

In *McRoberts v. Gorham* (1971) 18 C.A.3d 1040, 96 C.R. 427, plaintiffs filed two actions arising out of an automobile accident: one in the state court on July 9, 1964; another in the federal court under the Federal Tort Claims Act on June 17, 1965, on the theory that one defendant was on military duty. The parties engaged in extensive discovery and other proceedings in the state court, but all were desirous of deferring the state action until completion of the federal action. The federal district court gave judgment for plaintiffs in March 1967, but the Court of Appeals reversed in March 1969. The lower court dismissed the present state action in September 1969. *Held*, reversed, for reconsideration of the impracticability issue under the criteria set forth in *Brunzell Const. Co. of Nevada v. Wagner* (1970) 2 C.3d 545, 551, 86 C.R. 297, 468 P.2d 553, supra, §410.

(2) *Exception Not Applicable*. It is not enough, however, simply that some issue involved in the present action is subject to determination in the collateral action; if it were, the trial of almost any lawsuit could be postponed indefinitely. It must be shown that it would be excessively difficult and unreasonably expensive to proceed to trial until the collateral litigation is resolved. In *Reserve Ins. Co. v. Universal Underwriters Ins.* (1975) 51 C.A.3d 57, 123 C.R. 763, an insurance case, the court distinguished *Stella*. "[T]he fact that the very policy in issue between Reserve and Universal was being considered on appeal in [another] case should not blind us to the logical conclusion to which Reserve's position on this appeal inevitably leads: it probably happens hundreds of times every year that an issue which may be decisive on pending litigation is before the appellate courts of this state. The fact that here it related to the same insurance policy that was involved in the untried case, merely helped Reserve to spot it. Surely, it cannot be urged that it is 'impracticable and futile' as a matter of law to try a lawsuit just because the trial court will be asked to resolve a difficult legal question, the answer to which may be obvious in a few years." (51 C.A.3d 63.)

In *Mitchell v. Frank R. Howard Memorial Hosp.* (1992) 6 C.A.4th 1396, 1404, 8 C.R.2d 521, an action involving concurrent state and federal filings, the court said:

(a) "When a party makes a strategic decision to file identical actions in two forums, no judicial encouragement should be given to seeking a definitive ruling in one forum while allowing the case in the second forum to gather dust. Indeed, any ruling that it is 'impracticable and futile' to prepare a case for trial because pertinent legal issues are being decided in another forum would sanction the indefinite postponement of preparing the dormant case for trial. This result would run contrary to the substantial and important policy in California requiring the expeditious resolution of litigation." (6 C.A.4th 1404.)

(b) "After filing a complaint and engaging in minimal discovery, appellant allowed his state action to lapse for almost four years while he actively litigated the federal action. Once it became clear that his federal litigation was doomed, he once again returned to the state forum and attempted to revive an action he had long ago abandoned. By his utter lack of diligence in pursuing his state action, appellant himself set the stage for dismissal." (6 C.A.4th 1404.)

In *Lane v. Newport Bldg. Corp.* (1986) 176 C.A.3d 870, 222 C.R. 443, plaintiffs filed a complaint in January 1979 against two defendants for damages to plaintiffs' property allegedly resulting from the construction of a drainage channel on defendants' property. A third defendant, an engineer, was later substituted as a named defendant, and in 1982 he filed a *petition in bankruptcy*. The other parties were notified of this fact and of this defendant's intention not to attend a pretrial conference as a result of the automatic stay order of the bankruptcy court. When defendants' motion to dismiss was made plaintiffs relied on their counsel's assumption that the bankruptcy proceeding would stay the entire

action. *Held*, order of dismissal affirmed. Counsel's assumption was unreasonable, and diligent counsel could have taken any of the following steps to avoid dismissal or bring the action to trial within the 5-year period: "(1) apprising the trial court at the mandatory settlement conference of the problem presented by [the] bankruptcy stay; (2) moving the court or proposing a stipulation to stay the entire action, pending the outcome of the bankruptcy proceeding; (3) proposing a stipulation to extend the time within which the action must be brought to trial ... ; (4) moving the court to specially set the entire action for trial prior to the expiration of the five-year period ... ; (5) moving the court to sever the causes pertaining to [the bankruptcy defendant] and proceeding to trial on the remaining causes against respondents; or (6) seeking relief from the stay as to [the bankruptcy defendant] in bankruptcy court." (176 C.A.3d 874.)

In *Burch v. Slamin* (1955) 137 C.A.2d 1, 289 P.2d 498, plaintiff filed a San Francisco action, and, when the motion to dismiss was made, asserted that he had not set it for trial because a San Mateo action involving the same issues was pending. *Held*, he failed to sustain the burden of showing impossibility of bringing the cause to trial. His affidavit only disclosed that the San Mateo action was first filed; the record was silent as to the action in which process was first served (the test of priority of jurisdiction; see 2 Cal. Proc. (5), *Jurisdiction*, §434). (137 C.A.2d 3.)

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c. Arbitration.

1. Submission to Contractual Arbitration.

6 *Witkin Cal. Proc. PWT* § 412

[§ 412] Submission to Contractual Arbitration.

(1) *Importing Concept of Dismissal Statute.* In *Preston v. Kaiser Foundation Hosp.* (1981) 126 C.A.3d 402, 178 C.R. 882, plaintiffs filed a malpractice action against defendant on January 14, 1975. One plaintiff was a member of a labor union that had a contract with defendant containing an arbitration clause. Defendant notified plaintiffs of the duty to arbitrate and later moved to stay the action and compel arbitration. The court granted the motion in December 1976; defendant promptly selected its arbitrator, but plaintiffs did not select an arbitrator until October 1977, and no neutral arbitrator was ever selected. On January 14, 1980, the 5-year period expired, and in December the trial judge granted the motion to dismiss, which had the effect of vacating the order for arbitration and terminating the arbitration. *Held*, reversed.

(a) The exception excluding time during which the jurisdiction of the court is suspended (*supra*, §389) did not apply. The court had jurisdiction to order arbitration and to stay proceedings until arbitration was completed; consequently it had jurisdiction to dismiss the arbitration where plaintiffs failed to exercise reasonable diligence in moving the dispute to a conclusion. (126 C.A.3d 407.)

(b) The policy of the dismissal statute applies despite the fact that the parties have by contract agreed to arbitration, and the period of that statute should provide a measuring rod; however, language in *Lockhart-Mummery v. Kaiser Foundation Hosp.* (1980) 103 C.A.3d 891, 163 C.R. 325, to the effect that an arbitration proceeding should be dismissed after 5 years from the filing of the complaint, "is unnecessarily broad." (126 C.A.3d 408.) In importing the concept and limits of the dismissal statute into this situation, the judicially created exceptions to the statute must also be imported. Hence, the time should begin to run not from the date of filing the complaint but from the date of the order of arbitration, because during the period between these two dates it would not be possible or practical for the plaintiff to bring the matter to arbitration or trial. (126 C.A.3d 409.) This "exempt period" during which the impracticability exists should be considered in determining whether the plaintiff exercised reasonable diligence. (126 C.A.3d 409, 410.) (See *Gainey v. Occidental Land Research* (1986) 186 C.A.3d 1051, 1054, 231 C.R. 249 [5-year period did not run in absence of order to compel arbitration; distinguishing *Preston*]; on impossibility, impracticability, and futility exception, see *supra*, §395 et seq.)

However, the exception tolling the time between the filing of the complaint and the order for arbitration does not prevail where the plaintiff has failed to exercise reasonable diligence in expediting the arbitration proceedings. The plaintiff "cannot sit back while a defendant delays, since the plaintiff has an 'arsenal or of weapons' to prevent defendant's dilatory actions." (*Boutwell v. Kaiser Foundation Health Plan* (1988) 206 C.A.3d 1371, 1374, 254 C.R. 173 [plaintiff may petition superior court to assist in expediting proceedings by moving to appoint neutral arbitrator, to set arbitration date, to strike answer, or to enter default].)

(2) *Role of Arbitrator*. In *Young v. Ross-Loos Med. Group* (1982) 135 C.A.3d 669, 185 C.R. 536, plaintiffs, in July 1975, filed an action for wrongful death resulting from medical malpractice of defendants. Defendants, in October 1975, obtained an order staying the action and directing arbitration. Neither plaintiffs nor defendants showed any diligence in the arbitration proceeding, and in April 1981, an order was filed by the neutral arbitrator, reciting that the 5-year period had elapsed and the period had not been tolled, and ordering that "this action be dismissed." Plaintiffs filed a motion to vacate in the superior court, the court granted the motion, and defendants appealed. *Held*, reversed.

(a) Although the dismissal statute applies only to actions, and it can be enforced only by a judge, *Preston* correctly states that the concept of the statute has been imported into the test of reasonable diligence in arbitration. "We believe that the officer actually in charge of an arbitration proceeding is, at the very least, in as good a position to administer such test as is the judge of the superior court where proceedings have been stayed." (135 C.A.3d 673.)

(b) The arbitrator's decision, even if regarded as in the nature of a sanction, was equivalent to an award, i.e., a final resolution of the arbitration proceeding. Because no basis for vacating it was shown, "the superior court should have enforced it *by itself dismissing* the underlying civil action." (135 C.A.3d 674.)

(c) "Neither counsel's performance was such as to advance the judicial goal of resolving all disputes on their merits. That is to say, while we rule in favor of defense counsel's clients we do not applaud their efforts. Nonetheless, *under our adversary system* it is permissible, though unfortunate from the perspective of the public we serve, for a resisting party simply to sit and wait. ... The simple fact is that nothing defendants' counsel did, or rather didn't do, precluded plaintiffs from insisting upon moving forward and taking those steps necessary to accomplish that end." (135 C.A.3d 674.)

The statement in *Young* that the arbitrator is in as good a position to determine diligence in arbitration as a judge was reiterated in *Byerly v. Sale* (1988) 204 C.A.3d 1312, 251 C.R. 749. Plaintiff, bound by an arbitration agreement, nevertheless brought an action for medical malpractice. On defendant's petition, the matter was sent to arbitration, and languished there until the period ran and defendant's motion to dismiss the action was granted. *Held*, judgment reversed.

(a) The stay pending arbitration made it impossible to bring *the action* to trial, and this was therefore impracticable under C.C.P. 583.340(c) (supra, §395 et seq.). In any event, mere dismissal of the previously stayed complaint had no effect on the pending arbitration, which the court had no authority to dismiss. (204 C.A.3d 1314.) "Barring a subsequent stipulation not to arbitrate, the judicial system's future involvement should have been limited merely to confirming, correcting, or vacating any arbitration award." (204 C.A.3d 1315.)

(b) A contractual arbitration "has a life of its own outside the judicial system, and only the arbitrator should determine whether there has been an unreasonable delay in prosecution which would justify dismissal." (204 C.A.3d 1316.)

(c) "Consequently, the defendants' efforts to obtain dismissal of this lawsuit in the superior court and the plaintiff's efforts here for reinstatement have been much ado about nothing. ... [T]he complaint will be of significance only if the parties choose to return ... to litigate the dispute on its merits." (204 C.A.3d 1316.) (See *Kuzmanoff v. Kron* (1988) 207 C.A.3d Supp. 1, 255 C.R. 168 [upholding order of dismissal of the action, but reversing order denying petition to compel arbitration]; *Brock v. Kaiser Foundation Hosp.* (1992) 10 C.A.4th 1790, 13 C.R.2d 678 [following *Byerly v. Sale*].)

(3) *Disputes Over Arbitrator's Appointment or Fee*. Delay caused by a dispute over the appointment of an arbitrator or over an arbitrator's fee does not toll the 5-year dismissal period; the proper remedy is to petition the court for an

appropriate order expediting the arbitration proceeding. (*Burgess v. Kaiser Foundation Hosp.* (1993) 16 C.A.4th 1077, 1081, 20 C.R.2d 488.)

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aa. In General.

6 *Witkin Cal. Proc. PWT* § 413

[§ 413] In General.

(1) *Governing Statute.* Judicial arbitration is governed by *C.C.P. 1141.10* et seq. (See *infra*, §579 et seq.) Under *C.C.P. 1141.17*, submission of an action to judicial arbitration does not suspend the running of the time periods specified in *C.C.P. 583.110* et seq., except as *C.C.P. 1141.17* expressly provides. (*C.C.P. 1141.17(a)*.) If an action is or remains submitted to judicial arbitration more than 4 years and 6 months after the plaintiff has filed the action, then the time beginning on the date 4 years and 6 months after the plaintiff has filed the action and ending on the date on which a request for a trial de novo is filed under *C.C.P. 1141.20* is not included in computing the 5-year period of *C.C.P. 583.310*. (*C.C.P. 1141.17(b)*); see *C.R.C.*, Rule 3.810 et seq. [judicial arbitration]; *C.E.B.*, Effective Use of ADR, §11.17.) (On construction of original statute and implementing rule, see *Moran v. Superior Court* (1983) 35 *C.3d* 229, 197 *C.R.* 546, 673 *P.2d* 216, *infra*, §415.)

(2) *Nature and Scope.* The following cases are instructive in the application of *C.C.P. 1141.17*:

Johnson v. Santos (1983) 148 *C.A.3d* 566, 574, 196 *C.R.* 145 [arbitration of plaintiff's claim within last 6 months of 5-year period tolls dismissal statute not only as to plaintiff's claim, but also as to claims of intervenors; there is no way for intervenor to bring case to trial while arbitration of plaintiff's claim continues].

Lazelle v. Lovelady (1985) 171 *C.A.3d* 34, 44, 217 *C.R.* 145 [because 5-year period was tolled due to court congestion, case was pending as of effective date of amendment, and amendment applied to voluntary submission to arbitration that occurred before that date].

Niesner v. Kusch (1986) 186 *C.A.3d* 291, 296, 297, 230 *C.R.* 613, *infra*, §417, quoting the text [where action is submitted to arbitration within final 6 months of the 5-year period, *C.C.P. 1141.17(b)* applies and period is tolled even though arbitration never actually occurs].

Jackson v. Garmon (1990) 217 *C.A.3d* 860, 865, 266 *C.R.* 201, quoting the text [*C.C.P. 1141.17(b)* applies to both

compulsory and consensual arbitration].

Drummond v. Murata (1991) 227 C.A.3d 44, 49, 277 C.R. 727 [C.C.P. 1141.17(b) is exclusive means to suspend the running of 5-year period in action submitted to judicial arbitration].

Lee v. Park (1996) 43 C.A.4th 305, 309, 50 C.R.2d 511, *infra*, §416 [C.C.P. 1141.17(b) is exclusive means to suspend running of 5-year period in action submitted to judicial arbitration].

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bb. Stipulation for Binding Arbitration.

6 Witkin Cal. Proc. PWT § 414

[§ 414] Stipulation for Binding Arbitration.

A stipulation for binding judicial arbitration, i.e., waiving the right to demand a trial de novo, is nevertheless a "submission" to judicial arbitration, and the dismissal statute is tolled when that stipulation is executed or remains in arbitration during the last 6 months of the 5-year period. In *Porreco v. Red Top RV Center* (1989) 216 C.A.3d 113, 264 C.R. 609, plaintiffs filed a complaint on April 12, 1983, against a number of defendants, seeking rescission, restitution, and damages based on a contract to purchase an allegedly defective motor home. At a settlement conference on January 8, 1988, all parties agreed to submit the matter to binding arbitration, and all signed a stipulation to that effect by April 4, 1988. The 5-year period expired on April 12, 1988, and the motion to dismiss was filed on April 22, 1988. On May 3, 1988, the trial judge signed the order on the stipulation, and the stipulation and order were filed on May 4, 1988. The motion to dismiss was granted on the theory that the stipulation was ineffective to toll the statute until the judge signed the order. *Held*, judgment of dismissal reversed.

(a) *Case is submitted to arbitration when stipulation is signed.* The fact that the trial judge signed and filed the stipulation after expiration of the period does not invalidate it. "Neither the statute nor the rule appear to contemplate action by the court being necessary to effectuate the parties' stipulation to submit to arbitration." Because C.C.P. 1141.12(a) "does not appear to contemplate that a court may refuse to submit a case in which the parties have stipulated to arbitration, the court's 'order' on such a stipulation must be deemed a ministerial act." (216 C.A.3d 123.)

(b) *Tolling applies in cases voluntarily submitted to arbitration.* C.C.P. 1141.17 was amended in 1983 to replace the phrase "pursuant to court order" with "pursuant to this chapter." The effect of the amendment was to make the tolling provision apply whenever an action is submitted to judicial arbitration, and thus to include cases submitted by stipulation and by the plaintiff's election as well as by court order. (216 C.A.3d 124.)

(c) *Tolling applies in cases submitted to binding arbitration.* Defendant contended that the statute's tolling provision was inapplicable to the present case because the parties waived their right to a trial de novo. The proper interpretation is that the tolling provision applies to cases submitted to binding as well as nonbinding arbitration. C.C.P.

1141.17(b) "ensures that parties will be able to bring their case to *trial* within the dismissal period even if they decide to submit the case to arbitration near the end of that period. When parties agree to binding arbitration, tolling is similarly necessary to ensure the opportunity to begin the *arbitration proceedings* before expiration of the dismissal period." (216 C.A.3d 126.) The reference in C.C.P. *1141.17(b)* to "request for a de novo trial" is "intended to define the duration of the tolling period and not to limit the type of action subject to tolling." (216 C.A.3d 128.)

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cc. Tolling Until New Trial Date.

6 *Witkin Cal. Proc. PWT § 415*

[§ 415] Tolling Until New Trial Date.

Moran v. Superior Court (1983) 35 C.3d 229, 197 C.R. 546, 673 P.2d 216, construed the provision in C.C.P. 1141.20(b) that, after a request for a trial de novo, "trial shall be calendared, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar."

(a) This provision imposes a duty on the trial court, and, in order to ensure that the plaintiff will retain the benefit of the time remaining in the 5-year period, the period is tolled until the new trial date set by the court. (35 C.3d 241.) Former C.R.C., Rule 1616(b) (now C.R.C., Rule 3.826) merely states that the case shall be restored to the civil active list, but compliance with the rule alone does not satisfy the mandate of the statute. The court must actually recalendar the case for trial. (35 C.3d 241, footnote 10.)

(b) Hence, where "a defendant seeks a trial de novo after arbitration, the trial court should give the matter priority and assign it the earliest possible trial date. The time between the date the arbitration award is filed with the court and the date set for the new trial is to be excluded from calculation of the five-year period. ... This rule will ensure that the postarbitration trial date retains the same place in relation to the end of the five-year period as was held by the original trial date." (35 C.3d 242.) (See *Paul E. Iacono Structural Engineer v. Rizzo* (1984) 162 C.A.3d 803, 807, 208 C.R. 787 [*Moran* applies retroactively to all cases not final on date *Moran* became final]; *Hughes v. Southern Calif. Rapid Transit Dist.* (1985) 173 C.A.3d 512, 516, 517, 219 C.R. 82 [*Moran* tolling rule followed]; cf. *Wheeler v. Santa Monica* (1990) 219 C.A.3d 1554, 1563, 269 C.R. 175, supra, §392 [distinguishing *Moran*; time from award to new trial was not excluded, where new trial date was 15 months before expiration of 5-year period and delay in commencing action was caused by plaintiff's lack of diligence].)

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dd. Plaintiff's Duty to Monitor Resetting.

6 *Witkin Cal. Proc. PWT* § 416

[§ 416] Plaintiff's Duty to Monitor Resetting.

Two Court of Appeal cases held that, under *Moran v. Superior Court* (1983) 35 C.3d 229, 197 C.R. 546, 673 P.2d 216, supra, §415, the 5-year period is automatically tolled until the new trial date the court sets. (See *Hughes v. Southern Calif. Rapid Transit Dist.* (1985) 173 C.A.3d 512, 517, 219 C.R. 82; *Barna v. Passage 350 Canon* (1986) 186 C.A.3d 440, 446, 230 C.R. 764.)

However, it came to be the prevailing rule that the plaintiff has a continuing duty of reasonable diligence to advance the case to timely trial and to draw the calendaring court's attention to the statutory deadline. (See *Santa Monica Hosp. Med. Center v. Superior Court* (1988) 203 C.A.3d 1026, 250 C.R. 384; *Baccus v. Superior Court* (1989) 207 C.A.3d 1526, 1532, 255 C.R. 781 [*Moran* was not intended as "total abrogation" of duty to exercise reasonable diligence]; *Serrano v. FMC Corp.* (1990) 221 C.A.3d 1027, 1031, 271 C.R. 41 [diligence in bringing case to trial within 5-year deadline was not established]; *Dresser v. Bindi* (1990) 221 C.A.3d 1493, 271 C.R. 137 [Legislature intended "specifically to supersede language in *Moran* that the five-year mandatory dismissal period is tolled until the date set for a trial de novo"]; *Marchuk v. Ralphs Grocery Co.* (1990) 226 C.A.3d 1273, 1278, 276 C.R. 627 [pointing out that the *Barna* and *Hughes* courts "have reconsidered their views"]; *Drummond v. Murata* (1991) 227 C.A.3d 44, 49, 277 C.R. 727 [citing *Dresser*]; *Messih v. Levine* (1991) 228 C.A.3d 454, 458, 278 C.R. 825 [all courts "now agree that a plaintiff, notwithstanding his request for a trial de novo, has an ongoing duty of reasonable diligence"].)

Howard v. Thrifty Drug & Discount Stores (1995) 10 C.4th 424, 41 C.R.2d 362, 895 P.2d 469, agreed with the prevailing view. (10 C.4th 434.) The trial judge denied plaintiff's motion to specially set her action for trial, following judicial arbitration and defendant's request for a trial de novo, finding that 5 years had already elapsed since plaintiff filed her action, requiring dismissal. The trial judge further found that even if, as plaintiff contended, there were 44 days remaining in the 5-year period when she moved to specially set, plaintiff's lack of activity since defendant's request for a trial de novo made denial of the motion appropriate on discretionary grounds under C.C.P. 583.410 (infra, §438). The Court of Appeal, conceding that the trial judge may have miscalculated the amount of time tolled, and thus erred in granting mandatory dismissal, nonetheless upheld the dismissal on discretionary grounds. *Held*, affirmed.

(a) The automatic tolling language of *Moran* is contrary to the long-settled principle that it is the duty of the plaintiff, not the duty of the court, to keep track of critical dates. The burden is on the plaintiff to call to the attention of the court the necessity for setting the trial for a time within the period fixed by *C.C.P. 583.310*. This rule is well founded in that it is the plaintiffs who have the interest and the statutory duty under *C.C.P. 583.310* to timely prosecute their cases. *C.C.P. 1141.20* cannot be construed to relieve plaintiffs of this burden. (10 *C.4th* 434.)

(b) The evident purpose of *C.C.P. 1141.20* is to prevent plaintiffs from being penalized for undergoing arbitration; it accomplishes this purpose by returning plaintiffs to their prearbitration position on the trial calendar. *C.C.P. 1141.17*, however, restricts the amount of time that can be tolled automatically as the result of submitting an action to arbitration. "To reconcile these statutes, we endorse the narrow reading of *Moran* adopted by the Courts of Appeal ... [that] an action is automatically tolled as the result of submission to arbitration only if it falls within the terms set forth in section 1141.17--that is, only within the last six months of the five-year period, and only until a trial de novo is requested." (10 *C.4th* 434.) Although it remains the duty of the trial court to calendar or recalendar the case, it is the plaintiff's task to keep track of pertinent dates and to inform the court. Thus, if prior to arbitration a plaintiff is eligible to receive a trial date within the 5-year statute, as in *Moran*, then plaintiff is entitled to receive a trial date on a timely postarbitration request. If the trial judge fails to correctly calendar or recalendar the case after having been properly notified, only then will the action be tolled pursuant to *C.C.P. 1141.20* from the date of the trial de novo request until the date of the new trial. This tolling will result not from "submission to arbitration" but from the court's failure in the postarbitration period to fulfill its duty under *C.C.P. 1141.20*. (10 *C.4th* 435.)

Howard was followed in *Lee v. Park* (1996) 43 *C.A.4th* 305, 50 *C.R.2d* 511, where judicial arbitration was ordered more than 4 years after the original complaint was filed. After the parties spent 41/2 months agreeing on an arbitrator, the award was filed and plaintiffs timely requested a trial de novo. When the trial judge set the case for a trial date that was beyond the 5-year dismissal period of *C.C.P. 583.310* as tolled by *C.C.P. 1141.20*, plaintiffs failed to object or to inform the judge of the last day for trial within the period prescribed by those statutes. *Held*, the action was properly dismissed. It was plaintiffs' obligation to exercise reasonable diligence in calculating the mandatory dismissal date, and the trial judge had no duty to compute the last day for trial and set the case for trial before that date. Furthermore, even though the parties spent 41/2 months agreeing on an arbitrator, plaintiffs received the benefit, under *C.C.P. 1141.20(b)*, of tolling from the date 41/2 years after the filing of their complaint until the date they filed a request for a trial *de novo*. (43 *C.A.4th* 308.)

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ee. Impracticability and Diligence.

6 Witkin Cal. Proc. PWT § 417

[§ 417] Impracticability and Diligence.

(1) *In General.* Prior to the 1983 amendment of *C.C.P. 1141.17*, the statutory tolling provision was held in several cases not to apply to arbitration proceedings commenced by election or stipulation. (See *supra*, §§413, 414.) However, the judicially declared doctrine of impossibility or impracticability applied where the plaintiff had acted with reasonable diligence in prosecuting the case. (See *Moran v. Superior Court* (1983) 35 C.3d 229, 197 C.R. 546, 673 P.2d 216, *supra*, §415; *Brown v. Engstrom* (1979) 89 C.A.3d 513, 152 C.R. 628; *Apollo Plating v. Superior Court* (1982) 135 C.A.3d 1019, 1022, 186 C.R. 12; *Carpenters Southern Calif. Administrative Corp. v. Surety Co.* (1983) 145 C.A.3d 245, 249, 251, 193 C.R. 308; *Lazelle v. Lovelady* (1985) 171 C.A.3d 34, 217 C.R. 145.) The impossibility, impracticability, and futility excuse has since been codified. (See *C.C.P. 583.340(c)*, *supra*, §396.)

(2) *Lack of Diligence During Arbitration.* In *Niesner v. Kusch* (1986) 186 C.A.3d 291, 230 C.R. 613, while the case was pending in arbitration, plaintiff noticed an exemption from arbitration and the parties stipulated to an agreement to restore the case to the civil active list. The case was removed from the arbitration hearing list during the final 6 months of the 5-year period, but an at-issue memorandum was not filed until after the 5-year period would have terminated. *Held*, dismissal based on plaintiff's lack of diligence during arbitration reversed.

(a) *C.C.P. 1141.17* "expressly seeks to protect a litigant from the harsh rule of mandatory dismissal under the five-year statute while the case is in arbitration during the last six months of the five-year statute." (186 C.A.3d 298.)

(b) Plaintiff's conduct after submission to arbitration may be considered for purposes of discretionary dismissal under the 2-year statute (*infra*, §438 et seq.), *but not* under the mandatory 5-year statute while the case is pending in arbitration during the last 6 months of the period. (186 C.A.3d 298.)

(3) *Motion for Arbitration To Avoid Dismissal.* In *Sisler v. Superior Court* (1988) 205 C.A.3d 864, 252 C.R. 665, plaintiff B sued defendant S for damages in excess of \$ 50,000 (the maximum amount in controversy for mandatory arbitration), and took no steps to prosecute the action until the filing of an at-issue memorandum 32 days before the

running of the 5-year period. B then, on shortened notice, moved for referral to arbitration and stipulated to waiver of damages in excess of \$ 50,000. The motion was heard and granted on the last day of the 5-year period. *Held*, it was error to grant the motion.

(a) "The Legislature did not intend arbitration to serve as a means of avoiding dismissal when a plaintiff has failed to diligently prosecute the action." (205 C.A.3d 867.) "We find the order permitting [B] to utilize the arbitration procedure as a means of bypassing the diligent prosecution statutes without consideration of all relevant factors a clear violation of the public policy underlying both the arbitration act and the diligent prosecution statutes." (205 C.A.3d 868.)

(b) When a plaintiff makes a motion seeking to avoid the 5-year statute, the trial judge should consider the factors relevant to a motion under the discretionary dismissal provisions of C.C.P. 583.420 (infra, §439 et seq.). (205 C.A.3d 868.) The circumstances here are analogous to those in which a plaintiff files a motion for trial preference in order to avoid dismissal. (205 C.A.3d 869, citing and discussing *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 C.3d 554, 194 C.R. 773, 669 P.2d 9, infra, §470.)

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1. Estoppel Against Defendant.

6 *Witkin Cal. Proc. PWT* § 418

[§ 418] Estoppel Against Defendant.

(1) *Former Rejection of Doctrine.* Formerly, excuses based on the unconscionable conduct of the defendant (participating in lengthy negotiations for settlement, stipulating to continuances, etc.) were uniformly rejected in applying both former C.C.P. 581a (delay in service) and former C.C.P. 583 (delay in trial). In *Miller & Lux v. Superior Court* (1923) 192 C. 333, 219 P. 1006, supra, §375, defendant's counsel had insisted that another case be tried before the cases that eventually were dismissed. "The language of the code section under consideration is simple and direct and expressly provides the means whereby litigants may extend the statutory period. It is argued by plaintiffs that despite the apparently plain import of the language used ... nevertheless such time may be otherwise extended--that is to say, by words and conduct on the part of the defendants constituting a waiver of their right to dismiss. ... The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties." (192 C. 339.)

Later decisions gave full approval to this view. (See *Elmhurst Packers v. Superior Court* (1941) 46 C.A.2d 648, 650, 116 P.2d 487; *Bank of America v. Moore & Harrah* (1942) 54 C.A.2d 37, 43, 128 P.2d 623; *Breakstone v. Giannini* (1945) 70 C.A.2d 224, 232, 160 P.2d 887; *Hunt v. United Artists Studio* (1947) 79 C.A.2d 619, 625, 180 P.2d 460 [reviewing and distinguishing cases]; *Bank of America v. Superior Court* (1948) 84 C.A.2d 34, 37, 189 P.2d 799; *Favretto v. Favretto* (1948) 86 C.A.2d 299, 302, 194 P.2d 748; *Berger v. McMahan* (1953) 116 C.A.2d 328, 330, 253 P.2d 543; *Camille's Corp. v. Superior Court* (1969) 270 C.A.2d 625, 629, 75 C.R. 868.)

(2) *Doctrine Established.* The recognition of an estoppel defense in cases involving delay in service (supra, §351) eventually produced an unequivocal statement of the same rule in cases involving delay in trial.

In *Borglund v. Bombardier* (1981) 121 C.A.3d 276, 175 C.R. 150, the court declared that there is no logical reason for distinguishing between the two dismissal statutes in this respect, holding that the equitable doctrine of estoppel applies fully to motions brought under the delay-in-trial statute. "Our holding gives full flower to the 'duty of the trial court to examine *all the acts and conduct* of the parties, and render a discretionary decision with a view to furthering the

ends of justice.' ... If a trial court encounters statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception." (121 C.A.3d 281.)

In *Breacher v. Breacher* (1983) 141 C.A.3d 89, 190 C.R. 112, both parties mistakenly believed that the complaint had been filed 40 days after the actual filing date, and trial was set for a date within the 5-year period. Thereafter, delays occurred at the request of defense counsel, who did not want to be on beeper call during the Christmas and New Year's holidays. *Held*, defendants were estopped to demand dismissal. It "would be most unseemly to hold that after requesting and obtaining such a delay defendants may, a few days later upon learning the true filing date of the complaint, repudiate their own conduct and instead take advantage of it to secure a windfall dismissal on the eve of trial." (141 C.A.3d 93.) (See *Griffis v. S.S. Kresge Co.* (1984) 150 C.A.3d 491, 498, 197 C.R. 771 [plaintiff's attorney justifiably relied on representations of defendant's attorney on date that matter had been ordered to arbitration as basis for calculating tolling of period]; *Ward v. Levin* (1984) 161 C.A.3d 1026, 1034, 208 C.R. 312 [by requesting continuance, defendant was estopped from seeking dismissal until after continued date].)

(c) *Statutory Recognition.* C.C.P. 583.140 recognizes the estoppel doctrine as applicable to all the statutory grounds of dismissal. (See *supra*, §315.) The general elements of the doctrine apply. (*Greene v. State Farm Fire & Cas. Co.* (1990) 224 C.A.3d 1583, 1590, 274 C.R. 736, *infra*, §419; on equitable estoppel, see 13 *Summary* (10th), *Equity*, §190 et seq.)

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2. Estoppel Against Trial Court.

6 *Witkin Cal. Proc. PWT* § 419

[§ 419] Estoppel Against Trial Court.

In *Greene v. State Farm Fire & Cas. Co.* (1990) 224 C.A.3d 1583, 274 C.R. 736, Judge C, on August 27, 1987, signed a general order extending the 5-year deadline to March 18, 1988. The order was made pursuant to a civil jury trial calendar disposition program to which the court assigned 500 cases, and was issued after notice to the affected parties and two hearings. The order contained a finding that "it is impracticable, futile or impossible" for those cases to be assigned for trial before March 18, 1988. Plaintiff's case was assigned to Judge B for trial on March 14, 1988, and on defendants' motions, Judge B dismissed the action for failure to bring it to trial within 5 years. *Held*, reversed.

(a) Judge B's statement of decision included a finding of fact that plaintiff's failure to bring the case to trial within the statutory period "is not the result of impossibility, impracticability, or futility." In effect, Judge B "vacated general order 3.30 and its finding of fact." (224 C.A.3d 1588.)

(b) The power of one judge to vacate an order duly made by another judge is limited; ordinarily, an ex parte order may be vacated only on a showing that in the making of the original order, there was inadvertence, mistake, or fraud. (224 C.A.3d 1588.) Here, Judge B focused on the particular facts of the case, and disagreed with Judge C's general order. This was particularly inappropriate in light of the fact that the original order was not ex parte, but was made after notice and hearing. (224 C.A.3d 1589.)

(c) Under *Borglund v. Bombardier* (1981) 121 C.A.3d 276, 175 C.R. 150, *supra*, §418, the doctrine of equitable estoppel is applicable to motions to dismiss, and it applies here. The trial court "had an interest in expeditiously clearing its calendar of old cases. [Plaintiff] had an interest in having a full trial on the merits. These conflicting interests set up a situation in which equitable estoppel might be applied against the judicial branch of government." (224 C.A.3d 1590.) If a trial court encounters statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel is available. (224 C.A.3d 1592.) This principle "applies with no less force to statements and conduct by a court, upon which a plaintiff surely should be able to rely. ... [Plaintiff] had a right to believe the court's intent was as the order implicitly indicated--to achieve efficiency by processing a selected 500 cases in a certain order during a certain time period. ... [Plaintiff] had a right to rely on the

court's conclusion as to impossibility, impracticability, and futility, no matter what specialized knowledge of the facts she may have had." (224 C.A.3d 1592.)

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6 *Witkin Cal. Proc. PWT* § 420

[§ 420] Waiver by Going to Trial.

In *Butler v. Hathcoat* (1983) 146 C.A.3d 834, 194 C.R. 352, plaintiff filed a complaint for dissolution of partnership and accounting on May 30, 1974. The case was initially called on the short cause calendar in February 1977, and the judge ordered an accounting. Defendant then made a number of changes in counsel, and the case was finally set for trial on November 29, 1982, 8 years after its commencement. When the trial judge filed notice of intended decision for plaintiff, defendant's new counsel contended that the proceeding in February 1977 was not an actual trial and that the jurisdictional 5-year period had elapsed. The trial judge denied the motion to dismiss. *Held*, affirmed. By going to and participating in the trial until its conclusion, defendant waived his right to seek a dismissal. (146 C.A.3d 839, 840.)

Nothing in C.C.P. 583.110 et seq. "abrogates or otherwise affects" the principles of waiver. (C.C.P. 583.140, *supra*, §315.)

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e. Disposition of Litigable Issues.

1. Conclusive Admissions.

6 *Witkin Cal. Proc. PWT* § 421

[§ 421] Conclusive Admissions.

In *Martin v. Gibson* (1941) 48 C.A.2d 449, 119 P.2d 1012, defendants filed an answer consisting solely of an express admission of all allegations of the complaint, and praying for relief as they were entitled to by law. Over 5 years later, the trial court dismissed the action on motion of defendants. *Held*, this was error; the statute cannot apply where no issues of fact are to be tried. "We do not believe the legislature intended to compel a dismissal where there would be no trial, the object being to expedite the administration of justice in the matter of the trial of any issues of fact. Other causes for the law's delays or the failure to diligently proceed with any action can in other respects be reached by a motion to dismiss for want of prosecution." (48 C.A.2d 451.)

Martin was followed in *Smithers v. Ederer* (1956) 146 C.A.2d 227, 303 P.2d 771. Plaintiff sued for \$ 5,000. Defendant answered, admitting an indebtedness of \$ 2,500 and praying that plaintiff have judgment only for that. After 5 years, defendant filed a motion to dismiss and plaintiff filed a motion for summary judgment for \$ 2,500. *Held*, summary judgment was properly ordered. By his answer defendant had in effect waived a trial as to that amount. (146 C.A.2d 230.)

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2. Compromise Agreement.

6 *Witkin Cal. Proc. PWT* § 422

[§ 422] Compromise Agreement.

In *Gorman v. Holte* (1985) 164 C.A.3d 984, 211 C.R. 34, the parties stipulated in open court to the complete settlement of their dispute, and agreed to entry of judgment for plaintiffs on the settlement. The parties then failed to agree on the form of the judgment, none was entered, and after the 5-year period had run the trial judge granted defendant's motion to dismiss. *Held*, reversed.

(a) The purpose of the 5-year statute is to prevent avoidable delay in bringing an action to trial, and an action settled by agreement will not proceed to trial; hence, the settlement here rendered the statute legally irrelevant. (164 C.A.3d 987.)

(b) Although the case had not been brought to judgment, a final disposition of the dispute had been made, no issues were left to resolve, and nothing remained but to formally execute the judgment. The statute does not require that judgment be reached within 5 years; it merely requires that the trial be commenced within the period. "If plaintiffs had obtained entry of judgment based on the stipulated settlement, they still would not have 'brought the case to trial.' Would defendant still contend that dismissal ... was proper? May any settlement agreement reached subsequent to the filing of a complaint be rendered nugatory merely by the passage of the lawsuit's fifth anniversary?" (164 C.A.3d 988.)

(c) A settlement agreement has the attributes of a judgment; "it is decisive of the rights of the parties and serves to bar reopening of the issues settled." (164 C.A.3d 988.) The agreement is enforceable in a number of ways (*supra*, §§115, 126); and, while time constraints may govern the mechanics of enforcement, those constraints are not to be found in the dismissal statute. (164 C.A.3d 989.)

Gorman has been followed in several subsequent decisions. (See *Schiro v. Curci* (1990) 220 C.A.3d 840, 844, 269 C.R. 639; *Malouf Bros. v. Dixon* (1991) 230 C.A.3d 280, 285, 281 C.R. 235; *Brown & Bryant v. Hartford Acc. & Indem. Co.* (1994) 24 C.A.4th 247, 254, 255, 29 C.R.2d 144.)

Gorman was questioned in *Varwig v. Leider* (1985) 171 C.A.3d 312, 217 C.R. 208. In *Gorman*, plaintiffs had made

their motion to have judgment entered within the 5-year period and before defendant moved to dismiss. In *Varig*, plaintiff made no attempt to enforce the settlement within the period, and the court suggested that *Gorman* might be distinguished on that ground. However, the court emphatically disagreed with the general holding of *Gorman* that a settlement agreement precludes application of the dismissal statute.

(a) Until "a party seeks to enforce a compromise agreement and to have judgment entered thereon, the underlying lawsuit has not finally been disposed of although the parties may in fact be bound by a valid and enforceable settlement contract. Consequently, if the lawsuit is not brought before the trier of fact or if judgment is not entered on the compromise agreement within five years of the filing of the action, the provisions of [the 5-year statute] will apply, and as a general rule the lawsuit must be dismissed." (171 C.A.3d 315.)

(b) Contrary to the observations in *Gorman*, a dismissal will not affect the compromise agreement, which is governed by general principles of contract law. "The parties will retain their right to seek to specifically enforce their settlement contract even if the underlying lawsuit is dismissed. It is true that, if a separate lawsuit to enforce the agreement is filed, the purpose of encouraging settlement (e.g., to avoid the time and expense involved in a trial) will be defeated. The policies favoring settlement must, however, be balanced against the expressed desire of the Legislature to have litigation resolved in a reasonably expeditious manner. This purpose would be defeated if a lawsuit must remain pending before the trial court when the parties have reached a compromise agreement but have chosen not to enter judgment on it in a timely fashion." (171 C.A.3d 316.)

However, *Gorman* was found controlling in *Canal Street, Ltd. v. Sorich* (2000) 77 C.A.4th 602, 91 C.R.2d 811. The parties reached a "binding settlement agreement" during a judicially mandated settlement conference 2 years before the scheduled trial date but failed to reduce the agreement to judgment within the 5-year statutory period. In dismissing the action, the trial court followed *Varwig. Held*, reversed. *Gorman* and subsequent cases holding that a settlement agreement tolls the 5-year statutory period enunciate the better rule. Moreover, in computing the 5-year period, C.C.P. 583.340(c) specifically excludes the time during which bringing the action was impossible, impracticable, or futile. As cases following *Gorman* conclude, "attempting to bring an action to trial when all issues have been resolved through settlement would be futile." (77 C.A.4th 608.)

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f. Extension Where Less Than 6 Months Remain.

6 *Witkin Cal. Proc. PWT* § 423

[§ 423] Extension Where Less Than 6 Months Remain.

A problem arises when, within the last months before the 5-year period expires, an event occurs that suspends the running of the statute. When the tolling period ends and the statutory period begins to run again, the time to bring the action to trial may in many cases be too short. *C.C.P. 1141.17* solves this problem where the suspension results from submission of the action to judicial arbitration. The plaintiff has 6 months after a trial de novo is requested to bring the action to trial. (See *supra*, §413.) *C.C.P. 583.350* adopts this solution for all dismissal provisions relating to delay in trial:

"If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension." (*C.C.P. 583.350*.) (See Law Rev. Com. Comment to *C.C.P. 583.350*, and 17 Cal. Law Rev. Com. Reports, p. 912; cf. *Misic v. Segars* (1995) 37 C.A.4th 1149, 1156, 44 C.R.2d 100, *infra*, §431 [failure to bring action to trial within 6 months after end of tolling period].)

C.C.P. 583.350 applies only when the 5-year statute is tolled pursuant to *C.C.P. 583.310* et seq. Thus, *C.C.P. 1141.17* provides the exclusive means to extend the running of the 5-year period in an action submitted to judicial arbitration. (*Drummond v. Murata* (1991) 227 C.A.3d 44, 48, 277 C.R. 727.)

In *Rosenthal v. Wilner* (1988) 197 C.A.3d 1327, 243 C.R. 472, the Court of Appeal ordered a stay of plaintiffs' action pending resolution of the appeal in an underlying action, which could be determinative on the principal issues. That appeal was decided against plaintiffs, and the remittitur issued; but plaintiffs petitioned for certiorari, which the United States Supreme Court denied. The superior court dismissed the action on the ground that the complaint was not brought to trial within 6 months from the termination of the stay. *Held*, reversed; the stay did not terminate on the issuance of the Court of Appeal remittitur, but remained in effect until the denial of certiorari by the United States Supreme Court, and the action was brought within 6 months thereafter. (197 C.A.3d 1332, 1334.)

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5. Belated Attempt To Get Trial Date.

a. In General.

6 Witkin Cal. Proc. PWT § 424

[§ 424] In General.

(1) *Strict Rule Against Preferential Treatment.* In a number of cases, dismissals were upheld despite desperate and unsuccessful last-minute efforts of plaintiffs' counsel to get to trial before the end of the period. In *Bass v. Braun* (1960) 178 C.A.2d 744, 3 C.R. 212, plaintiffs' counsel sued in the wrong county, delayed taking many preliminary steps, and had the case set but stipulated to dropping it from the calendar. With November 1958 as the deadline, he filed a memorandum to set in July 1958 and called the clerk's attention to the short time left. On appeal from the judgment of dismissal, he argued that the lower court was guilty of an abuse of discretion in failing to advance the cause on the calendar. *Held*, judgment affirmed. The calendar was full for the balance of the year, and plaintiffs were not entitled to preferential treatment.

(a) "We cannot ignore the knowledge which is available to all experienced trial lawyers and judges, that most of the courts in the populous counties often set more than one case in each department to be sure that the court's time is fully occupied and that no time is lost in getting cases to trial. It would, indeed, be unfair to diligent litigants to have a litigant who has negligently allowed his case to approach too close to the final deadline to come into court and plead this fact as an excuse to push diligent litigants out of their legitimate place in line for court hearing. Indeed, we have no means of knowing, under the facts in the case here at bar, how many other litigants were in the position of having their causes finally ready for trial just before their own time limitation was to run. We have no doubt that the trial judge in the case at bar understood and had all these matters, as well as the details of the factual background, in mind." (178 C.A.2d 750.)

(b) The plaintiff in this situation may possibly avoid dismissal by the following steps: Waive a jury, and ask that the matter be called to trial solely to swear a witness and continue the matter until an open trial date. (178 C.A.2d 749.) (On this procedure, see *supra*, §375.) (See *Beswick v. Palo Verde Hosp. Assn.* (1961) 188 C.A.2d 254, 260, 10 C.R. 314 [following *Bass* [when dilatory plaintiff, close to end of period, moves for early trial date, judge may consider all circumstances, including condition of calendar, rights of other litigants, and possible prejudice to defendant]; *General Ins. Co. of America v. Superior Court* (1966) 245 C.A.2d 366, 370, 53 C.R. 777; *Grafft v. Merrill Lynch* (1969) 273 C.A.2d 379, 384, 78 C.R. 42.)

(2) *Rule Relaxed.* A new approach was taken in *Weeks v. Roberts* (1968) 68 C.2d 802, 69 C.R. 305, 442 P.2d 361.

Plaintiff sued as assignee for collection on behalf of an experienced attorney to recover \$ 35,000 in legal fees from defendant client. The complaint was filed January 31, 1961. Delays due to plaintiff's failure to act made the running of the 5-year period imminent. Plaintiff finally had a pretrial on January 5, 1966, and trial was set for January 28, 1966. Then defendant moved to vacate the trial date order on the ground that plaintiff had not allowed sufficient time for an ordinary setting. The master calendar judge found this to be so, and on January 21, 1966, vacated the trial date order and ordered the cause off calendar. On January 31, 1966, the last day of the period, plaintiff moved to set for trial, and on February 1, 1966, defendant moved to dismiss. The master calendar judge denied plaintiff's motion and granted defendant's motion. *Held*, reversed with directions to set the case for trial.

(a) Special setting for trial as a means of avoiding the bar of the dismissal statute is within the trial court's discretion. That court must consider not only the fact that the period is about to expire but the total picture, including dilatory conduct of the plaintiff, condition of the calendar, and rights of other litigants. (68 C.2d 806.)

(b) "[A] trial court should not confuse and discredit the law by refusing to set a cause within the five-year period because it believes that a discretionary dismissal is warranted." (68 C.2d 806.) If the master calendar judge wanted to exercise discretion to dismiss under the 2-year statute (*infra*, §438), he could have done so, subject to review on appeal. He did not do that; instead, he vacated the trial setting without giving another trial date, thus allowing the 5-year period to run and making dismissal mandatory. This was an abuse of discretion. "If a court feels impelled to dismiss an action less than five years after its filing for want of prosecution, it should do so and accept review on that basis. It should not exercise its discretion to dismiss on the basis of inconvenience to the court and in the guise of a refusal to specially set. It is monstrous to foreclose a litigant's substantial rights because of the inconvenience incident to providing a courtroom. Fault and delay may be ground for dismissal; but court congestion is no reason to preempt one's day in court when there is a reasonable time to provide it." (68 C.2d 807.)

(c) "We have recently held" that periods of 33, 58, and 104 days prior to expiration of the period, after completion of pretrial, were reasonable time to commence trial, and that refusals to specially set within those periods were abuses of discretion as a matter of law. (68 C.2d 807.) Here, there were 28 days remaining when the motion for special setting came on for hearing (after pretrial was completed), and this was a reasonable time. Cases such as *Beswick* and *Bass* are distinguishable as not having been pretried. The *Stuart* and *General Insurance* cases involved periods of less than 28 days, and "may continue to control" on such periods; but "a preferred procedure would be to grant preferential dates expressly without prejudice to a motion to dismiss." (68 C.2d 808.)

(d) The remaining technical obstacle to relief was the actual expiration of the mandatory 5-year period. But the judge's erroneous vacation of the trial date made trial impossible (see *supra*, §408). Hence, the statute should be tolled for the period during which this impediment existed, i.e., from January 21, 1966, until the remittitur is filed. Plaintiff would then have 10 days to commence trial (January 21 to January 31), and "[t]rial should be set to commence within those 10 days." (68 C.2d 809.)

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b. Discretion To Grant Preferential Setting.

1. In General.

6 *Witkin Cal. Proc. PWT* § 425

[§ 425] In General.

Weeks v. Roberts (1968) 68 C.2d 802, 69 C.R. 305, 442 P.2d 361, supra, §424, was distinguished on its facts, and its recommended procedure was rejected, in *Salas v. Sears, Roebuck & Co.* (1986) 42 C.3d 342, 228 C.R. 504, 721 P.2d 590. On September 12, 1979, plaintiffs filed an action for damages for personal injuries, and on June 3, 1980, filed an at-issue memorandum. On July 15, 1983, the trial court sent plaintiffs a notice of trial setting conference and intention to dismiss on its own motion, requiring them to give all other parties written notice of a hearing on September 21, 1983, within 10 days of receiving the court's notice. Plaintiffs did not comply, but simply gave defendant a telephoned notice on the day before the hearing. Because of this failure to give proper notice, the court took the trial setting conference off calendar and removed the case from the civil active list. For the succeeding 10 months plaintiffs did nothing; then, on August 1, 1984, they gave notice to defendant of an ex parte application for an order shortening time for a hearing on a motion for trial preference, and on August 3, 1984 (40 days before the 5-year bar) they filed a motion for trial preference under former C.C.P. 36(d) (now C.C.P. 36(e); see 7 *Cal. Proc.* (5th), *Trial*, §66). Defendant filed an opposition, and at the hearing the court indicated its intention to deny the motion for lack of diligence, but nevertheless ordered a second hearing to be held 3 days later, inviting the parties to file supplemental papers. Plaintiffs failed to submit any declarations or authority, and the court denied their motion. Plaintiffs then allowed the 5-year period to elapse without making a motion for reconsideration or a second motion for trial preference, and on September 26, 1984, the court granted defendants' motions to dismiss. Plaintiffs appealed, contending that, under *Campanella v. Takaoka* (1984) 160 C.A.3d 504, 206 C.R. 745, and *Kotoff v. Efseaff* (1985) 172 C.A.3d 991, 218 C.R. 499, 40 days was adequate time to set the case for trial, and that the court therefore had a mandatory duty to grant their motion for trial preference. The Court of Appeal affirmed the dismissal orders, holding that the motion to specially set is addressed to the sound discretion of the trial court and was not abused here. *Held*, Court of Appeal judgment affirmed, *Campanella* and *Kotoff* disapproved, and *Weeks* distinguished.

(a) Former C.C.P. 36(d) gives the trial court discretion to grant a motion for preference on a showing of "cause." Plaintiffs contended that "cause" is established as a matter of law when a special setting is necessary to avoid mandatory dismissal under the 5-year statute. However, the approach of the 5-year limit, while "a critical consideration," is not the

exclusive consideration. As pointed out in *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 C.3d 554, 194 C.R. 773, 669 P.2d 9, *infra*, §470, the action of the court on a motion to specially set is "tantamount to action upon a motion to dismiss for failure to prosecute within the two-year period," and the motions under former C.C.P. 36(d) and the discretionary dismissal statute turn on identical considerations. Hence, the trial court may dismiss on its own motion in response to a plaintiff's motion for preferential setting, without notifying the plaintiff in advance of its intention to dismiss. (42 C.3d 346.)

(b) The situation in this case is nearly identical to that in *Wilson*. "In both instances plaintiffs were guilty of an appalling lack of diligence and offered no justification for the delay." And again "we conclude that although the interests of justice weigh heavily against disposing of litigation on procedural grounds--a policy we reaffirm--that policy will necessarily prevail only if a plaintiff makes some showing of excusable delay." (42 C.3d 347.)

(c) *Weeks* is distinguishable on its facts. There, the plaintiff had completed discovery and pretrial proceedings and had already been granted a preferential trial date within the 5-year limit when a second judge vacated the setting because of lack of courtroom space. "We expressly declined to extend our holding to cases in which the parties had not completed pretrial proceedings at the time the plaintiff sought an early trial date." (42 C.3d 348.)

(d) The *Weeks* dictum, that "a preferred procedure would be to grant preferential dates expressly without prejudice to a motion to dismiss," led to the holdings in *Campanella* and *Kotoff*, but the reasoning of *Weeks* on that point is no longer persuasive. At the time of *Weeks*, former C.C.P. 583(a) on the court's inherent power to dismiss provided that the court in its discretion could dismiss "on motion of the defendant and after due notice to the plaintiff," and the *Weeks* court thought it improper for the trial court, in the guise of denying an early setting, to achieve a dismissal that it could not directly order without a timely motion by the defendant. The "preferred procedure" avoided that harsh result by requiring the court to set the early trial date, but preserved the defendant's right to move for a dismissal. (42 C.3d 348.) However, 1 year after *Weeks*, the statute was amended to delete the requirement of a motion by the defendant, thus permitting the trial court to act on its own motion, and eliminating the necessity of two separate proceedings. Hence, there is no longer any basis for preferring the cumbersome procedure endorsed in *Weeks*. (42 C.3d 348.)

(e) "We therefore conclude that a trial court does not have a mandatory duty to set a preferential trial date, even when the five-year deadline approaches. Its discretion is not wholly unfettered: it must consider the 'total picture,' as *Wilson* prescribes, including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if the early trial date is denied." (42 C.3d 349.)

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b. Discretion To Grant Preferential Setting.

2. Preferential Setting Denied.

6 *Witkin Cal. Proc. PWT* § 426

[§ 426] Preferential Setting Denied.

In a number of cases following *Salas v. Sears, Roebuck & Co.* (1986) 42 C.3d 342, 228 C.R. 504, 721 P.2d 590, supra, §425, preferential setting has been denied. The following are illustrative:

Howard v. Thrifty Drug & Discount Stores (1995) 10 C.4th 424, 440, 441, 41 C.R.2d 362, 895 P.2d 469, supra, §416 [plaintiff's lack of activity since defendant's request for trial de novo made denial of motion appropriate on discretionary grounds].

Minkin v. Levander (1986) 186 C.A.3d 64, 71, 230 C.R. 592 [given plaintiff's neglect in moving case forward and lateness of motion to specially set, trial court acted within its discretion by denying preferential setting].

Martin v. K & K Properties (1987) 188 C.A.3d 1559, 1568, 234 C.R. 161 [based on "appellants' total lack of diligence and their failure to comply with the 15-day trial notice requirement of section 594, we find no abuse of discretion in the trial court's actions"].

San Bernardino City Unified School Dist. v. Superior Court (1987) 190 C.A.3d 233, 238, 235 C.R. 356 [lack of diligence in failing to trigger earlier trial setting by filing at-issue memorandum; no excusable delay from unilateral attempt at settlement; prejudice to opposing party from short time to prepare for trial].

Parlen v. Golden State Sanwa Bank (1987) 194 C.A.3d 906, 912, 240 C.R. 73 [no action taken for 31/2 years and no showing of reasonable diligence, excusable delay, or good cause for motion to specially set].

Nye v. 20th Century Ins. Co. (1990) 225 C.A.3d 1041, 1045, 275 C.R. 319 [no excuse for delays, where at issue memorandum was filed 21/2 years after accident giving rise to action, and where attorney waited until 41 days before expiration of 5-year period before moving to specially set case for trial].

Salinas v. Atchison, Topeka & Santa Fe Ry. Co. (1992) 5 C.A.4th 1, 15, 6 C.R.2d 446 [no showing of diligence, and delay prejudicial].

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b. Discretion To Grant Preferential Setting.

3. Preferential Setting Required.

6 *Witkin Cal. Proc. PWT* § 427

[§ 427] Preferential Setting Required.

Preferential setting has been held required, under the circumstances, in a number of cases. (See *Cordova v. Vons Grocery Co.* (1987) 196 C.A.3d 1526, 1534, 1535, 242 C.R. 605 [plaintiffs offered complete showing of excusable delay; judgment of dismissal reversed]; *Schmitt v. Superior Court* (1989) 216 C.A.3d 453, 456, 264 C.R. 806 [attorney for plaintiff acted with diligence, and delay was due to mishandling of matter by court clerk; denial of motion to specially set was abuse of discretion]; *Biondi, Flemming & Gonzales v. Braham* (1990) 218 C.A.3d 842, 851, 267 C.R. 365 [cross-complainant acted with diligence and was twice not given constitutionally required notice of trial setting conferences; denial of motion to specially set was abuse of discretion]; *Pat Rose Associates v. Coombe* (1990) 225 C.A.3d 9, 17, 275 C.R. 1 [trial court's denial of motion to specially set case for trial, based on mistaken belief that 5-year period was tolled, excused delay in bringing case to trial].)

In *Dick v. Superior Court* (1986) 185 C.A.3d 1159, 230 C.R. 297, the factors relevant to a determination of a motion for trial preference were applied and denial of plaintiff's motion to specially set was held an abuse of discretion. Mandamus was issued to compel granting the motion to specially set, and directing commencement of the trial within 43 days of the order (to meet the 5-year deadline).

(a) *Plaintiff's diligence.* The trial judge stated that plaintiff had acted with diligence in prosecuting his action up to the time of the motion for trial preference, in filing at-issue memoranda, pursuing settlement negotiations, and moving to specially set with 43 days remaining to try a case which would require only 5 days of trial time. (185 C.A.3d 1165, 1166.)

(b) *No prejudice to the defendant from accelerated trial date.* No showing was made by defendant that granting of the motion would prejudice it, and "[t]his silence must be taken as a concession of no prejudice." (185 C.A.3d 1167.)

(c) *Condition of calendar disregarded.* The court in *Salas v. Sears, Roebuck & Co.* (1986) 42 C.3d 342, 228 C.R. 504, 721 P.2d 590 (supra, §425), observed that it would be unfair to advance the case of a dilatory plaintiff simply because he was approaching the end of the 5-year period; but this was not the situation here. Plaintiff was diligent.

"Court congestion notwithstanding, petitioner has earned his right to his day in court. It is patently unfair to deny him that right on the sole ground of court congestion which, as the Supreme Court intimated in *Salas*, is a problem endemic to the system rather than the fault of individual litigants." (185 C.A.3d 1167.)

In *Rim Forest Lumber Co. v. Woodside Const. Co.* (1987) 190 C.A.3d 454, 235 C.R. 443, involving two related actions against numerous individuals and entities, the trial court denied plaintiff's motion to specially set and then dismissed on its own motion under the discretionary dismissal statute. *Held*, dismissal and denial of the motion to specially set were an abuse of discretion.

(a) *Factors considered.* In ruling on its own motion for a discretionary dismissal, the trial court purported to consider the factors enumerated in former C.R.C., Rule 373(e) (now C.R.C., Rule 3.1342(e); *infra*, §439). (190 C.A.3d 461.) While the rule does not specifically mention plaintiff's diligence and prejudice to the defendant resulting from any delay, "these issues must also be taken into consideration" in ruling on a discretionary dismissal. (190 C.A.3d 464.)

(b) *Plaintiff's diligence.* Uncontradicted affidavits indicated that plaintiff had completed its pleadings and discovery and had engaged in numerous settlement negotiations with a number of parties, resulting in "substantial monetary payments, defaults and dismissals." (190 C.A.3d 463, 464.)

(c) *No prejudice to defendant.* One defendant contended that, because discovery was not complete, it would be prejudiced by a special setting. However, that defendant, which had already initiated discovery, "had the means in its own hands of completing any discovery it desired." In addition, that defendant failed to move for a severance from other defendants. (190 C.A.3d 466.)

(d) *Impracticability of bringing case to trial.* Bankruptcy proceedings with respect to various defendants, with attendant bankruptcy stays, were in effect at all times since the complaints were filed. (190 C.A.3d 466.) "[W]hatever delay occurred in the trial of these cases resulted from the impracticability if not legal impossibility of bringing them to trial during the pendency of the bankruptcy stays." Plaintiff investigated possible relief from the stays, "but was advised by competent counsel from the local jurisdiction that relief would be very unlikely." (190 C.A.3d 467.) Also, while it was theoretically possible to sever the defendants in bankruptcy, separate trials would result in "enormous monetary expense and an outrageous duplicative waste of the court's resources." (190 C.A.3d 468.)

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D. Mandatory Dismissal for Delay in New Trial.

1. In General.

6 *Witkin Cal. Proc. PWT* § 428

[§ 428] In General.

C.C.P. 583.320(a) requires dismissal for delay of 3 years in bringing an action to trial again after any of the following:

- (1) A mistrial or jury disagreement (see *infra*, §429).
- (2) A motion for new trial (see *infra*, §430).
- (3) A decision on appeal (see *infra*, §431 et seq.).

Dismissal is mandatory. (*C.C.P.* 583.360, *supra*, §365.) However, there can be no dismissal if the action is brought to trial within the 5-year period of *C.C.P.* 583.310 for bringing an action to trial. (*C.C.P.* 583.320(b), *infra*, §434.) (See generally *C.E.B.*, 2 Civil Proc. Before Trial 4th, §§39.63, 39.64; *Rutter Group*, 3 Civil Proc. Before Trial §11:268 et seq.; *Cal. Civil Practice*, 3 Procedure §22:65 et seq.)

C.C.P. 583.330 et seq., governing dismissal and exceptions under the 5-year statute, are by their terms applicable to dismissals and exceptions under the 3-year statute as well. (On 5-year statute, see *supra*, §358 et seq.)

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2. After Mistrial or Jury Disagreement.

6 *Witkin Cal. Proc. PWT* § 429

[§ 429] After Mistrial or Jury Disagreement.

If trial is commenced but no judgment is entered because of a mistrial or because the jury is unable to reach a decision, the action must again be brought to trial within 3 years after the order declaring the mistrial or the disagreement of the jury is entered. (*C.C.P. 583.320(a)(1)*; see *Rose v. Boydston* (1981) 122 C.A.3d 92, 98, 99, 175 C.R. 836 [former statute was not inapplicable where judge considered ordering mistrial but did not make actual order]; *In re Marriage of Hinds* (1988) 205 C.A.3d 1398, 253 C.R. 170, supra, §317 [applying *C.C.P. 583.161* exception for dissolution or separation actions to delay after mistrial].)

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3. After New Trial Is Granted.

6 *Witkin Cal. Proc. PWT* § 430

[§ 430] After New Trial Is Granted.

If after judgment a new trial is granted and no appeal is taken, the action must again be brought to trial within 3 years after the order granting the new trial is entered. (*C.C.P.* 583.320(a)(2); see *McDonald Candy Co. v. Lashus* (1962) 200 C.A.2d 63, 66, 19 C.R. 137, *infra*, §435; *Cotton v. Hallinan* (1962) 201 C.A.2d 415, 20 C.R. 40; *Youngblood v. Terra* (1970) 10 C.A.3d 533, 89 C.R. 13.)

An order setting aside an improperly granted judgment by default is not equivalent to the granting of a new trial; a default judgment, including a summary judgment taken by default, by its very designation expressly states that it is the result of a nonadversary proceeding. (*Tiholiz v. Superior Court* (1980) 104 C.A.3d 201, 205, 163 C.R. 452 [criticizing contrary statements in *Briley v. Sukoff* (1979) 98 C.A.3d 405, 410, 159 C.R. 452].)

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4. After Decision on Appeal.

a. Order Granting New Trial.

6 *Witkin Cal. Proc. PWT* § 431

[§ 431] Order Granting New Trial.

(1) *Statutory Requirement.* If an order granting a new trial is affirmed on appeal, the action must again be brought to trial within 3 years after the remittitur is filed by the clerk of the trial court. (*C.C.P. 583.320(a)(3).*)

(2) *Distinction: Order Setting Aside Default Is Not Order for New Trial.* In *Misic v. Segars* (1995) 37 *C.A.4th* 1149, 44 *C.R.2d* 100, plaintiffs obtained a default judgment on the fifth anniversary of the filing of the complaint, defendants subsequently had the judgment set aside, and the ruling setting aside the judgment was affirmed on appeal. More than 2 years after the default judgment was set aside, the trial judge granted defendants' motion to dismiss for failure to bring the matter to trial within 5 years from the filing of the complaint. *Held*, affirmed.

(a) The order setting aside the default was not an order for a new trial entitling plaintiffs to a 3-year extension of the time to try the case. The word "trial" has a restricted meaning, judicially defined in terms of a contest rather than a procedure where a trial judge examines the offered evidence, even if uncontested, and determines whether it supports a particular judgment. (37 *C.A.4th* 1154.) The default "prove-up" was not a trial, and the decision on the previous appeal was not affirmance of "an order granting a new trial" within the meaning of *C.C.P. 583.320(a)(3)*. (37 *C.A.4th* 1155.)

(b) Although the 5-year period was tolled with the entry of the default judgment on the 5-year anniversary, the tolling ceased with the setting aside of the judgment. Because less than 6 months remained in the 5-year period, *C.C.P. 583.350* (supra, §423) gave plaintiffs 6 months to get to trial, and they failed to do so. (37 *C.A.4th* 1156.)

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4. After Decision on Appeal.

b. Judgment Reversed With Remand for New Trial.

6 *Witkin Cal. Proc. PWT* § 432

[§ 432] Judgment Reversed With Remand for New Trial.

(1) *Statutory Requirement.* If a judgment is reversed on appeal and the action is remanded for a new trial, the action must again be brought to trial within 3 years after the remittitur is filed by the clerk of the trial court. (*C.C.P.* 583.320(a)(3); see *Booth v. Los Angeles* (1945) 69 C.A.2d 104, 107, 158 P.2d 401; *Neustadt v. Skernswell* (1950) 99 C.A.2d 293, 221 P.2d 694; *St. Louis-San Francisco Ry. Co. v. Superior Court* (1969) 276 C.A.2d 762, 767, 81 C.R. 705.)

(2) *Nature of Judgment Reversed.* The 3-year requirement is applicable not only where there is a reversal after trial on the merits, but also where there is a reversal of a judgment of dismissal following the sustaining of a demurrer without leave to amend. (*McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 532, 105 C.R. 330, 503 P.2d 1338 [rejecting contention that C.C.P. 656, defining a new trial as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee," states exclusive definition of "trial" or "new trial"]; *Good v. California* (1969) 273 C.A.2d 587, 590, 78 C.R. 316.)

A dismissal for lack of subject matter jurisdiction is likewise a "trial" within the meaning of *C.C.P.* 583.320(a)(3). In *Finnie v. District No. 1 - Pac. Coast Dist., Marine Engineers' Beneficial Assn.* (1992) 9 C.A.4th 1311, 12 C.R.2d 348, plaintiff, expelled from defendant labor unions, filed a petition for mandamus in May 1981, alleging that the unions' disciplinary procedures violated his right to due process under California law. Defendant unions moved to dismiss the action for lack of subject matter jurisdiction, contending that plaintiff's claims were preempted by federal law. The trial court granted the motion, but the judgment of dismissal was reversed. On May 18, 1990, plaintiff filed a motion to specially set the case for trial before June 26, 1990. The parties agreed at this juncture that the 5-year period of *C.C.P.* 583.310 (*supra*, §369) would have expired on January 20, 1990, but that the period had been extended under *C.C.P.* 583.350 (*supra*, §423) to June 26, 1990, 6 months after issuance of the remittitur. Defendants then moved to dismiss for failure to bring the case to trial by June 26. In opposition, plaintiff contended that he had 3 years after issuance of the remittitur to bring the case to trial under *C.C.P.* 583.320(a)(3). The trial court granted the motion to dismiss, but plaintiff moved to vacate the order under *C.C.P.* 663 (8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §139), and the trial court granted this motion on the ground that it had committed an error of law in not applying *C.C.P.* 583.320(a)(3). *Held*, order granting motion to vacate affirmed.

(a) A motion for new trial under *C.C.P.* 657 lies to attack a judgment of dismissal where the issue is one of law. (9 *C.A.4th* 1315.) The fact that plaintiff labeled his motion one to vacate under *C.C.P.* 663 does not preclude relief: his motion may properly be treated as a motion for new trial for purposes of appellate review. (9 *C.A.4th* 1316.)

(b) *McDonough Power Equipment Co. v. Superior Court*, *supra*, held that a "trial" within the meaning of the 3-year statute occurs where a judgment of dismissal is entered after the demurrer is sustained without leave to amend. (9 *C.A.4th* 1317.) In *McDonough*, the dismissal was based on statute of limitations grounds; but there is no functional difference between a motion to dismiss for lack of subject matter jurisdiction and a demurrer based on a statute of limitations. Both are in the nature of general demurrers presenting questions of law put in issue by pleadings, and both result in a final disposition of an action. (9 *C.A.4th* 1318, citing the text.)

(3) *What Constitutes Retrial on Remand.* In determining whether the action has again been brought "to trial" after reversal and remand, "trial" means a hearing and decision on issues that have a direct connection with those raised by the pleadings. In *Mass v. Superior Court* (1961) 197 *C.A.2d* 430, 17 *C.R.* 549, petitioner, a schoolteacher, was suspended for claiming his self-incrimination privilege before a Congressional committee. The superior court upheld the board of education, but the Supreme Court reversed, holding that he was entitled to a judicial hearing, i.e., a new trial, on the reasons for his claim of privilege. The remittitur was filed January 27, 1957, and petitioner moved to dismiss on April 18, 1961. The trial judge refused to dismiss on the theory that the 3-year period was tolled on May 29, 1957, by petitioner's motion to remand the proceedings to the board for a hearing pursuant to the remittitur. *Held*, mandamus issued to compel dismissal. The main issue here was the sufficiency of petitioner's reasons for claiming the privilege. The motion to remand was merely concerned with the proper forum to hear the matter, and was in no way related to that issue; hence, it was not such a trial as to preclude application of the dismissal statute. (197 *C.A.2d* 434, 435.)

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4. After Decision on Appeal.

c. Distinction: Judgment Reversed Without Remand for New Trial.

6 *Witkin Cal. Proc. PWT* § 433

[§ 433] Distinction: Judgment Reversed Without Remand for New Trial.

(1) *In General.* No retrial is required where the reversal is with directions to enter judgment for the appellant; the dismissal statute does not apply. (See *No Oil v. Los Angeles* (1984) 153 C.A.3d 998, 1004, 200 C.R. 768, citing the text.)

The same is true of any other reversal without a remand for a new trial. Thus, in *Fannin Corp. v. Superior Court* (1974) 36 C.A.3d 745, 111 C.R. 920, the judge made an order of discretionary dismissal just before the end of the 5-year period, and plaintiff appealed. The order was reversed with directions to the trial court to exercise discretion in the light of recent cases. *Held*, the 3-year period was not available, for no new trial, in the sense of determination of an issue of fact or law raised by the pleadings, was directed. "The position taken by real party would result in giving a non-diligent litigant an automatic three-year extension in any case where a defendant has obtained a dismissal for lack of prosecution and the plaintiff, upon taking an appeal from the order of dismissal, is successful in having it reversed. We do not believe the Legislature intended such a result." (36 C.A.3d 754.)

(2) *Determination of Matters Ancillary to Judgment.* In *No Oil v. Los Angeles*, *supra*, plaintiffs brought an action against defendants challenging failure of defendant city to prepare an environmental impact report prior to enactment of ordinances establishing oil drilling districts. Defendants had judgment, plaintiffs appealed, and the Supreme Court reversed with directions to set aside the ordinances. Before the remittitur issued, plaintiffs moved in the Supreme Court for an award of attorneys' fees (under the private attorney general doctrine; see 7 Cal. Proc. (5th), *Judgment*, §256 et seq.). The Supreme Court denied the motion without prejudice to its renewal before the trial court, and ordered that the trial court decide the issue on the merits. Plaintiffs accordingly made the motion in the trial court, but discovery proceedings then took more than 3 years with no hearing on the motion. Defendants then moved to dismiss the proceedings and the motion was granted. *Held*, reversed. (a) The Supreme Court's reversal of the judgment with directions did not call for a new trial on the merits. (153 C.A.3d 1004.) (b) Former C.C.P. 583(c) (now C.C.P. 583.330(a)(3)), by its terms and purposes, does not apply to matters that are ancillary or collateral to the judgment. Because the issue of attorneys' fees was ancillary to the action, and the motion was properly made after the judgment became final, dismissal was improper. (153 C.A.3d 1006.)

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

Correction: Page 886, line 24, " *C.C.P. 583.330(a)(3)*" should be " *C.C.P. 583.320(a)(3)*".



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5. Extensions, Exceptions, and Excuses.

a. In General.

6 *Witkin Cal. Proc. PWT* § 434

[§ 434] In General.

The extensions, exceptions, and excuses that apply to the original 5-year period for bringing an action to trial initially also apply to the 3-year period for bringing the action to retrial, and include the following:

- (1) A stipulation or agreement extending the time for trial. (*C.C.P. 583.330*, supra, §382 et seq.)
- (2) The time during which the court's jurisdiction is suspended. (*C.C.P. 583.340(a)*, supra, §389 et seq.)
- (3) The time during which prosecution of the action is stayed or enjoined. (*C.C.P. 583.340(b)*, supra, §§393, 394.)
- (4) The time during which bringing the action to trial is impossible, impracticable, or futile for other reasons. (*C.C.P. 583.340(c)*, supra, §395 et seq. and infra, §§435, 436.)
- (5) Estoppel or waiver. (*C.C.P. 583.140*, supra, §§315, 418 et seq. and infra, §437.)
- (6) The 6-month grace period available at the end of a period of tolling or extension. (*C.C.P. 583.350*, supra, §423.)

In addition, there can be no dismissal if the action is brought to trial within the 5-year period of *C.C.P. 583.310* for bringing an action to trial. (*C.C.P. 583.320(b)*.) (On cases construing former law and reaching contrary results, see *McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 105 C.R. 330, 534, 503 P.2d 1338, supra, §432; *Balboa Ins. Co. v. Aguirre* (1983) 149 C.A.3d 1002, 1006, 197 C.R. 250.)

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5. Extensions, Exceptions, and Excuses.

b. Trial Impossible, Impracticable, or Futile.

1. In General.

6 *Witkin Cal. Proc. PWT* § 435

[§ 435] In General.

(1) *Impossibility*. This exception was judicially recognized in *Hsu v. San Francisco* (1966) 240 C.A.2d 317, 321, 323, 49 C.R. 531. A tort action was brought against defendant city and its employees, judgment on demurrer was rendered, and plaintiff obtained a reversal on appeal. Then the legislative moratorium (see 5 *Summary* (10th), *Torts*, §216) intervened, preventing trial of the cause against the city for 735 days. *Held*: (a) This period could not be counted as to that cause, and dismissal as to it was improper. (b) The moratorium did not preclude or render impracticable prosecution of the action against the individual defendants, and as to them the dismissal was proper. (See *Good v. California* (1969) 273 C.A.2d 587, 592, 78 C.R. 316 [moratorium statute made trial impracticable and dismissal was improperly granted].)

(2) *Impracticability*. This exception was recognized, but held inapplicable on the facts, in *McDonald Candy Co. v. Lashus* (1962) 200 C.A.2d 63, 66, 19 C.R. 137. Defendants L and H were granted a new trial on August 12, 1957. Another defendant, D, also moved for a new trial; its motion was denied, and its appeal from the judgment was decided against it on April 27, 1959. Defendants L and H moved to dismiss on December 14, 1960. Plaintiff contended that the time while D's appeal was pending (over 20 months) should be added to the 3-year period because of the statutory language ("if no appeal has been taken") and because it would have been undesirable to proceed with the litigation until the appeal was settled. *Held*, the statutory language was inapplicable and there was no impracticability, because the case involved completely severable issues under a complaint and cross-complaint, and D's appeal, even if successful, would not have affected the rights of the other parties. (200 C.A.2d 67, 68.)

(3) *Exception Codified*. The impossibility, impracticability, or futility exception is now codified. In applying the 3-year statute, time is excluded during which "[b]ringing the action to trial ... was impossible, impracticable, or futile." (C.C.P. 583.340(c); see *Hattersley v. American Nucleonics Corp.* (1992) 3 C.A.4th 397, 399, 4 C.R.2d 331 [3-year period was tolled for 314 days because of courtroom unavailability]; on impossibility, impracticability, or futility exception generally, see *supra*, §395 et seq.)

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5. Extensions, Exceptions, and Excuses.

b. Trial Impossible, Impracticable, or Futile.

2. Requirement of Reasonable Diligence.

6 *Witkin Cal. Proc. PWT* § 436

[§ 436] Requirement of Reasonable Diligence.

In applying the impossibility, impracticability, or futility exception under the 3-year statute, as under the 5-year statute (see *supra*, §395 et seq.), it is the duty of the plaintiff, not the court or clerk, to ensure that the matter is prosecuted in a timely fashion. Thus, the plaintiff must be diligent in discovering any calendar errors made by the clerk and in remedying these errors by moving to specially set the case for retrial. (See *Crown Coach Corp. v. Superior Court* (1972) 8 C.3d 540, 547, 105 C.R. 339, 503 P.2d 1347 [plaintiff did not file at-issue memorandum until 26 months after remittitur had been filed, and then took no action during remaining 10 months of 3-year period to bring action to trial]; *Youngblood v. Terra* (1970) 10 C.A.3d 533, 537, 89 C.R. 13.)

In *Mesler v. Bragg Management Co.* (1990) 219 C.A.3d 983, 268 C.R. 522, plaintiff's personal injury action resulted in a judgment for defendant. The Supreme Court reversed the judgment and the remittitur was filed on September 9, 1985. Then plaintiff filed an at-issue memorandum, which was not filed by the clerk. More than 2 years after the filing of the remittitur, and 22 days before expiration of the 3-year period of C.C.P. 583.320(a)(3), plaintiff filed a motion to specially set. The motion was denied and defendant's motion to dismiss was granted. *Held*, affirmed.

(a) In refusing to credit M's argument that "the personnel of the court are to blame for his failure to bring his case to trial within the mandatory three years, we are not advocating condonation of errors committed by court personnel in any degree whatsoever. However, those errors which are readily ascertainable by the exercise of reasonable diligence by the litigants, will not serve to excuse the litigants from sufficiently monitoring their case in the trial court to insure that the case is brought to trial within statutory time restraints." (219 C.A.3d 994.)

(b) *Salas v. Sears, Roebuck & Co.* (1986) 42 C.3d 342, 228 C.R. 504, 721 P.2d 590, *supra*, §425, and *Karubian v. Security Pac. Nat. Bank* (1984) 152 C.A.3d 134, 199 C.R. 295, *supra*, §399, are controlling. (219 C.A.3d 994, 995.) The reasoning of these cases on the mandatory 5-year period in which the case must initially be brought to trial is equally applicable to cases involving the 3-year period for retrial after issuance of the remittitur. And under the shorter limitation period, "the burden on the litigant to demonstrate diligence in insuring that the matter will be brought to trial in a timely manner is increased." (219 C.A.3d 995.) Here, the trial judge did not abuse his discretion in denying M's

"11th hour attempt to obtain a preferential trial setting, just 22 days before the 3-year limit would run." (219 C.A.3d 996.)

A strong dissent, reviewing the background of the current preference for trial on the merits over dismissal on procedural grounds (see *C.C.P. 583.130*, supra, §315), concluded that the majority's reasoning and conclusion were wrong. (219 C.A.3d 999.)

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5. Extensions, Exceptions, and Excuses.

c. Estoppel.

6 *Witkin Cal. Proc. PWT* § 437

[§ 437] Estoppel.

(1) *Doctrine Judicially Established.* In *Holder v. Sheet Metal Worker's Int. Assn.* (1981) 121 C.A.3d 321, 175 C.R. 313, involving former C.C.P. 583(c) (delay after new trial granted; now C.C.P. 583.330(a)(2)), defense counsel sought a continuance, and plaintiff's counsel advised him that he would not object. Defense counsel's unopposed motion was granted, resulting in postponement of the trial date beyond the 3-year period, and when the period ran, defense counsel successfully moved for dismissal. *Held*, reversed.

(a) Although former C.C.P. 583(c), unlike the other dismissal statutes, did not authorize a stipulation to extend the time, this does not indicate a legislative intent to reject the judicially developed estoppel doctrine recognized in *Tresway Aero v. Superior Court* (1971) 5 C.3d 431, 96 C.R. 571, 487 P.2d 1211, *supra*, §353. (121 C.A.3d 327.)

(b) "A trial court's consideration of factual circumstances pertaining to waiver or estoppel frustrates neither the judicial nor legislative policies underlying that section. When a defendant selects a trial date beyond the three-year period, he shows his willingness to excuse delay and his apparent satisfaction with his state of preparedness for trial. If the net effect of defendant's conduct is construed to be a waiver of his right to pursue his subdivision (c) motion, the primary policy of permitting a trial on the merits is satisfied. Moreover, to deny the application of estoppel is tantamount to giving a judicial imprimatur to the conduct of lawyers inconsistent with their role as officers of the court. ... Here, [defense counsel] represented to opposing counsel he wished to continue the case for trial. In his motion for continuance he made that same representation to the court. Having made that bargain, he is bound by it. ... The Legislature, in depriving parties from extending this three year limitation period of subdivision (c) did not preempt the courts of their power to regulate proceedings before them and to control lawyers in the performance of their professional obligations." (121 C.A.3d 327.)

In *Balboa Ins. Co. v. Aguirre* (1983) 149 C.A.3d 1002, 1009, 197 C.R. 250, involving former C.C.P. 583(d) (delay after mistrial; now C.C.P. 583.030(a)(1)), the court declared that, "to be consistent with the liberal approach" of *Tresway Aero*, "we consider the facts in the light of the estoppel doctrine." However, on consideration it appeared that the acts relied on for an estoppel occurred after the expiration of the 3-year period, and the dismissal was affirmed.

(2) *Statutory Recognition.* *C.C.P. 583.140* recognizes the estoppel doctrine as applicable to all of the grounds of dismissal for delay in prosecution. (See *supra*, §315.)

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

Corrections: Page 889, line 3 of section, " *C.C.P. 583.330(a)(3)*" should be " *C.C.P. 583.320(a)(3)*"; page 890, line 13, "C.C.P. 583.030(a)(1)" should be " *C.C.P. 583.320(a)(1)*".



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E. Discretionary Dismissal for Delay.

1. In General.

a. Power To Dismiss.

6 *Witkin Cal. Proc. PWT* § 438

[§ 438] Power To Dismiss.

(1) *Inherent Power.* Discretionary dismissal for delay in prosecution has been recognized as an *inherent power* of the court. (See *People v. Jefferds* (1899) 126 C. 296, 58 P. 704; *Gray v. Times-Mirror Co.* (1909) 11 C.A. 155, 160, 104 P. 481; *Romero v. Snyder* (1914) 167 C. 216, 217, 138 P. 1002; *Oberkotter v. Spreckels* (1923) 64 C.A. 470, 473, 221 P. 698; *Steinbauer v. Bondesen* (1932) 125 C.A. 419, 423, 14 P.2d 106; *Craghill v. Ford* (1932) 127 C.A. 661, 667, 16 P.2d 343, *supra*, §282; *Cohn v. Rosenberg* (1943) 62 C.A.2d 140, 143, 144 P.2d 399, *supra*, §282; *Karras v. Western Title Ins. Co.* (1969) 270 C.A.2d 753, 757, 76 C.R. 141, *supra*, §282, citing the text; *Binyon v. California* (1993) 17 C.A.4th 952, 955, 21 C.R.2d 673, *supra*, §316, citing the text; on court's inherent power to dismiss generally, see *supra*, §282.) However, if the action has been brought to trial and tried, there is no discretionary power to dismiss because of delay in decision after its submission. The fault in that case is that of the court, not the plaintiff. (*Jackson v. Thompson* (1941) 47 C.A.2d 405, 408, 118 P.2d 31.)

(2) *Statutory Power.* The court may in its discretion dismiss an action for delay in prosecution pursuant to C.C.P. 583.410 et seq. "on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case." (C.C.P. 583.410(a); see *Oskooi v. Fountain Valley Regional Hosp. & Med. Center* (1996) 42 C.A.4th 233, 238, 49 C.R.2d 769 [C.C.P. 583.410 et seq. applied in administrative mandamus proceeding]; *Franklin Capital Corp. v. Wilson* (2007) 148 C.A.4th 187, 215, 55 C.R.3d 424 [trial court had no authority to dismiss action with prejudice]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §15.66 et seq.)

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E. Discretionary Dismissal for Delay.

1. In General.

b. Criteria Governing Exercise of Discretion.

6 *Witkin Cal. Proc. PWT* § 439

[§ 439] Criteria Governing Exercise of Discretion.

The voluminous case law prior to 1970 deals with a great variety of situations in which the trial court was called on to exercise discretion without statutory direction and with little judicial guidance. (See *infra*, §§449, 450, 460 et seq.) C.R.C., Rule 3.1342(e), though phrased in terms of procedure, now summarizes the significant factors developed by the cases with regard to discretionary dismissal, and states them as criteria governing the exercise of discretion. (See *C.C.P. 583.410(b)* [discretionary dismissal must be in accordance with criteria prescribed by rules adopted by Judicial Council].)

In ruling on the motion the court must consider "all matters relevant to a proper determination of the motion," including the following:

- (1) The court's file in the case and the affidavits and supporting data submitted by the parties. (C.R.C., Rule 3.1342(e)(1).)
- (2) The availability of the moving party and other essential parties for service of process. (C.R.C., Rule 3.1342(e)(1).)
- (3) The *diligence in seeking to effect service* of process. (C.R.C., Rule 3.1342(e)(2).)
- (4) The extent to which the parties engaged in settlement negotiations or discussions. (C.R.C., Rule 3.1342(e)(3).)
- (5) The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought. (C.R.C., Rule 3.1342(e)(4).)
- (6) The nature and complexity of the case. (C.R.C., Rule 3.1342(e)(5).)
- (7) The law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case. (C.R.C., Rule 3.1342(e)(6).)

(8) The nature of any extensions of time or other delay attributable to either party. (C.R.C., Rule 3.1342(e)(7).)

(9) The condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial. (C.R.C., Rule 3.1342(e)(8).)

(10) Whether the interests of justice are best served by dismissal or trial of the case. (C.R.C., Rule 3.1342(e)(9).)

(11) Any other fact or circumstance relevant to a fair determination of the issue. (C.R.C., Rule 3.1342(e)(10).)

In applying these criteria, the court "must be guided by the policies set forth" in *C.C.P. 583.130* (supra, §315) favoring trial on the merits. (C.R.C., Rule 3.1342(e).)

The court must consider the factors listed in C.R.C., Rule 3.1342(e); failure to do so is an abuse of discretion. (*Dockery v. Hyatt* (1985) 169 C.A.3d 830, 833, 215 C.R. 488.) The following cases are also instructive:

State Comp. Ins. Fund v. Selma Trailer & Mfg. Co. (1989) 210 C.A.3d 740, 748, 258 C.R. 545 [trial judge's application of criteria calling for dismissal].

Dubois v. Corroon & Black Corp. (1993) 12 C.A.4th 1689, 1696, 1697, 1700, 16 C.R.2d 719 [trial judge need not specifically state that factors enumerated in rule were considered, but actual consideration is mandatory in deciding whether to exercise discretionary power to dismiss].

Williams v. Los Angeles Unified School Dist. (1994) 23 C.A.4th 84, 93, 28 C.R.2d 219 [summarizing evidence relating to factors enumerated in rule, and finding substantial evidence to support dismissal].

Kidd v. Kopald (1994) 31 C.A.4th 132, 146, 36 C.R.2d 875, infra, §468 [express findings on factors delineated in rule was not required].

Cohen v. Hughes Markets (1995) 36 C.A.4th 1693, 1699, 43 C.R.2d 66 [trial judge improperly failed to consider factors enumerated in rule; his "exclusive focus" was on plaintiff's personal absence when case was called to trial].

Vernon v. Great Western Bank (1996) 51 C.A.4th 1007, 1011, 59 C.R.2d 350 [case was dismissed following pattern of conduct by plaintiff and her attorney showing failure to prosecute diligently and total disregard of court's orders].

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

See *Van Keulen v. Cathay Pac. Airways, Ltd.* (2008) 162 C.A.4th 122, 130, 75 C.R.3d 471 [almost all criteria in C.R.C., Rule 3.1342(e) were applicable; trial court properly exercised discretion in dismissing action that had been stayed on basis of forum non conveniens where plaintiffs failed to diligently prosecute claims in proper forum].



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E. Discretionary Dismissal for Delay.

1. In General.

c. Premature Dismissal Is Improper.

6 *Witkin Cal. Proc. PWT* § 440

[§ 440] Premature Dismissal Is Improper.

A trial judge may not dismiss a case for delay for a time period less than that specified by statute or rule. (*General Motors Corp. v. Superior Court* (1966) 65 C.2d 88, 98, 52 C.R. 460, 416 P.2d 492, supra, §409; *Cohen v. Hughes Markets* (1995) 36 C.A.4th 1693, 1698, 43 C.R.2d 66.)

In *Roman v. Usary Tire & Service Center* (1994) 29 C.A.4th 1422, 35 C.R.2d 329, plaintiff's wrongful termination action was dismissed under C.C.P. 583.410(a) 23 months after the complaint was filed, after neither plaintiff nor his counsel appeared at a hearing on an order to show cause. *Held*, order of dismissal reversed.

(a) Discretionary dismissal for delay in prosecution was premature. Although C.C.P. 583.410(a) provides that the court may, in its discretion, dismiss an action for delay in prosecution, C.C.P. 583.420 prohibits discretionary dismissal for delay unless one of certain conditions has occurred. (See *infra*, §442 et seq.) These include failure to bring the action to trial within 3 years, or within 2 years under a Judicial Council rule adopted pursuant to C.C.P. 583.410. Former C.R.C., Rule 372 (now C.R.C., Rule 3.1340), as adopted by the Judicial Council pursuant to this authorization, allowed the court to dismiss an action under C.C.P. 583.410 for delay in prosecution if the action has not been brought to trial within 2 years after it was commenced. However, the present case was less than 2 years old when the trial court ordered dismissal. (29 C.A.4th 1430.)

(b) Under C.C.P. 583.130, the express policy of the state is to favor trial on the merits over dismissal for failure to proceed with reasonable diligence. (29 C.A.4th 1431.) (See *Hawks v. Hawks* (2006) 141 C.A.4th 1435, 1437, 47 C.R.3d 145 [delay of less than 2 years in service is not ground for dismissal under C.C.P. 583.410(a); trial court erred in dismissing action only 2 months after action was commenced].)

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1. In General.

d. Extensions, Exceptions, and Excuses.

6 Witkin Cal. Proc. PWT § 441

[§ 441] Extensions, Exceptions, and Excuses.

The extensions, exceptions, and excuses recognized in the statutes governing mandatory dismissal are applicable to discretionary dismissal. Under *C.C.P. 583.420(b)*, the times provided for discretionary dismissal are computed "in the manner provided for computation of the comparable times" under *C.C.P. 583.210* et seq. (mandatory dismissal for delay in service) and *C.C.P. 583.310* et seq. (mandatory dismissal for delay in trial). (See *C.C.P. 583.230*, supra, §338; *C.C.P. 583.240*, supra, §346; *C.C.P. 583.330*, supra, §382; *C.C.P. 583.340*, supra, §396.)

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2. Delay in Service.

a. In General.

6 *Witkin Cal. Proc. PWT* § 442

[§ 442] In General.

(1) *Statutory Requirement.* Formerly, the general duty on the part of the plaintiff at every stage of the proceedings to use diligence to bring the case to a final determination remained despite the enactment of the mandatory dismissal statute (former C.C.P. 581a); and the court had inherent power to dismiss where the delay was less than the 3 years specified in the statute. (See *Kreiss v. Hotaling* (1893) 99 C. 383, 385, 33 P. 1125; *Bernard v. Parmelee* (1907) 6 C.A. 537, 542, 92 P. 658 [delay of 4 months was inexcusable under peculiar circumstances]; *Anderson v. Nawa* (1914) 25 C.A. 151, 157, 143 P. 555 [proof of actual prejudice to defendant was not required].)

Under C.C.P. 583.420, the court has discretion to dismiss only if service is not made "within two years after the action is commenced against the defendant." (C.C.P. 583.420(a)(1).) The court must exercise its discretion in accordance with the criteria set forth in C.R.C., Rule 3.1342(e). (See *supra*, §439.)

(2) *Extensions, Exceptions, and Excuses.* The statutory excuses avoiding mandatory dismissal for delay in service are applicable to discretionary dismissals on this ground. (See C.C.P. 583.420(b); *supra*, §441.)

(3) *Local Rules.* Additional time requirements for service may be imposed by "fast track" case management rules. (See *Govt.C. 68600* et seq. [Trial Court Delay Reduction Act]; on fast track rules generally, see 2 *Cal. Proc.* (5th), *Courts*, §257 et seq.)

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2. Delay in Service.

b. Time for Service.

1. Amended Complaint.

6 *Witkin Cal. Proc. PWT* § 443

[§ 443] Amended Complaint.

Ordinarily, the 2-year period runs from the filing of the original complaint, not the filing of an amended complaint. When the amended complaint is based on different operative facts, however, the defendant does not become a party, and the statutory period does not run, until the amended complaint is filed. In *American Western Banker v. Price Waterhouse* (1993) 12 C.A.4th 39, 14 C.R.2d 916, plaintiff AWB, a loan broker, borrowed money to buy equipment leased to customers. Investors in AWB ("guarantors") guaranteed many of the corporate obligations. Loans and leases went bad, allegedly in large part due to corrupt practices by AWB management, and the guarantors caused new management to be placed in AWB operations. On October 14, 1987, AWB filed an action against defendant public accounting firms, for negligence and fraud, alleging that defendant should have discovered and notified plaintiffs of AWB's misdeeds. On July 12, 1988, AWB and the guarantors filed an amended complaint, and served it on February 8, 1990, more than 2 years after the original complaint was filed, but less than 2 years after the amended complaint was filed. On motion of defendants under C.C.P. 583.420(a)(1), the trial court dismissed the action for failure to serve the summons within 2 years after commencement of the action. *Held*, judgment affirmed as to AWB but *reversed as to the guarantors*.

(a) *Relation-back doctrine*.

(1) In *Barrington v. A.H. Robins Co.* (1985) 39 C.3d 146, 216 C.R. 405, 702 P.2d 563, *supra*, §326, the court adopted the relation-back rules in statute of limitations cases for use in determining when an action has "commenced" for purposes of the delay-in-prosecution statutes. If the new cause of action involves new facts or a new injury it does not relate back to the original complaint; if it rests on the same general set of facts and refers to the same injuries as the original complaint, it does relate back. (12 C.A.4th 48.)

(2) Defendants contended that the *Barrington* rules apply only to amended complaints that add *defendants*, arguing that otherwise a plaintiff could extend forever the time for service of summons simply by adding new plaintiffs. But in statute of limitations cases the relation-back distinction has been held applicable to amendments involving plaintiffs, and there is no hint in *Barrington* that the court intended to limit the application of the rule. (12 C.A.4th 49.) Also, in

view of the reciprocal nature of the rule, the contention that service can be indefinitely delayed is wholly unfounded. "To the extent time for service of the amended complaint begins when the amended complaint is filed, the statute of limitations is tolled only upon filing of the amended complaint, and hence cannot operate to expose defendants to any liability on which the statute of limitations has already run." (12 C.A.4th 49.)

(3) It is possible that on reinstitution of the action in the trial court the guarantors' theory of recovery would be subrogation, in which the subrogee's entitlement would be wholly derivative of the subrogor's rights. (12 C.A.4th 51.) But a different result is required as to claims of the guarantors in their own right. "It is true that the claims of the guarantor appellants arise from the same general facts as AWB's claims and that the guarantor appellants' claims are derivative in the sense that there would be no such claims but for AWB's relationship with respondents. However, the differences between the claims include the guarantor appellants' allegations of (1) *duty* owed them by respondents, a duty independent of that owed AWB, and (2) the guarantor appellants' own compensable *injury*, being separate and apart from any compensable injury of AWB." (12 C.A.4th 51.)

(b) *No waiver of point.* In the proceedings below the guarantors failed to assert a distinction between themselves and AWB in the context of commencement of the action; and normally, if there is a contested evidentiary proceeding in the court below, the appellant is not permitted to raise a new theory of the case on appeal. (12 C.A.4th 52, citing the text.) However, when the facts relating to the new contention are undisputed, the court may entertain the contention as a question of law and pass on it. (12 C.A.4th 52.) There is no unfairness in determining that these appellants have not waived their point; appellants' separateness, both in fact and in legal theory, is a direct prerequisite to the claims they will be able to assert on remand. (12 C.A.4th 53.)

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2. Delay in Service.

b. Time for Service.

2. Doe Defendant.

6 *Witkin Cal. Proc. PWT § 444*

[§ 444] Doe Defendant.

The 2-year requirement is applicable to claims against Doe defendants as well as named defendants. In *Clark v. Stabond Corp.* (1987) 197 C.A.3d 50, 242 C.R. 676, defendant S was initially sued as a Doe defendant and, under C.C.P. 474, could be named by an amendment to the complaint that "related back" to the filing of the original complaint. (See 4 *Cal. Proc.* (5th), *Pleading*, §493.) The plaintiff's use of this device was ultimately limited by the mandatory dismissal period of 3 years (C.C.P. 583.210, *supra*, §322), and the relation-back doctrine applied to calculate when the 3-year service period began. (197 C.A.3d 56, citing *Barrington v. A.H. Robins Co.* (1985) 39 C.3d 146, 216 C.R. 405, 702 P.2d 563, *supra*, §326). Thus, the question was whether C.C.P. 474 limits the applicability of C.C.P. 583.420 "in those actions brought against Doe defendants whose identity might be discerned more than two years after filing a complaint but less than the three-year outer limit for effecting service." (197 C.A.3d 57.) *Held*, no such limitation exists.

(a) "[N]either the relevant statute nor rule of court recognizes an exception to the diligence requirement." C.C.P. 583.420, permitting discretionary dismissal for delay in service speaks in terms of all defendants, not merely named defendants. Former C.R.C., Rule 373(e) (now C.R.C., Rule 3.1342(e)), setting forth matters relevant to the proper determination of a motion to dismiss for delay in prosecution, does not distinguish between service on named or fictitious defendants. "Rather, the rule requires consideration of the availability of the moving party for service of process and 'the diligence in seeking to effect service of process.' " (197 C.A.3d 58.)

(b) Policy considerations also support application of the discretionary dismissal statutes to actions against Doe defendants. One purpose of the statutes is to expedite the administration of justice; another is to avoid prejudice to the defendant caused by the dissipation of material evidence. "These purposes would be frustrated by carving out an exception to the discretionary dismissal statutes based on how a defendant is identified in the plaintiff's complaint." (197 C.A.3d 58.)

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b. Time for Service.

3. Complaint in Intervention.

6 *Witkin Cal. Proc. PWT* § 445

[§ 445] Complaint in Intervention.

In *Kuchins v. Hawes* (1990) 226 C.A.3d 535, 276 C.R. 281, plaintiff, injured in an automobile accident, filed a complaint on November 10, 1986, against three defendants. On May 10, 1989, 21/2 years later, she served the complaint on the three defendants, who moved to dismiss. However, on June 20, 1988, before the expiration of the 2-year period of C.C.P. 583.420, an insurer had served a complaint in intervention against the three defendants, who answered on June 12, 1989. Nevertheless, the trial court granted defendants' motion to dismiss plaintiff's complaint. *Held*, affirmed.

(a) The Courts of Appeal have reached different conclusions on the issue whether service of a complaint in intervention on a defendant satisfies the requirement that the plaintiff serve the complaint within the 2-year period.

(1) One line of cases views the intervenor's action as separate and independent. To hold it inseparable from the underlying action would interfere with one purpose of the intervention statutes: to avoid a multiplicity of suits. "If negligent or intentional lack of prosecution on the part of a plaintiff could deprive an intervenor of his cause of action, interveners would ... bring independent actions to pursue their ... rights." (226 C.A.3d 539.)

(2) The other line of cases takes the position that a complaint and a complaint in intervention are interchangeable and essentially the same lawsuit. But these cases are distinguishable from the case here. In those cases, an intervenor was not permitted to file a complaint in intervention after expiration of the time period allotted the plaintiff to prosecute the action; to allow the intervenor to do so would undermine another purpose of intervention--to avoid delay. (226 C.A.3d 540.)

(b) "If we were to accept in isolation the maxim that a complaint and a complaint in intervention are essentially the same lawsuit, we might be tempted to conclude that service of [intervenor's] complaint in intervention operated as an effective service of plaintiff's complaint. We decline to do so, however, since application of such an interpretation in this case would promote rather than prevent protracted delay and lack of diligence." (226 C.A.3d 540.) Plaintiff "should not be permitted to ride on the coattails of the intervenor and obtain by the intervenor's diligence that which she failed to

achieve by her own effort." (226 C.A.3d 541.)

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2. Delay in Service.

c. Excuse for Delay.

1. Necessity for Showing.

6 *Witkin Cal. Proc. PWT* § 446

[§ 446] Necessity for Showing.

The necessity for showing diligence or excuse for delay in order to avoid discretionary dismissal once the 2-year period for service has run is somewhat unclear. It has been held that a plaintiff's failure to make a showing does not in itself require dismissal, in that the discretionary dismissal statute does not place that restriction on the trial court's exercise of its discretion. (See *Denham v. Superior Court* (1970) 2 C.3d 557, 563, 86 C.R. 65, 468 P.2d 193, *infra*, §453; *Ladd v. Dart Equipment Corp.* (1991) 230 C.A.3d 1088, 1105, 281 C.R. 813.) However, there is authority that dismissal is required when no justification for delay is provided. (See *Trailmobile v. Superior Court* (1989) 210 C.A.3d 1451, 1455, 259 C.R. 100; *Putnam v. Clague* (1992) 3 C.A.4th 542, 549, 5 C.R.2d 25.) In any event, reasonable diligence or excuse is an important criterion to be considered by the court in determining whether to dismiss. (See C.C.P. 583.130, *supra*, §315 ["plaintiff shall proceed with reasonable diligence"]; C.R.C., Rule 3.1342(e), *supra*, §439 [listing diligence of parties as criterion to be considered].)

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c. Excuse for Delay.

2. Sufficiency of Showing.

6 *Witkin Cal. Proc. PWT* § 447

[§ 447] Sufficiency of Showing.

(1) *Higher Standard Than for Bringing Matter to Trial.* Higher standards are imposed for excusing delay in service than for excusing delay in bringing a matter to trial. Under the statute governing the computation of time for mandatory dismissal, which applies in cases of discretionary dismissal (see *C.C.P. 583.420(b)*, supra, §441), delay in service, unlike delay in trial, can be excused on the ground of impossibility, impracticability, or futility only for causes beyond the plaintiff's control, and service, unlike bringing to trial, is ordinarily within the plaintiff's control. (*Scarzella v. DeMers* (1993) 17 *C.A.4th* 1762, 1770, 1771, 22 *C.R.2d* 329; *Williams v. Los Angeles Unified School Dist.* (1994) 23 *C.A.4th* 84, 28 *C.R.2d* 219; on discretionary dismissal for delay in trial, see *infra*, §451 et seq.)

(2) *Putnam Test.* In *Putnam v. Clague* (1992) 3 *C.A.4th* 542, 5 *C.R.2d* 25, the court undertook an elaborate examination of the case law and the Recommendation of the Law Revision Commission, and came to the following conclusion regarding the sufficiency and effect of a showing of excuse when discretionary dismissal is sought: "We hold that when the plaintiff makes a credible showing of excuse, based on counsel's decisions which are not clearly unreasonable, dismissal should not be ordered unless the defendant was prejudiced by the delay or some other circumstance shows that the interests of justice are best served by dismissal." (3 *C.A.4th* 546.)

(a) "One rule which has rather clearly emerged from the decisional law is that the plaintiff, opposing a motion to dismiss for delay in prosecution, has the initial burden to show excusable delay. Only after he has done so does the court consider other factors such as prejudice." (3 *C.A.4th* 549.) A plaintiff who offers no excuse or justification for the delay cannot simply rely on the policy favoring trial on the merits. (3 *C.A.4th* 551.) But the Supreme Court and Court of Appeal decisions offer no guidance as to what quantum of showing is necessary for the plaintiff to meet his burden or as to what constitutes excuse or justification for delay. (3 *C.A.4th* 552, 553.)

(b) The approach followed by this court in its prior decisions is consistent with the apparent reason for the "some showing of excusable delay" rule and the policies underlying the dismissal statutes. "A plaintiff who has been inattentive to his case for an unreasonable period of time should not be able to nullify the dismissal statute by simply invoking the general policy favoring trial on the merits. The same is true when the plaintiff offers an excuse which,

under the factual and procedural circumstances of the particular case, is not credible or is clearly unreasonable. If the excuse is credible and not clearly unreasonable, however, the court should consider all other factors, including prejudice to the defendant, before ordering dismissal. Otherwise, the statutory policy favoring trial on the merits could be nullified by a judicially constructed rule." (3 C.A.4th 557.)

(c) "When the plaintiff offers some explanation or excuse reflecting a conscious decision not to serve or otherwise prosecute the action, we believe there are two essential questions the court must initially address. Is the explanation credible under all the circumstances? If the facts are disputed and the trial court finds on substantial evidence that the explanation is merely an afterthought or pretext designed to cover up neglect, dismissal may be warranted. If the explanation is credible, however, the court should consider whether the reasons given for the decision are clearly unreasonable. That is, could a reasonably competent attorney conclude that delay was justified under the circumstances? ... In considering this question, however, courts should be careful not to engage in second-guessing attorneys' litigation decisions. If the decision is one which a reasonably competent attorney might have made under the circumstances, the burden should shift to the defendant to show that other factors, such as prejudice, support dismissal." (3 C.A.4th 557.)

(d) A detailed review of the record here shows that plaintiffs offered a credible, reasonable excuse for their delay, and that defendant did not show actual prejudice or any other factor justifying dismissal. (3 C.A.4th 563.) (See *Yao v. Anaheim Eye Med. Group* (1992) 10 C.A.4th 1024, 1030, 12 C.R.2d 856 [applying *Putnam* test]; *American Western Banker v. Price Waterhouse* (1993) 12 C.A.4th 39, 14 C.R.2d 916, supra, §443 [financial inability is no excuse; applying *Putnam* test].)

(3) *Criticism of Putnam Test.* In *Roach v. Lewis* (1993) 14 C.A.4th 1179, 18 C.R.2d 281, the only declaration opposing dismissal was filed by plaintiff's trial counsel, and he relied primarily on the test set forth in *Putnam*. In affirming the trial court's order of dismissal, the court strongly criticized that test:

(a) Under the first prong of the test, the trial judge is supposed to determine whether the explanation is "credible under all the circumstances." But this should not be part of a test: "Attorneys are required to be truthful at all times, and the cause that an attorney espouses should not be advanced simply because the trial judge finds that the attorney is not lying." (14 C.A.4th 1184.)

(b) The second prong is equally inappropriate. "If the explanation is found 'credible,' the trial court is supposed to then 'consider whether the reasons given for the decision are clearly unreasonable.' ... Presumably, if the trial court determines that a reasonably competent attorney would so conclude, that is the end of the inquiry, and dismissal must be denied. Such total deference to counsel's strategy is unwise, particularly when the result is to deprive trial courts of the ability to run their own calendars." C.R.C., Rule 373(e) (now C.R.C., Rule 3.1342(e); supra, §439) "sets forth in detail the relevant matters to be considered by the court in ruling on dismissal motions. Attorneys' strategy calls are not set forth as a relevant matter." (14 C.A.4th 1184.) (See *Williams v. Los Angeles Unified School Dist.* (1994) 23 C.A.4th 84, 98, 28 C.R.2d 219 [distinguishing *Putnam* and following *Roach*].)

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2. Delay in Service.

d. Prejudice to Defendant.

6 Witkin Cal. Proc. PWT § 448

[§ 448] Prejudice to Defendant.

(1) *Affirmative Showing Is Not Required.* The unexcused failure to serve a summons within the 2-year period prima facie constitutes a sufficient ground for discretionary dismissal. In such a case, there is no requirement for an affirmative showing of prejudice. (*Schumpert v. Tishman Co.* (1988) 198 C.A.3d 598, 605, 243 C.R. 810; *Los Angeles v. Superior Court (Quintero)* (1988) 203 C.A.3d 1205, 1210, 250 C.R. 481; *Hilliard v. Lobley* (1989) 216 C.A.3d 638, 641, 265 C.R. 5; *Scarzella v. DeMers* (1993) 17 C.A.4th 1762, 1768, 22 C.R.2d 329; on lack of necessity to show prejudice in discretionary dismissal cases generally, see *Blank v. Kirwan* (1985) 39 C.3d 311, 332, 216 C.R. 718, 703 P.2d 58 [involving delay in trial].) Nevertheless, prejudice is a factor to be considered by the trial court in the exercise of its discretion in ruling on dismissal. (*Adams v. Roses* (1986) 183 C.A.3d 498, 505, 506, 228 C.R. 339 [prejudice to defendants in medical malpractice action arising from inability to make discovery, interview witnesses, and preserve evidence because of plaintiff's refusal to grant access to medical records]; *Putnam v. Clague* (1992) 3 C.A.4th 542, 563, 5 C.R.2d 25, supra, §447; *Williams v. Los Angeles Unified School Dist.* (1994) 23 C.A.4th 84, 28 C.R.2d 219.)

(2) *Inference of Prejudice.* While there is generally no inference of prejudice to the defendant from delay in bringing the action to trial (see infra, §456), the presumption may arise from a delay in service, because the defendant is frequently unaware of the existence of the action when not served. (*Luti v. Graco* (1985) 170 C.A.3d 228, 231, 215 C.R. 902; on discretionary dismissal for delay in trial, see infra, §451 et seq.)

In *Luti*, an inference of prejudice was sufficient to support the superior court's dismissal of a products liability action, which went unserved for almost 3 years. (170 C.A.3d 230.)

(a) "Cases on the subject may be divided into two broad categories, those where the delay occurred in the service of the complaint and those where service was prompt, but the prosecution slow. Within each of these groupings there has been disagreement as to whether prejudice must be shown and whether there are circumstances in which it may be inferred. There is an important lesson in these cases: an unjustified delay in serving the summons and complaint is accorded less appellate tolerance than one in which service is timely but the case is not diligently pursued. The difference in treatment, although never articulated to our knowledge, makes sense. A defendant who is served has the ability to prepare a defense notwithstanding the plaintiff's inactivity; the same is not generally true of an unserved

defendant." (170 C.A.3d 233.)

(b) "In contrast to the late service cases, courts have declined to infer prejudice where there was timely service of the complaint and only lethargy thereafter. Under this line of authority, unless the defendant demonstrates actual prejudice as a result of the delay, the court exceeds its authority in ordering dismissal of the action." (170 C.A.3d 235.)

(c) *Hurtado v. Statewide Home Loan Co.* (1985) 167 C.A.3d 1019, 213 C.R. 712, took the position that a showing of actual prejudice is required; this conclusion is correct in ordinary cases where the complaint has been promptly served. However, there may be extraordinary circumstances in which the judge is entitled to infer prejudice. (170 C.A.3d 236.) "In our view, a court does not abuse its discretion in presuming prejudice where a delay in service of the summons and complaint is prolonged and unjustified and defendants had no actual knowledge of the existence of the action--in short, the extraordinary circumstances of this case. Here, plaintiff failed to adequately justify a very lengthy delay in service. Defendants were not apprised of this accident for almost four years and were consequently unable to act to defend themselves. A presumption of prejudice under these facts was well within the court's discretion." (170 C.A.3d 238.) (See *Los Angeles v. Superior Court (Quintero)* (1988) 203 C.A.3d 1205, 1210, 250 C.R. 481 [following *Luti*]; *Terzian v. Ventura* (1994) 24 C.A.4th 78, 83, 28 C.R.2d 809 [prejudice presumed from unjustified delay of almost 3 years]; cf. *Cubit v. Ridgecrest Community Hosp.* (1987) 194 C.A.3d 1552, 1572, 240 C.R. 346 [no inference of prejudice where delay was justified].)

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2. Delay in Service.

e. Review.

1. Dismissal Upheld.

6 *Witkin Cal. Proc. PWT* § 449

[§ 449] Dismissal Upheld.

(1) *Dismissal in Accord With Statutory Conditions.* A trial court's exercise of discretion in dismissing for delay in service will be affirmed where it accords with the conditions set forth in *C.C.P. 583.420(a)(1)* (supra, §442) and the criteria prescribed in C.R.C., Rule 3.1342(e) (supra, §439). The following cases are illustrative:

Martin v. K & K Properties (1987) 188 C.A.3d 1559, 1566, 234 C.R. 161 [failure to serve for almost 3 years after cross-complaint was filed; failure to initiate discovery for over 4 years].

Danielson v. ITT Industrial Credit Co. (1988) 199 C.A.3d 645, 655, 660, 245 C.R. 126 [plaintiffs failed to meet burden of showing impracticability or futility].

Los Angeles v. Superior Court (Quintero) (1988) 203 C.A.3d 1205, 1208, 1209, 250 C.R. 481 [delay resulting from discovery proceedings was not excuse].

Trailmobile v. Superior Court (1989) 210 C.A.3d 1451, 1456, 259 C.R. 100 [plaintiff's excuses, lacking in specificity, were insufficient to meet burden].

Roach v. Lewis (1993) 14 C.A.4th 1179, 1185, 18 C.R.2d 281, supra, §447 [excuses of partial settlement, possibility of further complications in plaintiff's injuries, and desire to avoid stress of discovery were insufficient to avoid dismissal].

Scarzella v. DeMers (1993) 17 C.A.4th 1762, 1771, 22 C.R.2d 329 [delay in service of legal malpractice complaint was not excused by pendency of appeal in underlying action; defendant's actual knowledge of complaint was not equivalent to notice provided by service of process].

(2) *Invalid Excuses.* The courts generally reject excuses based on negligence, unilateral mistake, or personal considerations. As the court said in *Caldwell v. Regents of Univ. of Calif.* (1913) 23 C.A. 29, 136 P. 731: "A party bringing an action should be prepared, when he files his complaint, if he is proceeding in good faith, to meet, as far as

he is able to, every requirement which the nature and circumstances of the action and the averments of the complaint call for." (23 C.A. 34.) The following cases are also instructive:

Witter v. Phelps (1912) 163 C. 655, 656, 126 P. 593 [during delay, material witness for defendant died; plaintiff's excuse was his feeling of consideration for defendant's health].

Mori v. Mori (1915) 171 C. 79, 81, 151 P. 1136 [plaintiff, mother of defendant, offered excuse that defendant was being tried for murder and that she did not want to prejudice him].

Anderson v. Nawa (1914) 25 C.A. 151, 143 P. 555 [fact that there were many defendants was not excuse for failing to serve some of them; necessity of investigating facts does not excuse long period of neglect to serve].

Watterson v. Hillside Water Co. (1919) 42 C.A. 364, 367, 183 P. 592 [dismissal upheld despite assertions that plaintiff was waiting for another case to be decided on appeal in order to be advised on law, that one of plaintiff's attorneys had died, and that plaintiff mistakenly believed he had period of mandatory dismissal statute in which to serve].

Bryson v. Harryman (1931) 118 C.A. 588, 591, 5 P.2d 665 [plaintiff's lack of funds to prosecute action; illustrating particularly strict view when action amounts to cloud on title].

Welden v. Davis Auto Exchange (1957) 153 C.A.2d 515, 315 P.2d 33 [delay in serving summons on cross-complaint less than 1 year, but pleading could have been filed more than 2 years before, and record disclosed number of dilatory and obstructionist steps].

Rice v. Arden Farms Co. (1962) 199 C.A.2d 349, 357, 18 C.R. 863 [lower court did not abuse discretion in rejecting plaintiff's excuse of financial inability to proceed by reason of other pending litigation, where defendant's affidavit showed death of material witness].

Clark v. Stabond Corp. (1987) 197 C.A.3d 50, 55, 242 C.R. 676 [defendant was available for service during entire period of delay, plaintiffs failed to pursue discovery diligently, case was relatively simple].

Schumpert v. Tishman Co. (1988) 198 C.A.3d 598, 603, 604, 243 C.R. 810 [plaintiff's attorney admitted that he neglected to examine file for nearly 3 years].

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2. Abuse of Discretion.

6 *Witkin Cal. Proc. PWT* § 450

[§ 450] Abuse of Discretion.

The repeated rejection of the typical plaintiff's excuses for delay (*supra*, §449) means, in practical effect, that an order of dismissal can be successfully challenged for abuse of discretion only where conduct of the defendant has contributed to the delay. A good example is *Ferris v. Wood* (1904) 144 C. 426, 77 P. 1037. Plaintiff sued on a judgment. Service of summons was delayed for over 2 years, at first while plaintiff's attorney was seeking property to attach, and then while plaintiff was engaged in discussing a proposal by defendant to compromise the claim. *Held*, the court abused its discretion in dismissing the action. "It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve, but rather to impede or defeat, the ends of substantial justice." (144 C. 429.) (See *Forneris v. Krell* (1945) 69 C.A.2d 280, 281, 158 P.2d 937; *Ordway v. Arata* (1957) 150 C.A.2d 71, 78, 309 P.2d 919 [probably meritorious action for money lent, close friendship between parties, death of plaintiff husband, illness of attorney].)

Of course, inability to locate a defendant, after a diligent attempt to find and serve him, is a good excuse. (*Fox Woodsum Lumber Co. v. Janes* (1946) 76 C.A.2d 748, 752, 173 P.2d 854.)

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3. Delay in Trial.

a. In General.

6 *Witkin Cal. Proc. PWT* § 451

[§ 451] In General.

(1) *Statutory Requirement.* The Law Revision Commission criticized the former statute's 2-year period as allowing dismissal for failure to bring the action to trial when the 3-year period for mandatory dismissal for service had not expired, and added: "The two-year trial period is also unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits." (17 Cal. Law Rev. Com. Reports, p. 915.)

Thus, *C.C.P. 583.420(a)(2)* specifies a general 3-year period, but authorizes the Judicial Council to provide by rule for a 2-year period.

(2) *Judicial Council Rule: 2-Year Period.* C.R.C., Rule 3.1340 authorizes the court, on its own motion or on motion of the defendant, to dismiss an action for delay in prosecution if the action is not brought to trial or "conditionally settled" within 2 years after it is commenced. "Conditionally settled" means that (a) a settlement agreement conditions dismissal on terms that are not to be fully performed within 2 years after the case is filed, and (b) notice of the settlement has been filed pursuant to C.R.C., Rule 3.1385. (C.R.C., Rule 3.1340(c).)

(3) *Applicable Criteria.* The court must exercise its discretion in accordance with the criteria set forth in C.R.C., Rule 3.1342(e). (See *supra*, §439.)

(4) *Extensions, Exceptions, and Excuses.* The statutory excuses for avoiding mandatory dismissal for delay in trial are applicable to discretionary dismissal on this ground. (See *C.C.P. 583.420(b)*, *supra*, §441.)

(5) *Local Rules.* Additional time requirements for bringing the action to trial may be imposed by "fast track" case management rules. (See *Govt.C. 68600* et seq. [Trial Court Delay Reduction Act]; on fast track rules generally, see 2 *Cal. Proc. (5th), Courts*, §257 et seq.)

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b. Excuse for Delay.

1. Former Rule: Dismissal Required Absent Adequate Showing.

6 *Witkin Cal. Proc. PWT* § 452

[§ 452] Former Rule: Dismissal Required Absent Adequate Showing.

In the early stages of application of the discretionary dismissal statute, orders granting dismissal were often reversed, pursuant to the policy favoring trial on the merits. Later, the appellate courts began to emphasize the policy of preventing unreasonable delay in litigation, and the duty of the trial judge to carry out this policy. As a result, "discretionary" dismissal took on a mandatory character when the plaintiff failed to make a sufficient showing of excuse, and mandamus issued to compel dismissal.

Black Bros. Co. v. Superior Court (1968) 265 C.A.2d 501, 71 C.R. 344, was a landmark decision using this strict approach. Plaintiff employee was injured by a negligently manufactured product of defendant, a foreign corporation. The injury occurred on January 24, 1964. A workers' compensation claim resulted in an award on December 24, 1965. Meanwhile, on January 22, 1965, plaintiff filed the present action against defendant third-party tortfeasor. An order for service was obtained on January 8, 1968, and service was made by mail to Illinois on January 9, 1968. On March 26, 1968, defendant moved for dismissal under former C.C.P. 583(a), giving the court discretionary authority to dismiss an action not brought to trial within 2 years, and the motion was denied. *Held*, mandamus granted to compel dismissal. Plaintiff, having neglected to serve the summons for nearly 3 years, had failed to use diligence; the pendency of workers' compensation proceedings was not an excuse, for he could have served summons and then sought a continuance; and dismissal could be ordered under the 2-year period even though the mandatory 3-year period for service under former C.C.P. 581a had not expired. (265 C.A.2d 506, 509, 510.)

Later cases characterized the holding as follows: "Even though a motion to dismiss for lack of prosecution is made within the discretionary (two to five year) period, it must be granted unless opposed by an adequate showing of diligence or excuse for delay. Absent such showing, counsel cannot remain idle and hope for a grant of leniency which is beyond the court's power." (*Market-Front Co. v. Superior Court* (1969) 271 C.A.2d 505, 507, 76 C.R. 526; see *Paul W. Speer v. Superior Court* (1969) 272 C.A.2d 32, 37, 77 C.R. 152.)

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2. Current Rule: Discretion of Trial Court.

6 *Witkin Cal. Proc. PWT* § 453

[§ 453] Current Rule: Discretion of Trial Court.

"Mandatory" discretion was abandoned, and the rule of *Black Bros. Co. v. Superior Court* (1968) 265 C.A.2d 501, 71 C.R. 344, supra, §452, was repudiated in *Denham v. Superior Court* (1970) 2 C.3d 557, 86 C.R. 65, 468 P.2d 193. Plaintiffs filed an action against various defendants in June 1964. In April 1969, a motion to dismiss under former C.C.P. 583(a) was made and denied. The showing of excuse by plaintiffs, other than a recital of the usual procedures of demurrer and discovery, was that the law firm representing them had gone through basic changes: One member had been appointed a municipal court commissioner and another had been appointed to the municipal bench. The entire burden of a busy office then fell on an elderly member of the firm who relied on a mistaken oral statement of the appointed judge that a memorandum to set had been filed. *Held*, mandamus denied; the trial judge did not abuse his discretion in refusing to dismiss.

(a) "The statute places no restrictions on the exercise of the trial court's discretion, and in particular there is no requirement that the motion to dismiss 'must' be granted unless opposed by an adequate showing of diligence or excuse for delay." (2 C.3d 563.) Contrary expressions in *Black Bros.*, *Market-Front Co. v. Superior Court* (1969) 271 C.A.2d 505, 76 C.R. 526, *Paul W. Speer v. Superior Court* (1969) 272 C.A.2d 32, 77 C.R. 152, and similar cases are disapproved. (2 C.3d 563.)

(b) "The exercise of the trial court's discretion will be disturbed only for clear abuse ... ; and if there is any basis upon which its action can be sustained, and it appears that no injustice will result therefrom, a refusal to dismiss should be upheld. ... It is only when there is an entire absence of any showing constituting good cause ... that a writ of mandate to compel the dismissal of the action may properly issue." (2 C.3d 564.)

(c) The affidavit filed by plaintiffs' attorney did not contain any facts showing an excuse, and there was no reporter at the hearing on the motion to dismiss. However, intendments are indulged in favor of an order, and it was therefore presumed, as alleged in the points and authorities in opposition to the petition for mandamus, that plaintiffs' present attorney informed the lower court of the facts recited above. (2 C.3d 564, quoting the text.)

(d) The final argument of defendants, that plaintiffs should have taken steps to obtain an accelerated trial date, was unconvincing. The lower court was presumably aware of the state of its own calendar, and with more than 18,000 civil cases awaiting trial setting in Los Angeles County at that time, it would have been useless for plaintiffs to make such an effort. (2 C.3d 566.)

The *Denham* approach was followed in later decisions. (See *Martindale v. Superior Court* (1970) 2 C.3d 568, 573, 86 C.R. 71, 468 P.2d 199; *Rathbun v. Superior Court* (1970) 8 C.A.3d 690, 695, 87 C.R. 568; *Applegate Drayage Co. v. Municipal Court* (1972) 23 C.A.3d 628, 632, 100 C.R. 400; *Maggio v. United Farm Workers* (1991) 227 C.A.3d 847, 884, 278 C.R. 250, 3 Summary (10th), *Agency and Employment*, §655.)

In *Woolfson v. Personal Travel Service* (1971) 3 C.3d 909, 92 C.R. 286, 479 P.2d 646, the motion to dismiss was made 3 years and 3 months after the complaint was filed, and the record showed 17 months of total inactivity. The excuses offered by plaintiff's attorney were (a) inability to consult with his client, who had gone to England to act as executor of his father's estate, and (b) preoccupation with two trials during the last few months of the statutory period. (3 C.3d 912, footnote 2.) The motion was heard before the *Denham* decision, and the trial judge's remarks made it clear that he felt compelled to grant the motion under the rule of *Black Bros. Held*, reversed. *Denham* and *Martindale* "called an abrupt halt to the line of Court of Appeal decisions" relied on; and, in view of the showing of excuse, dismissal was not compelled, and could only be ordered as an exercise of discretion. If the judge had exercised his discretion, the order might have been upheld; but the record showed that he followed the now repudiated rule of mandatory dismissal. (3 C.3d 912.)

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3. Necessity for Some Showing.

6 *Witkin Cal. Proc. PWT* § 454

[§ 454] Necessity for Some Showing.

Despite the decisions in *Denham v. Superior Court* (1970) 2 C.3d 557, 86 C.R. 65, 468 P.2d 193, and the cases following it (supra, §453), there remains an area in which dismissal is the only appropriate course, and denial of the motion is an abuse of discretion.

In *Dunsmuir Masonic Temple v. Superior Court* (1970) 12 C.A.3d 17, 90 C.R. 405, plaintiff allegedly suffered personal injuries in February 1966. Her action was filed in February 1967, and summons was served just 3 days short of the 3-year period. The motion to dismiss was promptly filed, and the only showing in opposition was that plaintiff had been physically incapacitated after the accident. The trial judge, with reluctance, denied the motion. *Held*, mandamus granted to compel dismissal; illness of a party at all times represented by counsel, with no difficulty of communication, was no excuse.

(a) "The distinction appears to be the difference between an *adequate* showing and *any* showing. Although *Denham* removes from the plaintiff any *burden* to show good cause for delay, it does not remove plaintiff's obligation to make *some showing of good cause* before the court, upon which the court may exercise its discretion. We construe that to mean that the trial court may not act arbitrarily and deny the motion when plaintiff has made no relevant showing whatever. There must be *something* upon which a discretion can rest." (12 C.A.3d 21.)

(b) "The proposition that justice is generally better served when cases are heard on their merits is tritely true. But there are also instances where justice will be better served by dismissal, and this is such a situation. The action has remained in a status of unexplained stagnancy for more than three years. Dismissal will result in the removal of a case from an overcrowded list of pending cases. If it has no merit dismissal will do no harm and will serve as a warning that the processes of the law must not be abused by allowing the courts to become warehouses for frivolous lawsuits. If, on the contrary, the action is meritorious, plaintiff will still be left with an appropriate remedy against her attorney." (12 C.A.3d 22.) (See *D'Hondt v. Regents of Univ. of Calif.* (1984) 153 C.A.3d 723, 732, 200 C.R. 628, *infra*, §457; *Kidd v. Kopald* (1994) 31 C.A.4th 132, 140, 36 C.R.2d 875, *infra*, §468 [agreement for open extension of time to respond did not preclude dismissal where extension was not requested until almost 2 years after complaint was filed, was revoked

by filing of demurrer, and was intended in part to give plaintiff's attorney more time to review documents]; *Oskooi v. Fountain Valley Regional Hosp. & Med. Center* (1996) 42 C.A.4th 233, 49 C.R.2d 769 [plaintiff's lack of economic resources and awaiting outcome of other actions were not sufficient excuses for failure to prosecute].)

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4. Attorney's Neglect Imputed to Client.

6 *Witkin Cal. Proc. PWT* § 455

[§ 455] Attorney's Neglect Imputed to Client.

In *Freedman v. Pacific Gas & Elec. Co.* (1987) 196 C.A.3d 696, 242 C.R. 8, plaintiff oil brokers sued several defendants for commissions allegedly due under agreements. The litigation was delayed for years, partly as a result of problems encountered by S, plaintiffs' attorney, involving discipline and criminal charges. S resigned from the State Bar, other counsel were substituted, and defendants moved for discretionary dismissal 4 years and 7 months after commencement of the action. *Held*, order of dismissal affirmed; there was no abuse of discretion.

(a) The key question is whether plaintiffs should be charged with S's delay in moving the case to trial. The governing case is *Carroll v. Abbott Laboratories* (1982) 32 C.3d 892, 187 C.R. 592, 654 P.2d 775, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §172, dealing with a motion under C.C.P. 473. "Because relief from default depends on the party being able to show excusable neglect and implicates the same opposing policies of encouraging diligence yet having cases resolved on their merits, the reasoning of those cases is generally applicable to dismissal-for-delay cases." (196 C.A.3d 705.) *Carroll*, reviewing prior decisions, stated the rule that an attorney's inexcusable neglect is chargeable to the client, and the narrow exception where there was a total failure on the part of counsel to represent the client. (196 C.A.3d 705, 706.)

(b) The trial court found, on sufficient evidence, that the exception did not apply here. S filed the original complaint, resisted demurrers and motions to strike, filed four amended complaints, and served all defendants within a year of commencing the action; also he met frequently with plaintiffs during the course of the relationship, initiated some discovery, and participated in settlement negotiations. "The record shows procrastination and delay, but not a severing of the attorney-client relationship." (196 C.A.3d 707.) (Cf. *Fleming v. Gallegos* (1994) 23 C.A.4th 68, 72, 28 C.R.2d 350 [failure of two different attorneys to act constituted abandonment, and could not be imputed to client who was not herself negligent in prosecuting action; following *Daley v. Butte* (1964) 227 C.A.2d 380, 38 C.R. 693, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §171].)

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c. Prejudice to Defendant.

6 *Witkin Cal. Proc. PWT* § 456

[§ 456] Prejudice to Defendant.

(1) *No Requirement That Prejudice Be Shown.* No showing of prejudice to the defendant is required to support a discretionary dismissal. Discretionary dismissal is designed not merely to remedy prejudice to the defendant, but also "to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence." (*Blank v. Kirwan* (1985) 39 C.3d 311, 332, 216 C.R. 718, 703 P.2d 58; see *San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen* (1985) 175 C.A.3d 1050, 1054, 221 C.R. 342; *Longshore v. Pine* (1986) 176 C.A.3d 731, 736, 222 C.R. 364 ["under the rule affirmed in *Blank* there was no requirement that the defendant here make a showing of prejudice before the action could be dismissed for delay in prosecution"]; *Freedman v. Pacific Gas & Elec. Co.* (1987) 196 C.A.3d 696, 704, 711, 242 C.R. 8, *supra*, §455; *Wong v. Davidian* (1988) 206 C.A.3d 264, 269, 270, 253 C.R. 675; *Dubois v. Corroon & Black Corp.* (1993) 12 C.A.4th 1689, 1699, 16 C.R.2d 719.) (On cases prior to *Blank* that required showing of prejudice, see *Los Angeles v. Gleneagle Dev. Co.* (1976) 62 C.A.3d 543, 133 C.R. 212, *infra*, §463; *Hurtado v. Statewide Home Loan Co.* (1985) 167 C.A.3d 1019, 213 C.R. 712; *Troupe v. Courtney* (1985) 169 C.A.3d 930, 933, 215 C.R. 703.)

Nevertheless, prejudice is a factor to be considered by the trial court in the exercise of its discretion in ruling on dismissal. (*Rim Forest Lumber Co. v. Woodside Const. Co.* (1987) 190 C.A.3d 454, 464, 235 C.R. 443; *Freedman v. Pacific Gas & Elec. Co.*, *supra*, 196 C.A.3d 711.)

(2) *No Inference of Prejudice.* There is generally no inference of prejudice to the defendant from delay in bringing the action to trial. (*Luti v. Graco* (1985) 170 C.A.3d 228, 235, 215 C.R. 902, *supra*, §448 [dictum]; *Cordova v. Vons Grocery Co.* (1987) 196 C.A.3d 1526, 242 C.R. 605.) The presumption may arise, however, from a delay in service. (See *supra*, §448.)

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d. Effect of Judicial Arbitration.

6 *Witkin Cal. Proc. PWT* § 457

[§ 457] Effect of Judicial Arbitration.

Diversion of the action to judicial arbitration does not excuse the plaintiff from the duty of reasonable diligence. In *D'Hondt v. Regents of Univ. of Calif.* (1984) 153 C.A.3d 723, 200 C.R. 628, plaintiff filed a malpractice suit against defendants. Over 3 years later, the trial court found that the amount in controversy did not exceed the prescribed amount mandating judicial arbitration and ordered arbitration under former C.R.C., Rule 1601 et seq. (now C.R.C., Rule 3.811 et seq.; *infra*, §§583, 586). Two years later, the arbitration was still not concluded, and defendant moved to dismiss. *Held*, order of dismissal affirmed.

(a) Plaintiff relied on the tolling provisions of *C.C.P. 1141.17* and former C.R.C., Rule 1601(d) (*supra*, §413). These provisions were construed in *Crawford v. Hoffman* (1982) 132 C.A.3d 1015, 183 C.R. 599, and *Moran v. Superior Court* (1983) 35 C.3d 229, 197 C.R. 546, 673 P.2d 216, *supra*, §415, to preclude dismissal under the 5-year period (*supra*, §413), and their effect on the 2-year period was not considered. (153 C.A.3d 729.)

(b) Even though mandatory dismissal under the 5-year statute would have been improper here, there is nothing in the tolling provisions to prevent the trial court from exercising its discretion under the 2-year statute. (153 C.A.3d 730.)

(c) Plaintiff made no showing of diligence or excuse for the delay of 2 years and 8 months while the arbitration proceeding was pending; his attorney failed to respond to communications from defense counsel, and continued the arbitration hearing three times, without setting a new date after the third continuance. (153 C.A.3d 731.)

(d) Although some cases have rejected the presumption of prejudice from delay alone, in a case such as this, when almost 7 years have passed from the time of the alleged negligence, "it was reasonable for the trial court to conclude that the defendants were prejudiced by the passage of time." (153 C.A.3d 732.) (See *Howard v. Thrifty Drug & Discount Stores* (1995) 10 C.4th 424, 438, 41 C.R.2d 362, 895 P.2d 469, *supra*, §416 [discretionary dismissal upheld]; *Nanfito v. Superior Court* (1991) 2 C.A.4th 315, 319, 2 C.R.2d 876 ["Where the arbitration is of this type, the matter is only on a sabbatical from the courthouse and the superior court retains full jurisdiction to dismiss for lack of diligent prosecution"].)

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e. Effect of Trial Preference.

6 *Witkin Cal. Proc. PWT* § 458

[§ 458] Effect of Trial Preference.

In *Landry v. Berryessa Union School Dist.* (1995) 39 C.A.4th 691, 46 C.R.2d 119, a tort action brought by two minors against a school district, plaintiffs moved to advance the trial setting date, asserting that they were minors under age 14 entitled to mandatory trial preference under C.C.P. 36(b) (see 7 Cal. Proc. (5th), Trial, §70). Defendant responded by filing a motion for discretionary dismissal pursuant to C.C.P. 583.410 and 583.420(a)(2), asserting that plaintiffs had failed to exercise diligence in bringing the case to trial. The trial judge denied plaintiffs' motion to advance, granted defendant's motion to dismiss, and denied plaintiffs' motion for reconsideration. *Held*, affirmed; plaintiffs' trial preference did not divest the trial judge of the discretion to dismiss. C.C.P. 36(b) is mandatory; thus, the trial court does not have discretion to deny trial preference to a party under 14 who has a substantial interest in the litigation. However, this rule was never intended to eviscerate the discretionary dismissal provisions of C.C.P. 583.410 et seq. (39 C.A.4th 696.) The underlying assumption behind C.C.P. 36 is that the plaintiff has diligently engaged in preparation for trial or settlement. In those circumstances, the plaintiff is entitled to priority based on age. Where the plaintiff has been dilatory in efforts to move the case along, however, the trial judge retains jurisdiction to dismiss the action under C.C.P. 583.410 et seq. (39 C.A.4th 697.)

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f. Effect of Trial Setting.

6 *Witkin Cal. Proc. PWT* § 459

[§ 459] Effect of Trial Setting.

In *Lopez v. California* (1996) 49 C.A.4th 1292, 57 C.R.2d 266, plaintiffs brought a wrongful death action against the state in 1990 but had not "seriously advanced the case" toward trial over the next 4 1/2 years. The trial judge in August 1994 set a trial date (see 7 *Cal. Proc.* (5th), *Trial*, §§54, 55) and then in November 1994 granted the state's motion to dismiss for failure to prosecute. *Held*, affirmed; the fact that the trial judge set a trial date was immaterial. Given the current legislative mandate for expeditious case management, trial judges routinely set matters for trial without regard to issues such as a motion to dismiss for failure to prosecute. The Legislature has charged the courts with actively managing cases and moving calendars along. The fast track rules implementing the legislative mandate also direct trial judges to process these matters expeditiously. (49 C.A.4th 1296.) Trial judges, in accordance with the legislative purpose, routinely set matters as quickly as their calendars and good management allow. At these routine hearings, judges cannot be expected to process extraneous matters. The question whether a case meets the criteria for dismissal is simply not before the trial judge unless brought expressly to the judge's attention. While the trial judge does possess the power to dismiss on the court's own motion, the existence of the power does not force the judge to exercise it at any particular time; nor does it mean that the judge must address the issue at routine case management conferences. "We are unwilling to promulgate a rule which would put this additional burden on trial court judges." (49 C.A.4th 1297.)

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g. Review.

1. Dismissal Upheld.

aa. Earlier Decisions.

6 *Witkin Cal. Proc. PWT* § 460

[§ 460] Earlier Decisions.

The following decisions, decided before the adoption of criteria for exercising discretion (*supra*, §439), illustrate the wide range of situations in which the delay was found to be unjustified:

Hayashi v. Lorenz (1954) 42 C.2d 848, 852, 271 P.2d 18 [awaiting resolution in other action provided no excuse].

Barry v. Learner (1931) 113 C.A. 651, 656, 299 P. 82 [neither sickness nor death of attorney is excuse].

Vogel v. Marsh (1932) 122 C.A. 748, 749, 10 P.2d 791 [plaintiff's assertions that case "had been in the hands of numerous attorneys who ... in some manner conspired to defraud him"].

Bell v. American States Water Service Co. of Calif. (1935) 10 C.A.2d 604, 606, 52 P.2d 503 [no excuses for failure to bring condemnation action to trial].

Sedarovich v. Paul (1936) 16 C.A.2d 452, 60 P.2d 871 [stipulation to set case for trial "on or after" certain date was material only on question of diligence].

Smith v. Wiget (1946) 75 C.A.2d 591, 593, 171 P.2d 563 [plaintiff's contention that he timely brought matters to attention of trial court was not supported by record].

Perrin v. Resleure (1946) 77 C.A.2d 408, 410, 175 P.2d 281 [one attorney entered military and other was ill; record did not show that absence of attorneys prevented prosecution of action].

Simonini v. Jay Dee Leather Products Co. (1948) 85 C.A.2d 265, 268, 193 P.2d 53 [dismissal following eight continuances by plaintiff].

Hillsdale Builders Supply Co. v. Eichler (1952) 109 C.A.2d 117, 118, 240 P.2d 343 [only excuse for delay was that

plaintiff's counsel was engaged in research to determine liability of other corporate defendants].

Knight v. Pacific Gas & Elec. Co. (1960) 178 C.A.2d 923, 933, 3 C.R. 600 [delay of 3 years and 3 months caused by counsel for plaintiffs seeking and receiving continuances, dropping matter from calendar, and failing to meet pretrial dates; excuse of press of business and other trial commitments was rejected].

Abner Corp. v. Lushing (1963) 212 C.A.2d 597, 606, 28 C.R. 207 [defendant filed demurrer and motion was granted to transfer action, but plaintiff, for more than 3 years, took no action to have demurrer decided].

Price v. Grayson (1969) 276 C.A.2d 50, 52, 80 C.R. 602 [over 4-year delay; only excuses were pressure of business and office confusion].

Monroy v. Roman Catholic Archbishop of Los Angeles (1969) 276 C.A.2d 492, 81 C.R. 130, is an extreme example. The trial was delayed for 4 years and 2 months, but the record clearly showed that the initial delays were caused by defendant. Plaintiff contended that "since defendant procrastinated during the earlier years of the case, she was entitled to do the same during its later years." The court rejected this argument and affirmed the order of dismissal. (276 C.A.2d 495.)

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1. Dismissal Upheld.

bb. Later Decisions.

6 *Witkin Cal. Proc. PWT* § 461

[§ 461] Later Decisions.

The following decisions, decided after the adoption of criteria for exercising discretion (*supra*, §439), exhibit a similar variety of situations as those decided before adoption of criteria (*supra*, §460):

Farrar v. McCormick (1972) 25 C.A.3d 701, 704, 102 C.R. 190 [delay of nearly 5 years in bringing case to trial, inaction for 13 months prior to motion to specially set case for trial].

Moore v. El Camino Hosp. Dist. (1978) 78 C.A.3d 661, 664, 144 C.R. 314 [delay of 4 years, 7 months; no opposition to motion except unsworn statement by counsel that attorney who had case had left firm "and it was our belief" that he took it with him].

Brown v. Pacific Tel. & Tel. Co. (1980) 105 C.A.3d 482, 487, 164 C.R. 445 [neither plan to gather medical information with view toward settlement nor absence of associate in law firm for extended time were adequate justification for delay].

Kunzler v. Karde (1980) 109 C.A.3d 683, 688, 167 C.R. 425 ["only showing of good cause was plaintiff's counsel's allegations that he mistakenly believed an at issue memorandum had been filed during an office relocation" and this was insufficient to show that court abused its discretion].

Marra v. Mission Foods Corp. (1993) 19 C.A.4th 724, 727, 23 C.R.2d 741 [plaintiff's open extension of time for defendant to respond to complaint did not estop defendant from seeking dismissal where extension was for plaintiff's benefit].

Tustin Plaza Partnership v. Wehage (1994) 27 C.A.4th 1557, 1563, 33 C.R.2d 366 [dismissal was proper where delay before and after service was unjustified; neglect by counsel not amounting to positive misconduct does not excuse failure to prosecute].

Graham v. Beers (1994) 30 C.A.4th 1656, 1660, 36 C.R.2d 765 [dismissal was proper where counsel assumed matter would settle and made conscious decision to put case "on the back burner"].

Landry v. Berryessa Union School Dist. (1995) 39 C.A.4th 691, 698, 46 C.R.2d 119, supra, §458 [showing of ongoing settlement negotiations failed to establish excusable delay where plaintiffs allowed 71/2 months to go by without activity on case, and settlement discussion on which plaintiffs claimed reliance did not commence until after 11-month delay].

Lopez v. California (1996) 49 C.A.4th 1292, 1294, 57 C.R.2d 266, supra, §459 [dismissal was proper where plaintiffs had not seriously advanced case toward trial during 4-plus years between filing of complaint and motion to dismiss, and no excuse was shown for lack of activity].

The discretionary denial of an earlier motion to dismiss is not a determination that delay up to that time was justified. Hence, on a later motion, the court may consider both the previous delay and subsequent delay as part of the total picture of plaintiff's lack of diligence. (*Feingersh v. Lutheran Hosp. Soc.* (1977) 66 C.A.3d 406, 410, 412, 136 C.R. 155.) (See *Lopez v. Larson* (1979) 91 C.A.3d 383, 396, 399, 404, 153 C.R. 912 [even "assuming the trial court originally concluded that good cause was shown for the delay, it was not bound by its earlier conclusions when it granted the motion for reconsideration"].)

In *Corlett v. Gordon* (1980) 106 C.A.3d 1005, 1014, 165 C.R. 524, plaintiffs contended that small firms have a lesser capacity to observe the time limits, and that to impose exacting requirements on them would compel them to restrict their caseloads and deprive members of the public of economical representation. The court emphatically rejected the notion that small firms are to be judged by a different standard than large firms. "Every attorney, whether he is a sole practitioner, a member of a large firm or a member of a small firm, and regardless of the extent of his legal experience, owes an obligation--not only to his client but also the court and the justice system--not to undertake legal representation in matters unless he has adequate time to pursue the matter with reasonable diligence." (106 C.A.3d 1014.) The court distinguished the situation where particular circumstances (such as those in *Denham v. Superior Court* (1970) 2 C.3d 557, 86 C.R. 65, 468 P.2d 193, supra, §453) constituted cause for delay. (106 C.A.3d 1014, 1015.) (See *Farrant v. Casas de la Senda Homeowners Assn.* (1985) 170 C.A.3d 221, 226, 216 C.R. 27 ["sole practitioners and small firms should not be judged by standards different from those for larger law firms"; following *Corlett*].)

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aa. Earlier Decisions.

6 *Witkin Cal. Proc. PWT* § 462

[§ 462] Earlier Decisions.

In *Jepsen v. Sherry* (1950) 99 C.A.2d 119, 220 P.2d 819, 822, the court cautioned against an arbitrary practice of dismissal in all cases of delay amounting to 2 years. (99 C.A.2d 120.) "In most of the cases where such a dismissal has been sustained either nothing was done by the plaintiff or no valid excuse for the delay was shown, and no unusual circumstances appeared. Unreasonable delay in litigation should be avoided, but all the circumstances should be carefully considered before a plaintiff is denied relief without a hearing. While it appears here, technically, that more than two years had elapsed before the trial date and that some of the delay was probably unnecessary, the excuse for the delay is not entirely unreasonable and there are other considerations which should not be overlooked." (99 C.A.2d 122.)

These considerations, which led the court to reverse the order of dismissal, were (a) much delay was caused by negotiations for a settlement; (b) more was caused by defendants' four demurrers, three of which were never heard, and by their demand for a jury trial; (c) further delay was caused by the congested calendar; (d) the defendants admitted liability in a substantial amount; (e) the main defendant was a judge of the same court. (99 C.A.2d 123.) (See *Wilson v. Barry* (1953) 119 C.A.2d 621, 625, 259 P.2d 991 [pendency of appeal made it impracticable to bring cause to trial]; *Daley v. Butte* (1964) 227 C.A.2d 380, 392, 38 C.R. 693, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §171; *Fay v. Mundy* (1966) 246 C.A.2d 231, 54 C.R. 591; *Contract Engineers v. Welborn* (1968) 258 C.A.2d 553, 558, 65 C.R. 903; *Brown v. Superior Court* (1970) 7 C.A.3d 366, 369, 86 C.R. 670.)

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bb. Later Decisions.

6 *Witkin Cal. Proc. PWT* § 463

[§ 463] Later Decisions.

Los Angeles v. Gleneagle Dev. Co. (1976) 62 C.A.3d 543, 133 C.R. 212, reviewed the case law and gave former C.R.C., Rule 373 (now C.R.C., Rule 3.1342; *supra*, §439) a liberal construction in determining whether the trial court had abused its discretion. In December 1970, plaintiff city filed a breach of contract action against defendant G and S, its surety. Discovery was instituted on both sides, and at-issue memoranda were filed by both parties in February 1974. In March 1975, plaintiff had not yet received a notice of eligibility to file a certificate of readiness, and on April 3, 1975, it filed a motion to set an early trial date. G and S moved to dismiss. On April 21, 1975, the motion for an early trial date was denied without prejudice on the ground that the notice of eligibility would be forthcoming shortly, and it was received on April 30, 1975. Plaintiff sought a continuance on that date. The court denied the motion for continuance and granted the motions to dismiss by a minute order with no explanation of the grounds. On June 23, 1975, the city filed a motion under C.C.P. 473 for reconsideration of the motions to dismiss. The court denied relief in a brief order stating that the showing was inadequate because there was no activity in the case from October 1972, to January 1975, and the at-issue memorandum was not filed until February 1974. Plaintiff appealed from the order of dismissal. *Held*, order reversed as to defendant G, but affirmed as to S.

(a) *Policy favoring litigation on merits.* (1) The court rule (now C.R.C., Rule 3.1342) sets forth the facts that *must* be considered before a trial court may invoke its discretionary dismissal authority for delay in trial. *Denham v. Superior Court* (1970) 2 C.3d 557, 86 C.R. 65, 468 P.2d 193, *supra*, §453, disapproved *Black Bros. Co. v. Superior Court* (1968) 265 C.A.2d 501, 71 C.R. 344, and following cases, *supra*, §452, and was followed in *Woolfson v. Personal Travel Service* (1971) 3 C.3d 909, 92 C.R. 286, 479 P.2d 646, *supra*, §453. *Denham* and *Woolfson* make it clear that the policy underlying the dismissal statute is less powerful than the policy favoring litigation on the merits. (62 C.A.3d 556, 557.) (2) The delays in *Denham* and *Woolfson* were caused by law office practice difficulties; and the "acceptance of, or sympathy toward, these excuses by the Supreme Court indicates a trend toward more leniency than was apparent in older cases where neither the sickness or death of the attorney ... , nor the press of business, or a heavy trial schedule ... were considered an adequate excuse for delay." (62 C.A.3d 557.)

(b) *Dunsmuir distinguished*. In *Dunsmuir Masonic Temple v. Superior Court* (1970) 12 C.A.3d 17, 90 C.R. 405, supra, §454, illness of the client was held not to excuse dilatory conduct of her attorney, and an alternative remedy was available to the client. Here, negligence of attorneys representing the city does not give the client--the city and its taxpayers--a like remedy. (62 C.A.3d 560.)

(c) *Discretion of judge and review on appeal*. A reviewing court should not disturb the exercise of discretion unless there has been a miscarriage of justice. (62 C.A.3d 560.) However, an order denying relief is subject to closer appellate scrutiny than one granting relief. (62 C.A.3d 561.) Discretion must not be arbitrary, and if circumstances indicate a reasonable excuse for delay, dismissal will be reversed. (62 C.A.3d 561.)

(d) *Plaintiff's sufficient showing of excuse*. Plaintiff showed that its office was seriously understaffed, that the case had been handled by a number of different attorneys, and that it had a heavy caseload. "This meets the criterion of *Dunsmuir*, requiring plaintiff to make some showing for his delay; and it is no poorer or better an excuse than offered by plaintiffs in the *Denham* case." (62 C.A.3d 562.)

(e) *No showing of actual prejudice to defendants*. Defendants rely on a "presumption of prejudice"; in February, 1974, they made no claim of surprise or lost witnesses, and offered no objection to moving the case forward. (62 C.A.3d 562.) They did not move to dismiss until nearly 14 months thereafter, and then only after plaintiff had moved for an early trial date. Former C.R.C., Rule 373(a) (now C.R.C., Rule 3.1342(a)) imposes a 45-day notice period to allow the plaintiff to move the case to trial, and plaintiffs had already attempted to do so when the motions were made. (62 C.A.3d 563.) The "presumption of prejudice" is of questionable validity under the rule. "The penalty of dismissal against a dilatory plaintiff should be exercised with the utmost care; and where it appears that the plaintiff has a good cause of action, that plaintiff has made some showing of excuse for delay; and where defendant does not claim actual prejudice and has waited until the last possible moment to file a motion to dismiss, the ends of substantial justice are best met by a preference for the policy of favoring trials on the merits as contrasted with that policy which favors presumptions of prejudice." (62 C.A.3d 563.)

(f) *Condition of trial court's calendar*. Plaintiff's motion for an early trial date was denied without prejudice, on the ground that a notice of eligibility to file a certificate of readiness would be forthcoming shortly; this is indicative of the crowded state of the court's calendar, a factor not considered by the trial court. (62 C.A.3d 564.)

(g) *Conclusion as to G*. This defendant, in filing its own at-issue memorandum, was estopped from relying on the previous delay; and plaintiff then properly relied on the processes of the trial court to assign a trial date until it became apparent that the trial court was delaying, and then sought by its motion for an early trial to bring the case to a conclusion. (62 C.A.3d 564.)

(h) *Conclusion as to S*. This defendant did not file an at-issue memorandum and took no affirmative action to indicate willingness to go to trial, but did what it was entitled to do--wait out plaintiff's procedures. As to this defendant there was no abuse of discretion. (62 C.A.3d 564.)

The liberal approach of *Gleneagle* has been followed in a number of later cases. (See *United Farm Workers National Union v. International Brotherhood of Teamsters* (1978) 87 C.A.3d 225, 234, 236, 237, 150 C.R. 761; *Garza v. Delano Union Elementary School Dist.* (1980) 110 C.A.3d 303, 311, 167 C.R. 629; *Tannatt v. Joblin* (1982) 130 C.A.3d 1063, 1066, 182 C.R. 112 [record showed lack of careful consideration of Rule]; *Visco v. Abatti* (1983) 144 C.A.3d 904, 908, 192 C.R. 833; *Pomona Fed. Plaza, Ltd. v. Investment Concepts* (1988) 203 C.A.3d 217, 221, 222, 249 C.R. 757 [plaintiffs' delay to allow other parties to complete discovery was reasonable].)

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4. Delay in New Trial.

6 *Witkin Cal. Proc. PWT* § 464

[§ 464] Delay in New Trial.

(1) *Former Law.* Former C.C.P. 583(c) and (d) authorized mandatory dismissal for delay in a new trial, but contained no provision for discretionary dismissal where the delay did not amount to 3 years. However, the inherent power of the court to dismiss for lesser delay was upheld. (See *Inderbitzen v. Lane Hosp.* (1936) 17 C.A.2d 103, 105, 61 P.2d 514 [action not tried for 4 years after filing, and dismissed for failure to bring to trial 2 years and 10 months after remittitur]; *Phillips v. Santa Ana Times* (1936) 18 C.A.2d 280, 63 P.2d 838; *Cameron v. Cameron* (1952) 110 C.A.2d 258, 260, 242 P.2d 408 [nearly 21½ years]; *Blue Chip Enterprises v. Brentwood Savings & Loan Assn.* (1977) 71 C.A.3d 706, 712, 139 C.R. 651; on mandatory dismissal for delay in new trial, see *supra*, §428 et seq.)

(2) *Current Statute.* The trial court may dismiss an action in its discretion within 2 years after the following events:

(a) A court order is entered declaring a mistrial or the jury's disagreement. (C.C.P. 583.420(a)(3)(A).)

(b) An order is entered granting a new trial, if after judgment no appeal is taken. (C.C.P. 583.420(a)(3)(B).)

(c) Remittitur is filed by the clerk of the trial court affirming the granting of a new trial or ordering a new trial after reversing a judgment. (C.C.P. 583.420(a)(3)(C).)

The court must exercise its discretion in accordance with the criteria set forth in C.R.C., Rule 3.1342(e). (See *supra*, §439.)

The statutory excuses for avoiding mandatory dismissal for delay in retrial are applicable to discretionary dismissals on these grounds. (See C.C.P. 583.420(b), *supra*, §441.)

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5. Procedure.

a. Notice of Motion.

6 *Witkin Cal. Proc. PWT* § 465

[§ 465] Notice of Motion.

The defendant must serve and file a notice of motion at least 45 days before the date set for hearing, and may, "with the memorandum, serve and file a declaration stating facts in support of the motion." (C.R.C., Rule 3.1342(a); see *Tate v. Superior Court* (1975) 45 C.A.3d 925, 928, 119 C.R. 835, *infra*, §469; *Cohen v. Hughes Markets* (1995) 36 C.A.4th 1693, 1699, 43 C.R.2d 66 [dismissal in response to defense counsel's oral motion on morning of trial "did not comport with court rules or with due process"]; *Eliceche v. Federal Land Bank Assn.* (2002) 103 C.A.4th 1349, 1373, 128 C.R.2d 200 [defendant's discretionary motion to dismiss for failure to prosecute could be heard on shortened notice where plaintiff was granted preferential trial date to avoid mandatory dismissal statute, which would have expired within 45-day notice period].)

However, filing the notice of motion does not "preclude the opposing party from further prosecution of the case to bring it to trial." (C.R.C., Rule 3.1342(a).) The long notice period is, in fact, intended to afford the plaintiff ample time to complete any necessary preparation and move to set the case for trial, if so inclined. (*Farrar v. McCormick* (1972) 25 C.A.3d 701, 705, 102 C.R. 190.) (See C.E.B., 2 Civil Proc. Before Trial 4th, §39.85 et seq.; Cal. Civil Practice, 3 Procedure, §22:75 et seq.; 8B Am.Jur. P.P. Forms (2006 ed.), Dismissal, Discontinuance, and Nonsuit, §140 et seq.; on dismissal on court's own motion, see *infra*, §469.)

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5. Procedure.

b. Opposition, Response, and Reply.

6 *Witkin Cal. Proc. PWT* § 466

[§ 466] Opposition, Response, and Reply.

(1) *Plaintiff's Opposition.* Within 15 days after service of the notice of motion, the plaintiff may serve and file a written opposition. (C.R.C., Rule 3.1342(b).) Although the phrasing of this rule is permissive, failure to serve and file written opposition "may be construed by the court as an admission that the motion is meritorious," and the court may grant the motion "without a hearing on the merits." (C.R.C., Rule 3.1342(b).)

(2) *Defendant's Response.* Within 15 days after service of a written opposition, the defendant may serve and file a response. (C.R.C., Rule 3.1342(c).)

(3) *Plaintiff's Reply.* Within 5 days after service of a response, the plaintiff may serve and file a reply. (C.R.C., Rule 3.1342(d).)

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5. Procedure.

c. Ruling on Motion.

1. Ruling May Be Conditioned.

6 *Witkin Cal. Proc. PWT* § 467

[§ 467] Ruling May Be Conditioned.

The court may elect between two kinds of rulings on a motion for discretionary dismissal:

(1) It may decide the motion, by granting or denying dismissal. (C.R.C., Rule 3.1342(f).)

(2) It "may require as a condition of granting or denying dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice." The court may also "make any order necessary to effectuate" this authority, "including provisional and conditional orders." (*C.C.P. 583.430*; see C.R.C., Rule 3.1342(f) [court may continue or defer ruling on dismissal motion pending performance of conditions].)

In exercising its authority under *C.C.P. 583.430*, the court must consider the criteria prescribed in C.R.C., Rule 3.1342 (*supra*, §439), as well as the policy favoring trial on the merits (*C.C.P. 583.130*, *supra*, §315). Moreover, the authority of the court "to condition an order granting dismissal includes but is not limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date." (Law Rev. Com. Comment to *C.C.P. 583.430*.)

In *Hansen v. Snap-Tite* (1972) 23 C.A.3d 208, 100 C.R. 51, three plaintiffs filed a complaint in July 1966, demanding over \$ 1 million for services allegedly rendered to defendants. Defendant sought to obtain a trial date for some time and were finally successful in September 1969, when trial was set for February 19, 1970. On February 3, 1970, G, one of plaintiffs' attorneys, advised defendants to "hold off" on preparation for trial because plaintiffs "were losing their zeal." Negotiations resulted in an oral settlement agreement between counsel for defendants and counsel for plaintiffs (including C, who was also a coplaintiff) for \$ 10,000. The case was placed off calendar, defendants prepared settlement papers, and plaintiffs refused to perform. Plaintiffs then moved for an early trial setting. The judge granted the motion without prejudice to a motion to dismiss, and defendants filed their motion for discretionary dismissal on November 10, 1970. The motion was supported by declarations showing 258 attorney hours in preparation for trial, paid for by defendants, with the work product left in an unusable state by reason of the aborted settlement and consequent

delay. The judge made a conditional order, granting the motion unless plaintiffs paid defendants \$ 10,000 as reimbursement of attorneys' fees, not to be recoverable as costs. Plaintiffs failed to pay and the order of dismissal was entered. *Held*, affirmed.

(a) The conditional order was authorized by the former C.R.C., Rule 203.5(f) (now C.R.C., Rule 3.1342). "The purpose and effect of this rule are to give the trial court some appropriate sanction against the dilatory litigant short of the harsh remedy of dismissal of his case. Where the damage caused by the delay is compensable in money, it is a reasonable exercise of the court's power to offer the offending litigant the opportunity to make redress before subjecting him to the ultimate sanction of a dismissal. Such a ruling could serve both to deter and to remedy unreasonable delay, and to uphold the judicial policy which favors disposition of litigation on the merits." (23 *C.A.3d* 213.) The rule is analogous to the similar provisions of *C.C.P.* 473, which authorizes relief from default on any "terms as may be just," and which has been construed as authorizing conditions such as payment of costs or attorneys' fees to the adverse party. (23 *C.A.3d* 213, quoting the text.)

(b) The rule was properly applied. Counsel for plaintiffs made no effort to excuse their conduct, and C gave no satisfactory explanation of his agreement to settle without the approval of the two other plaintiffs; their conduct "at best, manifested a reckless disregard of the interests of the court and the opposing parties." (23 *C.A.3d* 214.) Also, there was no violation of the policy favoring trial on the merits. Plaintiffs chose "to abandon their claim rather than pay a part of the expense which their tactics cost the defendants." (23 *C.A.3d* 215.)

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5. Procedure.

c. Ruling on Motion.

2. Absent or Incorrect Statement of Grounds.

6 *Witkin Cal. Proc. PWT* § 468

[§ 468] Absent or Incorrect Statement of Grounds.

In *Kidd v. Kopald* (1994) 31 C.A.4th 132, 36 C.R.2d 875, the trial judge dismissed the case on his own motion, stating that the dismissal was for failure to bring the case to trial within 3 years under C.C.P. 583.410 et seq. By plaintiff's computation, the case had been pending for only 2 years and 5 months. *Held*, dismissal affirmed. The fact that the trial judge may have stated incorrect grounds for the dismissal is not fatal. The critical question is whether the judge abused his discretion and whether proper "delay in prosecution" grounds justifying the dismissal existed. Both C.C.P. 583.410 and former C.R.C., Rule 372 (now C.R.C., Rule 3.1340) authorize dismissal for delay in prosecution if the action has not been brought to trial within 2 years. Thus, the judge had ample authority to exercise his discretion. (31 C.A.4th 147.)

The California Supreme Court agreed with this analysis in *Howard v. Thrifty Drug & Discount Stores* (1995) 10 C.4th 424, 41 C.R.2d 362, 895 P.2d 469, *supra*, §416. When reviewing discretionary dismissal for failure to timely bring an action to trial, an appellate court must presume that the decision of the trial judge is correct. Although the trial judge is obliged to consider the relevant factors when ruling on a discretionary motion to dismiss, the judge is not compelled to state in written or oral form the reasons for granting dismissal. The burden is on the party challenging the decision to show an abuse of discretion. Thus, even if the judge's rationale is incorrect or not stated, the decision will be upheld on appeal if reasonable justification for it can be found. (10 C.4th 443.)

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5. Procedure.

d. Dismissal on Court's Own Motion.

1. In General.

6 *Witkin Cal. Proc. PWT* § 469

[§ 469] In General.

The court may dismiss an action on its own motion. (*C.C.P. 583.410(a)*; see *C.R.C.*, Rule 3.1340(a), *supra*, §451 [sua sponte dismissal for delay in trial or conditional settlement].) However, the plaintiff is afforded the same procedural rights he or she would have had if the defendant had made the motion, i.e., notice and an opportunity to oppose. (See *Andre v. General Dynamics* (1974) 43 *C.A.3d* 839, 845, 118 *C.R.* 95; *Gilbertson v. Osman* (1986) 185 *C.A.3d* 308, 313, 229 *C.R.* 627 [dismissal on court's own motion requires court itself to give notice by order to show cause "or similar means"; defendant's suggestion that court dismiss, contained in memorandum of points and authorities, was not sufficient notice]; *Reid v. Balter* (1993) 14 *C.A.4th* 1186, 1193, 18 *C.R.2d* 287, *infra*, §471 [court's dismissal of case when plaintiff failed to appear for status conference violated due process; plaintiff must receive notice of motion or intent to dismiss and opportunity to be heard].)

In *Tate v. Superior Court* (1975) 45 *C.A.3d* 925, 119 *C.R.* 835, the trial court issued its order to show cause on September 4 and noticed the hearing for September 18, thus giving petitioner only a 14-day notice instead of the 45-day notice required by the Rules of Court (*supra*, §465). The Court of Appeal assumed that the failure to comply with the rule would be an adequate basis for challenging the trial court's jurisdiction to dismiss; here, however, petitioner appeared at the hearing and argued the motion on its merits, thus waiving the defect in the notice (*supra*, §8). (45 *C.A.3d* 928.)

In *Cordova v. Vons Grocery Co.* (1987) 196 *C.A.3d* 1526, 242 *C.R.* 605, the trial court gave no notice and dismissed the action on the date set for trial after rejecting counsel's explanation of inability to proceed. However, plaintiffs' counsel moved for reconsideration, and at the hearing had a full opportunity to oppose the court's ruling; hence, when the motion for reconsideration was denied and judgment of dismissal was entered, due process was satisfied. (196 *C.A.3d* 1531, citing the text.)

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d. Dismissal on Court's Own Motion.

2. After Motion To Specially Set.

6 *Witkin Cal. Proc. PWT* § 470

[§ 470] After Motion To Specially Set.

A judge has the discretion to dismiss on his or her own motion where the plaintiff moves to specially set for trial. In *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 C.3d 554, 194 C.R. 773, 669 P.2d 9, plaintiff sued for damages for personal injuries allegedly inflicted by defendant's employee. The complaint was filed in June 1976 and was amended in December 1977; but, though defendant issued interrogatories and took depositions, plaintiff did nothing until May 1981--more than 4 years and 10 months after filing the complaint. On May 18, 1981, plaintiff's new attorney moved to specially set the case for trial, and at the hearing stated that he could not speak for various attorneys who had been associated in the past, but urged the court to hear the case on the merits before expiration of the statutory 5-year period because plaintiff had lost the sight of one eye and the damages sought were substantial. The judge denied the motion to set, and on his own motion dismissed the case, stating that he found no reason for the delay or any diligence in bringing the case to trial. Plaintiff appealed, contending that the judge abused his discretion in failing to follow the notice procedure and failing to refer to the factors contained in former C.R.C., Rule 203.5 (now C.R.C., Rule 3.1342). *Held*, dismissal affirmed.

(a) *Notice requirement of rule is not applicable.* The rule by its terms applies only to "a party" seeking dismissal; and two Court of Appeal opinions that referred to the rule (*Andre v. General Dynamics* (1974) 43 C.A.3d 839, 845, 118 C.R. 95, *supra*, §469, and *Tate v. Superior Court* (1975) 45 C.A.3d 925, 928, 119 C.R. 835, *supra*, §469) are distinguishable. The judge here did not bring plaintiff into court by a court-initiated motion to dismiss; he was faced with plaintiff's own motion to specially set. These motions have traditionally invited an inquiry into the same factors that are relevant to a motion to dismiss under the 5-year statute. (34 C.3d 560, 561.) Moreover, the lengthy notice period in the rule was not meant to apply to a motion to dismiss that follows a hearing on a motion to specially set. The 45-day period was intended to afford a plaintiff time to complete necessary preparation and move to set the case for trial; if the motion was already on file, and the plaintiff appeared at the hearing to argue it, the plaintiff needed no further time. (34 C.3d 561.)

(b) *No need to recite factors relied on.* The rule states that the trial judge must consider the factors relevant to a proper determination of the motion. However, it does not require the judge's designation of the basis for decision or a

statement that the judge considered all relevant matters or each of the listed factors. (34 C.3d 562.)

(c) *Assertion of serious injury from alleged wrong is insufficient.* "The appalling absence of diligence" on plaintiff's part is apparent, and the alleged wrong cannot by itself justify undermining the policy of the dismissal statute. "The more compelling policy favoring resolution on the merits will only prevail where plaintiff makes *some* showing of excusable delay." (34 C.3d 562.)

Two justices dissented on the ground that it was a denial of due process to dismiss on the court's own motion without prior notice of intent to do so. (34 C.3d 563.) (See *San Bernardino City Unified School Dist. v. Superior Court* (1987) 190 C.A.3d 233, 238, 235 C.R. 356 [reaffirming and applying *Wilson*]; on duty of trial court respecting preferential setting generally, see *supra*, §425 et seq.)

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e. Relief From Order.

1. Review of Order.

6 Witkin Cal. Proc. PWT § 471

[§ 471] Review of Order.

(1) *Appealability of Orders Granting or Denying Dismissal.* An order granting discretionary dismissal is appealable. (*Salas v. Sears, Roebuck & Co.* (1986) 42 C.3d 342, 345, footnote 3, 228 C.R. 504, 721 P.2d 590, supra, §425.) An order denying a discretionary dismissal is interlocutory and therefore is not directly appealable. However, the defendant is entitled to review of the denial by a petition for either writ of mandamus or writ of prohibition. (*McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 530, 105 C.R. 330, 503 P.2d 1338, supra, §432.)

(2) *Standard of Review.* A motion for discretionary dismissal is addressed to the trial court's sound discretion. (*Hilliard v. Lobley* (1989) 216 C.A.3d 638, 640, 265 C.R. 5.) Therefore, unless a clear case of abuse of discretion is shown or there has been a miscarriage of justice, the trial court's ruling on the motion will not be overturned by a reviewing court. (*Blank v. Kirwan* (1985) 39 C.3d 311, 331, 216 C.R. 718, 703 P.2d 58; *Freedman v. Pacific Gas & Elec. Co.* (1987) 196 C.A.3d 696, 703, 242 C.R. 8, supra, §455.) The appellate court must defer to factual findings made by the trial court. (*Shamblin v. Brattain* (1988) 44 C.3d 474, 478, 243 C.R. 902, 749 P.2d 339.)

A grant of dismissal is subject to closer appellate scrutiny than is a denial of dismissal, with doubts resolved in favor of the plaintiff. The policy seeking to prevent unreasonable delays in litigation "must sometimes yield to the more powerful policy which seeks to dispose of litigation on the merits." (*Hilburger v. Madsen* (1986) 177 C.A.3d 45, 51, 222 C.R. 713.)

(3) *Post-Trial Review.* In *Reid v. Balter* (1993) 14 C.A.4th 1186, 18 C.R.2d 287, an action arising out of a real estate sale, defendants appealed from a judgment for plaintiffs following trial, challenging the trial court's denial of their pretrial motion for discretionary dismissal for failure to timely bring the action to trial. *Held*, affirmed.

(a) "When an appeal is taken from a judgment and the appellant alleges the trial court made an erroneous pretrial ruling, it is not enough to show that the ruling was indeed erroneous. In addition, the appellant must also show resulting prejudice, and the probability of a more favorable outcome, *at trial*. ... Assuming *arguendo* the trial court abused its discretion in not granting defendants' motion for discretionary dismissal ... , defendants have not made a sufficient

showing that they were prejudiced at trial by the denial of their motion and that it was probably this prejudice that caused the verdict to go against them." (14 C.A.4th 1195.)

(b) "There is another reason for denying defendants appellate relief now, a strong public policy reason. After their motion for discretionary dismissal was denied, and prior to trial, defendants had the option of seeking pretrial review by petitioning for a writ of mandamus to compel the trial court to grant their motion to dismiss. Instead, defendants let this case proceed to trial, thereby expending the trial court's, the plaintiffs', and their own resources in both trial and posttrial proceedings, proceedings which defendants now contend should never have taken place." (14 C.A.4th 1195.) The course taken by defendants thwarted both purposes of the discretionary dismissal statute: protection of defendants, and furtherance of the administration of justice "by declogging court calendars and putting an end to elderly cases. ... As defendants failed to seek a pretrial resolution of the dismissal issue, we are not inclined to now disturb plaintiffs' victory on the merits." (14 C.A.4th 1196.)

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e. Relief From Order.

2. Relief Under C.C.P. 473.

6 *Witkin Cal. Proc. PWT § 472*

[§ 472] Relief Under C.C.P. 473.

C.C.P. 473, as amended in 1992 to apply to dismissals, in part provides that relief from dismissal is mandatory if a timely application is filed with an attorney's affidavit attesting to counsel's mistake, inadvertence, surprise, or neglect. (See *C.C.P. 473(b)*; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §192.) However, this provision does not apply to dismissals entered after a hearing in which the court has considered the excuses for delay. While an attorney affidavit of fault may excuse a plaintiff's failure to oppose a dismissal motion, it cannot excuse delay in prosecution that has already been adjudicated on a motion to dismiss. (*Williams v. Los Angeles Unified School Dist.* (1994) 23 *C.A.4th* 84, 105, 28 *C.R.2d* 219; *Tustin Plaza Partnership v. Wehage* (1994) 27 *C.A.4th* 1557, 1563, 33 *C.R.2d* 366; *Graham v. Beers* (1994) 30 *C.A.4th* 1656, 1660, 36 *C.R.2d* 765.)

The effect of *C.C.P. 473* on a discretionary dismissal was first examined in *Williams v. Los Angeles Unified School Dist.* On appeal of a discretionary dismissal of plaintiff's personal injury action, entered after she failed to serve the complaint for over 2 years, she argued that her motion for relief should have been granted as a matter of law under amended *C.C.P. 473*. *Held*, plaintiff was not entitled to relief under either the old or the new versions of the statute.

(a) The 1992 amendment to *C.C.P. 473* is not retroactive and does not apply to dismissals entered prior to its effective date, like the one in this case. (23 *C.A.4th* 104, following *Beeman v. Burling* (1990) 216 *C.A.3d* 1586, 265 *C.R. 719*, 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §192.)

(b) Furthermore, plaintiff had waived the right to argue that the 1992 amendment applied by failing to raise the issue in the trial court. Plaintiff's motion was expressly based on the former "excusable neglect" standard, and the amended statute was not brought to the trial judge's attention. (23 *C.A.4th* 105.)

(c) A motion for relief under *C.C.P. 473* may properly be used to present new justification for failing to make a full and complete opposition to a dismissal motion, but not to merely amplify or supplement the evidence and arguments presented in opposition to the motion. Plaintiff's motion for relief from default was merely a repeat of her original opposition to defendant's motion for dismissal, to the extent that she refiled copies of the same declarations. The motion

improperly requested relief from the original default in service of the summons and complaint, and did not allege any default in responding to the motion to dismiss, because none had occurred. The default in service had already been adjudicated and could not be reopened by means of a motion for relief under *C.C.P. 473*. (23 *C.A.4th* 105.)

(d) Assuming for the purpose of argument that the trial judge could have redetermined the merits of the dismissal order on the motion for relief from default, the motion could properly have been denied on the grounds that the erroneous determination by plaintiff's counsel to delay service of process until after the action was transferred from municipal to superior court did not entitle plaintiff to relief. Counsel never confessed to having been surprised, acting inadvertently, or committing any neglect, but at most conceded making a mistake of law. (23 *C.A.4th* 105.) However, he presented no evidence to show that his mistake was justified. (23 *C.A.4th* 106.)

The relationship between *C.C.P. 473* and *C.C.P. 583.410* et seq. was reexamined in *Tustin Plaza Partnership v. Wehage*, *supra*, and the *Williams* analysis was followed. The trial judge entered a discretionary dismissal under *C.C.P. 583.420(a)(2)* for failure to bring the case to trial within 3 years (see *supra*, §451). Plaintiff did not move for relief under *C.C.P. 473*, but on appeal the court requested further briefing on the availability of relief under the 1992 amendment. The court concluded that the relief is not available to renew the grounds on which a motion to dismiss was opposed.

(a) Formerly, the same grounds for relief generally applied to a motion under *C.C.P. 473* and to opposing a motion to dismiss for delay; both depended on a showing of excusable neglect, and both implicated the same opposing policies of encouraging diligence yet favoring resolution of cases on the merits. By amending *C.C.P. 473*, the Legislature displaced the trial court's discretion where attorney neglect caused default or dismissal, but by failing to similarly amend the discretionary dismissal statutes, it left the trial court's discretion undisturbed in determining whether attorney neglect excuses the delay. The Legislature presumably contemplated two different standards in evaluating attorney neglect: (1) discretion under California Rules of Court formulae (see *supra*, §439) for discretionary determinations of whether to grant a dismissal, and (2) a no-questions-asked policy for relief from default or dismissal under *C.C.P. 473*. (27 *C.A.4th* 1564.)

(b) Different standards make sense. A rule allowing attorney neglect to automatically excuse delay would totally undermine the public policies underlying the discretionary dismissal statutes: preventing the revival of stale claims and compelling reasonable diligence in the prosecution of actions. (27 *C.A.4th* 1564.) Even before the amendment of *C.C.P. 473*, there were differences between *C.C.P. 583* and *473* motions. Cases under both were similarly analyzed, but relief under *C.C.P. 473* was always viable only for a plaintiff who had *failed to oppose* a motion to dismiss, thus allowing a belated opposition to the underlying motion. (27 *C.A.4th* 1565, citing *Wilcox v. Ford* (1988) 206 *C.A.3d* 1170, 1176, 254 *C.R. 138*.)

(c) The amendment of *C.C.P. 473* offers a "defaulting" plaintiff the same relief available to a defaulting defendant—a chance to respond to an otherwise unopposed request for dismissal. (27 *C.A.4th* 1565.) However, the relief does not extend to the merits of the dismissal; they will be considered at the hearing on the *C.C.P. 473* motion. A plaintiff who has had a "day in court" on a discretionary motion to dismiss is not allowed a second bite; appeal is the only avenue for review. Otherwise, a plaintiff who failed to convince the trial judge that the case was diligently prosecuted could have the case dismissed, then have the case reinstated on a *C.C.P. 473* motion accompanied by an attorney's affidavit of negligence. "The Legislature cannot have intended such an absurd result." (27 *C.A.4th* 1566.)

A dissenting opinion observed that the majority's discussion of relief under *C.C.P. 473* improperly involved contentions not raised or considered in the trial court, and also misread the 1992 amendment of *C.C.P. 473*. "That amendment was obviously intended to place plaintiffs who are facing a discretionary dismissal on equal footing with defendants threatened with a default judgment. In both cases a party whose attorney is solely responsible for the neglect leading to dismissal or default is entitled to relief if the attorney declares the delay in prosecuting, or responding to, the lawsuit was due to his or her neglect." (27 *C.A.4th* 1567.)

Williams and *Tustin* were followed in *Graham v. Beers*, *supra*, where the trial judge dismissed a personal injury

action under *C.C.P. 583.410* for plaintiffs' failure to prosecute. The judge subsequently denied plaintiffs' motion for reconsideration, finding that plaintiffs' counsel assumed the matter would settle and that the attorney made a conscious decision to put the case "on the back burner." Shortly thereafter, plaintiffs moved for relief from the judgment of dismissal pursuant to *C.C.P. 473*, and the trial judge denied the motion. *Held*, affirmed. Although *C.C.P. 473* provides that the trial judge "shall" grant relief unless the dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect, this mandatory language does not apply to discretionary dismissals for delay entered after a hearing. (390 C.A.4th 1658.)

(a) To obtain mandatory relief under *C.C.P. 473*, the moving party need not show that counsel's mistake, inadvertence, surprise, or neglect was excusable. Attestation that one of these reasons existed is sufficient to obtain relief, unless the trial judge finds that the dismissal did not occur because of these reasons. However, a motion for relief from dismissal may not properly be used to merely amplify or supplement evidence and argument that have already been presented in opposition to the original motion to dismiss. (30 C.A.4th 1660.) In this case, the trial judge carefully considered the totality of the circumstances, and substantial evidence supported his finding that there was no justification for counsel's lack of diligence stemming from counsel's conscious decision not to prosecute. (30 C.A.4th 1660.)

(b) "By way of forceful dicta," the majority in *Tustin* discussed the issue considered here and reasoned that, although *C.C.P. 473* deprives a court of discretion where dismissal results from attorney neglect, the Legislature did not intend to undermine the trial judge's discretion in making a determination under *C.C.P. 583.410*. If the Legislature had intended to abrogate *C.C.P. 583.410* through its enactment of the amendments to *C.C.P. 473*, it would have said so. (30 C.A.4th 1661.)

(c) Although the seemingly contradictory language in the two sections is troubling, the Legislature cannot have intended *C.C.P. 473* to be the "perfect escape hatch" from the dismissal statutes. Under that interpretation, a "plaintiff who failed to convince the trial court that the prosecution of the case was diligent would have the case dismissed. That same plaintiff would then jump back into court on a *C.C.P. 473* motion, accompanied by an attorney's affidavit of negligence, and have the case reinstated based on the same facts offered, but discarded, in the hearing on the request to dismiss. The Legislature cannot have intended such an absurd result." (30 C.A.4th 1661, quoting *Tustin*.)

(d) The *Tustin* court, apparently eager to resolve the conundrum posed by the "dueling" statutes, decided the issue even though it was not raised in the trial court. For this reason the dissenting opinion in *Tustin* chides the majority in part for writing an opinion in search of a case. "Perhaps this is the case the *Tustin* opinion was searching for." (30 C.A.4th 1661.)

(e) *C.C.P. 473* may be used by counsel to seek relief from failure to oppose a motion to dismiss. (30 C.A.4th 1661.)

The interpretation of *C.C.P. 473* expressed in *Tustin* and *Graham* was expressly adopted in *Peltier v. McCloud River R. Co.* (1995) 34 C.A.4th 1809, 41 C.R.2d 182. The Legislature intended to reach only dismissals that occur through failure to oppose the dismissal motion, that is, those procedurally equivalent to defaults. (34 C.A.4th 1824.) A "literal" reading of the statute would, in effect, nearly nullify the discretionary dismissal statutes, "as few dismissals thereunder would ever assuredly be final." (34 C.A.4th 1816.)

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5. Procedure.

f. Effect of Dismissal.

6 *Witkin Cal. Proc. PWT* § 473

[§ 473] Effect of Dismissal.

The court may dismiss the complaint without prejudice. (*C.C.P.* 581(g), (h).) The dismissal is not on the merits and thus not res judicata on the issues. If not barred by the statute of limitations, a new action can be brought. (*Stephan v. American Home Builders* (1971) 21 C.A.3d 402, 406, 98 C.R. 354.) In contrast, a dismissal in federal court for failure to prosecute operates as an adjudication on the merits unless the court specifies otherwise. (See *F.R. Civ. P.*, Rule 41(b), *supra*, §357.)

A defendant who successfully obtains dismissal is entitled to recover costs as the prevailing party. (*C.C.P.* 1032(a)(4), (b).)

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A. In General.

6 Witkin Cal. Proc. PWT § 474

[§ 474] In General.

In addition to involuntary dismissal for specified delays in the prosecution of the action (supra, §319 et seq.), the following additional grounds of involuntary dismissal have been recognized:

(1) *Failure to appear at trial.* (See infra, §§475, 476.)

(2) *Failure to amend the complaint.* (See infra, §§477, 478.)

(3) *Lack of jurisdiction.* If the court, at any stage of a proceeding, determines that it has no jurisdiction of either the subject matter or the parties, it has no power to proceed and should dismiss on its own motion, unless required by statute to transfer to a court with jurisdiction. (See 2 Cal. Proc. (5th), *Jurisdiction*, §398 et seq.; *F.R. Civ. P.*, *Rule 12(b)*; 5B Federal Practice & Procedure (Wright & Miller) §1350; 27A Federal Procedure, L.Ed., §§62:476, 62:478.)

(4) *Action brought in an inconvenient forum* (stay or dismissal). (See *C.C.P.* 410.30, 418.10; 2 Cal. Proc. (5th), *Jurisdiction*, §374.)

(5) *No justiciable controversy.* A proceeding that does not present a controversy suitable for legal determination will be dismissed. This rule applies, e.g., to proceedings that are sham, collusive, or moot, or that involve purely political or religious issues. (See 3 Cal. Proc. (5th), *Actions*, §21 et seq.)

(6) *Abatement of action by statutory repeal.* (See 3 Cal. Proc. (5th), *Actions*, §§19, 20.)

(7) *Plaintiff's failure to give security for costs.* In several situations the plaintiff must give a bond as security for payment of costs: (a) when the plaintiff is a nonresident or foreign corporation; (b) in a shareholder's derivative suit; (c) when the defendant is an architect or engineer; (d) when the defendant is a doctor or other medical practitioner; (e) in the case of a vexatious litigant; (f) in certain actions challenging construction projects. The statutes are enforced by dismissal for failure to comply. (See 3 Cal. Proc. (5th), *Actions*, §350 et seq.; 2 Cal. Proc. (5th), *Jurisdiction*, §301.)

(8) *Plaintiff's failure to pay costs of transfer* after an order changing venue. (See 3 Cal. Proc. (5th), *Actions*, §938.)

(9) *Plaintiff's abandonment of case at trial.* The court may dismiss with prejudice "when upon the trial and before

the final submission of the case, the plaintiff abandons it." (*C.C.P. 581(d)*, *supra*, §312.)

(10) *Failure to join an indispensable party*. The dismissal is without prejudice. (*C.C.P. 389(b)*; see 4 *Cal. Proc.* (5th), *Pleading*, §180 et seq.)

(11) *Misuse of discovery*. The court may dismiss all or any part of the action. (*C.C.P. 2023.030(d)(3)(C)*; see 2 *Cal. Evidence* (4th), *Discovery*, §239 et seq.)

(12) *Failure to bring a small claims court appeal to trial*. (See *infra*, §479.)

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XIII. INVOLUNTARY DISMISSAL FOR REASONS OTHER THAN DELAY

B. Failure To Appear at Trial.

1. When Dismissal Is Proper.

6 *Witkin Cal. Proc. PWT* § 475

[§ 475] When Dismissal Is Proper.

(1) *Statutory Provisions.* *C.C.P. 581(b)(5)* provides for discretionary dismissal "when either party fails to appear on the trial and the other party appears and asks for the dismissal." (See *O'Day v. Superior Court* (1941) 18 C.2d 540, 116 P.2d 621 [heirship proceeding]; *Taecker v. Parker* (1939) 34 C.A.2d 143, 93 P.2d 197; cf. *Schlothman v. Rusalem* (1953) 41 C.2d 414, 417, 260 P.2d 68 [discretion was abused where nonappearing party relied on ambiguous assurance of trial judge that matter would not be tried on certain day]; *Lynch v. De Boom* (1915) 26 C.A. 311, 146 P. 908 [dismissal was abuse of discretion where nonappearing party relied on misinformation from court clerk that case would not be tried that day]; *Cohen v. Hughes Markets* (1995) 36 C.A.4th 1693, 1699, 43 C.R.2d 66 [*C.C.P. 581(b)(5)* does not authorize dismissal of party whose attorney is present; personal appearance by party is not essential].) The court also has discretion to dismiss either the whole complaint or only as to the particular defendant who appears and asks for dismissal. (*C.C.P. 581(l)*; see *Link v. Cater* (1998) 60 C.A.4th 1315, 1326, 71 C.R.2d 130 [trial judge abused discretion by dismissing action under *C.C.P. 581(l)* where plaintiff had diligently prosecuted case for over 4 years but failed to appear on trial date because he was receiving medical treatment outside the country].)

C.C.P. 581(b)(3) provides for discretionary dismissal, without prejudice, "when no party appears for trial following 30 days' notice of time and place of trial."

(2) *Necessity of Notice of Trial.* By its terms, *C.C.P. 581(b)(3)* requires 30 days' notice of the time and place of trial.

Also, *C.C.P. 581(b)(5)* is subject to the requirement of *C.C.P. 594(a)* that, if the issue is one of fact, proof must be made that the absent adverse party has had 15 days' notice of the trial (5 days in an unlawful detainer action). (See 7 *Cal. Proc.* (5th), *Trial*, §76.) "A court should not dismiss an action under ... section 581 ... except upon proof made in compliance with ... section 594 ... designed to prevent the manifest injustice of dismissing a party's action, or trying it in his absence, because of his failure to appear at a time at which he could not be held to have had notice that the trial would be had, or that any proceeding would be taken against him." (*Estate of Dean* (1906) 149 C. 487, 492, 87 P. 13.) Compliance with *C.C.P. 594(a)* is mandatory and jurisdictional; a judgment entered following a trial conducted in violation of the requirement is void. Also, the notice may be insufficient, even though timely. (*Urethane Foam Experts v. Latimer* (1995) 31 C.A.4th 763, 766, 767, 37 C.R.2d 404 [dismissal reversed; notice sent to party that had not

received adequate notice of withdrawal of its attorney was ineffective].)

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B. Failure To Appear at Trial.

2. Trial of Uncontested Matter as Alternative to Dismissal.

6 *Witkin Cal. Proc. PWT* § 476

[§ 476] Trial of Uncontested Matter as Alternative to Dismissal.

When one party has appeared and the other has not, the appearing party has an election of two procedures: (1) The party may have a dismissal entered under *C.C.P. 581(b)(5)* (supra, §475), but this, like other dismissals without trial, is not res judicata (see supra, §§357, 368). (2) The party may have a trial of an uncontested matter under *C.C.P. 594*. (See 7 *Cal. Proc.* (5th), *Trial*, §75 et seq.) After proper notice, the party "may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise directs, may proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require." (*C.C.P. 594(a)*); see *Clune v. Quitzow* (1899) 125 C. 213, 214, 57 P. 886 [plaintiff failed to appear; defendant had right to proceed with case and "to have judgment entered finally disposing of the case"].)

In *Wilson v. Goldman* (1969) 274 C.A.2d 573, 79 C.R. 309, the parties and trial judge confused an uncontested trial with a default. Plaintiffs filed a complaint for personal injuries, and defendant filed an answer placing liability and damages in issue. The case was set for trial and defendant was properly served with notice, but neither defendant nor his attorney appeared, and efforts to reach the attorney by phone were unsuccessful. (It was later shown, on motion to set aside a default judgment, that he had been hospitalized.) The trial judge entered defendant's default. Then, more than 4 months later, plaintiffs filed a memorandum to set the matter for trial, without notice to defendant or his counsel. At the hearing, a \$ 40,000 judgment was entered in plaintiff's favor. Defendant moved to set it aside and the motion was granted. *Held*, affirmed.

(a) The entry of default was void, for no default judgment can be rendered where the defendant has filed an answer. (274 C.A.2d 575, quoting the text; see supra, §§138, 182.)

(b) The later judgment was also void, because defendant, having answered, was not in default, and was therefore entitled to notice of trial, which was not given. (274 C.A.2d 577.) (See *Heidary v. Yadollahi* (2002) 99 C.A.4th 857, 864, 121 C.R.2d 695 [default was improperly entered for cross-defendants who had filed answer but failed to appear at trial; court erred in entering judgment after permitting cross-complainants to put on proof of damages at later date without notice to cross-defendants; following *Wilson*].)

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C. Demurrer Sustained.

6 Witkin Cal. Proc. PWT § 477

[§ 477] Demurrer Sustained.

(1) *Without Leave To Amend.* If a demurrer is sustained without leave to amend (see 5 Cal. Proc. (5th), *Pleading*, §997), dismissal of the action is the normal judgment, and it follows immediately. Either party may move for the dismissal. (C.C.P. 581(f)(1).)

(2) *With Leave To Amend.* Dismissal where a demurrer is sustained with leave to amend is governed by C.C.P. 581(f)(2).

(a) *Dismissal on Failure To Amend Within Time Allowed.* If the demurrer is sustained with leave to amend (see 5 Cal. Proc. (5th), *Pleading*, §988), the plaintiff has the duty to amend. Under C.C.P. 581(f)(2), the court may dismiss when "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court." Either party may move for the dismissal. An exception is provided where C.C.P. 597 (trial of special defenses not involving merits raised by answer; see supra, §210) applies. (C.C.P. 581(f)(2); see *Jeffers v. Screen Extras Guild* (1951) 107 C.A.2d 253, 237 P.2d 51; 5 Cal. Proc. (5th), *Pleading*, §990; *Leader v. Health Industries of America* (2001) 89 C.A.4th 603, 612, 107 C.R.2d 489 [plaintiffs' belated unfiled amended complaint presented at status conference before defendants had filed motion to dismiss did not affect court's ability to dismiss action on defendants' subsequent motion]; *Cano v. Glover* (2006) 143 C.A.4th 326, 330, 48 C.R.3d 871 [defendant was entitled to dismissal with prejudice after plaintiff filed fourth amended complaint and did not name defendant]; cf. *Yurkas v. Zampatti* (1946) 75 C.A.2d 493, 495, 171 P.2d 455 [premature dismissal, before lapse of time allowed, was erroneous but not void, and not ground for equitable action to set it aside].)

(b) *Who May Move for Dismissal.* Prior to 1963, the statute referred only to the defendant. The result was that the plaintiff, desirous of reviewing the judge's order sustaining the demurrer, had to wait until the defendant moved for dismissal (which defendant might deliberately not do), or use the cumbersome procedure of mandamus to compel entry of judgment of dismissal (see supra, §379). The reference to "either party" now allows the plaintiff to move for dismissal and thus obtain an appealable judgment. (See *California Ammonia Co. v. Macco Corp.* (1969) 270 C.A.2d 429, 433, 75 C.R. 753, citing the text; 5 Cal. Proc. (5th), *Pleading*, §997.)

(c) *Ex Parte Application.* Under the statute, a party must "move" for dismissal. It has been held, however, that a formal noticed motion is not required, for the losing party has already had a hearing; an ex parte application by the

defendant is sufficient. (*Oppenheimer v. Deutchman* (1955) 132 C.A.2d Supp. 875, 879, 281 P.2d 650; see C.R.C., Rule 3.1320(h) [motion to dismiss may be made by ex parte application under C.C.P. 581(f)(2)]; *Wilburn v. Oakland Hosp.* (1989) 213 C.A.3d 1107, 1110, 1111, 262 C.R. 155 [court may decide motion solely on basis of supporting affidavits].)

(d) *Failure To Amend After Stipulation Extending Time.* In *Harding v. Collazo* (1986) 177 C.A.3d 1044, 223 C.R. 329, defendants demurred to and moved to strike portions of plaintiff's first amended complaint. Pursuant to an oral stipulation, defendants took the hearing on the demurrer and motion to strike off calendar and plaintiff agreed to file a second amended complaint within 30 days of the scheduled hearing date. Plaintiff failed to file a second amended complaint as agreed. Defendants, after their unilateral extension of the stipulated time expired, moved to dismiss, and the trial court granted the motion. *Held*, affirmed. Although the stipulation was neither filed with the clerk nor entered in the minutes, plaintiff, having received its benefit, was bound. (177 C.A.3d 1052.) Moreover, the stipulation that the hearing on the demurrer would be taken off calendar in exchange for plaintiff's agreement to file an amended complaint by a day certain was the equivalent of a stipulation that the demurrer was deemed sustained with leave to amend within the time allowed by the stipulation. (177 C.A.3d 1053, 1054.)

(e) *Filing of Belated Amended Complaint.* *Oppenheimer* and *Wilburn* were distinguished in *Gitmed v. General Motors Corp.* (1994) 26 C.A.4th 824, 31 C.R.2d 625, on the ground that the belated filing of an amended complaint prevents the trial court from entertaining a motion to dismiss; in such a case, the proper procedure is for the defendant to move to strike the amended pleading before moving to dismiss. This brings dismissal under C.C.P. 581(f)(2) into harmony with the procedure followed in default proceedings (*supra*, §173). (26 C.A.4th 828.) Furthermore, when an amended complaint has been served, there is no implication that the plaintiff has abandoned the case, and it is incumbent on the defendant to give notice of a motion to strike or dismiss. (26 C.A.4th 829.)

(f) *Form of Dismissal.* Dismissals under C.C.P. 581(f)(2), like other court-ordered dismissals, must be in the form prescribed by C.C.P. 581d, i.e., a written order signed and filed; a minute entry is ineffective and is not an appealable order. (*Graski v. Clothier* (1969) 273 C.A.2d 605, 78 C.R. 447.)

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D. Motion To Strike Granted.

6 *Witkin Cal. Proc. PWT* § 478

[§ 478] Motion To Strike Granted.

The court may dismiss the complaint as to a defendant in the following circumstances:

(1) A motion to strike the whole of the complaint is granted without leave to amend. (*C.C.P. 581(f)(3).*)

(2) A motion to strike the whole or a portion of the complaint is granted with leave to amend and the plaintiff fails to amend within the time allowed by the court. (*C.C.P. 581(f)(4).*)

The motion to dismiss may have been made by either party. (*C.C.P. 581(f)(3), (f)(4).*)

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E. Failure To Bring Small Claims Court Appeal to Trial.

6 *Witkin Cal. Proc. PWT* § 479

[§ 479] Failure To Bring Small Claims Court Appeal to Trial.

C.R.C., Rule 8.913 covers the subject of involuntary dismissal of small claims court appeals as follows:

(1) *Mandatory dismissal: 1-year period.* The appeal must be dismissed if not brought to trial within 1 year after (a) the date of filing the appeal, or (b) if a new trial is ordered, the date of entry of the order. However, there may be no dismissal in these situations if a written stipulation extended the time for trial, or the appellant establishes that he or she exercised reasonable diligence to bring the case to trial. (C.R.C., Rule 8.913(c)(1), (c)(2).)

(2) *Mandatory dismissal: 3-year period.* The appeal must be dismissed if not brought to trial within 3 years after the filing of the appeal or the entry of the most recent new trial order. (C.R.C., Rule 8.913(c)(3).) (See 2 *Cal. Proc.* (5th), *Courts*, §312.)

Subject to these requirements, the appeal may be dismissed on the written request of the appellant or the stipulation of the parties. (C.R.C., Rule 8.913(b); on voluntary dismissal generally, see *supra* §283 et seq.)

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F. Improper Grounds for Dismissal.

6 *Witkin Cal. Proc. PWT* § 480

[§ 480] Improper Grounds for Dismissal.

(1) *Failure To Bring Demurrer to Hearing.* The plaintiff's failure to bring a demurrer to a hearing was formerly a ground of discretionary dismissal. The theory was that, although the defendant was the moving party in interposing the demurrer, it was the plaintiff's action that was delayed, and thus it was the plaintiff's duty to exercise diligence to bring about a prompt hearing on the demurrer. (See *Mowry v. Weisenborn* (1902) 137 C. 110, 113, 69 P. 971; *Pallett v. Guenther* (1922) 59 C.A. 434, 210 P. 969; cf. *Raggio v. Southern Pac. Co.* (1919) 181 C. 472, 476, 185 P. 171 [dismissal was unwarranted where continual inquiries were made of clerk and delay was fault of judge].) Under the Rules of Court, the party filing a demurrer must specify a date in the notice of hearing. The date must be "not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter." (C.R.C., Rule, 3.1320(c), (d); see 5 *Cal. Proc.* (5th), *Pleading*, §981.)

(2) *Lack of Representation.* In *Tulare v. Ybarra* (1983) 143 C.A.3d 580, 192 C.R. 49, plaintiff county's district attorney brought a paternity action under Welf.C. 11475.1 and 11476 against defendant, the alleged father of a child, for reimbursement of public assistance payments made under Welf.C. 11350 et seq. Under *Littlefield v. Superior Court* (1979) 98 C.A.3d 652, 160 C.R. 175, and *Salas v. Cortez* (1979) 24 C.3d 22, 154 C.R. 529, 593 P.2d 226, indigent defendants are entitled to court-appointed counsel in paternity cases, and defendant said that he wanted counsel. The trial judge then stated that, because the public defender was unwilling to take these cases, and neither the county Legal Service Association nor private attorneys were willing to act without compensation, he would dismiss the action without prejudice so as to allow the county to refile. *Held*, reversed. The judgment of dismissal was unauthorized; no statute permits dismissal of a paternity action for the reasons stated by the court, and no nonstatutory basis was shown. Moreover, the dismissal was highly prejudicial, involving delays and possible loss of recollection by witnesses, and depriving the minor child of a determination of paternity which children of more affluent parents may obtain. (143 C.A.3d 584.)

(3) *Action Brought in Improper Venue.* Dismissal of a mandamus petition filed in the wrong county was erroneous where the court had subject matter jurisdiction. (See *Lipari v. Department of Motor Vehicles* (1993) 16 C.A.4th 667, 672, 20 C.R.2d 246, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §301.)

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XIV. ALTERNATIVE DISPUTE RESOLUTION

A. In General.

1. Nature and Scope of ADR.

6 *Witkin Cal. Proc. PWT* § 481

[§ 481] Nature and Scope of ADR.

(1) *Legislative Findings.* "The resolution of many disputes can be unnecessarily costly, time-consuming, and complex when achieved through formal court proceedings where the parties are adversaries and are subjected to formalized procedures." (B. & P.C. 465(a).) "To achieve more effective and efficient dispute resolution in a complex society, greater use of alternatives to the courts, such as mediation, conciliation, and arbitration should be encouraged." (B. & P.C. 465(b).)

(2) *Concept Defined.* "Alternative dispute resolution" (ADR) refers to a variety of procedures used to resolve controversies, in lieu of the customary court trial. ADR is an amorphous concept that includes mechanisms varying from one another on a number of levels, including the following:

- (a) The formality of the procedure.
- (b) The extent of interaction with the court system.
- (c) The degree of participation by third parties.
- (d) Whether the procedure is mandatory or voluntary.
- (e) Whether the outcome is binding or nonbinding.

At one end of the ADR spectrum is simple negotiation, where parties to a controversy discuss their concerns in an attempt to reach a mutually satisfying solution. (See *infra*, §485.) At the opposite end, the same controversy could be resolved by an evidentiary hearing before a private judge, with the parties represented by attorneys, the formal rules of evidence guiding the procedure, and the judge's decision entered as a final judgment in the public records subject to appellate review. (See *infra*, §495 et seq.) The single characteristic common to these procedures is that they offer a complete or partial alternative to the traditional court system.

(3) *Practice Works and Commentary.* Practice works and commentary on ADR are extensive. (See Chap. 14; C.E.B., 3 Civil Proc. Before Trial 4th, Chap. 45; C.E.B., Effective Use of ADR; C.J.E.R., Judges Benchbook, Civil

Proceedings: Before Trial 2d §3.1 et seq.; Rutter Group, Alternative Dispute Resolution; 85 *Cal. L. Rev.* 577 [questioning whether court-ordered and contractual ADR constitute state action subject to constitutional restraint]; 103 *Harv. L. Rev.* 1086 [mandatory mediation and summary jury trial]; 1 Pepperdine Dispute Resolution L. J. 3 [future of ADR]; 1 Pepperdine Dispute Resolution L. J. 141 [historical review of arbitration and judicial civil justice]; 2 Pepperdine Dispute Resolution L. J. 303 [tribal practices and modern ADR]; 3 Pepperdine Dispute Resolution L. J. 317 [uniformity in ADR: Uniform Arbitration Act and Uniform Mediation Act]; 5 Pepperdine Dispute Resolution L. J. 115 [use of ADR by Catholic Church]; 6 Pepperdine Dispute Resolution L. J. 63 [resolving end-of-life disputes through ADR]; 6 Pepperdine Dispute Resolution L. J. 109 [propriety of ADR in civil rights controversies]; 14 *Pepperdine L. Rev.* 943 [symposium on ADR]; 16 *Pepperdine L. Rev.* 52 [same]; 36 *Santa Clara L. Rev.* 1055 [ADR: Where Have All the Critics Gone?]; 49 *Stanf. L. Rev.* 917 [advantages of international intellectual property-specific ADR]; 74 *So. Cal. L. Rev.* 83 [speculations on causes of ADR]; 44 *U.C.L.A. L. Rev.* 1935 [ADR and decline of American civil jury]; 26 *U.S.F. L. Rev.* 346 [use of ADR in California courts]; 2 Federal Procedure, Lawyers Edition §2:243 et seq. [ADR in federal administrative practice]; Cal. Civil Practice, 4 Procedure §26:1 et seq.; Cal. Transactions Forms, 2 Business Transactions, 4 Am.Jur.2d (2007 ed.), Alternative Dispute Resolution; 57 Am.Jur. Trials 255 [alternative dispute resolution in employment law cases]; 105 Am.Jur. Trials 125 [arbitration and mediation of bankruptcy disputes].)

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

(3) *Practice Works and Commentary.* See 8 Pepperdine Dispute Resolution L. J. 355 [strategic relationship between ethics and dispute resolution]; 8 Pepperdine Dispute Resolution L. J. 379 [why we still litigate]; 8 Pepperdine Dispute Resolution L. J. 397 [10 essential elements of effective dispute resolution program].



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A. In General.

2. Programs and Legislation.

6 *Witkin Cal. Proc. PWT* § 482

[§ 482] Programs and Legislation.

(1) *General Programs.* A Dispute Resolution Advisory Council and a funding mechanism for local dispute resolution programs have been established by the Legislature. (See *B. & P.C.* 465 et seq.; 14 *Pepperdine L. Rev.* 943 [institutionalization of ADR in California]; 16 *Pepperdine L. Rev.* 52 [same].) (On mediation, see *infra*, §486 et seq.; on voluntary settlement conference, see *infra* §492; on private judging, see *infra* §495 et seq.; on contractual arbitration, see *infra*, §499 et seq.; on judicial arbitration, see *infra*, §579 et seq.)

(2) *Specific Legislation.* Numerous statutes contemplate the use of ADR proceedings for particular types of disputes. Some of these statutes mandate ADR. For example, an attorney must arbitrate a fee dispute with a client if the client chooses arbitration. (*B. & P.C.* 6200(c).) (See *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 *C.A.4th* 119, 130, 18 *C.R.2d* 626 [statutes may not compel binding ADR as substitute for litigation "absent a countervailing state interest of overriding significance"].) Some statutes permit but do not require ADR. For example, habitually truant or disorderly pupils may be referred to a truancy mediation program. (*Educ.C.* 48263.)

Other statutory provisions regulating ADR proceedings include the following:

(a) *Partnership.* *Corp.C.* 16803(c) permits a person winding up a partnership's business on dissolution to settle disputes by mediation or arbitration. (On dissolution and winding up of partnerships, see 9 *Summary* (10th), *Partnership*, §46 et seq.)

(b) *Dissolution of Marriage.* *Family C.* 2451(b) permits a case management plan in dissolution of marriage proceedings to provide for alternative dispute resolution. (On case management plans in dissolution proceedings, see 11 *Summary* (10th), *Husband and Wife*, §71.)

(c) *Dependency.* *Welf.C.* 350 authorizes dependency mediation programs in juvenile court. (On dependency proceedings, see 10 *Summary* (10th), *Parent and Child*, §519 et seq.)

(d) *Eminent Domain Disputes.* *C.C.P.* 1250.420 permits the parties to an eminent domain proceeding to agree to submit the dispute to mediation or arbitration. (On eminent domain law, see 8 *Summary* (10th), *Constitutional Law*,

§1170 et seq.)

(e) *Common Interest Development Associations*. C.C. 1368.3 et seq. require an association, or an owner or member of a common interest development, to exhaust attempts at alternative dispute resolution prior to filing an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief together with a claim for damages not in excess of the jurisdictional amounts specified in *C.C.P. 116.220* and *116.221* (small claims court). The requirement does not apply to small claims actions or assessment disputes. (On common interest developments, see 12 *Summary* (10th), *Real Property*, §85 et seq.)

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Correction: Page 940, line 8, "C.C. 1368.3 et seq." should be "C.C. 1369.520".



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A. In General.

3. Judicial Standards and Rules.

6 *Witkin Cal. Proc. PWT* § 483

[§ 483] Judicial Standards and Rules.

(1) *Standards of Judicial Administration.* Several Standards of Judicial Administration deal with ADR. Superior courts are directed to develop, implement, and maintain mediation and other ADR programs through the following activities:

(a) Establishing appropriate criteria for determining which cases should be referred to ADR and what ADR processes are appropriate. The criteria should include whether the parties are likely to benefit from the process. (Standards of Judicial Administration, Standard 10.70(b)(1).)

(b) Developing, refining, and using lists of qualified ADR neutrals. (Standards of Judicial Administration, Standard 10.70(b)(2).)

(c) Adopting appropriate criteria for referring cases to qualified ADR neutrals. (Standards of Judicial Administration, Standard 10.70(b)(3).)

(d) Developing ADR information and providing educational programs for parties not represented by counsel. (Standards of Judicial Administration, Standard 10.70(b)(4).)

(e) Providing ADR education for judicial officers. (Standards of Judicial Administration, Standard 10.70(b)(5).)

(f) Coordinating ADR promotional activities and exploring joint funding and administration of ADR programs among the courts and with professional and community-based organizations. (Standards of Judicial Administration, Standard 10.70(c).)

Courts that are not required or do not elect to have an ADR administrative committee are encouraged to form committees of judges, attorneys, ADR neutrals, and county ADR administrators to oversee the court's ADR programs. (Standards of Judicial Administration, Standard 10.71.)

(2) *Rules of Court.* C.R.C., Rule 3.221 sets forth ADR rules applicable to all general civil cases. Thus, courts must make available to the plaintiff, at the time the complaint is filed, an ADR information package that includes general

information about the ADR process, ADR programs available in that court, and an ADR stipulation form for use by the parties. (C.R.C., Rule 3.221(a).) The plaintiff, and each cross-complainant, must then serve a copy of that package on each defendant along with the complaint or cross-complaint. (C.R.C., Rule 3.221(c).) Courts may make the package available on their websites, provided the hard copies are available in the clerk's office. (C.R.C., Rule 3.221(b).) (On rules for judicial arbitration, see C.R.C., Rule 3.810 et seq.; *infra*, §579 et seq.)

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A. In General.

4. Immunity of Persons Performing Dispute Resolution Services.

6 Witkin Cal. Proc. PWT § 484

[§ 484] Immunity of Persons Performing Dispute Resolution Services.

An ADR proceeding is acknowledged to be a valid alternative forum entitled to dignity comparable to that of a court. Procedures such as arbitration, mediation, and settlement conferences are critical to the proper functioning of the courts. Thus, a neutral third party performing dispute resolution services is entitled to absolute quasi-judicial immunity. (*Howard v. Drapkin* (1990) 222 C.A.3d 843, 860, 271 C.R. 893; see 5 *Summary* (10th), *Torts*, §174.)

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



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B. Negotiation.

6 *Witkin Cal. Proc. PWT* § 485

[§ 485] Negotiation.

Negotiation is the most widely practiced form of dispute resolution; it includes all the efforts the parties make to settle the dispute themselves and without the intervention of a neutral third party. Negotiation is nonbinding. Also, it is almost always voluntary, although a dispute resolution agreement may require negotiations before either litigation or additional ADR mechanisms may be invoked. It is the cornerstone of labor-management dispute resolution. (See C.E.B., 1 Civil Proc. Before Trial 3d, §5.11; 14 *Pepperdine L. Rev.* 839 [competitive negotiation]; Rutter Group, Alternative Dispute Resolution §§1:30, 2:1 et seq.; Cal. Transactions Forms, 2 Business Transactions, §14:16 et seq.)

However, an attorney lacks implied authority, merely on the basis of employment, to compromise or settle the client's claim. Moreover, the burden is on opposing counsel to ascertain at his or her peril whether the other party has in fact expressly authorized a proposed settlement. (*Blanton v. Womancare* (1985) 38 C.3d 396, 406, 212 C.R. 151, 696 P.2d 645 [authority to stipulate to binding arbitration]; 1 *Cal. Proc.* (5th), *Attorneys*, §252.) (On authority of attorney to compromise case, see 1 *Cal. Proc.* (5th), *Attorneys*, §242.)

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



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XIV. ALTERNATIVE DISPUTE RESOLUTION

C. Mediation.

1. In General.

6 *Witkin Cal. Proc. PWT* § 486

[§ 486] In General.

(1) *Nature of Process.* "Mediation" is simply a meeting between the parties supervised by a neutral third-party mediator and intended to facilitate settlement negotiations. However, unlike other ADR procedures that focus on obtaining a settlement, mediation emphasizes the process over the result. Unless the parties consent to bind themselves to a mediated agreement, the results of a mediation are unenforceable. The mediator, unlike a judge or arbitrator, has no power to render a binding decision; the mediator's function is rather that of assisting the parties to reach their own agreement. In fact, the mediator ordinarily refrains from expressing any opinion on the merits of the case or its settlement value. (4 *Am.Jur.2d* (2007 ed.), *Alternative Dispute Resolution* §6; see *C.C.P.* 1775.1(a) [pilot program; mediation is "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement"]; C.E.B., 3 *Civil Proc. Before Trial* 4th, §45.11; Rutter, *Alternative Dispute Resolution* §§1:31 et seq., 1:66 et seq., 3:1 et seq.; 4:202 et seq., 7:1 et seq.; C.J.E.R., *Judges Benchbook*, *Civil Proceedings: Before Trial* 2d, §3.38 et seq.; *Cal. Civil Practice*, 3 *Procedure* §26:5 et seq.)

The mediation process is designed to assist effective communication between the parties. Mediation is often used when the parties want to continue a relationship (e.g., commercial, labor-management, or landlord-tenant) after the resolution of the current conflict. The mediator generally deals directly with the parties, rather than through their attorneys. A mediation is normally informal, held in private, and relatively unstructured. Unlike other forms of dispute resolution, a mediation is not designed to establish the legal rights and obligations of the parties. The result of a successful mediation is a mutually acceptable solution, without too much regard for the enforcement of any party's legal rights in the abstract. (See 4 *Am.Jur.2d* (2007 ed.), *Alternative Dispute Resolution* §6.)

(2) *Agreement To Mediate.* Parties to a contract may agree to mediate disputes or claims arising out of the agreement, and may prescribe penalties for failure to do so. (See *Frei v. Davey* (2004) 124 C.A.4th 1506, 1513, 22 C.R.3d 429 [seller's refusal to mediate barred seller's recovery of attorneys' fees where residential purchase agreement permitted recovery only if prevailing party had not refused prelitigation or prearbitration request to mediate]; *Templeton Dev. Corp. v. Superior Court* (2006) 144 C.A.4th 1073, 1082, 51 C.R.3d 19 [C.C.P. 410.52 (infra, §531), prohibiting clauses in contracts between California contractors and subcontractors for work performed within state that require arbitration outside California, also applies to mediation].) (On interpretation of contract provisions permitting recovery of attorneys' fees, see 7 *Cal. Proc.* (5th), *Judgment*, §§168, 169.)

(3) *Appellate Mediation*. Several appellate jurisdictions in California have implemented mediation programs to relieve backlogs and expedite civil appeals. (See 42 *San Diego L. Rev.* 177 [appellate mediation programs in California and elsewhere]; First Appellate District Local Rule 2 [mediation in civil appeals].)

(4) *Judge As Private Mediator*. Code of Judicial Ethics, Canon 4F prohibits a judge from acting as a mediator in a private capacity unless expressly authorized by law. The Advisory Committee Commentary notes that Canon 4F does not prohibit participation in mediation performed as part of the judge's judicial duties. (On California Code of Judicial Ethics, see 2 *Cal. Proc.* (5th), *Courts*, §52 et seq.)

(5) *Commentary*. Mediation is the subject of extensive commentary. (See 48 *Hastings L. J.* 703 [distinguishing mediation processes on basis of social norms]; 1 *Pepperdine Dispute Resolution L. J.* 11 [mediating on Internet]; 1 *Pepperdine Dispute Resolution L. J.* 37 [family mediation]; 2 *Pepperdine Dispute Resolution L. J.* 241 [mediation's impact on employee-employer relationships and mediator neutrality]; 3 *Pepperdine Dispute Resolution L. J.* 39 [clarifying theoretical underpinnings of mediation]; 3 *Pepperdine Dispute Resolution L. J.* 67 [principles and practice of mediation as conflict transformation ("transformative mediation")]; 3 *Pepperdine Dispute Resolution L. J.* 97 ["transformative" mediator coaching]; 3 *Pepperdine Dispute Resolution L. J.* 111 [substituting mediation for arbitration and process of mediator assessing strengths and weaknesses of each party's case ("evaluative mediation") and offering substantive settlement recommendations]; 6 *Pepperdine Dispute Resolution L. J.* 493 [mediation in health care system]; 76 *So. Cal. L. Rev.* 161 [doctrinal law and mediation; mediation of will disputes and marital dissolutions]; 37 *U.S.F. L. Rev.* 627 [representing parties in EEOC mediations]; 44 *U.C.L.A. L. Rev.* 1871 [conflicts and issues among dispute professionals]; 50 *U.C.L.A. L. Rev.* 69 [using dispute system design methods to promote productive behavior in mediation and reduce bad conduct]; 57 *Am.Jur. Trials* 555 [mediation as trial alternative]; 43 *A.L.R.5th* 545 [sanctions for bad faith in, or noncompliance with, agreement made in mediation].)

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

(5) *Commentary*. See 7 *Pepperdine Dispute Resolution L. J.* 401 [mediation in mass disaster cases]; 7 *Pepperdine Dispute Resolution L. J.* 501 [mediating child custody disputes for high conflict parties]; 8 *Pepperdine Dispute Resolution L. J.* 243 [use of therapeutic jurisprudence in realm of mediation ethics]; 8 *Pepperdine Dispute Resolution L. J.* 273 [minimizing limited authority negotiating in court-mandated mediation]; 8 *Pepperdine Dispute Resolution L. J.* 307 [nationwide mediation certification programs]; 42 *U.S.F. L. Rev.* 577 [effects that style of mediator imposes on neutrality and impartiality requirements of mediation].



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C. Mediation.

2. Confidentiality.

6 *Witkin Cal. Proc. PWT* § 487

[§ 487] Confidentiality.

Ev.C. 1115 et seq. provide a comprehensive scheme dealing with the confidentiality of matters disclosed during the course of mediation. With limited exceptions, anything said during mediation or any document prepared for or in the course of mediation is not admissible in evidence or subject to discovery, and its disclosure may not be compelled. All communications, negotiations, or settlement discussions by and between the participants or mediators are confidential. (*Ev.C. 1119*; see *Ev.C. 1115* [definitions]; *Ev.C. 1120* [types of evidence not covered]; *Ev.C. 1122* [disclosure by agreement]; *Ev.C. 1123* [written settlement agreements reached through mediation]; *Ev.C. 1124* [oral agreements reached through mediation]; *Ev.C. 1127* [attorneys' fees]; *Ev.C. 1128* [reference to mediation as irregularity in proceedings]; *Barajas v. Oren Realty & Dev. Co.* (1997) 57 C.A.4th 209, 215, 218, 67 C.R.2d 62 [former *Ev.C. 1152.5* (now *Ev.C. 1119*) does not require that attorney who mediates case against party must be disqualified from later cases against same party]; *Saeta v. Superior Court* (2004) 117 C.A.4th 261, 267, 11 C.R.3d 610, citing the text [employer's termination review board hearing was not designed to facilitate or assist parties to voluntarily and independently reach mutually acceptable agreement; thus, it did not constitute mediation, and privileges of *Ev.C. 703.5* (judges, arbitrators, or mediators as witnesses) and *Ev.C. 1119* did not apply]; 41 *Santa Clara L. Rev.* 1093 [confidentiality in mediation]; 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §152 et seq. [information disclosed in mediation]; 2 *Cal. Evidence* (4th), *Witnesses*, §51 [mediator's testimony].)

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



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C. Mediation.

3. Regulation of Mediation.

6 *Witkin Cal. Proc. PWT* § 488

[§ 488] Regulation of Mediation.

(1) *In General.* Mediation of various types of disputes is authorized by statute. (See, e.g., *Educ.C.* 48263 [truancy mediation program]; *Educ.C.* 56500.3 et seq. [special education identification, assessment, or placement]; *Food & Ag.C.* 13127(c) [pesticide regulation]; *Govt.C.* 66030 et seq. [land use disputes]; *Water C.* 1219 [water use in protected areas].) Labor disputes are subject to mediation on request of a party or when a work stoppage is threatened. (*Lab.C.* 65, 66.)

A number of statutes govern mediation of disputes involving public employees. (See *Govt.C.* 3507.3 [appropriateness of organization to represent public employees who are professionals]; *Govt.C.* 3518 [disputes between the governor and employee organizations]; *Govt.C.* 3548 [public school employees]; *Govt.C.* 3590 [higher education employees]; *Pub.Util.C.* 125524 [North San Diego County Transit Development Board employees].)

Various statutes coordinate mediation and the judicial system. Among these are *Ev.C.* 1115 et seq. (confidentiality of mediation proceedings; supra, §§486, 487) and *Family C.* 1850 et seq., 3160 et seq. (mediation of child custody and visitation issues; see 10 *Summary* (10th), *Parent and Child*, §278 et seq.).

Mediation is offered as an alternative to court-ordered arbitration under a pilot program in Los Angeles County and other counties opting to provide for it. (See *C.C.P.* 1775 et seq., infra, §489 et seq.)

(2) *Rules of Conduct for Mediators.* C.R.C., Rule 3.850 et seq. establish "minimum standards of conduct for mediators in court-connected mediation programs for general civil cases." (C.R.C., Rule 3.850(a).) The rules apply to mediators who have agreed to be included on a superior court's mediator list and who are selected by the court to mediate a case. (C.R.C., Rule 3.851(a).) (See Judicial Council Form No. ADR-107 [Attendance Sheet for Court-Program Mediation of Civil Case (Alternative Dispute Resolution)].) The rules cover the following topics:

- (a) C.R.C., Rule 3.852 [definitions].
- (b) C.R.C., Rule 3.853 [mediator's duty to promote voluntary participation and self-determination by parties].
- (c) C.R.C., Rule 3.854 [confidentiality requirements].

- (d) C.R.C., Rule 3.855 [impartiality, conflict of interest, disclosure, and withdrawal].
- (e) C.R.C., Rule 3.856 [competence and candor with court].
- (f) C.R.C., Rule 3.857 [mediator's duty to maintain quality of process].
- (g) C.R.C., Rule 3.858 [marketing services].
- (h) C.R.C., Rule 3.859 [compliance with compensation and gift requirements].
- (i) C.R.C., Rule 3.860 [attendance sheets for participants; agreement to disclose communications solely to address complaints].
- (j) C.R.C., Rule 3.865 [complaint procedure required].
- (k) C.R.C., Rule 3.866 [designation of person to receive inquiries and complaints].
- (l) C.R.C., Rule 3.867 [confidentiality of complaint procedure].
- (m) C.R.C., Rule 3.868 [person participating in complaint procedure is disqualified from serving as adjudicator].

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

(2) *Rules of Conduct for Mediators.* C.R.C., Rule 3.865 et seq. (complaints about mediators; see *infra*, this section), were added in 2008. Several of the rules cited in the text were renumbered and included in the new scheme.

- (j) C.R.C., Rule 3.865 was renumbered C.R.C., Rule 3.868.
- (k) C.R.C., Rule 3.866 was renumbered C.R.C., Rule 3.867.
- (l) C.R.C., Rule 3.867 was renumbered C.R.C., Rule 3.871.(m) C.R.C., Rule 3.868 was renumbered C.R.C., Rule 3.872.

(3) *(New) Requirements for Addressing Complaints About Court-Program Mediators.* C.R.C., Rule 3.865 et seq., added in 2008 and effective July 1, 2009, provide procedures for complaints about court-program mediators, to ensure that the procedures are (a) consistent with the mediation confidentiality provisions in *Ev.C* 703.5 (judges, arbitrators, or mediators as witnesses about prior proceeding) and *Ev.C* 1115 et seq. (rules of evidence applicable to mediation), and (b) "fair and respectful to the interested parties." The procedures do not abrogate or limit a court's inherent authority and sole discretion to determine a mediator's eligibility to serve, compensation, or to take other actions to ensure the quality of mediators. (Advisory Committee Comments to C.R.C., Rule 3.865.) The rules govern the following topics:

- (a) C.R.C., Rule 3.865 [application and purpose].
- (b) C.R.C., Rule 3.866 [definitions].
- (c) C.R.C., Rule 3.867 [complaint coordinator].
- (d) C.R.C., Rule 3.868 [complaint procedure required].
- (e) C.R.C., Rule 3.869 [general requirements for complaint procedures and complaint proceedings].
- (f) C.R.C., Rule 3.870 [permissible court actions on complaints].
- (g) C.R.C., Rule 3.871 [confidentiality of complaint proceedings, information, and records].

(h) C.R.C., Rule 3.872 [disqualification from subsequently serving as adjudicator].



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C. Mediation.

4. Court-Ordered Mediation.

a. Scope of Pilot Project.

6 *Witkin Cal. Proc. PWT* § 489

[§ 489] Scope of Pilot Project.

Absent statutory authority, courts cannot require parties to participate in mediation or sanction parties for failure to do so. (*Kirschenman v. Superior Court* (1994) 30 *C.A.4th* 832, 835, 36 *C.R.2d* 166.) *C.C.P.* 1775 et seq. establish a pilot project in which certain courts may order cases into mediation as an alternative to judicial arbitration (infra, §579 et seq.). The Judicial Council has implemented the project by C.R.C., Rule 3.870 et seq. The purpose is "to encourage the use of court-annexed alternative dispute resolution methods in general, and mediation in particular." (*C.C.P.* 1775(f).)

Only Los Angeles County courts are required to participate in the project, but other courts may elect to do so. (*C.C.P.* 1775.2; C.R.C., Rule 3.870.) The project does not preempt other current or future ADR programs in the trial courts. (*C.C.P.* 1775.13; see, e.g., San Francisco Uniform Local Rules, Rule 4.1 [mandatory judicial arbitration]; Rule 4.2 [voluntary civil mediation].)

Courts participating in the pilot program may order mediation for any case in which the amount in controversy does not exceed \$ 50,000 for each plaintiff, without regard to questions of liability, defenses, or comparative negligence and whether or not the action includes a prayer for equitable relief. (*C.C.P.* 1141.11, 1775.3(a), 1775.5; C.R.C., Rule 3.871(a)(1).) Any other action, regardless of the amount in controversy, may be submitted to mediation if all the parties so stipulate. (C.R.C., Rule 3.871(a)(2).)

Actions previously ordered into judicial arbitration may not be ordered into mediation. Conversely, action referred to mediation may not be later ordered into arbitration. (*C.C.P.* 1775.4.)

Amenability of an action for mediation is determined on a case-by-case basis. (C.R.C., Rule 3.871(b).) The court's determination must be made after consideration of the expressed views of the parties. (C.R.C., Rule 3.871(a)(1).) (See *Jeld-Wen v. Superior Court* (2007) 146 *C.A.4th* 536, 543, 53 *C.R.3d* 115 [trial courts do not have authority to order parties in complex civil actions to attend and pay for private mediation; thus, trial court erred by ordering party to attend and by sanctioning party for not doing so].)

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

C.R.C., Rule 3.870 was renumbered C.R.C., Rule 3.890 in 2008. C.R.C., Rule 3.871 was renumbered C.R.C., Rule 3.891 in 2008.



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C. Mediation.

4. Court-Ordered Mediation.

b. Time for Mediation.

6 *Witkin Cal. Proc. PWT* § 490

[§ 490] Time for Mediation.

A stipulation to mediation under the pilot program must be filed not later than 90 days before trial unless the court permits a later time. (C.R.C., Rule 3.871(a)(2).)

Submission of an action to mediation generally does not suspend the running of deadlines relating to dismissal for delay in prosecution (*C.C.P. 583.110* et seq., supra, §315 et seq.). (*C.C.P. 1775.7(a)*.) However, if an action is or remains submitted to mediation more than 4 years and 6 months after the plaintiff has filed the action, then the time beginning on the date 4 years and 6 months after the plaintiff has filed the action and ending on the date on which a statement of nonagreement is filed by the mediator (infra, §491) is not included in computing the 5-year dismissal period of *C.C.P. 583.310* for bringing an action to trial (supra, §358 et seq.). (*C.C.P. 1775.7(b)*.)

To illustrate the calculation of the tolling period, in *Gonzalez v. Los Angeles* (2004) 122 C.A.4th 1124, 19 C.R.3d 381, plaintiff filed a personal injury action on May 14, 1998. Under the 5-year deadline, plaintiff had to bring the action to trial before May 14, 2003. The court ordered the case to mediation on February 26, 2003, with a completion date of April 18, 2003. On April 17, 2003, the case did not settle in mediation, and on that date the mediator filed a "Statement of Nonagreement," as required by *C.C.P. 1775.9*. On May 19, 2003, defendant filed a motion to dismiss for failure to bring the case to trial within 5 years, namely May 14, 2003. At the July 10, 2003, hearing on defendant's motion, the trial court stated that the 5-year period was tolled under *C.C.P. 1775.7*, and that the tolling began on February 26, 2003, the date the case was ordered to mediation, and ended on April 18, 2003, a total of 51 days. Under this analysis, the 5-year period expired on July 7, 2003 (May 14, 2003, plus 51 days), and because the case was not brought to trial by that date, the trial court dismissed the case. *Held*, reversed. The trial court miscalculated. The last 6 months of the 5-year period that commenced on May 14, 1998, began on November 14, 2002, and this is the date on which the 5-year statute was tolled, not the date the case was submitted to mediation. Thus, the tolling ended on April 17, 2003, and that date became the new 4-year, 6-month date, and the 5-year deadline was extended to October 17, 2003. (122 C.A.4th 1129.)

Submission to mediation does not affect "fast track" delay reduction deadlines (*Govt.C. 68600* et seq.), with the exception that the deadlines may be extended up to 90 days on stipulation by the parties. (C.R.C., Rule 3.876.)

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

C.R.C., Rule 3.871 was renumbered C.R.C., Rule 3.891 in 2008. C.R.C., Rule 3.876 was renumbered C.R.C., Rule 3.896 in 2008.



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C. Mediation.

4. Court-Ordered Mediation.

c. Procedure.

6 *Witkin Cal. Proc. PWT* § 491

[§ 491] Procedure.

(1) *Selection of Mediator.* Under the pilot project, a mediator must be selected within 30 days of submission of the action to mediation. The method of selection and qualification of the mediator are as the parties determine. If, however, the parties fail to agree on a mediator within 15 days of the date of submission to mediation, the court may select a mediator from a panel maintained by the court in consultation with local bar associations, ADR providers, and associations of providers. (*C.C.P. 1775.6*; *C.R.C.*, Rule 3.872, 3.873.)

(2) *Mediation Statement.* The mediator may request from each party a short mediation statement about the issues, their possible resolution, and information helpful to their resolution. (*C.R.C.*, Rule 3.874(b)(2).)

(3) *Discovery While Mediation Is Pending.* The parties retain the rights to discovery otherwise available. (*C.C.P. 1775.11*; on discovery, see 2 *Cal. Evidence* (4th), *Discovery*, §1 et seq.) However, the parties are urged "to exercise restraint" in discovery while the case is in mediation. (*C.R.C.*, Rule 3.876(d).)

(4) *Attendance.* All parties and attorneys must attend all mediation sessions in person unless excused by the mediator or permitted to attend by telephone. Each party is entitled to have counsel present at all sessions that concern the party. Counsel and an insurance representative of a covered party also must be present or available at sessions, unless excused by the mediator. (*C.R.C.*, Rule 3.874(a).)

(5) *List of Participants.* At least 5 days before the first mediation session, each party must serve a list of its participants on the mediator and other parties. The list must include the names of the parties, attorneys, representatives of a party that is not a natural person, insurance representatives, and any other persons attending with or on behalf of the party. (*C.R.C.*, Rule 3.874(b)(1).)

(6) *Termination of Mediation.* Mediation must be completed within 60 days of reference to the mediator, but that period may be extended by the court for up to 30 days on a showing of good cause. (*C.R.C.*, Rule 3.876(c).)

(7) *Statement of Agreement or Nonagreement.* Within 10 days of the conclusion of the mediation, the mediator

must file a statement on Judicial Council Form, ADR-100 [Statement of Agreement or Nonagreement] advising the court whether the mediation ended in full agreement, or in nonagreement as to the entire case or as to particular parties in the case. (C.C.P. 1775.9(a); C.R.C., Rule 3.875.) If the case is not entirely resolved by the mediation, it is returned to the civil active list and, if possible, given the same place on the list that it had prior to mediation. (C.C.P. 1775.9(b).)

(8) *Reference to Mediation or Statements Made in Mediation Is Prohibited.* Statements made by the parties during mediation are subject to Ev.C. 1152 and 1119, which generally exclude from evidence offers of compromise and statements and admissions made during mediation (see 1 Cal. Evidence (4th), Circumstantial Evidence, §152 et seq.). (C.C.P. 1775.10.) Also, any reference to the mediation or the statement of nonagreement during any subsequent trial is ground for a new trial under C.C.P. 657 (8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §§19, 46) as an "irregularity in the proceedings." (C.C.P. 1775.12; see Ev.C. 1128 [reference to mediation during subsequent trial is irregularity in proceedings for purposes of C.C.P. 657].)

(9) *Award of Mediation Expenses.* When a court-ordered mediation proves unsuccessful, "reasonably necessary expenses incident thereto may, in the sound discretion of the trial court, be awarded after trial to a prevailing party." (Gibson v. Bobroff (1996) 49 C.A.4th 1202, 1209, 57 C.R.2d 235, 7 Cal. Proc. (5th), Judgment, §125.)

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

(1) *Selection of Mediator.* C.R.C., Rules 3.872 and 3.873 were renumbered C.R.C., Rules 3.892 and 3.893, respectively, in 2008.

(2) *Mediation Statement.* C.R.C., Rule 3.874 was renumbered C.R.C., Rule 3.894 in 2008.

(3) *Discovery While Mediation Is Pending.* C.R.C., Rule 3.876 was renumbered C.R.C., Rule 3.896 in 2008.

(4) *Attendance.* C.R.C., Rule 3.874 was renumbered C.R.C., Rule 3.894 in 2008.

(5) *List of Participants.* C.R.C., Rule 3.874 was renumbered C.R.C., Rule 3.894 in 2008.

(6) *Termination of Mediation.* C.R.C., Rule 3.876 was renumbered C.R.C., Rule 3.896 in 2008.

(7) *Statement of Agreement or Nonagreement.* C.R.C., Rule 3.875 was renumbered C.R.C., Rule 3.895 in 2008.



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D. Settlement Conference.

6 *Witkin Cal. Proc. PWT* § 492

[§ 492] Settlement Conference.

(1) *In General.* "On the court's own motion or at the request of any party, the court may set one or more mandatory settlement conferences." (C.R.C., Rule 3.1380(a); see C.E.B., 3 Civil Proc. Before Trial 4th, §40.71; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §5.2 et seq.; Rutter Group, Alternative Dispute Resolution, §3:146 et seq.; 7 *Cal. Proc.* (5th), Trial, §53.)

C.R.C., Rule 3.1380 applies only to settlement conferences supervised by the court, not to private conferences arranged without notice to the court and held without the use of court facilities. (*Raygoza v. Betteravia Farms* (1987) 193 C.A.3d 1592, 1595, 239 C.R. 188 [court lacks authority to impose sanction for failure to attend private settlement conference before retired superior court judge].) As an alternative to a court-supervised conference, the parties may decide to submit all or some of the disputed issues to a private settlement conference, often before a retired judge. Like mediation (*supra*, §486), a settlement conference is a nonbinding process involving an effort to negotiate a settlement before a neutral third party. Unlike mediation, attorneys for the parties usually conduct the negotiations and the settlement officer both expresses an opinion on the merits and probable outcome of the litigation and attempts to persuade the parties to compromise. (See C.E.B., 3 Civil Proc. Before Trial 4th, §40.86; C.E.B., 3 Civil Proc. Before Trial 4th, Chap. 46 [negotiating settlement], Chap. 49 [sliding scale and structured settlements], C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §§3.57, 3.58, 5.1 et seq.; Rutter Group, Alternative Dispute Resolution §§1:40 et seq., 3:146 et seq.; 90 A.L.R.4th 326 [authority of court to compromise action].)

(2) *Participation of Judge in Private Settlement Proceedings.* Code of Judicial Ethics, Canon 4F, prohibits a judge from performing judicial functions in a private capacity unless expressly authorized by law. The Advisory Committee Commentary notes that Canon 4F does not prohibit participation in settlement conferences performed as part of the judge's judicial duties. (See *Travelers Cas. & Surety Co. v. Superior Court* (2005) 126 C.A.4th 1131, 1141, 24 C.R.3d 751 [judge appointed as settlement mediator improperly turned settlement mediation into fact-finding, coercive procedure in order to prevent insurer from declaring coverage forfeiture]; on California Code of Judicial Ethics, see 2 *Cal. Proc.* (5th), Courts, §52 et seq.)

(3) *Restrictions on Appointments.* A court may not appoint a person to conduct a settlement conference if the person is simultaneously serving as a mediator in the same action. Nor may a court appoint a person to conduct a mediation under C.R.C., Rule 3.1380. (C.R.C., Rule 3.1380(d).)

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



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E. Neutral Fact-Finding or Evaluation.

6 Witkin Cal. Proc. PWT § 493

[§ 493] Neutral Fact-Finding or Evaluation.

When a disputed issue involves an appraisal of data by an expert, the parties may agree to appoint a neutral expert to evaluate and report on the matter. Examples of issues that may call for neutral evaluation are discovering the cause of product failure and determining the fair market value of real property. The procedure is often used in conjunction with other ADR mechanisms, such as mediation, where an impasse is reached in negotiations over an issue amenable to neutral fact-finding. The parties may or may not agree to be bound by the neutral expert's findings. (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d §§3.59, 3.60; Rutter Group, Alternative Dispute Resolution §§1:49, 1:50; 3:249 et seq.)

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F. Mini-Trial.

6 *Witkin Cal. Proc. PWT* § 494

[§ 494] Mini-Trial.

A "mini-trial" does not involve a trial as such, but is rather a form of facilitated negotiation in which the attorneys representing the disputing parties present their best case to the parties themselves, or representatives of the parties with authority to settle the case. A neutral third party, such as a retired judge, may be asked to moderate the presentations and render nonbinding opinions on the probable resolution of specific legal and factual issues and the overall result that would be obtained in a court proceeding. After each side presents its case, the parties or their representatives attempt to negotiate a settlement, perhaps with the neutral third party acting as a mediator. (See C.E.B., 3 Civil Proc. Before Trial 4th, §45.40; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §3.53, 3.54; Rutter Group, Alternative Dispute Resolution §§1:51 et seq.; 3:196 et seq.)

Because the mini-trial requires a greater commitment of time and resources than most other ADR procedures, it is best suited where the amount in controversy is high and the factual issues are complex. Examples might be patent or government contract disputes.

To be contrasted with the mini-trial is the "summary jury trial," a settlement program in which the case is argued to a mock or advisory jury. (See C.E.B., 3 Civil Proc. Before Trial 4th, §45.57; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d §§3.55, 3.56.)

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XIV. ALTERNATIVE DISPUTE RESOLUTION

G. Private Judging.

1. In General.

6 *Witkin Cal. Proc. PWT* § 495

[§ 495] In General.

The increased number of civil lawsuits and the consequent trial court backlogs have led to wider use in recent years of a procedure known as "rent-a-judge" or "private judging." (See C.E.B., 3 Civil Proc. Before Trial 4th, §45.51 et seq.; 14 *Pepperdine L. Rev.* 989 [analysis of a First Amendment challenge to rent-a-judge proceedings]; C.J.E.R., Judges Benchbook, Civil Proceedings Before Trial 2d, §§3.92, 3.93; Rutter, Alternative Dispute Resolution §1:68 et seq., 6:1 et seq., 7:131 et seq.; Cal. Civil Practice, 4 Procedure §26:9 et seq.)

The private judge may be either a *referee* (see *infra*, §496) or a *temporary judge* (see *infra*, §497), and is often a retired judge. The parties typically select and negotiate and pay the fees of the private judge. (See Code of Judicial Ethics, Canon 4F [judge may not perform judicial functions in private capacity unless expressly authorized by law].)

The current use of private judging goes beyond the scope of the authorizing statutes and increasingly has become a matter of contract between the disputing parties. The primary advantages of the private judging procedure are that it permits the parties (1) to avoid the delay of the traditional trial courts, and (2) to select a judge with knowledge of the particular legal or factual issues involved in the dispute. The major criticisms are that the procedure favors the wealthy and permits litigants to keep resolution of their disputes secret from public scrutiny. (See 94 *Harv. L. Rev.* 1599; 17 *U.C. Davis L. Rev.* 619.)

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G. Private Judging.

2. Voluntary Reference.

6 *Witkin Cal. Proc. PWT* § 496

[§ 496] Voluntary Reference.

Private judging may be by way of voluntary reference (by agreement or stipulation of the parties) pursuant to *C.C.P.* 638 et seq. The conditions for voluntary reference and the procedure to be followed are treated in detail earlier in this chapter. (See *supra*, §63 et seq.) (See also *C.E.B.*, 3 Civil Proc. Before Trial 4th, §§45.52, 45.53; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d §§3.70 et seq.; Rutter Group, *Alternative Dispute Resolution* §§6:116 et seq., 7:149 et seq.; *Cal. Civil Practice*, 4 Procedure §26:13 et seq.)

The referee may be any person mutually acceptable to the parties and need not be a judge or a lawyer. (*Bird v. Superior Court* (1980) 112 *C.A.3d* 595, 169 *C.R.* 530.) Thus, a referee may be one who possesses special commercial or technical expertise. For example, in a lawsuit over the profits of a business venture, an accountant may be appointed as a referee to examine the books and witnesses to enable the court to enter a final judgment. (See *Rice v. Brown* (1951) 104 *C.A.2d* 100, 231 *P.2d* 65.) Other advantages of voluntary reference are that the trial may be set at a mutually convenient time; and the parties may agree to simplified procedures.

The case may be submitted either for a *general reference* (*C.C.P.* 638(a), *supra*, §64) or a *special reference* (*C.C.P.* 638(b), *supra*, §64). A general reference is a trial on all the issues of fact or law, while a special reference only considers part of the issues. (See *supra*, §64.) If the entire case is referenced, the referee's decision will stand as the decision of the court, and when the decision is filed, the judgment may be entered as if the matter had been tried by the court. (See *C.C.P.* 644(a), *supra*, §74.)

A voluntary reference may be ordered as a result of a predispute agreement to submit to a referee, or by a postdispute submission agreement or stipulation. The reference agreement must be filed with the court, or entered into the minutes or the docket. The court may appoint a referee on the unilateral motion of a party to a written contract or lease that provides that any controversy will be heard by a reference. (*C.C.P.* 638, *supra*, §68.) (See *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Nationwide Ins. Co.* (1999) 69 *C.A.4th* 709, 714, 82 *C.R.2d* 16 [submitting dispute to binding arbitration while retaining right to appeal was in substance voluntary reference].)

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3. Temporary Judge.

6 *Witkin Cal. Proc. PWT* § 497

[§ 497] Temporary Judge.

The private judge may be a temporary judge appointed pursuant to Cal. Const., Art. VI, §21. The appointment, qualification, and disqualification of temporary judges are discussed in detail in 2 *Cal. Proc. (5th), Courts*, §348 et seq. (See C.R.C., Rule 2.832 [temporary judges serve without compensation unless parties agree otherwise in writing]; C.E.B., 3 Civil Proc. Before Trial 4th, §45.54 et seq.; 94 *Harv. L. Rev.* 1592 [California rent-a-judge experiment]; Rutter Group, Alternative Dispute Resolution §§6:13 et seq., 7:131 et seq.; Cal. Civil Practice, 4 Procedure §26:26 et seq.)

Among the distinctions between a trial before a referee (see *supra*, §496) and a trial before a temporary judge are the following:

(1) Only "parties litigant" may stipulate to having their controversy decided by a temporary judge (Cal. Const., Art. VI, §21), while parties may contractually agree in advance of filing a lawsuit to submit their disputes to a referee (see *C.C.P.* 638, *supra*, §68).

(2) A temporary judge must be a member of the State Bar (Cal.Const., Art. VI, §21), but a referee does not have to be a lawyer.

(3) A temporary judge must take an oath (C.R.C., Rule 2.831(b)), while a referee is not so required.

(4) A temporary judge may punish a party or attorney for contempt (*Nierenberg v. Superior Court* (1976) 59 C.A.3d 611, 130 C.R. 847), but a referee does not have that power (*Marcus v. Work. Comp. App. Bd.* (1973) 35 C.A.3d 598, 111 C.R. 101).

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G. Private Judging.

4. Procedure.

6 *Witkin Cal. Proc. PWT* § 498

[§ 498] Procedure.

(1) *In General.* The private judge is ordinarily bound by the rules of evidence (see *Ev.C. 300*), and the procedure in hearings is generally the same as that used in trials before regular judges (*Rice v. Brown (1951) 104 C.A.2d 100, 103, 231 P.2d 65*). However, the rules and procedures to be followed are sometimes specified in the parties' agreement. (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §3.92; Rutter Group, Alternative Dispute Resolution, §§6:107, 6:108.)

(2) *Filing of Papers.* A party must tender and the clerk must accept for filing all original papers accompanied by the required fee within the time limits specified. The filing party must generally provide a file-stamped copy to the temporary judge of each paper relevant to the issues before him. When no fee is required in order to file the paper, in lieu of a file-stamped copy, the filing party may use a true copy of the paper accompanied by a declaration about the date of its filing. (*C.R.C.*, Rule 2.400(b).)

(3) *Use of Exhibits.* If proceedings are conducted by a temporary judge outside of court facilities, the temporary judge must keep all exhibits and deliver them, properly marked, to the clerk at the conclusion of the proceeding, unless the parties file a written stipulation that the exhibits may be disposed of otherwise. On request of the temporary judge, the clerk must deliver exhibits to the judge's possession, and the temporary judge must not release them to any person other than the clerk. However, the exhibits must be made available during business hours for inspection by any person within a reasonable time after request. (*C.R.C.*, Rule 2.400(c).)

(4) *Use of Court Facilities, Court Personnel, and Jurors.* A party who has elected to use the services of a privately compensated temporary judge is deemed to have elected to proceed outside the courtroom, and court facilities, court personnel, or summoned jurors may not be used, except on a finding by the presiding judge that the use would further the interests of justice. (*C.R.C.*, Rule 2.833(b).) For all matters pending before privately compensated temporary judges, the clerk must post a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. (*C.R.C.*, Rule 2.833(a).)

(5) *Order for Appropriate Hearing Site.* The presiding judge or supervising judge, on request of any person or on

the judge's own motion, may order that a case before a privately compensated temporary judge must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings. The request must be by letter with reasons stated and must be accompanied by a declaration that a copy of the request was mailed to each party, to the temporary judge, and to the clerk for placement in the file. The order may require that notice of trial or of other proceedings be given to the requesting party directly. An order for an appropriate hearing site is not grounds for withdrawal of a stipulation. (C.R.C., Rule 2.833(c).)

(6) *Motion To Seal Records*. A motion to seal records in a cause before a privately compensated temporary judge must be served and filed and must be heard by the presiding judge or a judge designated by the presiding judge. The moving party must mail or deliver a copy of the motion to the temporary judge and to persons or organizations who have expressed their intention to attend the hearing. (C.R.C., Rule 2.834(a).)

(7) *Intervention*. A motion for leave to file a complaint for intervention in a cause before a privately compensated temporary judge must be served and filed, and must be heard by the trial court judge to whom the case is assigned or, if not assigned, by the presiding judge. The party seeking intervention must mail or deliver a copy of the motion to the temporary judge. If intervention is allowed, the case must be returned to the trial court docket unless all parties stipulate to proceed before the temporary judge. (C.R.C., Rule 2.834(b).)

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

(1) *In General*.

(*New*) *Open proceedings*: Proceedings before a temporary judge that would be open to the public if held before a judge must be open to the public regardless of where conducted. (C.R.C., Rule 2.834(a), added in 2009.)

(2) *Filing of Papers*. C.R.C., Rule 2.400(b) was amended in 2009 to refer to "documents" rather than "papers," and to provide that all original documents must be filed with the clerk in the same manner as would be required if the case were being heard by a judge. (C.R.C., Rule 2.400(b)(1).) The portion of the rule concerning the procedure when no fee is required was deleted. The rule was further amended as follows:

(a) If a document must be filed with the court before a judge may consider it, a temporary judge must not accept or consider a copy of that document 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), added in 2009.)

(b) 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 must file the original with the court no later than the next court day after the document or application was submitted to the temporary judge and must promptly provide a filed-stamped copy of the document or application to the temporary judge. (C.R.C., Rule 2.400(b)(3), added in 2009.)

(c) A party that has submitted a document to a temporary judge must immediately notify the temporary judge 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), added in 2009.)

(3) *Use of Exhibits*. C.R.C., Rule 2.400 was amended in 2009 to provide as follows:

(a) If proceedings are conducted outside of court facilities, the temporary judge must keep all 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 that provides for a different disposition. On request of the temporary judge, the clerk must deliver exhibits filed with the court to the temporary judge, who must not release them except to 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 that would be open to the public if filed with the

court must be made available during business hours for inspection within a reasonable time after request and under reasonable conditions. (C.R.C., Rule 2.400(d)(1).)

(c) A temporary judge must file a statement in each case that provides the name, telephone number, and mailing address of a person to contact for access to submitted documents or exhibits that would be open to the public if filed or lodged with the court. The temporary judge must also file a revised statement if the contact information changes. (C.R.C., Rule 2.400(d)(2), added in 2009.) (4) *Use of Court Facilities, Court Personnel, and Jurors*. C.R.C., Rule 2.833 was renumbered C.R.C., Rule 2.834 in 2009 and amended as follows:

(a) A party who has elected to use the services of a temporary judge is deemed to have elected to proceed outside court facilities. Court facilities, court personnel, and summoned jurors may not be used except on a finding by the presiding judge or his or her designee that the use would further the interests of justice. (C.R.C., Rule 2.834(c).)

(b) The temporary judge must file a statement that provides the case name, telephone number, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all proceedings scheduled in the matter that would be open to the public if held before a judge. The statement may also provide the address of a publicly accessible website that contains information regarding the proceedings. The clerk must post the statement in the court facility. (C.R.C., Rule 2.834(b).)

(5) *Order for Appropriate Hearing Site*. C.R.C., Rule 2.833(c) was renumbered C.R.C., Rule 2.834(d) in 2009 and amended as follows:

(a) The presiding judge or his or her designee, on application of any person or on the judge's own motion, may order that a case before a temporary judge be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend. The application must state facts showing good cause for granting the application, must be served on all parties and the temporary judge, and must be filed with the court. The proceedings are not stayed while the application is pending unless so ordered by the presiding judge or his or her designee. An order for an appropriate hearing site is not grounds for withdrawal of a stipulation that a case may be heard by a temporary judge. (C.R.C., Rule 2.834(d)(1).)

(b) If a court staff mediator or evaluator is required to attend a hearing before a temporary judge, unless otherwise ordered by the presiding judge or his or her designee, that hearing must take place at a location requiring no more than 15 minutes' travel time from the work site of the mediator or evaluator. (C.R.C., Rule 2.834(d)(2).)

(6) *Motion To Seal Records*. C.R.C., Rule 2.834(a) was renumbered C.R.C., Rule 2.835(a) in 2009 and amended to provide that a motion or application to seal records in a case pending before a temporary judge must be filed with the court and must be served on all parties that have appeared and the temporary judge. The motion or application must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee.

(7) *Intervention*. C.R.C., Rule 2.834(b) was renumbered C.R.C., Rule 2.835(b) in 2009 and amended to provide that a motion for leave to file a complaint for intervention in a case pending before a temporary judge must be filed with the court and served on all parties and the temporary judge. The motion must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. If intervention is allowed, the case must be returned to the trial court docket unless all parties stipulate to proceed before the temporary judge.



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H. Contractual Arbitration.

1. In General.

a. Definition and Nature.

6 *Witkin Cal. Proc. PWT* § 499

[§ 499] Definition and Nature.

(1) *Nature and Intent of Agreement.* In contractual arbitration, the parties agree to submit disputes to a nonjudicial resolution by an independent third person or persons. (*Herman Feil v. Design Center of Los Angeles* (1988) 204 C.A.3d 1406, 1414, 251 C.R. 895.) (On arbitration agreement as plea in abatement, see 5 *Cal. Proc.* (5th), *Pleading*, §1129.) The agreement need not specifically include the term "arbitration" and may simply provide for a valuation, appraisal, binding audit, or similar proceeding. (*C.C.P. 1280(a)*; see *Coopers & Lybrand v. Superior Court* (1989) 212 C.A.3d 524, 530, 260 C.R. 713 [agreement to arbitrate may include agreement for valuation, including audits].) (On arbitration as condition precedent to action for breach of contract, see 3 *Cal. Proc.* (5th), *Actions*, §314 et seq.)

In *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 C.A.4th 676, 57 C.R.2d 867, plaintiff employee sued defendant hotel employer for wrongful termination. Defendant petitioned to compel "mandatory contractual arbitration" of plaintiff's claims, contending that plaintiff had agreed to participate in the hotel's mandatory internal problem-solving procedures when she signed documents in the Employee Handbook that stated in part "I agree to resolve all disputes concerning my employment with the Hotel by the procedures outlined in this Handbook." If a dispute remained unresolved after the first three steps of a four-step grievance mechanism, the fourth step placed the dispute before a hotel review committee for a final decision. The committee consisted of management and nonmanagement employees with the hotel general manager having the tie-breaking vote. A hotel employee acted as Procedural Chairperson and decided what evidence was relevant and permitted. The committee was empowered to reach a final and binding decision by majority vote. An Employee Guide set forth rules and procedures applicable to the review committee, provided employees with advice on preparing for the review, and strongly discouraged using attorneys. Defendant argued that the committee procedure was not inherently biased and that, in agreeing to comply with the terms of the Handbook, plaintiff agreed to participate in the review committee procedure before filing suit, thus waiving her right to a judicial forum for employment-related claims. The trial judge denied defendant's petition. *Held*, affirmed; plaintiff did not agree to arbitrate her claims.

(a) *Attributes of true arbitration procedure.* An agreement's failure to identify a grievance procedure as arbitration is not fatal to the use of the procedure as a binding mechanism for resolving disputes. More important is the nature and intended effect of the proceeding. (50 C.A.4th 683.) Although California statutory and case law does not define

arbitration, California decisions and authority from other states support the view that a dispute resolution procedure is an arbitration if the procedure has the following attributes: (1) a third-party decision maker, (2) a final and binding decision, and (3) a mechanism to assure a minimum level of impartiality. (50 C.A.4th 687.)

(b) *Minimum level of impartiality.* Party-affiliated representatives or otherwise partial decisionmakers may play a role in an arbitration if the procedure also contains some impartial means of resolving disagreements that cannot be resolved by the partial decisionmakers. (50 C.A.4th 688.) Here, the effective decisionmakers are not simply party-affiliated; they are parties to the dispute. The employee has no representative among the decision makers to counterbalance the employer's inherent, substantial, and obvious power. No provision even purports to afford or assure impartiality; the entire procedure is slanted in management's direction. (50 C.A.4th 688.) Nor does the procedure guarantee an employee an opportunity to be heard: a terminated employee is expressly precluded from challenging the employer's policy, procedure, or rules. (50 C.A.4th 690.)

(c) *Intent to enter into arbitration agreement.* Defendant's handbook describing the procedure suggested that defendant viewed the procedure as an internal problem-solving mechanism and not as a substitute for litigation. (50 C.A.4th 691.) Evidence of an employer's intent to create a procedure by which it can address its employment problems is not evidence of anyone's intent to arbitrate. (50 C.A.4th 692.) Moreover, evidence that participation in the review committee procedure was intended to be voluntary also supports the conclusion that the parties did not intend to enter into a mandatory arbitration agreement. Because there was no arbitration agreement between the parties, defendant's petition to compel arbitration was properly denied. (50 C.A.4th 693.) (See *American Federation of State, County & Mun. Employees v. Metropolitan Water Dist. of Southern Calif.* (2005) 126 C.A.4th 247, 258, 24 C.R.3d 285 [memorandum of understanding containing grievance and appeal procedure was not agreement to arbitrate where procedure did not provide for binding decision by hearing officer and thus lacked "core component" of finality; following *Cheng*].)

(2) *Judicial Arbitration Distinguished.* To be contrasted with contractual arbitration is judicial arbitration, under which, by statute and rule, certain actions are diverted to arbitration prior to trial, although there is no preexisting agreement to arbitrate. (See *infra*, §579 et seq.) An important distinction is that a judicial arbitration award is nonbinding, i.e., either party may demand a trial de novo. (On differences between contractual and judicial arbitration, see *infra*, §580.)

West's Key Number Digest, Arbitration 1 et seq.

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

(1) *Nature and Intent of Agreement.* See *Toal v. Tardif* (2009) 178 C.A.4th 1208, 1222, 101 C.R.3d 97, citing the text [no valid agreement to arbitrate where stipulation to arbitrate was signed only by parties' attorneys and not by parties and attorneys lacked express authority to do so].



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H. Contractual Arbitration.

1. In General.

b. Public Policy Considerations.

6 *Witkin Cal. Proc. PWT* § 500

[§ 500] Public Policy Considerations.

(1) *In General.* A strong public policy favors enforcing arbitration agreements. (*Izzi v. Mesquite Country Club* (1986) 186 C.A.3d 1309, 1315, 231 C.R. 315 [arbitration agreements are liberally interpreted].) The policy is evidenced by the Arbitration Act (C.C.P. 1280 et seq., infra, §502), which is incorporated by implication into all arbitration agreements unless inconsistent with their terms. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 C.3d 473, 479, 121 C.R. 477, 535 P.2d 341; *Conejo Valley Unified School Dist. v. William Blurock & Partners* (1980) 111 C.A.3d 983, 993, 169 C.R. 102; *American Home Assur. Co. v. Benowitz* (1991) 234 C.A.3d 192, 198, 285 C.R. 626; see *Kennedy, Cabot & Co. v. National Assn. of Sec. Dealers* (1996) 41 C.A.4th 1167, 1175, 49 C.R.2d 66 [doubts regarding scope of arbitrable issues must be resolved in favor of arbitration]; *Saika v. Gold* (1996) 49 C.A.4th 1074, 1076, 56 C.R.2d 922 [courts indulge every intendment to implement and give effect to arbitration proceedings]; *Mayhew v. Benninghoff* (1997) 53 C.A.4th 1365, 1371, 62 C.R.2d 27 [although public policy favors arbitration, right to judicial forum is substantial, and policy alone cannot replace actual agreement to arbitrate].)

(2) *Inherent Conflict Exception.* In *Broughton v. Cigna Healthplans of Calif.* (1999) 21 C.4th 1066, 90 C.R.2d 334, 988 P.2d 67, plaintiffs, seeking both monetary and injunctive relief, sued their health insurer for medical malpractice and for violating the Consumers Legal Remedies Act (C.C. 1750 et seq., 4 *Summary* (10th), *Sales*, §296). Defendant moved to compel arbitration under a mandatory arbitration clause in the health insurance plan. *Held*, although claims for damages under the Act are arbitrable, the injunctive relief remedy is not. While federal and state statutory mandates and strong public policy favor enforcing arbitration agreements, not all controversies implicating statutory rights may be suitable for arbitration. (21 C.4th 1073.) Here, there is an inherent conflict between arbitration and the underlying purpose of the injunctive relief remedy under the Act. First, the relief is for the benefit of the general public rather than the party bringing the action. Second, the judicial forum, with continuing jurisdiction of the superior court over public injunctions and its ongoing capacity to reassess as circumstances dictate, provides a necessary continuity and consistency generally cumbersome and inadequate under arbitration. (21 C.4th 1078; distinguishing *private dispute* circumstances in *Swan Magnetics v. Superior Court* (1997) 56 C.A.4th 1504, 66 C.R.2d 541, infra, §577.) (See *Coast Plaza Doctors Hosp. v. Blue Cross of Calif.* (2000) 83 C.A.4th 677, 691, 99 C.R.2d 809 [claim for injunctive relief under Unfair Competition Act constituted public injunctive remedy and was not arbitrable; following *Broughton*]; 1

Pepperdine Dispute Resolution L. J. 91 [judicial policing of consumer arbitration]; 76 *So. Cal. L. Rev.* 433 [arbitration of "public injunctions"; *Broughton* and United States Supreme Court cases].)

Broughton's bar against arbitrating injunctive relief claims under the Consumer Legal Remedies Act (CLRA) also applies to claims for injunctive relief under California's unfair competition law (*B. & P.C.* 17200 et seq.) and false advertising statute (*B. & P.C.* 17500). In *Cruz v. PacifiCare Health Systems* (2003) 30 *C.4th* 303, 133 *C.R.2d* 58, 66 *P.3d* 1157, plaintiff, a member of one of defendant's health plans, alleged unfair competition and false advertising in connection with defendant's sale, marketing, and delivery of medical services. Plaintiff alleged that he was filing the action in his individual capacity and on behalf of the general public; he sought injunctive relief for the unfair competition and false advertising claims as well as restitution and disgorgement of money wrongfully acquired. Defendant sought to compel arbitration under the subscriber agreement between defendant and plaintiff's employer. The trial court denied the motion, stating that *Broughton* expressly precluded arbitration of plaintiff's claim for injunctive relief under the CLRA and extended the bar to plaintiff's claims for injunctive relief under the unfair competition and false advertising statutes. The trial court also reasoned that, because plaintiff's claims for disgorgement, restitution, and unjust enrichment were essentially equitable remedies distinct from damages, they were similarly not arbitrable. *Held*, affirmed as to injunctive relief and reversed as to other equitable remedies.

(a) *Injunctive relief*. By seeking to enjoin defendant's alleged deceptive advertising practices, plaintiff acts for the benefit of health care consumers and the general public. Thus, plaintiff's claim is virtually indistinguishable from the CLRA claim in *Broughton*. As with *Broughton*, there is an inherent conflict between arbitration and the underlying purpose of the injunctive relief available under the unfair competition and false advertising statutes. Therefore, plaintiff's injunctive relief claim is not arbitrable. (30 *C.4th* 315.)

(b) *Equitable monetary relief*. *Broughton* permits arbitration of damage claims under the CLRA. C.C. 3281 defines damages as compensation in money for detriment from unlawful acts or omissions, and the definition is broad enough to include a restitutionary element. Thus, there is no reason why restitutionary claims, like CLRA claims for damages, should not be arbitrable. "Nothing in *Broughton's* functional analysis suggests that the mere designation of restitution as an equitable remedy makes the request for the remedy inarbitrable." (30 *C.4th* 318.) Moreover, disgorgement of funds is essentially an award of money damages, and plaintiff's claim for unjust enrichment is basically an action for restitution, both of which are within an arbitrator's power to award. (30 *C.4th* 318, 320.)

Three justices concurred in holding that plaintiff's claims for restitution, disgorgement, and unjust enrichment were arbitrable, but dissented with respect to extending *Broughton* to bar arbitration of requests for injunctive relief under the unfair competition and false advertising statutes, arguing that post-*Broughton* United States Supreme Court cases "cast grave doubt on *Broughton's* legal analysis and conclusion," and that extending *Broughton* will frustrate legitimate contract expectations of those seeking the benefits of a nonjudicial forum for dispute resolution. (30 *C.4th* 321, 322.) (See *Aral v. EarthLink* (2005) 134 *C.A.4th* 544, 553, 36 *C.R.3d* 229 [trial court erred in ruling that plaintiff's entire action must go to court where plaintiff was seeking both injunctive and restitutionary relief under Unfair Competition Law; proper procedure is to sever and compel arbitration of claim for restitution; following *Cruz*].)

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



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H. Contractual Arbitration.

1. In General.

c. Commentary and Practice Works.

6 *Witkin Cal. Proc. PWT* § 501

[§ 501] Commentary and Practice Works.

Contractual arbitration is the subject of extensive commentary and practice advice.

(1) *Commentary*. (See 31 Cal. Western L. Rev. 73 [participation of unlicensed advocates in resolution of disputes between stockbrokers and investors]; 38 *Hastings L. J.* 239 [arbitration and alternative dispute resolution]; 20 *Loyola L.A. L. Rev.* 643 [enforcement of predispute arbitration agreements under securities statutes]; 1 Pepperdine Dispute Resolution L. J. 91 [judicial policing of consumer arbitration]; 4 Pepperdine Dispute Resolution L. J. 1 [analysis and recommendations for California's adoption of Revised Uniform Arbitration Act]; 4 Pepperdine Dispute Resolution L. J. 469 [nonsignatory's ability to compel international commercial arbitration]; 38 *U.S.F. L. Rev.* 1 [symposium on mandatory arbitration clauses]; 22 Western State L. Rev. 1 [future of binding arbitration].)

(2) *Practice Works*. (See C.E.B., *Construction Contracts, Defects, and Litigation*, Chap. 5; Rutter Group, *Alternative Dispute Resolution* §§1:60 et seq., 5:1 et seq., 7:13 et seq.; Cal. Civil Practice, 3 Procedure §26:45 et seq.; Cal. Transactions Forms, 2 Business Transactions §14:48 et seq.; 3 Civil Proc. Before Trial 4th, §45.12 et seq.; Cal. Civil Practice, 4 *Civil Procedure*, §§26:45 et seq.; 77 *A.L.R.4th* 1071 [statute of limitations applicable to proceeding to compel arbitration]; 4 *Am.Jur.2d* (2007 ed.), *Alternative Dispute Resolution* §46 et seq.; 2A *Am.Jur. P.P. Forms* (2000 ed.), *Arbitration and Award*; 27 Proof of Facts 3d 103 [establishing grounds to vacate nonjudicial arbitration award]; 31 Proof of Facts 3d 495 [invalidity of foreign arbitration agreement or award]; 35 Proof of Facts 3d 161 [arbitration of claims respecting securities broker's excessive, unsuitable, or unauthorized trading]; 11 *Am.Jur. Trials* 327 [arbitration of labor dispute]; 27 *Am.Jur. Trials* 621 [arbitration of real estate dispute]; 89 *Am.Jur. Trials* 55 [arbitration of securities dispute]; 100 *Am.Jur. Trials* 45 [arbitration of construction dispute].)

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

(1) *Commentary*. See 122 *Harv. L. Rev.* 1170 [proposals for reform of consumer-defendant arbitration]; 9 Pepperdine Dispute Resolution L. J. 167 [partiality and partisanship in tripartite panel arbitrations].

(2) *Practice Works*. See 2A *Am.Jur.P.P. Forms* (2010 ed); 108 *Am.Jur. Trials* 313 [arbitrating and mediating customer securities disputes at Financial Industry Regulatory Authority (FINRA); superseding 89 *Am.Jur. Trials* 55,

text, p. 960]; 109 Am.Jur. Trials 1 [arbitrating securities industry disputes at FINRA].



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H. Contractual Arbitration.

2. California Legislation.

a. General Statute.

6 *Witkin Cal. Proc. PWT* § 502

[§ 502] General Statute.

(1) *In General.* California's first arbitration statute was enacted in 1851 and became part of the Code of Civil Procedure in 1872. The current Arbitration Act (*C.C.P. 1280 et seq.*) was enacted in 1961, following a study and recommendations of the California Law Revision Commission. (See 1961 Law Rev. Com. Reports, p. G-25 et seq.) It is similar to the Uniform Arbitration Act (7 U.L.A. (Master Ed.), p. 1 et seq.).

The statute consists of the following chapters:

- (a) General Provisions (*C.C.P. 1280 et seq.*).
- (b) Enforcement of Arbitration Agreements (*C.C.P. 1281 et seq.*).
- (c) Conduct of Arbitration Proceedings (*C.C.P. 1282 et seq.*).
- (d) Enforcement of the Award (*C.C.P. 1285 et seq.*).
- (e) General Provisions Relating to Judicial Proceedings (*C.C.P. 1290 et seq.*).

The Arbitration Act provides "a comprehensive, all-inclusive statutory scheme applicable to all written agreements to arbitrate disputes." (*American Home Assur. Co. v. Benowitz* (1991) 234 C.A.3d 192, 198, 285 C.R. 626.) However, arbitration of certain types of disputes is regulated by specific statutes. (See *infra*, §503 et seq.)

(2) *Sitting Judge May Not Conduct Contractual Arbitration.* Whether a judge, in hearing and deciding a matter submitted by agreement of the parties, was exercising judicial powers or was an arbitrator subject to the California Arbitration Act was the principal issue in *Elliott & Ten Eyck Partnership v. Long Beach* (1997) 57 C.A.4th 495, 67 C.R.2d 140. The parties in a contract action selected a judge to hear the matter and agreed that the judge, *acting as an arbitrator*, would rule on all issues and render a binding, nonappealable decision. The judge acted at all times in his official capacity as a judicial officer, was neither paid by the parties nor privately retained by them, and conducted the proceeding in court in a manner closely resembling a bench trial. The papers he signed all bore the standard judicial

imprint. Following an award for plaintiffs, defendants sought a supplemental award concerning issues raised but not decided during the proceedings. The supplemental order modified the award, favored defendants, and provided that "the court" retained jurisdiction to enforce the award. Plaintiffs, before a different judge, sought to vacate the award, contending that the hearing judge exceeded the authority of arbitrators to correct awards under *C.C.P. 1284* (infra, §567). Defendants argued that the parties never intended to limit the hearing judge's authority to that of an arbitrator under the Act. The motion to vacate was denied. *Held*, affirmed.

(a) *Consequences if judge was acting as contract arbitrator.* If the judge was acting as a contract arbitrator subject to the restrictions of the Act, the supplemental order would be void; once an arbitrator has published an award by delivering it to the parties, the award may not be revised or corrected by the parties or altered without their consent. (57 *C.A.4th* 501.) Cases decided under the Act have emphasized the narrow scope of an arbitrator's authority to modify an award (infra, §567). Thus, because the supplemental award here substantively changed the original award, if the judge's authority was limited by *C.C.P. 1284*, the supplement was void. (57 *C.A.4th* 502.) In addition, where the parties refer all their differences to arbitration, the arbitrator must decide all controverted issues, and if not, the award is void and must be set aside. (57 *C.A.4th* 503.)

(b) *Arbitration proceeding defined.* What constitutes a true arbitration proceeding was thoroughly discussed and the defining attributes were set forth in *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 *C.A.4th* 676, 57 *C.R.2d* 867, supra, §499. Essentially, an arbitration proceeding must have a neutral, third-party decisionmaker selected by the parties, an opportunity for the parties to be heard, and a binding decision. *Cheng-Canindin* also recognized that labeling a procedure as an "arbitration" does not necessarily mean that it is. (57 *C.A.4th* 503.)

(c) *Applicability to proceedings here.* Here, although the essential attributes of an arbitration were present, it does not follow that the proceeding was a contractual arbitration under the Act. The judge at all times acted as a judicial officer trying a case, and as such was bound to follow statutory and decisional law. Although it is doubtful that the parties could by stipulation free the judge from following the law and acting as a judge, the parties could agree to waive some normal trial procedures and the right to appeal. (57 *C.A.4th* 504.) The essence of the parties' agreement was that the judge resolve their case with finality and without the possibility of appellate review. The specific and repeated express waiver of appeal would have little, if any, purpose if the parties intended the judge to be a contract arbitrator, because contract arbitration is generally binding and not subject to appeal. (57 *C.A.4th* 504.) As a judicial officer, the judge was free to issue a decision and to change it before it became final, which he did. (57 *C.A.4th* 505.) (See *Heenan v. Sobati* (2002) 96 *C.A.4th* 995, 1000, 117 *C.R.2d* 532 [despite parties' agreement for "judicial binding arbitration" by sitting judge, proceedings were not those of contract arbitration but of bench trial subject to waivers, e.g., of right to appeal; there is no such thing as judicial binding arbitration, and sitting judge may not conduct contractual arbitration; following *Elliott*].)

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



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2. California Legislation.

b. Special Statutes.

1. In General.

6 *Witkin Cal. Proc. PWT* § 503

[§ 503] In General.

Arbitration in certain areas is subject to statutory regulation additional to that provided in the Arbitration Act. (See *Porter v. Golden Eagle Ins. Co.* (1996) 43 C.A.4th 1282, 1287, 51 C.R.2d 338, 2 Summary (10th), *Insurance*, §214 [Arbitration Act governs all private, contractual arbitration, including arbitration that is compelled by special statute].) The following are illustrative:

(1) *Medical Malpractice and Health Care Plans.* (C.C.P. 1295; *Health & Saf.C.* 1363.1, 1373.19 et seq.; see *infra*, §504).

(2) *Real Estate Contracts.* (C.C.P. 1298 et seq.; see *infra*, §505.)

(3) *Disability Insurance Plans.* (*Ins.C.* 10123.19.)

(4) *Public Construction Contracts.* (C.C.P. 1296.)

(5) *International Commercial Disputes.* (C.C.P. 1297.11 et seq.)

(6) *Uninsured Motorist Claims.* (*Ins.C.* 11580.2; *American Home Assur. Co. v. Benowitz* (1991) 234 C.A.3d 192, 201, 285 C.R. 626 [Arbitration Act is applicable to uninsured motorist arbitrations]; see 2 Summary (10th), *Insurance*, §208.)

(7) *Partnership Claims or Liability.* (*Corp.C.* 16803(c); see 9 Summary (10th), *Partnership*, §48.)

(8) *Disputes Between School District Boards.* (*Educ.C.* 35565; see *Natomas Union School Dist. v. Grant Joint Union High School Dist.* (1993) 14 C.A.4th 350, 356, 17 C.R.2d 547 [arbitration is mandatory].)

(9) *Fee Disputes Between Insurer and Independent Counsel.* (C.C. 2860(c); see *Fireman's Fund Ins. Cos. v. Younesi* (1996) 48 C.A.4th 451, 457, 55 C.R.2d 671, 2 Summary (10th), *Insurance*, §290 [C.C. 2860(c) is limited to

disputes over amount of legal fees or rates of hourly billing].)

(10) *Disputes Involving Licensed Contractors*. (B. & P.C. 7085 et seq.; see *Woolls v. Superior Court* (2005) 127 C.A.4th 197, 208, 25 C.R.3d 426 [noncompliance with B. & P.C. 7191 (arbitration provisions in contracts for work on residential property with one to four units must be conspicuous and must contain advisement that consumer waived judicial rights) rendered agreement unenforceable].)

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

(9) *Fee Disputes Between Insurer and Independent Counsel*. See *Compulink Management Center v. St. Paul Fire & Marine Ins. Co.* (2008) 169 C.A.4th 289, 300, 87 C.R.3d 72 [C.C. 2860(c) required arbitration only of independent counsel's fee claim in insured's action against insurer; claims for breach of contract, breach of covenant of good faith and fair dealing, and declaratory relief were beyond scope of statute and required adjudication by trial court].



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b. Special Statutes.

2. Medical Malpractice and Health Care Plans.

6 *Witkin Cal. Proc. PWT* § 504

[§ 504] Medical Malpractice and Health Care Plans.

Contracts for medical services that contain provisions for arbitration of medical malpractice claims are governed by *C.C.P. 1295*. Health care service plans that require binding arbitration to settle disputes must disclose that fact, and for cases where the claim is \$ 200,000 or less, must provide for the selection of a single neutral arbitrator. (See *Health & Saf.C. 1363.1* [disclosure]; *Health & Saf.C. 1373.19* [selection]; *Health & Saf.C. 1373.20* [arbitration plan where no arbitration provider is used]; *Health & Saf.C. 1373.21* [requirements for arbitration award]; 1 Pepperdine Dispute Resolution L. J. 45 [medical malpractice arbitration in new millennium].)

In *Medeiros v. Superior Court* (2007) 146 C.A.4th 1008, 1019, 53 C.R.3d 307, defendant health care service had a group service health plan with plaintiff's employer. Rather than sign an enrollment form for health services, employees such as plaintiff were required to sign a benefit election agreement form that the employer forwarded to defendant. In the middle of the signature page, the agreement form stated that an enrolling employee agreed to "abide by the rules of binding arbitration as described in the Evidence of Coverage and Disclosure brochures." The provision was not prominently displayed, but defendant argued that the benefit election form need not comply with the statutory mandatory disclosure requirements because the requirement applied only to the application for group service agreement with the employer. Plaintiff sued defendant for multiple claims, and the trial court granted defendant's motion to compel arbitration. *Held*, order compelling arbitration vacated. In deciding to enroll in a health plan and be bound by an arbitration provision, there is "no reason why employees who enroll in a group plan should be afforded some lesser right of disclosure. ... In the context of a group health plan, it is the employees, not the employers, who are the 'prospective enrollees.' " Thus, a group health plan that requires binding arbitration must include a disclosure to the employee-subscribers that meets the requirements of *Health & Saf.C. 1363.1*. (146 C.A.3th 1017.)

The following cases are also instructive:

Contra Costa v. Kaiser Foundation Health Plan (1996) 47 C.A.4th 237, 246, 54 C.R.2d 628, 6 Summary (10th), *Torts*, §949 [MICRA policy favoring enforcement of health care provider arbitration agreements is not applicable to claims by third parties seeking equitable indemnity from health care provider].

Hollister v. Benzl (1999) 71 C.A.4th 582, 585, 83 C.R.2d 903 [arbitration agreement signed by plaintiff on her first visit to defendant physician's office was valid, enforceable, and complied with C.C.P. 1295; defendant had no other predisclosure duties regarding medical benefit plan between plaintiff and health care provider because defendant's sole responsibility was to provide medical services].

Smith v. PacifiCare Behavioral Health of Calif. (2001) 93 C.A.4th 139, 154, 113 C.R.2d 140, *infra*, §509 [Federal Arbitration Act does not preempt application of *Health & Saf.C. 1363.1*].

Pagarigan v. Superior Court (2002) 102 C.A.4th 1121, 126 C.R.2d 124 [Medicare health care service plan's arbitration provision violated *Health & Saf.C. 1363.1* and was unenforceable; following *Smith*]; *Imbler v. PacifiCare of Calif.* (2002) 103 C.A.4th 567, 577, 126 C.R.2d 715 [same].

Zolezzi v. PacifiCare of Calif. (2003) 105 C.A.4th 573, 578, 129 C.R.2d 526 [federal Medicare Act does not preempt *Health & Saf.C. 1363.1*; defendant's noncompliance with statute precluded enforcement of contractual arbitration provision; thus, defendant health care provider's petition to compel arbitration was properly denied].

Malek v. Blue Cross of Calif. (2004) 121 C.A.4th 44, 60, 16 C.R.3d 687 [*Health & Saf.C. 1363.1* requires strict compliance; thus, health care service provider's arbitration provision that lacked statutory disclosures and was neither prominently displayed nor properly positioned failed to meet statutory requirements and was unenforceable]; *Robertson v. Health Net of Calif.* (2005) 132 C.A.4th 1419, 1425, 34 C.R.3d 547 [same; following *Malek*].

Viola v. Department of Managed Health Care (2005) 133 C.A.4th 299, 310, 34 C.R.3d 626 [Legislature's authorization of arbitration under health care service plans permits Department of Managed Health Care, which licenses and regulates plans in California, to approve plans that include binding arbitration provisions].

Zembsch v. Superior Court (2006) 146 C.A.4th 153, 165, 53 C.R.3d 69 [arbitration disclosure located immediately above signature line on health care enrollment form did not stand out from rest of document and was not readily noticeable; thus, provision did not meet statutory requirements and was unenforceable; following *Malek* and *Robertson*].

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

Titolo v. Cano (2007) 157 C.A.4th 310, 317, 68 C.R.3d 616, Supp., *infra*, §532 [communications between physician and patient's insurer regarding diagnosis or treatment constituted medical services].

Burks v. Kaiser Foundation Health Plan (2008) 160 C.A.4th 1021, 1028, 73 C.R.3d 257 [arbitration provision was unenforceable where arbitration disclosure statement on enrollment form was not prominently displayed; although placed immediately above signature line, statement was printed in typeface that was substantially same or smaller than that used on rest of form, lacked heading, and was not highlighted].

Rodriguez v. Blue Cross of Calif. (2008) 162 C.A.4th 330, 340, 75 C.R.3d 754 [strict compliance with *Health & Saf.C. 1363.1* is required; thus, arbitration provision was unenforceable where most of disclosure and its highlighted language dealt with medical malpractice claims, which were not involved in this action, and created confusion regarding waiver of right to judicial forum for disputes other than malpractice]. *Correction:* Page 964, line 34, "heath" should be "health".



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3. Real Estate Contracts.

6 *Witkin Cal. Proc. PWT* § 505

[§ 505] Real Estate Contracts.

C.C.P. 1298 et seq. govern arbitration provisions contained in contracts to convey real property. The provisions require arbitration provisions to be clearly apparent and that specific advisory language immediately precede the line or space provided for the parties to indicate their assent or nonassent to arbitration. (*C.C.P. 1298*.) (See *Grubb & Ellis Co. v. Bello* (1993) 19 *C.A.4th* 231, 241, 23 *C.R.2d* 281 [real estate contract arbitration statute does not require mutuality of arbitration remedy as prerequisite to enforcing arbitration provision]; *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 *C.A.4th* 83, 88, 80 *C.R.2d* 147 [where purchase agreement clearly contemplated that all parties had to agree to arbitration provision for it to be effective and sellers failed to initial provision, there was no agreement to arbitrate; criticizing *Grubb & Ellis Co. v. Bello*]; *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 *C.A.4th* 759, 766, 28 *C.R.3d* 752 [real estate broker who failed to initial arbitration provisions in purchase agreement was entitled to enforce provisions as agent for signatory parties].)

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

See *McAvoy v. Hilbert* (2009) 172 *C.A.4th* 707, 713, 91 *C.R.3d* 437 [*C.C.P. 1298* applies to *any* agreement; thus, statute applied to "open listing agreement" (no exclusive rights or priorities granted to listing agent) that contemplated real property sales transaction, which included sale of business and real property].



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3. Federal Arbitration Act.

a. In General.

1. Nature and Scope.

6 *Witkin Cal. Proc. PWT* § 506

[§ 506] Nature and Scope.

Written arbitration provisions in interstate and foreign commercial transactions (except employment contracts) and in maritime transactions (foreign commercial matters within admiralty jurisdiction) are enforceable under the Federal Arbitration Act (FAA; 9 U.S.C., §1 et seq.). (On authorization and procedures for court-annexed ADR in civil cases in federal district court, see 28 U.S.C., §651651 et seq.; Rutter Group, Federal Civil Proc. Before Trial, §15:89 et seq.)

The following cases are instructive:

Southland Corp. v. Keating (1984) 465 U.S. 1, 104 S.Ct. 852, 858, 861, 79 L.Ed.2d 1, 11, 15, 7 Summary (10th), *Constitutional Law*, §10 [FAA preempts state requirement of judicial consideration of claims brought under California's Franchise Investment Law].

Shearson/Amer. Express v. McMahon (1987) 482 U.S. 220, 107 S.Ct. 2332, 2345, 96 L.Ed.2d 185, 201 [claims under antifraud provisions of Securities Exchange Act and treble damage claims under RICO are arbitrable under FAA].

Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 115 S.Ct. 834, 840, 130 L. Ed.2d 753, 764 [interstate commercial transaction coverage of FAA is to be read broadly, reaching to limits of Congress' powers under Commerce Clause (U.S. Const., Art. I, §8)].

Circuit City Stores v. Adams (2001) 532 U.S. 105, 121 S.Ct. 1302, 1308, 149 L.Ed.2d 234, 245 [FAA employment contract exemption applies only to employment contracts of transportation workers].

Citizens Bank v. Alafabco (2003) 539 U.S. 52, 123 S.Ct. 2037, 2039, 156 L.Ed.2d 46, 51 [Alabama debt restructuring agreements executed in Alabama and signed by Alabama residents were contracts involving commerce; thus, arbitration provisions were subject to FAA].

Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S.Ct. 2402, 2407, 156 L.Ed.2d 414, 422 [whether arbitration agreement in FAA case prohibits class action arbitration must be decided by arbitrator]; *Garcia v. DIRECTV*

(2004) 115 C.A.4th 297, 302, 9 C.R.3d 190 [same; following *Green Tree Financial Corp. v. Bazzle*].

Main v. Merrill Lynch (1977) 67 C.A.3d 19, 25, 136 C.R. 378 [FAA is applicable to contract dealing with transaction in interstate commerce].

Wilder v. Whittaker Corp. (1985) 169 C.A.3d 969, 975, 215 C.R. 536 [FAA is not applicable to employment contract of worker engaged in foreign commerce].

Spellman v. Securities, Annuities & Ins. Services (1992) 8 C.A.4th 452, 459, 10 C.R.2d 427 [discussing employment contract exception].

Aviation Data v. American Express Travel Related Services Co. (2007) 152 C.A.4th 1522, 1535, 62 C.R.3d 396, *infra*, §550 [FAA applied where arbitration provisions were contained in credit card members' agreements; FAA rules required that federal law be used to decide whether party had waived right to arbitration].

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

See *Hall Street Associates, L.L.C. v. Mattel* (2008) 552 U.S. 576, 128 S.Ct. 1396, 1404, 170 L.Ed.2d 254, 264 [FAA provides exclusive criteria for review of arbitration awards; thus, arbitration agreement that provides for vacation of award where arbitrator's findings are not supported by substantial evidence or if arbitrator's conclusions of law are erroneous is not enforceable]; *Vaden v. Discover Bank* (2009) 556 U.S. 491, 129 S.Ct. 1262, 1278, 173 L.Ed.2d 206, 224 [in considering petitions to compel arbitration under FAA, federal district court must ask whether court would have jurisdiction over entire controversy "save for [the arbitration] agreement" and may not base jurisdiction on defense or counterclaim; thus, district court could not compel arbitration where controversy was based entirely on state law]; *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. ___, 129 S.Ct. 1896, 1900, 1902, 173 L.Ed.2d 832, 837, 840 [litigant in federal court who is not signatory to arbitration agreement may invoke FAA provisions for stay if relevant state contract law permits enforcement of arbitration agreement by nonsignatory; thus, Court of Appeals had jurisdiction to review federal district court's denial of request under FAA for stay pending arbitration by nonsignatory litigant]; on enforceability in California of agreements extending scope of judicial review, see *Supp.*, *infra*, §576.



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3. Federal Arbitration Act.

a. In General.

2. Commentary and Practice Works.

6 *Witkin Cal. Proc. PWT* § 507

[§ 507] Commentary and Practice Works.

(1) *Commentary.* Commentary on the FAA is extensive. (See 40 Cal. Western L. Rev. 383 [arbitration agreements in employment contracts and effect on employee's right to pursue claims with California Labor Commissioner]; 41 Cal. Western L. Rev. 1 [class arbitration under FAA]; 101 *Harv. L. Rev.* 280 [federal securities and RICO claims]; 54 *Hastings L. J.* 1593 [scope of FAA employment contract exemption]; 3 Pepperdine Dispute Resolution L. J. 157 [legitimacy of parties' agreement for expanded judicial review of award in context of FAA]; 6 Pepperdine Dispute Resolution L. J. 147 [preliminary injunctions as provisional remedies in disputes subject to FAA]; 36 *Santa Clara L. Rev.* 559 [Act exclusions]; 46 *Santa Clara L. Rev.* 49 [whether court or arbitrator should decide if res judicata bars subsequent arbitration under FAA]; 76 *So. Cal. L. Rev.* 433 [arbitration of "public injunctions"; clash between state statutory remedies and FAA]; 43 *U.C.L.A. L. Rev.* 999 [reconciling FAA and Bankruptcy Code].)

(2) *Annotations and Practice Works.* A number of annotations and practice works deal with the FAA. (See 13 *A.L.R.6th* 145 [validity of arbitration provision that precludes class actions]; 141 *A.L.R. Fed* 1 [vacating federal arbitration award because of fraud, corruption, or arbitrator misconduct]; 159 *A.L.R. Fed* 1 [validity and effect under FAA of provision for alternative method of appointing arbitrator where one party fails to follow agreement's appointment procedure]; 1 *A.L.R. Fed* 2d 557 [mandatory stay provision of FAA]; 3 *A.L.R. Fed* 2d 419 [statute of limitations under FAA on filing motion to confirm award]; 10 *A.L.R. Fed* 2d 489 [when does contract evidence transaction involving interstate commerce within meaning of FAA; legal issues and principles]; 11 *A.L.R. Fed* 2d 489 [when does contract evidence transaction involving interstate commerce within meaning of FAA; service contracts]; 86 *Am.Jur. Trials* 111 [litigator's guide to arbitration process focusing on Act]; 94 *Am.Jur. Trials* 211 [appealing adverse arbitration awards governed by FAA]; 83 *Proof of Facts* 3d 1 [interrelationship between arbitration contracts governed by FAA and American Arbitration Association rules].)

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

(2) *Annotations and Practice Works.* See 108 *A.L.R. Fed* 179 [preemption by FAA of state laws prohibiting or restricting arbitration agreements]; 28 *A.L.R. Fed* 2d 1 [construction and application of FAA; Supreme Court cases]; 39

A.L.R. Fed 2d 253 [enforceability under FAA of arbitration provision, applicable to employee not covered by collective bargaining agreement, to compel arbitration of claims under federal civil rights statutes]; *41 A.L.R. Fed 2d 261* [modification or correction of arbitration award under FAA where there was evident material miscalculation of figures or mistake in describing person, thing, or property].



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3. Federal Arbitration Act.

b. Conflicting State Law Is Preempted.

1. General Policy.

6 *Witkin Cal. Proc. PWT* § 508

[§ 508] General Policy.

The Federal Arbitration Act (FAA) prevails, under the Supremacy Clause (U.S. Const., Art. VI, cl. 2), over conflicting state arbitration requirements regarding claims within the coverage of the FAA. It preempts state laws precluding or restricting arbitration of those claims. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 16, 104 S.Ct. 852, 858, 861, 79 L.Ed.2d 1, 11, 15, 7 Summary (10th), *Constitutional Law*, §10 [FAA preempts state requirement of judicial consideration of claims brought under California's Franchise Investment Law]; *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 115 S.Ct. 834, 842, 130 L.Ed.2d 753, 766 [FAA preempts state law where transaction involves interstate commerce in fact, even if parties did not contemplate interstate commerce connection]; *Mastrobuono v. Shearson Lehman Hutton* (1995) 514 U.S. 52, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76, 83 [FAA, which permits private punitive damages awards, preempts contrary state laws]; 109 *Harv. L. Rev.* 269 [discussing *Mastrobuono*]; cf. *Strotz v. Dean Witter Reynolds* (1990) 223 C.A.3d 208, 212, 216, 217, 272 C.R. 680 [allegations of fraud in inception or inducement of contract containing arbitration clause subject to FAA are sufficient to place issue of fraud before court and petition to compel arbitration may be denied].)

By its enactment, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. ... Congress intended to foreclose legislative attempts to undercut the enforceability of arbitration." (*Southland Corp. v. Keating*, *supra*, 465 U.S. 10, 104 S.Ct. 858, 79 L.Ed.2d 12.)

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



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XIV. ALTERNATIVE DISPUTE RESOLUTION

H. Contractual Arbitration.

3. Federal Arbitration Act.

b. Conflicting State Law Is Preempted.

2. Distinctions.

6 *Witkin Cal. Proc. PWT* § 509

[§ 509] Distinctions.

(1) *Jury Requirements of FAA Are Not Binding on California.* In *Rosenthal v. Great Western Financial Sec. Corp.* (1996) 14 C.4th 394, 58 C.R.2d 875, 926 P.2d 1061, an action by mutual fund investors alleging misrepresentations regarding the security of their investments, the client agreements signed by plaintiffs contained an arbitration clause, and defendants petitioned for arbitration. Plaintiffs opposed arbitration, asserting fraud in the execution of the contract and fraud permeating the transaction. The trial judge denied plaintiffs' request for a jury trial respecting the existence and validity of the arbitration agreement. *Held*, denial affirmed; while the client agreements are subject to the Federal Arbitration Act, the provision of that Act for a jury trial of questions regarding the existence of an arbitration agreement (9 U.S.C., §4) does not operate in California courts, and there is no right to a jury trial on these issues.

(a) Because the transactions here involved interstate commerce, questions concerning arbitrability of the dispute are governed by the Federal Arbitration Act (see 9 U.S.C., §§1, 2). The Act favors enforceability of arbitration agreements and preempts contrary state law. While the California statutory scheme on enforcement of private arbitration agreements is similar to the federal Act, it differs in one important respect. The California statute does not provide for a jury trial of issues as to the making of the arbitration agreement or a party's default. Instead, C.C.P. 1281.2 and 1290.2 require petitions to compel arbitration to be determined in the manner provided "for the making and hearing of motions." (14 C.4th 405, 407.)

(b) Under general principles of federal preemption, states may establish rules of *procedure* governing litigation in their own courts, even when the controversy is governed by substantive federal law. Here, California procedures for the summary determination of a petition to compel arbitration serve to further, rather than defeat, the policy of the federal Act favoring enforceability. Determining the existence and validity of the arbitration agreement in the manner of a motion is designed to further the use of private arbitration as a means of resolving disputes more quickly and less expensively than litigation. Accordingly, the federal provisions governing jury trial are inoperative in this state. (14 C.4th 407, overruling, to the extent they reached the opposite conclusion, *Main v. Merrill Lynch* (1977) 67 C.A.3d 19, 24, 136 C.R. 378; *Strotz v. Dean Witter Reynolds* (1990) 223 C.A.3d 208, 210, footnote 1, 272 C.R. 680; and *Rice v. Dean Witter Reynolds* (1991) 235 C.A.3d 1016, 1025, 1 C.R.2d 265.)

(c) The summary procedure allowing the court rather than a jury to decide whether the arbitration agreement is void for fraud does not deprive plaintiffs of their state constitutional rights to due process and a jury trial under Cal. Const., Art. I, §§7, 16. A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract. Because actions for specific performance were not recognized at common law, the California Constitution does not guarantee the parties a jury trial. Thus, plaintiffs are not constitutionally entitled to a jury trial on whether the arbitration agreements should be specifically enforced, including the question whether they are void for fraud. (14 C.4th 410.)

(2) *Regulation of Insurance*. *Health & Saf.C. 1363.1* (supra, §504) imposes various disclosure requirements on health care service plans. *Erickson v. Aetna Health Plans of Calif.* (1999) 71 C.A.4th 646, 650, 84 C.R.2d 76, held that the FAA preempts *Health & Saf.C. 1363.1*. *Smith v. PacifiCare Behavioral Health of Calif.* (2001) 93 C.A.4th 139, 113 C.R.2d 140, disagreed. Defendant sought enforcement of the arbitration provisions in its health care service plans. Plaintiff argued that the plans failed to meet the disclosure requirements of *Health & Saf.C. 1363.1* and thus should not be enforced. Defendant contended that it does not matter whether the provisions meet the requirements in *Health & Saf.C. 1363.1* because under *Erickson* those provisions are preempted by the FAA. *Held*, the FAA does not preempt *Health & Saf.C. 1363.1*.

(a) The McCarran-Ferguson Act (15 U.S.C., §1101 et seq.) was enacted to ensure that the primary regulation of the business of insurance be left to the states, and it provides that an act of Congress cannot be construed to invalidate, impair, or supersede a state law enacted for that purpose, unless the federal Act specifically relates to the business of insurance. (93 C.A.4th 152.)

(b) Health service plans are engaged in the business of insurance, and *Health & Saf.C. 1363.1* was enacted for the purpose of regulating an important aspect of that business relating to the performance and enforcement of policies. Thus, because *Health & Saf.C. 1363.1* regulates the business of insurance within the meaning of the McCarran-Ferguson Act, application of the FAA would have the effect of invalidating, impairing, and superseding the operation of *Health & Saf.C. 1363.1*. Therefore, the McCarran-Ferguson Act precludes application of the FAA and its preemptive effect. (93 C.A.4th 154.) (See *Pagarigan v. Superior Court* (2002) 102 C.A.4th 1121, 126 C.R.2d 124 [requirements of *Health & Saf.C. 1363.1* were not preempted by FAA or federal regulatory scheme governing Medicare; following *Smith*]; *Imbler v. PacifiCare of Calif.* (2002) 103 C.A.4th 567, 571, 126 C.R.2d 715 [same].)

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

Correction: Page 969, line 41, "15 U.S.C., §1101 et seq." should be "15 U.S.C., §1011 et seq."



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3. Federal Arbitration Act.

b. Conflicting State Law Is Preempted.

3. Illustrations.

6 *Witkin Cal. Proc. PWT* § 510

[§ 510] Illustrations.

(1) *Finding Preemption*. The following cases have found that California law was preempted:

Doctor's Associates v. Casarotto (1996) 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902, 906 [FAA preempts state statute conditioning enforceability of arbitration agreements on compliance with special notice provision not applicable to contracts generally]; see 28 West L.A. L. Rev. 387 [arbitration and state sovereignty; *Doctor's Associates*].

Energy Group v. Liddington (1987) 192 C.A.3d 1520, 1525, 238 C.R. 202 [FAA preempts C.C.P. 1281.2 to extent it authorizes stay of arbitration of dispute governed by FAA].

Baker v. Aubry (1989) 216 C.A.3d 1259, 1265, 265 C.R. 381 [FAA preempts even though plaintiff employee claimed overtime pay under California statute].

Hall v. Nomura Sec. Int. (1990) 219 C.A.3d 43, 48, 50, 268 C.R. 45 [FAA preempts even though action was brought under state antidiscrimination statute].

Warren-Guthrie v. Health Net (2000) 84 C.A.4th 804, 810, 101 C.R.2d 260 [in claim against HMO subject to FAA, FAA preempted C.C.P. 1281.2(c) (infra, §536) exception to mandatory arbitration; statute is specifically applicable to arbitration and conflicts with FAA provisions favoring enforceability except for grounds applicable to revocation of contracts generally].

Hedges v. Carrigan (2004) 117 C.A.4th 578, 583, 11 C.R.3d 787 [FAA preempts statutory or judicial requirement that compliance with C.C.P. 1298, which specifies font size and notice provisions of arbitration provisions in real estate contracts, is condition precedent to enforcement of those provisions].

Shepard v. Edward Mackay Enterprises (2007) 148 C.A.4th 1092, 1101, 56 C.R.3d 326 [FAA preempts California law that permits purchaser of real property to bring action for construction and design defects notwithstanding agreement to arbitrate; defendant demonstrated substantial interstate commerce connection for which FAA controlled].

Giuliano v. Inland Empire Personnel (2007) 149 C.A.4th 1276, 1284, 58 C.R.3d 5 [FAA preempts California statute that permits actions on wage claims where plaintiff's employment contract involves interstate commerce].

(2) *No Preemption*. The following cases have found that California law was not preempted:

Discover Bank v. Superior Court (2005) 36 C.4th 148, 163, 30 C.R.3d 76, 113 P.3d 1100 [FAA does not preempt California law on unconscionability of provision forbidding classwide arbitration].

Chase v. Blue Cross of Calif. (1996) 42 C.A.4th 1142, 1158, 50 C.R.2d 178, *infra*, §552 [FAA does not preempt state law mandating forfeiture of right to arbitration if insurer breaches covenant of good faith and fair dealing by engaging in bad faith conduct designed to mislead insured; states may regulate contracts, including arbitration clauses, under general contract law principles].

Blue Cross of Calif. v. Superior Court (1998) 67 C.A.4th 42, 60, 78 C.R.2d 779 [FAA does not preempt California rule permitting classwide arbitrations].

Muao v. Grosvenor Properties (2002) 99 C.A.4th 1085, 1090, 122 C.R.2d 131, *infra*, §526 [FAA procedural rules permitting immediate appeal of order compelling arbitration do not conflict with California law not permitting appeal and are not binding on California courts].

Sanders v. Kinko's (2002) 99 C.A.4th 1106, 1110, 121 C.R.2d 766, *infra*, §526 [FAA does not preempt California procedural law governing arbitration agreements; thus, FAA procedures to compel arbitration in federal court did not preclude trial court from denying defendant employer's motions to stay lawsuit and compel arbitration pending resolution of plaintiff employees' class certification issues].

Mitchell v. American Fair Credit Assn. (2002) 99 C.A.4th 1345, 1355, 122 C.R.2d 193 [FAA did not preempt California's Credit Services Act requirement that all contract modifications be signed; requirement prevented credit services organization from modifying its membership contract to require arbitration and preclude class relief by notifying its members by mail that continued membership constituted acceptance of modification; signature requirement was neutral contract principle].

McManus v. CIBC World Markets Corp. (2003) 109 C.A.4th 76, 87, 134 C.R.2d 446 [California's definition of unconscionability and requirements of *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, *infra*, §518, did not conflict with federal system of arbitration created by Security and Exchange Commission's adoption of Form U-4 or arbitration rules of National Association of Securities Dealers and New York Stock Exchange].

Ruiz v. Sysco Food Services (2004) 122 C.A.4th 520, 535, 18 C.R.3d 700 [FAA did not preempt arbitration of employee's state tort claims under collective bargaining agreement and California law].

Woolls v. Superior Court (2005) 127 C.A.4th 197, 212, 25 C.R.3d 426, [agreement between California homeowner and California contractor to renovate single-family residence in California did not involve interstate commerce or implicate FAA].

Ovitz v. Schulman (2005) 133 C.A.4th 830, 855, 35 C.R.3d 117 [FAA does not preempt C.C.P. 1286.2(a)(6)(A) (*infra*, §572), which requires vacation of award where arbitrator fails to make required disclosures].

Klussman v. Cross Country Bank (2005) 134 C.A.4th 1283, 1291, 36 C.R.3d 728 [FAA did not prevent California court from deciding whether arbitration agreement was revocable on state law contractual grounds; following *Discover Bank*].

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

(1) *Finding Preemption*. See *Preston v. Ferrer* (2008) 552 U.S. 346, 128 S.Ct. 978, 987, 169 L.Ed.2d 917, 929 [question of contract's validity was for arbitrator to decide pursuant to FAA; FAA preempts California's Talent Agencies Act (Lab.C. 1700 et seq.), which otherwise vests jurisdiction with Labor Commissioner].



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3. Federal Arbitration Act.

c. Effect of Choice-of-Law Provision.

6 *Witkin Cal. Proc. PWT* § 511

[§ 511] Effect of Choice-of-Law Provision.

Choice-of-law provisions in arbitration agreements will be given effect, provided that there is no conflict with the policies underlying the Federal Arbitration Act (FAA). In *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488, plaintiff and defendant entered into a construction contract, which included (a) an agreement to arbitrate disputes, and (b) a choice-of-law clause selecting the law of the place where the project is located (California). Following a dispute about compensation for extra work, defendant sued plaintiff for fraud and breach of contract and sought indemnity from two third parties involved in the project, with whom it did not have arbitration agreements. When plaintiff petitioned to compel arbitration, defendant sought a stay under *C.C.P. 1281.2*, pending resolution of the breach of contract suit. The trial court granted a stay. *Held*, affirmed; the California stay provision is not, under the circumstances, preempted by the FAA.

(a) The choice-of-law clause is not a waiver of a federal right. The FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to an order directing that arbitration proceed in the manner provided by the agreement of the parties. The finding of the Court of Appeal, that by incorporating California law the parties agreed that arbitration would not proceed in situations within the scope of *C.C.P. 1281.2*, was not a finding that plaintiff had waived a federal right to compel arbitration, "but a finding that it had no such right in the first place, because the parties' agreement did not require arbitration to proceed in this situation." (109 S.Ct. 1253, 103 L.Ed.2d 497.)

(b) The choice-of-law clause does not violate the strong federal policy favoring arbitration of disputes within the scope of the FAA. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration--rules which are manifestly designed to encourage resort to the arbitral process--simply does not offend the rule of liberal construction." (109 S.Ct. 1254, 103 L.Ed.2d 498.)

(c) The choice-of-law clause is not preempted by the FAA. The contract here involves interstate commerce and is clearly within the scope of the Act. However, the Act does not contain an express preemptive provision and does not

reflect a Congressional intent to occupy the entire field of arbitration. Further, a stay under *C.C.P. 1281.2*, in accord with the terms of the agreement, does not undermine the goals and policies of the Act. (109 S.Ct. 1254, 1255, 103 L.Ed.2d 499.) "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to 'rigorously enforce' such agreements according to their terms, ... we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." (109 S.Ct. 1255, 1256, 103 L.Ed.2d 500.)

In *Mt. Diablo Med. Center v. Health Net of Calif.* (2002) 101 C.A.4th 711, 124 C.R.2d 607, plaintiff hospital filed an action against defendant HMO and third parties to determine responsibility and amounts for health care services plaintiff rendered to defendant's members. A hospital participation agreement between plaintiff and defendant contained broad arbitration language and a choice-of-law provision that California law applied to the validity, construction, interpretation, and enforcement of the agreement. The trial court relied on *C.C.P. 1281.2(c)* in denying a petition to arbitrate, and concluded that arbitration would create a risk of conflicting rulings with pending third-party litigation. Defendant argued that the choice-of-law provision was not intended to render the agreement to arbitrate subject to California's Code of Civil Procedure and thus *C.C.P. 1281.2(c)* was preempted by the FAA requirement that arbitration provisions be enforced despite the potential for conflicting results. *Held*, denial of arbitration affirmed.

(a) Although the choice-of-law provision did not mention arbitration or other specific controversies, it was "broad, unqualified and all-encompassing." (101 C.A.4th 722.) The reference to enforcement reasonably includes whether proceedings to enforce the agreement will be in court or by arbitration. Moreover, *C.C.P. 1281.2(c)* is contained in that portion of California's Code of Civil Procedure captioned "Enforcement of Arbitration Agreements." "An interpretation of the choice-of-law provision to exclude reference to this chapter would be strained at best." (101 C.A.4th 722.)

(b) *C.C.P. 1281.2(c)* does not reflect a hostility to the enforcement of arbitration agreements that the FAA was designed to overcome. The statute is not a special rule that limits an arbitrator's authority or the rights of the parties. "Rather, it is part of California's statutory scheme designed to enforce the parties' arbitration agreements, as the FAA requires." Were it otherwise, the choice-of-law provision could not be construed to incorporate the statute. (101 C.A.4th 726.)

In *Cronus Inv. v. Concierge Services* (2005) 35 C.4th 376, 25 C.R.3d 540, 107 P.3d 217, plaintiff's transfer of a business involved six agreements, four of which contained arbitration provisions in which the parties agreed that arbitration would be governed by California law, but that this provision would not be deemed an election to preclude application of the FAA, if the FAA were applicable. Plaintiffs sued defendant and others for breach of contract, breach of fiduciary duty, conversion, and fraud. Defendants filed a cross-complaint alleging multiple claims. Plaintiffs petitioned the trial court under *C.C.P. 1281.2* and *1281.4* to compel arbitration and stay litigation, contending that they had already demanded arbitration and that some of the cross-claims implicated the parties' arbitration agreements. Defendants sought a stay of arbitration under *C.C.P. 1281.2(c)*. To avoid contradictory outcomes and to promote efficiency, the trial court denied the petition to stay litigation and compel arbitration and granted defendants' motion to stay arbitration pending the outcome of the litigation. The Court of Appeal determined that the FAA does not preempt the application of *C.C.P. 1281.2(c)*, "an evenhanded application of state principles addressing the general problem of multiple litigation." (35 C.4th 382.) *Held*, affirmed.

(a) The purpose of the FAA is to ensure the enforceability of private agreements to arbitrate, not to force parties to arbitrate absent an agreement to do so. Nor does the FAA require the parties to arbitrate under specific procedural rules. The parties are free to specify what law will govern their arbitration, and the FAA will preempt only those state laws that apply of "their own force" to limit arbitration agreements against the parties' intentions or that withdraw the power to enforce the agreements. (35 C.4th 385.)

(b) The parties' choice-of-law provision incorporates California's rules of arbitration into their agreements, and procedural provisions of the FAA will only apply if application of *C.C.P. 1281.2(c)* conflicts with the FAA. Similar

stay provisions in the FAA were enacted to regulate federal procedures in federal court. Thus, there is no procedural conflict between the FAA and *C.C.P. 1281.2(c)*. (35 *C.4th* 389.)

(c) The FAA contains no provisions for the practical problems arising in multiparty contractual disputes when only some of the agreements contain arbitration provisions and only some of the parties are subject to those provisions. However, *C.C.P. 1281.2(c)* empowers the trial court to consolidate or stay arbitration proceedings in order to minimize the potential for contradictory judgments in exactly those circumstances. That is what the trial court did here, and to do so causes no conflict with the substantive spirit of the FAA, which is to ensure the enforceability of arbitration agreements. (35 *C.4th* 392.)

Several other decisions are noteworthy. (See *Warren-Guthrie v. Health Net* (2000) 84 *C.A.4th* 804, 812, 101 *C.R.2d* 260 [provision in HMO agreement stating that arbitration was to be conducted in accordance with *C.C.P. 1280* et seq. was construed to apply only to how arbitration was to be conducted, and not construed as agreeing that plan would be governed by California law for all purposes]; *Rodriguez v. American Technologies* (2006) 136 *C.A.4th* 1110, 1122, 39 *C.R.3d* 437 [trial court erred in denying defendant's petition to arbitrate and to stay court proceedings where parties' agreement unconditionally adopted FAA to govern contract disputes; FAA controlled, and *C.C.P. 1281.2(c)*, relied on by plaintiff, was not applicable]; *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 *C.A.4th* 761, 784, 49 *C.R.3d* 531 [*C.C.P. 1281.2(c)* is procedural state rule and thus is not preempted by FAA if parties have agreed "to arbitrate in accordance with California law"].)

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H. Contractual Arbitration.

4. Agreement To Arbitrate.

a. Agreement Is Enforceable.

6 *Witkin Cal. Proc. PWT* § 512

[§ 512] Agreement Is Enforceable.

(1) *Early Rule and Revision.* The early rule was opposed to arbitration as a substitute for court proceedings. Parties might voluntarily arbitrate controversies and reach binding conclusions if the proceedings were fairly conducted and they had notice and an opportunity for hearing, but an executory agreement to submit a controversy to arbitration was unenforceable as an improper attempt to deprive the parties of their right to resort to the courts. This rule against specific performance of arbitration agreements was originally stated in former C.C. 3390(3). (See *Rives-Strong Bldg. v. Bank of America* (1942) 50 C.A.2d 810, 814, 123 P.2d 942.) In 1927, by the enactment of former C.C.P. 1280, written arbitration agreements were made enforceable. Under this statute, (a) an agreement in writing to submit an existing controversy to arbitration or (b) a provision in a written contract that a controversy thereafter arising should be arbitrated was enforceable, except in labor contracts.

(2) *Present Statutory Authorization.* The current statute provides that a "written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (C.C.P. 1281.) A "written agreement" includes a written agreement that has been extended or renewed by an oral or implied agreement. (C.C.P. 1280(f).) (See *Madden v. Kaiser Foundation Hosp.* (1976) 17 C.3d 699, 706, 131 C.R. 882, 552 P.2d 1178, *Vernon v. Drexel Burnham & Co.* (1975) 52 C.A.3d 706, 715, 125 C.R. 147 [arbitration agreement prevails over policy of law favoring class actions]; 3 *Summary* (10th), *Agency and Employment*, §135; *Pacific Inv. Co. v. Townsend* (1976) 58 C.A.3d 1, 9, 129 C.R. 489 [arbitration should be ordered "unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"]; *Outdoor Services v. Pabagold* (1986) 185 C.A.3d 676, 684, 230 C.R. 73 [enforcement of arbitration by third-party beneficiary of principal contract]; *In re Marriage of Berezna* (2003) 110 C.A.4th 1062, 1067, 2 C.R.3d 351 [parties' stipulation to submit future child support issues to binding arbitration was void to extent that it purported to bind court and children to future awards]; 38 A.L.R.5th 69 [validity of arbitration provisions concerning alimony or support payments or child visitation or custody].)

The Federal Arbitration Act is comparable. (See 9 U.S.C., §2 [arbitration provision within scope of act "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"]; supra, §506 et seq.)

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4. Agreement To Arbitrate.

b. Form and Construction of Agreement.

1. In General.

6 *Witkin Cal. Proc. PWT* § 513

[§ 513] In General.

(1) *Scope.* An arbitration agreement may be broad and require the arbitration of all disputes arising from a contract, or it may be narrow and limit the type of disputes subject to arbitration. The agreement is liberally construed in favor of arbitration. (*Izzi v. Mesquite Country Club* (1986) 186 C.A.3d 1309, 1315, 231 C.R. 315 [buyer's tort claims were "connected" with condominium purchase agreement requiring arbitration]; see 38 A.L.R.5th 69 [construction of arbitration provisions concerning alimony or support payments or child visitation or custody].)

On the other hand, there is no policy to compel persons to accept arbitration of controversies that they have not agreed to arbitrate. (*Coopers & Lybrand v. Superior Court* (1989) 212 C.A.3d 524, 537, 260 C.R. 713; *Lee v. Southern Calif. University for Professional Studies* (2007) 148 C.A.4th 782, 786, 56 C.R.3d 134.) The parties may limit the application of an arbitration provision. (*Morris v. Zuckerman* (1967) 257 C.A.2d 91, 96, 64 C.R. 714.) In determining the scope of an arbitration clause, the court should give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. (*Victoria v. Superior Court* (1985) 40 C.3d 734, 222 C.R. 1, 710 P.2d 833 [ambiguous provision was construed against drafter to exclude from medical services arbitration clause patient's claim of sexual assault by hospital employee].)

(2) *Form.* There is no required form or terminology for an arbitration agreement, except where statutorily prescribed for particular transactions. (See, e.g., C.C.P. 1295 [agreements concerning medical malpractice]; C.C.P. 1298 [disputes arising from real estate contracts].) A simple agreement to arbitrate impliedly incorporates the statutory procedures that are not inconsistent with the express terms of the contract. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 C.3d 473, 479, 121 C.R. 477, 535 P.2d 341.) An agreement referring to arbitration pursuant to the rules of a named organization incorporates the procedures of that organization. (*Workman v. Superior Court* (1986) 176 C.A.3d 493, 496, 222 C.R. 69.) The agreement need not expressly provide for arbitration and may incorporate by reference an arbitration clause contained in another document. (*Boys Club of San Fernando Valley v. Fidelity & Deposit Co. of Maryland* (1992) 6 C.A.4th 1266, 1271, 8 C.R.2d 587; see *Wolschlager v. Fidelity Nat. Title Ins. Co.* (2003) 111 C.A.4th 784, 791, 4 C.R.3d 179 [preliminary report for title insurance policy properly incorporated by reference arbitration provisions contained in subsequent policy where report, although not mentioning arbitration, clearly and

unequivocally advised plaintiff to review policy]; *Kleveland v. Chicago Title Ins. Co.* (2006) 141 C.A.4th 761, 765, 46 C.R.3d 314 [plaintiff was not bound by arbitration provision that was neither included in preliminary title report nor incorporated by reference into that report; distinguishing *Wolschlager*].)

(3) *Construction.* In *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C.4th 495, 30 C.R.3d 787, 115 P.3d 68, plaintiff challenged the enforceability of an arbitration provision in a disability insurance policy underwritten by defendant, arguing that (a) the arbitration provision conflicted with the policy's service of suit provision (underwriter's agreement to submit to jurisdiction of court), thus creating an ambiguity that should be resolved in plaintiff's favor, and (b) the arbitration provision required the parties to share the costs of arbitration and was therefore contrary to *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, *infra*, §518. The trial court agreed and denied defendant's petition to compel arbitration. *Held*, reversed.

(a) *Service of suit provision.* Other jurisdictions have commonly enforced arbitration agreements contained in insurance contracts that include service of suit clauses, and have rejected arguments that consent to service creates an ambiguity or waives the right to compel arbitration. The matter is simpler here because the first sentence of the arbitration provision states that the parties agree to arbitrate all matters "[n]otwithstanding any other item set forth herein," thus establishing a priority for arbitration. (36 C.4th 503.)

(b) *Cost-sharing.* Plaintiff's claims are for nonpayment of benefits and breach of the covenant of good faith and fair dealing. The prohibition under *Armendariz* against employer-mandated arbitration provisions that impose costs on employees is restricted to claims by employees based on statutory and constitutional provisions and does not apply to plaintiff's claims. Moreover, the rule is a judicially created exception to *C.C.P. 1284.2* (*infra*, §564), which provides that parties to an arbitration agreement share costs. "To extend *Armendariz* to the arbitration of claims not carefully tethered to statutory or constitutional provisions would seem an arbitrary refusal to enforce" *C.C.P. 1284.2*. (36 C.4th 508.)

West's Key Number Digest, Arbitration 6 et seq.

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



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4. Agreement To Arbitrate.

b. Form and Construction of Agreement.

2. Oral Agreement.

6 *Witkin Cal. Proc. PWT* § 514

[§ 514] Oral Agreement.

(1) *Oral Stipulation To Arbitrate.* In *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 C.A.4th 672, 71 C.R.2d 771, defendant attorney had associated plaintiff attorney as cocounsel in an insurance bad faith action. The insurer appealed the verdict and plaintiff handled the appeal. When defendant disputed plaintiff's right to a fee for the appellate work, plaintiff sued. The parties stipulated to resolve the matter through binding arbitration and ultimately sought to enter into the stipulation in court and have the judge so order it. It was further agreed that the oral agreement on the record would be sufficient and there would be no written stipulation. The judge so ordered. The subsequent arbitration was favorable to plaintiff and defendant sought a trial de novo. Defendant also opposed plaintiff's petition to confirm the award. The trial judge confirmed the arbitration award and entered judgment for plaintiff. *Held*, affirmed. While C.C.P. 1281.2 permits the courts to compel arbitration based only on a written agreement, nothing prevented defendant from waiving his rights under C.C. 3513 ["Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement"]. That is what defendant did when he agreed that the court should order arbitration. Hence, no written arbitration agreement was required for the court to order defendant to arbitrate. (61 C.A.4th 678, 680.)

(2) *Oral Agreement To Modify Written Agreement.* In *Magness Petroleum Co. v. Warren Resources of Calif.* (2002) 103 C.A.4th 901, 127 C.R.2d 159, a joint venture agreement required arbitration of disputes before the American Arbitration Association (AAA). The parties stipulated in writing to arbitrate an earlier dispute before a retired judge, W, associated with Judicial Arbitration and Mediation Services (JAMS); during the pendency of that arbitration, W concluded that the parties orally agreed to his jurisdiction over all future disputes. Almost 6 months after the final award in the prior dispute, plaintiff filed a demand for arbitration with the AAA seeking dissolution of the joint venture and a final accounting. Defendant filed a petition to compel arbitration before W, which plaintiff opposed with a counterpetition to compel arbitration before the AAA. The trial court granted defendant's petition, finding that, based on language in W's earlier order following an oral stipulation, the parties had vested all future jurisdiction with W. *Held*, reversed, with an order to grant plaintiff's petition.

(a) Oral agreements to arbitrate are generally not enforceable. C.C.P. 1281 et seq. apply only to written agreements,

and *C.C.P. 1281.2* specifically requires a court to order arbitration on petition of a party to an arbitration agreement alleging the existence of a *written* agreement to arbitrate. Moreover, *C.C.P. 1280(f)* expressly provides that "written agreement" is deemed to include a written agreement that has been extended or renewed by an oral or implied agreement. No authority exists to include an oral agreement revising or modifying a written agreement that has not expired. (*103 C.A.4th 908.*) Thus, "[t]he only oral agreements enforceable under the statute are oral agreements to extend or renew an expired agreement, not oral agreements to modify an existing written agreement." (*103 C.A.4th 909.*)

(b) When waiver, estoppel, or an oral agreement is reflected in a written court or other record, as in *Law Offices of Ian Herzog*, courts may permit an exception to the rule barring enforceability of oral agreements to arbitrate. That was not the case here. There was no evidence that plaintiff waived or should be estopped from asserting the statutory right that only written arbitration agreements may be enforced. (*103 C.A.4th 909.*)

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b. Form and Construction of Agreement.

3. Illustrations.

6 Witkin Cal. Proc. PWT § 515

[§ 515] Illustrations.

The following cases illustrate permissible forms and the construction of arbitration agreements:

Service Employees Int. Union v. Los Angeles (1996) 42 C.A.4th 1546, 1553, 50 C.R.2d 216 [construction favoring arbitration is preferred, even where arbitration provision is contained in agreement bearing on duties of governmental entity].

Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co. (1996) 45 C.A.4th 631, 637, 53 C.R.2d 50, infra, §576 [parties to contractual arbitration may agree that arbitration be governed by any rules they see fit, including rules for judicial arbitration].

Brookwood v. Bank of America (1996) 45 C.A.4th 1667, 1670, 53 C.R.2d 515 [doubts concerning scope of arbitrable issues are resolved, under both federal and state arbitration statutes, in favor of arbitration].

Cheng-Canindin v. Renaissance Hotel Associates (1996) 50 C.A.4th 676, 683, 57 C.R.2d 867, supra, §499 [agreement's failure to identify grievance procedure as "arbitration" is not fatal to its use as binding mechanism for resolving disputes; more important is nature and intended effect of proceedings].

Wolitsky v. Blue Cross of Calif. (1997) 53 C.A.4th 338, 348, 61 C.R.2d 629 [arbitration provision in health care policy was sufficiently broad to encompass arbitration of claim based on Unruh Civil Rights Act (C.C. 51 et seq., 8 Summary (10th), Constitutional Law, §898 et seq.)].

Caro v. Smith (1997) 59 C.A.4th 725, 729, 734, 69 C.R.2d 306, infra, §575 [after acknowledging its duty to defend and indemnify defendant, defendant's insurer agreed to binding arbitration of all issues of liability and damages; manner of agreement was considered "true" (contractual) arbitration].

Banner Entertainment v. Superior Court (1998) 62 C.A.4th 348, 357, 72 C.R.2d 598 [California contract law principles were applied to determine whether there was enforceable arbitration agreement; no agreement was found

despite lengthy negotiations and draft agreements].

24 Hour Fitness v. Superior Court (1998) 66 C.A.4th 1199, 1209, 78 C.R.2d 533, *infra*, §520 [broad arbitration clause in employee handbook encompassing "every kind or type of dispute" without limitation, "any allegation of wrongful discharge, discrimination, or any injury to ... physical, mental or economic interests" was valid].

Badie v. Bank of America (1998) 67 C.A.4th 779, 787, 79 C.R.2d 273 [arbitration clause added unilaterally by bank to account agreements did not constitute agreement on part of account holders to arbitrate subsequent disputes].

Sy First Family Ltd. Partnership v. Cheung (1999) 70 C.A.4th 1334, 1340, 83 C.R.2d 340 [agreement characterized by counsel as "Stipulation and Order Re Reference to American Arbitration Association" was agreement for binding arbitration given language of stipulation, agreement to try case under AAA commercial arbitration rules, panel's prehearing inquiries about nature of proceeding, and implied consent reflected by conduct].

Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell (1999) 76 C.A.4th 227, 229, 90 C.R.2d 195 [arbitration provision in law partnership agreement extending to "[a]ny controversy or claim arising out of or relating to any provision of this Agreement" was broad enough to encompass action for dissolution, accounting, and alleged breach by one partner].

Coast Plaza Doctors Hosp. v. Blue Cross of Calif. (2000) 83 C.A.4th 677, 684, footnote 2, 99 C.R.2d 809 [provision in service agreement between hospital and managed health care provider extending to "any problem or dispute arising under this Agreement and/or concerning the terms of this Agreement" encompassed tort claims].

Martinez v. Scott Specialty Gases (2000) 83 C.A.4th 1236, 1245, 100 C.R.2d 403 [broad arbitration provision in employee handbook encompassed plaintiffs' public policy, defamation, misrepresentation, and loss of consortium claims].

Romo v. Y-3 Holdings (2001) 87 C.A.4th 1153, 1158, 105 C.R.2d 208 [arbitration provision in employment handbook with its own place for dates and signatures by employee and employer, neither of whom signed, was evidence that arbitration was effective only if both parties assented to that particular provision; because neither party signed, there was no agreement to arbitrate, even though employee had signed acknowledgment of receipt of handbook and its terms].

Basura v. U.S. Home Corp. (2002) 98 C.A.4th 1205, 120 C.R.2d 328 [defendant's failure to initial arbitration provisions in 28 of 48 home sales contracts did not preclude arbitration; defendant's initialing provisions in 20 contracts indicated that defendant intended to be uniformly bound by arbitration and failure to initial 28 provisions was simply clerical error].

Pagarigan v. Libby Care Center (2002) 99 C.A.4th 298, 301, 120 C.R.2d 892 [there was no valid agreement to arbitrate where adult children of J, who was comatose at time of admission to nursing facility, signed arbitration agreements 1 week later without consent or durable power of attorney from J].

Goliger v. AMS Properties (2004) 123 C.A.4th 374, 376, 19 C.R.3d 819 [daughter who signed as "responsible party" in mother's admission to residential health care facility but did not sign as mother's agent did not agree to arbitrate either her mother's claim for malpractice or her own wrongful death claim; following *Pagarigan*].

Garrison v. Superior Court (2005) 132 C.A.4th 253, 265, 33 C.R.3d 350 [daughter of patient in residential care facility as attorney-in-fact under broadly written durable power of attorney for health care was authorized to enter into binding arbitration agreement on behalf of patient; distinguishing *Pagarigan* and *Goliger*].

Hogan v. Country Villa Health Services (2007) 148 C.A.4th 259, 264, 55 C.R.3d 450 [trial court erred in refusing to compel daughter to arbitrate elder abuse claim where unrestricted power of attorney for health care impliedly included

power to enter into arbitration agreement contained in contract of admission of mother to health care facility; following *Garrison*].

Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 C.A.4th 635, 639, 643, 124 C.R.2d 363 [broad arbitration provision in parties' licensing agreement that encompassed each "dispute, controversy, or claim arising out of or relating to this" agreement extended to parties' deposit agreement with bank; arbitrator correctly determined that deposit agreement was related to license agreement].

Alan v. Superior Court (2003) 111 C.A.4th 217, 228, 3 C.R.3d 377 [arbitration provision that required parties to submit disputes to forum chosen by and subject to rules of National Association of Securities Dealers (NASD) was open to challenge and required trial court to decide whether out-of-state location chosen by NASD was proper, and if it was not, dispute should be adjudicated in California court].

Lopez v. Charles Schwab & Co. (2004) 118 C.A.4th 1224, 1230, 13 C.R.3d 544 [applying contract law principles, there was no contract formed and hence no agreement to arbitrate where securities broker disapproved plaintiff's application for account but relied on application's arbitration provisions to compel plaintiff to arbitrate her action for conversion and emotional distress].

Hartnell Community College Dist. v. Superior Court (2004) 124 C.A.4th 1443, 1449, 22 C.R.3d 410 [college district's 20-year practice of not refusing to arbitrate faculty grievances on ground that grievance could be redressed by another process (e.g., collective bargaining) showed that ambiguous arbitration provisions concerning nature of grievances did not express mutual agreement that district could unilaterally determine arbitrability].

Provencio v. WMA Sec. (2005) 125 C.A.4th 1028, 1033, 23 C.R.3d 524 [arbitration provision in investment services contract that required proceedings before NASD was not binding; defendant company was defunct and no longer member of NASD, and plaintiff did not give written consent to arbitrate with NASD if defendant was nonmember].

Solano v. Lionsgate Corp. (2005) 126 C.A.4th 741, 746, 24 C.R.3d 362 [False Claims Act (Govt.C. 12650 et seq., 5 Summary (10th), Torts, §767) issues were arbitrable where contract specified that all demands for monetary compensation or damages arising under or related to performance would be arbitrated unless arbitration was waived by either party after claim arose].

Medical Staff of Doctors Med. Center in Modesto v. Kamil (2005) 132 C.A.4th 679, 684, 33 C.R.3d 853 [arbitration provision in service contract between plaintiff medical group and defendant insurer that required arbitration of disputes "concerning the terms of the agreement" did not encompass defamation suit against defendant for allegedly defamatory statements unrelated to terms of agreement].

Villacreses v. Molinari (2005) 132 C.A.4th 1223, 1231, 34 C.R.3d 281 [one-page real estate sales agreement without arbitration provision and separate escrow agreement containing arbitration advisory language mandated by C.C.P. 1298 did not constitute agreement to arbitrate real estate disputes; advisory language is meant to accompany arbitration provision, which this did not, and thus did not constitute agreement].

Gravillis v. Coldwell Banker Residential Brokerage Co. (2006) 143 C.A.4th 761, 773, 49 C.R.3d 531 [arbitration provisions in form home purchase agreement that excluded actions for bodily injury did not exclude claim for emotional distress and accompanying diabetes].

Bono v. David (2007) 147 C.A.4th 1055, 1067, 54 C.R.3d 837 [arbitration provision covering any "controversy involving the construction or application of any provision" of real property development agreement did not apply to defamation action].

EFund Capital Partners v. Pless (2007) 150 C.A.4th 1311, 1322, 1329, 59 C.R.3d 340 [trial court erred in denying motion to compel arbitration where plaintiff's claims for fraudulent inducements and negligent misrepresentation arose

out of strategic relationship agreement between parties that contained arbitration provision for "any dispute or other disagreement"; disagreeing with Ninth Circuit cases relied on by trial court].

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

The following cases illustrate permissible forms and the construction of arbitration agreements:

Segal v. Silberstein (2007) 156 C.A.4th 627, 635, 67 C.R.3d 426 [provision making arbitration "exclusive" process in Texas, but "nonexclusive" process outside Texas was construed to mean that, outside Texas, parties could consider less than "full-blown" litigation, as initiated by plaintiff, but also less formal and less costly alternative dispute resolution processes, such as mediation and conciliation; thus trial court erred in failing to grant defendant's petition to compel arbitration].

Adajar v. RWR Homes (2008) 160 C.A.4th 563, 569, 73 C.R.3d 17 [applications for warranties, signed by plaintiff home buyers and purporting to acknowledge consent to arbitration terms contained in warranty booklets to be issued at later time, did not incorporate those provisions by reference, and thus did not constitute agreements to arbitrate].

Serrano v. Stefan Merli Plastering Co. (2008) 162 C.A.4th 1014, 1027, 76 C.R.3d 559 [agreement by parties' counsel to have trial judge decide "validity and reasonableness" of expedited service fee charged by private court reporter was not agreement to arbitrate].

Winter v. Window Fashions Professionals (2008) 166 C.A.4th 943, 947, 950, 83 C.R.3d 89 [in action involving franchise agreement where arbitration provisions stated that they might not be enforceable under California law, trial court found no "meeting of the minds" regarding choice of law, hence no agreement to arbitrate; because challenge was to arbitration provisions specifically, issue was properly decided by trial court applying federal law].



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4. Agreement To Arbitrate.

c. Appraisal or Valuation Agreement.

6 *Witkin Cal. Proc. PWT* § 516

[§ 516] Appraisal or Valuation Agreement.

Under former law, courts opposed to the enforceability of arbitration agreements made a distinction between arbitration agreements and contract provisions giving third persons the power to make a valuation, or to fix the amount of loss or damage, or to perform similar functions of appraisal, determination of values, or other calculation or settlement. This type of provision was recognized as common and necessary for the successful conduct of business and, accordingly, was treated as valid and enforceable. The distinction was still recognized under the 1927 statute, and as a result, appraisers acting under such an agreement did not have to comply with the procedural provisions of the statute; e.g., they did not have to give the parties notice and an opportunity for hearing. (*Rives-Strong Bldg. v. Bank of America* (1942) 50 C.A.2d 810, 817, 123 P.2d 942 [provision in lease for adjustment of rental by "arbitrators" was valuation or appraisal provision despite use of that term]; see *Bewick v. Mecham* (1945) 26 C.2d 92, 97, 156 P.2d 757 [same].)

Under current law, agreements subject to the procedural provisions of the arbitration statute include "agreements providing for valuations, appraisals and similar proceedings." (*C.C.P. 1280(a)*; see *State Farm Fire & Cas. v. Hardin* (1989) 211 C.A.3d 501, 506, 259 C.R. 433 [fire insurance policy appraisal clause]; *Unetco Industries Exchange v. Homestead Ins. Co.* (1997) 57 C.A.4th 1459, 1466, 67 C.R.2d 784 [scope of appraisal is matter of agreement; fire insurance policy's appraisal provision encompassed appraisal of both earthquake loss and replacement costs].) Under *C.C.P. 1280(a)*, a confirmed award of appraisers is treated as a confirmed award in arbitration. (*Klubnikin v. California Fair Plan Assn.* (1978) 84 C.A.3d 393, 398, 148 C.R. 563 [award is binding and res judicata unless challenged by petition to vacate or by response to petition to confirm].) And an agreement for a binding audit is an agreement to arbitrate. (*Coopers & Lybrand v. Superior Court* (1989) 212 C.A.3d 524, 534, 260 C.R. 713.)

At the time of enactment of the arbitration statute, the Uniform Sales Act provision on a contract to sell at a valuation (former C.C. 1730) was amended to make the arbitration provisions available for purposes of valuation. U.C.C. 2305, subsequently enacted, refers to a price to be fixed "by a third person or agency," but makes no specific reference to a person appointed pursuant to the arbitration statute. (U.C.C. 2305(1)(c); on contract for sale with open price term, see 4 *Summary* (10th), *Sales*, §47.)

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



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4. Agreement To Arbitrate.

d. Employment or Labor Agreement.

1. In General.

6 *Witkin Cal. Proc. PWT* § 517

[§ 517] In General.

(1) *Enforceability*. By definition, enforceable agreements include "agreements between employers and employees or between their respective representatives." (*C.C.P. 1280(a)*); see 90 *Cal. L. Rev.* 1203 [achieving knowing and voluntary consent in predispute mandatory arbitration agreements at contracting stage of employment]; 93 *Cal. L. Rev.* 323 [mandatory arbitration of employment discrimination disputes]; 1 *Pepperdine Dispute Resolution L. J.* 107 [employees' right to choose arbitration]; 22 *Pepperdine L. Rev.* 1485 [binding arbitration in nonunion workplace].)

(2) *Professional Employment Contract*. The arbitration contracts of professionals such as doctors, lawyers, artists, actors, and executives are specifically enforceable. (*Universal Pictures Corp. v. Superior Court* (1935) 9 *C.A.2d* 490, 493, 50 *P.2d* 500; see *Vianna v. Doctors' Management Co.* (1994) 27 *C.A.4th* 1186, 1189, 33 *C.R.2d* 188 [agreement to arbitrate "any dispute of any kind whatsoever" regarding enforcement of provisions of employment contract of vice-president for human resources included claim for breach of covenant of good faith and fair dealing in wrongful termination action]; *Powers v. Dickson, Carlson & Campillo* (1997) 54 *C.A.4th* 1102, 1109, 1115, 63 *C.R.2d* 261 [arbitration provision in amendment to attorney retainer and fee agreement was enforceable as to legal malpractice claim]; *Buckhorn v. St. Jude Heritage Med. Group* (2004) 121 *C.A.4th* 1401, 1407, 18 *C.R.3d* 215 [agreement to arbitrate disputes arising "between the parties concerning the enforcement or the interpretation of any provisions" of employment contract between physician and medical group included physician's posttermination claims for defamation and interference with prospective business advantage].)

(3) *Employment Agency Contract*. Under former Lab.C. 1647.5, arbitration provisions in employment agency contracts were enforceable under certain conditions. (See *Garson v. Division of Labor Law Enforcement* (1949) 33 *C.2d* 861, 865, 206 *P.2d* 368 [discussing power of Labor Commissioner as compared with that of ordinary arbitrator]; *Robinson v. Superior Court* (1950) 35 *C.2d* 379, 387, 218 *P.2d* 10 [contract between artist and employment agency]; 20 *A.L.R.3d* 642 [arbitration of controversies between agent and applicant].) These contracts are now covered by the general arbitration statute.

(4) *Collective Bargaining Agreement*. An arbitration clause in a collective bargaining agreement is specifically

enforceable. (*Lab.C.* 1126; see *Levy v. Superior Court* (1940) 15 C.2d 692, 699, 104 P.2d 770; *Posner v. Grunwald-Marx* (1961) 56 C.2d 169, 176, 14 C.R. 297, 363 P.2d 313; *Painters Dist. Council No. 33 v. Moen* (1982) 128 C.A.3d 1032, 1036, 181 C.R. 17 [contractor-union contract specifying procedure for employment grievances and disputes was enforceable arbitration agreement]; *United Public Employees v. San Francisco* (1997) 53 C.A.4th 1021, 1029, 62 C.R.2d 440 [union's petition to compel arbitration concerning member's classification and random selection for drug testing was denied; federal drug testing law had preemptive effect and classification of positions was not within scope of collective bargaining agreement]; *Torrez v. Consolidated Freightways Corp.* (1997) 58 C.A.4th 1247, 1259, 68 C.R.2d 792 [union may not prospectively waive employee's right to judicial forum for employee's statutory discrimination claims; thus, collective bargaining agreement that required arbitration of all employment-related claims did not extend to employee's discrimination claim under FEHA; applying rule developed for federal statutory claims]; 48B Am.Jur.2d (2005 ed.), *Labor and Labor Relations* §2489 et seq.; 20 Williston 4th §56:1 et seq.; 3 *Summary* (10th), *Agency and Employment*, §559.) (On conditions required in arbitration provision in collective bargaining agreement for application of collateral estoppel effect of arbitration award involving FEHA claim, see *Camargo v. California Portland Cement Co.* (2001) 86 C.A.4th 995, 1018, 103 C.R.2d 841.)

(5) *Predispute Arbitration Agreement as Condition of Employment.* A compulsory predispute arbitration agreement is not unenforceable just because it is required as a condition of employment or offered on a "take it or leave it" basis. In *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 C.A.4th 1105, 88 C.R.2d 664, the trial court sustained defendants' demurrers in a wrongful termination action where plaintiff was discharged for refusing to sign a predispute arbitration agreement requiring that work-related disputes be resolved through binding arbitration. *Held*, affirmed. Federal and state law permit an employee's rights to a jury trial and a judicial forum to be waived by agreement, even when the waiver is required as a condition of employment. Those rights do not implicate a substantial public policy that would prohibit the employee's termination. (74 C.A.4th 1121, 1127.)

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

(5) *Predispute Arbitration Agreement as Condition of Employment.* See *Mitri v. Arnel Management Co.* (2007) 157 C.A.4th 1164, 1170, 69 C.R.3d 223 [there was no agreement to arbitrate where employees' signatures on "Acknowledgment Receipt" page of employee handbook did not establish that they agreed to arbitration provisions that were contained within handbook; arbitration provisions merely put employees on notice that they would have to sign separate agreement, which they never did].



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d. Employment or Labor Agreement.

2. Particular Claims.

aa. Discrimination Claims.

6 *Witkin Cal. Proc. PWT* § 518

[§ 518] Discrimination Claims.

Discrimination claims are arbitrable if the arbitration agreement permits an employee to vindicate his or her statutory rights. To ensure that vindication, the agreement must, at a minimum, provide for a neutral arbitrator, adequate discovery, a written decision that permits a limited form of judicial review, and limitations on costs. In *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, plaintiff employees sued defendant for wrongful termination, alleging claims in tort, in contract, and for discrimination under California's Fair Employment and Housing Act (FEHA; *Govt.C. 12900 et seq.*; 3 *Summary* (10th), *Agency and Employment*, §334; 8 *Summary* (10th), *Constitutional Law*, §915 et seq.), and sought general and punitive damages, injunctive relief, attorneys' fees, and costs. Plaintiffs had signed employment applications containing an arbitration clause encompassing future claims of wrongful termination and limiting recovery to lost wages. Plaintiffs subsequently signed a separate employment arbitration agreement containing the same clause. The trial court denied defendant's motion to compel arbitration, finding that the agreement (1) was an adhesion contract and unconscionably one-sided, (2) precluded damages ordinarily available for statutory antidiscrimination claims and tort damages, such as punitive damages, and (3) lacked discovery provisions. The Court of Appeal reversed, concluding that, although the agreement's damages provision was unconscionable and contrary to public policy, the rest of the agreement should be enforced. And because the agreement incorporated the California Arbitration Act (CAA), adequate discovery was available. *Held*, reversed, with orders to affirm the judgment of the trial court.

(a) *FEHA claims*. Although one federal Court of Appeals has held that the 1991 Civil Rights Act prohibits the enforcement of mandatory employment agreements to arbitrate claims under Title VII of the Civil Rights Act of 1964, its reasoning is unpersuasive and nothing in the 1991 Act prohibits mandatory employment arbitration agreements that encompass state and federal antidiscrimination claims. (24 C.4th 93.)

(b) *General contract principles apply regarding enforceability*. Under both federal and California law, arbitration agreements may only be invalidated for the same reasons as other contracts. (24 C.4th 96.) Thus, the enforceability of the arbitration agreement here turns on whether and to what extent the agreement is unconscionable or contrary to

public policy. (24 C.4th 99.)

(c) *Statutory right established for public reason cannot be waived.* In agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute but only submits to resolution in an arbitral forum. Thus, an agreement that compels a claimant to curtail those substantive statutory rights is not permitted. Under C.C. 3513, a law established for a public reason cannot be contravened by private agreement. The rights established by the FEHA are for a public reason and a contract purporting to waive those rights is unenforceable. (24 C.4th 100.) Therefore, an arbitration agreement must contain the following minimum safeguards to ensure full vindication of statutory civil rights: (1) provision for neutral arbitrators, (2) provision for more than minimal discovery, (3) requirement of a written award, (4) provision for the same relief otherwise available in court, and (5) no requirement that employees pay unreasonable costs or arbitrators' fees or expenses as a condition of access to arbitration. (24 C.4th 102.) Here, while the agreement may impliedly meet four of the safeguards, the agreement requires plaintiffs to arbitrate statutory claims without affording the full range of statutory remedies available under the FEHA, including punitive damages and attorneys' fees to a prevailing plaintiff. This limitation is contrary to public policy and unlawful. (24 C.4th 104.)

(d) *Unconscionable lack of mutuality.* An arbitration agreement that, as here, is imposed in an adhesive context lacks basic fairness and mutuality when it requires only one of the contracting parties to arbitrate all claims arising out of the same transaction or occurrence. Here, the agreement lacks mutuality in this sense because it requires the arbitration of employee, but not employer, claims arising out of a wrongful termination. (24 C.4th 114.) "Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose." (24 C.4th 118.)

(e) *Severability of unconscionable provisions.* C.C. 1670.5 permits a court to enforce what remains of a contract if it is possible to sever the unconscionable clause. However, two factors here weigh against severance. First, the arbitration agreement has both an unlawful damages provision and an unconscionably unilateral arbitration clause. These multiple defects indicate a systematic effort to impose arbitration not as an alternative to litigation, but as an inferior forum that works to defendant's advantage. Second, the agreement's lack of mutuality permeates and there is no single provision a court can strike or restrict in order to remove the unconscionable taint. Thus, severance is not possible and the entire agreement is void. (24 C.4th 121.)

(f) *Costs and fees.* Consistent with the majority of jurisdictions to consider the issue, when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear in court. This will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred in litigation, costs that are essentially imposed on an employee by the employer. (24 C.4th 107.) (See 34 *Golden Gate L. Rev.* 75 [mandatory predispute arbitration agreements as condition of hire; *Armendariz* and federal approach compared]; 29 *Pepperdine L. Rev.* 401 [influence of *Armendariz* on employment litigation in California]; 34 *U.S.F. L. Rev.* 765 [arguments for and against enforceability of mandatory arbitration provision regarding employment discrimination claims; discussing *Armendariz* before Supreme Court review]; 36 *U.S.F. L. Rev.* 571 [*Armendariz*].)

The following cases are instructive:

Spellman v. Securities, Annuities & Ins. Services (1992) 8 C.A.4th 452, 457, 458, 10 C.R.2d 427 [arbitration was compelled under employment agreement to adhere to rules of National Association of Securities Dealers; California racial discrimination and wrongful termination claim were arbitrable].

Craig v. Brown & Root (2000) 84 C.A.4th 416, 422, 100 C.R.2d 818 [employer's arbitration program met *Armendariz* standards because it provided for neutral arbitrator, adequate discovery, written decision, and limitations on costs].

Pinedo v. Premium Tobacco Stores (2000) 85 C.A.4th 774, 781, 102 C.R.2d 435 [arbitration provision was

unconscionable where it limited employee's recovery to wages paid 6 months prior to termination less unemployment benefits and other pay, precluded recovery of FEHA damages, required employee to initially bear all costs and travel to out-of-town arbitrator, and where limit on damages applied only to employee; applying *Armendariz* analysis].

Fitz v. NCR Corp. (2004) 118 C.A.4th 702, 717, 13 C.R.3d 88 [arbitration provisions in employment contract that limited discovery to only two depositions did not provide plaintiff with sufficient discovery to vindicate her age discrimination claim; applying *Armendariz*].

Nyulassy v. Lockheed Martin Corp. (2004) 120 C.A.4th 1267, 1282, 16 C.R.3d 296 [mandatory arbitration provision in employment contract that was nonnegotiable and imposed on employee unilateral obligation to arbitrate disputes failed *Armendariz* tests].

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

See *Metters v. Ralphs Grocery Co. (2008) 161 C.A.4th 696, 703, 74 C.R.3d 210* [there was no valid agreement to arbitrate employee's discrimination claims where arbitration provisions were contained in form used to submit grievances rather than in employment contract; language in form was confusing, failed to define terms, and referred to unattached policy, and there was no written warning that by submitting grievance employee was agreeing to arbitration; distinguishing *Spellman v. Securities, Annuities & Ins. Services (1992) 8 C.A.4th 452, 10 C.R.2d 427*, text, p. 989]; *Ontiveros v. DHL Express (USA) (2008) 164 C.A.4th 494, 510, 79 C.R.3d 471* [arbitration-related fee requirement was unconscionable and limited discovery provisions did not afford employee full opportunity to vindicate discrimination claim; applying *Armendariz v. Foundation Health Psychcare Services (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669*, text, p. 987].



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bb. Other Statutory Claims.

6 *Witkin Cal. Proc. PWT* § 519

[§ 519] Other Statutory Claims.

The analysis employed in *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, supra, §518, with respect to FEHA claims may be applied as well to the enforcement of rights under other statutes created for a public purpose.

In *Mercuro v. Superior Court* (2002) 96 C.A.4th 167, 116 C.R.2d 671, a former employee of a securities corporation brought actions under FEHA, *Lab.C.* 230.8 (prohibiting discrimination against an employee-parent for taking time off to visit the child's school), and *Lab.C.* 970 (prohibiting misrepresentations to induce persons to relocate for job purposes). The employer sought arbitration under provisions contained in a Securities Industry Registration Form U-4 and a separate arbitration agreement the employer coerced the employee to sign a year after hire under threats of job-related negative repercussions. *Held*, the corporation's arbitration agreement was unenforceable because it was both procedurally and substantively unconscionable given the employer's oppressive tactics and the agreement's lack of mutuality of arbitrable claims. (96 C.A.4th 174.) Moreover, under *Armendariz*, the agreement impermissibly imposed arbitration fees on the employee and thus prevented the employee from vindicating his unwaivable statutory rights under *Lab.C.* 230.8 and 970, both statutes having public purposes. "[W]e see no reason why *Armendariz*'s 'particular scrutiny' of arbitration agreements should be confined to claims under FEHA. Rather, under the Supreme Court's analysis, such scrutiny should apply to the enforcement of rights under any statute enacted 'for a public reason.' " (96 C.A.4th 180.) (See *Fittante v. Palm Springs Motors* (2003) 105 C.A.4th 708, 715, 129 C.R.2d 659 [plaintiff's claim under *Lab.C.* 970 was arbitrable where preemployment arbitration agreement satisfied *Armendariz* criteria even though agreement was required as condition of employment]; *Independent Assn. of Mailbox Center Owners v. Superior Court* (2005) 133 C.A.4th 396, 416, 412, 34 C.R.3d 659 [franchisees' statutory claims under Franchise Investment Law, Cartwright Act, Uniform Trade Secrets Act, and Unfair Competition Law affected public interest and were sufficiently similar to mandatory employee/employer arbitration or consumer arbitration to be subject to *Armendariz* rule of cost-shifting]; 55 *Hastings L. J.* 987 [unconscionability as defense; *Mercuro*]; on application of *Armendariz* to nonstatutory public policy claims, see *infra*, §521.)

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

See *D.C. v. Harvard-Westlake School* (2009) 176 C.A.4th 836, 862, 98 C.R.3d 300 [hate crime statutes are for public purpose and create unwaivable rights, which brings them within rule of *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, text, §518, prohibiting inappropriate arbitral expenses; hence, plaintiffs in hate crime action could not be required to pay any type of arbitral expense they would not have had to pay in court action even though arbitration agreement provided for attorneys' fees to prevailing party; judgment awarding attorneys' fees to defendant was reversed].



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cc. Harassment Claims.

6 *Witkin Cal. Proc. PWT § 520*

[§ 520] Harassment Claims.

In *24 Hour Fitness v. Superior Court* (1998) 66 C.A.4th 1199, 78 C.R.2d 533, plaintiff employee sued her former employer and various employees for causes of action arising from alleged sexual harassment in the workplace. Defendants sought summary judgment on the ground that plaintiff had agreed to arbitrate all claims. The agreement consisted of a signed document entitled "Certificate Of Acknowledgment Of Receipt & Reading The Personnel Handbook" in which plaintiff agreed to submit any dispute arising out of the employment to binding and final arbitration according to the procedures outlined in an employment arbitration procedures manual. "Disputes" were described very broadly in the handbook. The trial judge denied summary judgment as to all defendants, finding triable issues whether all of plaintiff's claims were subject to arbitration, and whether all defendants were bound by the arbitration agreement. *Held*, mandamus issued directing the trial judge to vacate the order and grant summary judgment for all defendants save one.

(a) *Employer is entitled to summary judgment if all claims against it are arbitrable.* The presence of nonarbitrable claims against some defendants does not preclude summary judgment in favor of a defendant for whom *all* claims are arbitrable. Thus, if all claims raised by plaintiff against defendant employer are subject to arbitration, that defendant can properly seek summary judgment rather than a motion to compel arbitration and stay proceedings. (66 C.A.4th 1207.)

(b) *Arbitration agreement.* The arbitration clause was broad. It extended to "every kind or type of dispute" arising from employment, including "any allegation of wrongful discharge, discrimination, or any injury" to the employee's physical, mental, or economic interests. All of plaintiff's claims were based on the same factual allegations of alleged episodes of harassment arising from her employment. Thus, all claims were covered by the arbitration agreement, and defendant employer was entitled to summary judgment. (66 C.A.4th 1209.)

(c) *Other defendant employees.* Although defendant employees were not parties to the arbitration agreement, they were entitled to its benefit if, as the complaint alleged, they were acting as agents for the employer. Thus, each defendant employee was entitled to summary judgment *only if* plaintiff's claims against each of them were entirely

subject to the arbitration agreement. In support of their motion for summary judgment, defendant employees, save one, properly relied on plaintiff's allegations (*supra*, §230) that defendants were acting within the course and scope of their employment at all relevant times; one defendant employee admitted in discovery that he made objectionable statements outside the scope of his employment. Plaintiff was unable to rebut the other defendant employees' position. Thus, those defendants also were entitled to the benefit of summary judgment. (66 C.A.4th 1211.)

(d) *Arbitration agreement was not unconscionable.* Assuming that the arbitration agreement may have been part of an adhesion contract, plaintiff failed to show the existence of a factual issue of substantive unconscionability, as required under *Stirlen v. Supercuts* (1997) 51 C.A.4th 1519, 60 C.R.2d 138, *infra*, §538. The arbitration clause applied equally to employer and employee, allowed both substantially the same array of discovery procedures as in civil actions, and did not create an imbalance in remedies potentially available to either side. (66 C.A.4th 1213.) (See 52 *Hastings L. J.* 771 [arguing that 24 Hour Fitness holding was inequitable].)

In *Blake v. Ecker* (2001) 93 C.A.4th 728, 113 C.R.2d 422, plaintiff sued her former employer and others for sexual harassment. Her complaint contained six causes of action, including one under the FEHA. The trial court granted defendants' motion to compel arbitration and stayed further proceedings. Under the terms of the employment contract's arbitration agreement, plaintiff was required to arbitrate any disputes by her against defendants, except those under the Workers' Compensation Act. In contrast, defendants were not required to arbitrate claims they might have against plaintiff for specified violations of the employment agreements, e.g., breach of license agreements, and breach of trade secret and confidentiality provisions. For almost 2 years, neither party took action to initiate arbitration. Defendants then moved to dismiss plaintiff's complaint for failure to prosecute. Plaintiff moved to vacate the prior order compelling arbitration and staying the action in light of *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, *supra*, §518, decided during the 2-year inactivity period, which plaintiff argued resolved the previously unsettled issue of the validity of employment arbitration agreements. The trial court granted defendants' motion to dismiss and placed plaintiff's motion to vacate off calendar as moot. *Held*, reversed and remanded. The trial court should have ruled on plaintiff's motion in light of *Armendariz*, which applies retroactively. The enforceability of the arbitration agreement must be decided in the first instance by the trial court. In addressing the issue of unconscionability, the trial court must apply the *Armendariz* analysis and determine under general contract principles whether the arbitration agreement is enforceable. (93 C.A.4th 740.)

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dd. Nonstatutory Public Policy Claims.

6 *Witkin Cal. Proc. PWT* § 521

[§ 521] Nonstatutory Public Policy Claims.

In *Little v. Auto Stiegler* (2003) 29 C.4th 1064, 130 C.R.2d 892, 63 P.3d 979, plaintiff alleged that he was demoted, then terminated, because he investigated and reported defendant employer's warranty fraud. He sued defendant, in part, for wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 C.3d 167, 164 C.R. 839, 610 P.2d 1330, 3 Summary (10th), *Agency and Employment*, §242 (*Tameny* claim). Plaintiff had signed three nearly identical arbitration agreements while employed by defendant between 1995 and 1997. Defendant's initial motion to compel arbitration was granted. Following the decision in *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, supra, §518, the trial court granted plaintiff's request for reconsideration and denied defendant's motion to compel, finding that the applicable arbitration provisions did not meet the *Armendariz* standards. The Court of Appeal reversed, holding in part that *Armendariz* did not apply to nonstatutory claims. *Held*, the minimum requirements for arbitration of unwaivable statutory claims under the Fair Employment and Housing Act (FEHA) also apply to claims for termination in violation of public policy.

(a) *Armendariz* held that statutory rights established for a public reason are unwaivable, that the FEHA was enacted for public reasons, and that the rights it conferred were unwaivable. To enable an employee to vindicate those rights in an arbitration, claims under the FEHA are subject to the following minimal requirements: (1) The arbitration agreement may not limit damages normally available under the statute, (2) there must be sufficient discovery to permit adequate arbitration, (3) there must be a written decision and judicial review, and (4) the employer must pay all arbitration costs. (29 C.4th 1076.)

(b) *Tameny* claims are by definition unwaivable. Because a legitimate *Tameny* claim protects a public interest, it cannot be contravened by a private agreement. An agreement that requires employees to waive claims of termination in violation of public policy "would itself be contrary to public policy. Accordingly, because an employer cannot ask the employee to waive *Tameny* claims, it also cannot impose on the arbitration of these claims such burdens or procedural shortcomings as to preclude their vindication. Thus, the *Armendariz* requirements are as appropriate to the arbitration of *Tameny* claims as to unwaivable statutory claims." (29 C.4th 1077.) (On arbitration provisions at issue, see *infra*, §540.)

(See *Abramson v. Juniper Networks* (2004) 115 C.A.4th 638, 660, 9 C.R.3d 422 [where plaintiff alleged *Tameny* claim, arbitration provision in employment agreement that required plaintiff to pay half of arbitration costs (thousands of dollars in AAA fees) imposed impermissible forum costs in violation of public policy and was therefore unenforceable under *Little* and *Armendariz*]; *Giuliano v. Inland Empire Personnel* (2007) 149 C.A.4th 1276, 1290, 58 C.R.3d 5 [Armendariz was not applicable to case involving breach of employment contract claim for multimillion-dollar bonus and severance payment; claim was not based on FEHA or fundamental public policy tied to constitutional or statutory provision; distinguishing *Little*].)

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3. Employer as Third-Party Beneficiary of Arbitration Agreement.

6 *Witkin Cal. Proc. PWT* § 522

[§ 522] Employer as Third-Party Beneficiary of Arbitration Agreement.

In *Cione v. Foresters Equity Services* (1997) 58 C.A.4th 625, 68 C.R.2d 167, plaintiff sued defendant for wrongful termination. Defendant, a member of the National Association of Securities Dealers (NASD), sought to compel arbitration and stay plaintiff's action, contending that defendant was a third-party beneficiary of an arbitration provision contained in plaintiff's Uniform Application for Securities Industry Registration (Form U-4) with NASD, completed by plaintiff shortly after starting to work for defendant. The provision required arbitration of any dispute, claim, or controversy arising between a signatory and the signatory's employer. In Form U-4, plaintiff specifically named defendant as his employer. After completing Form U-4, plaintiff and defendant entered into an integrated, written employment agreement that contained provisions for terminating the agreement, but no dispute resolution provisions. In opposing defendant's motion, plaintiff argued that the written employment agreement fully set forth the parties' entire understanding of the employment terms and did not mandate arbitration. In denying defendant's motion, the trial judge determined that Form U-4 was not part of the integrated written employment agreement. *Held*, reversed.

(a) *Governing law and issues.* Disputes between a member of a national stock exchange and its employees are governed by the Federal Arbitration Act (FAA) where there is a binding arbitration agreement (*supra*, §506 et seq.). Hence, federal law determines the construction and scope of the arbitration provision. However, whether a valid arbitration agreement exists is determined under state law contract principles. (58 C.A.4th 633.) To decide whether plaintiff's employment claims are arbitrable, it is necessary to determine (1) whether an agreement to arbitrate existed, (2) whether defendant waived the right to compel arbitration, and if not, (3) whether plaintiff's claim is within the scope of the arbitration agreement. (58 C.A.4th 634.)

(b) *Agreement to arbitrate.* The Form U-4 signed by plaintiff contained a provision requiring arbitration of disputes with defendant. Thus, applying state law principles, plaintiff clearly entered into an agreement to arbitrate when he executed Form U-4 containing an express arbitration provision. (58 C.A.4th 635, citing *Spellman v. Securities, Annuities & Ins. Services* (1992) 8 C.A.4th 452, 10 C.R.2d 427, *supra*, §518.) Plaintiff contends that his integrated written employment agreement with defendant rendered the arbitration agreement with NASD unenforceable. However, defendant does not seek to enforce the employment contract, but to enforce the arbitration agreement with the NASD as

a third-party beneficiary. (58 C.A.4th 636.) The intent to benefit defendant appears from the terms of Form U-4 specifically identifying defendant as plaintiff's employer. Hence, defendant's motion to compel arbitration was "tantamount to a suit in equity seeking specific performance" of plaintiff's agreement with the NASD. (58 C.A.4th 637.)

(c) *Waiver*. Plaintiff contends that defendant waived a third-party right to compel arbitration by entering into the written employment agreement which, under the integration provision, supersedes plaintiff's Form U-4 arbitration obligation. However, assuming that the employment agreement constitutes the parties' entire agreement, the agreement says nothing about the intention of plaintiff and NASD with respect to the Form U-4 arbitration provision. Nor is there evidence that defendant or NASD intended that the employment agreement waive or supersede plaintiff's arbitration obligation. (58 C.A.4th 637.) In addition, without evidence that the employment agreement was inconsistent with plaintiff's arbitration obligation, silence about dispute resolution does not establish that the employment agreement superseded that obligation. (58 C.A.4th 638.) Moreover, because the employment agreement was silent regarding a forum for dispute resolution, plaintiff's arbitration agreement with NASD is probative and admissible as not inconsistent with the terms of the employment agreement. "Hence, since the written employment agreement was reasonably susceptible to the meaning that it did not supersede the Form U-4, any doubts must be resolved in favor of arbitration." (58 C.A.4th 639, citing *Thorup v. Dean Witter Reynolds* (1986) 180 C.A.3d 228, 225 C.R. 521, *infra*, §545.)

(d) *Scope of arbitration agreement*. The Form U-4 arbitration provision requires that disputes between plaintiff and defendant be arbitrated under the rules of the NASD. However, plaintiff contends that his employment-based claims fall outside the scope of the arbitration agreement because NASD rules assertedly did not require NASD arbitration of employment disputes until the rules were amended *after* he signed Form U-4. Under both federal and California law, doubts whether an arbitration agreement extends to a particular dispute are resolved in favor of arbitration, unless the agreement clearly does not cover the dispute. (58 C.A.4th 641, 642.) In addition, various California and federal courts have concluded that preamendment employment disputes are arbitrable. (58 C.A.4th 643, citing *Spellman*,.) Thus, plaintiff's employment dispute with defendant comes within the scope of the arbitration provision. (58 C.A.4th 645.)

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5. Enforcement Procedure.

a. Self-Executing Agreement.

6 *Witkin Cal. Proc. PWT* § 523

[§ 523] Self-Executing Agreement.

Some arbitration agreements are self-executing, that is, effective without court order. (*National Marble Co. v. Bricklayers & Allied Craftsmen* (1986) 184 C.A.3d 1057, 1064, 229 C.R. 653.) This is the case when the agreement expressly describes the procedure to be followed when a dispute arises. A party to a self-executing agreement may invoke the other party's duty to arbitrate by giving notice and complying with the other provisions of the agreed procedure. (*Mitchum, Jones & Templeton v. Chronis* (1977) 72 C.A.3d 596, 600, 140 C.R. 160.)

If the opposing party wants to object to the proceeding, the party may seek an injunction on the ground that there is no enforceable arbitration agreement. (*Commercial Ins. Co. of Newark, New Jersey v. Copeland* (1967) 248 C.A.2d 561, 564, 56 C.R. 794.) Alternatively, the opposing party may participate in the proceeding and raise the objection by a petition to vacate the award (see C.C.P. 1285, *infra*, §569 et seq.) or by opposing a petition to confirm the award (see C.C.P. 1285.2, *infra*, §566). (*National Marble Co. v. Bricklayers & Allied Craftsmen*, *supra*, 184 C.A.3d 1064.)

If the agreement permits a party to unilaterally proceed with the arbitration, a court may confirm the arbitrator's award in spite of the opponent's refusal to participate. (*National Marble Co. v. Bricklayers & Allied Craftsmen*, *supra*, 184 C.A.3d 1068.)

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5. Enforcement Procedure.

b. Petition To Compel Arbitration.

1. In General.

6 *Witkin Cal. Proc. PWT* § 524

[§ 524] In General.

(1) *Nature of Proceeding.* When an arbitration agreement is not self-executing (*supra*, §523), a party to that agreement wishing to compel the other party to arbitrate may petition the court for an order to that effect. (*C.C.P. 1281.2*; see *Valsan Partners Ltd. Partnership v. Calcor Space Facility* (1994) 25 C.A.4th 809, 817, 30 C.R.2d 785 [trial judge had no authority to condition granting petition on petitioner's compliance with previous arbitration awards].) The proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract. (*California Teachers Assn. v. Governing Bd.* (1984) 161 C.A.3d 393, 399, 207 C.R. 659.) The petition may be filed in lieu of filing an answer to the complaint; the petitioning defendant has 15 days after any denial of the petition to plead to the complaint. (*C.C.P. 1281.7*.)

(2) *Allegations of Petition.* The petition must allege that there is a controversy between the parties, that there is a written agreement to arbitrate, and that the other party has refused to do so. (*C.C.P. 1281.2*; see *Graphic Arts Int. Union v. Oakland Nat. Engraving Co.* (1986) 185 C.A.3d 775, 780, 230 C.R. 95 [petition to compel arbitration must allege facts demonstrating existence of arbitrable controversy; conclusory allegation that dispute exists are insufficient].) The petition must also set forth the written agreement and the arbitration provision verbatim, or a copy of the agreement should be attached. (C.R.C., Rule 3.1330.) However, for purposes of the petition, it is not necessary to follow the normal procedures for document authentication. *C.C.P. 1281.2* does not require the petitioner to introduce the agreement into evidence. As a preliminary matter, the court is only required to make a finding that the agreement exists, not an evidentiary determination of its validity. (*Condee v. Longwood Management Corp.* (2001) 88 C.A.4th 215, 218, 105 C.R.2d 597 [in wrongful death action against residential care facility in which defendant petitioned to compel arbitration, court erred in denying petition on ground that agreement was not properly authenticated]; see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §3.)

(3) *Venue.* The petition is filed in a court having jurisdiction in the county where the agreement was made or was to be performed. If the agreement does not specify the place of performance and was not made in California, the petition may be filed in the county where any party resides or has a place of business. Otherwise, the petition may be filed in any county. (*C.C.P. 1292*.) However, a petition to compel arbitration of a controversy involved in a pending superior

court action must be filed with that court. (*C.C.P. 1292.4.*)

(4) *Service.* The petition, notice of the hearing, and supporting papers may be served in the manner required by the arbitration agreement. If the agreement does not provide a method, service within California may be accomplished in the same manner as the service of a summons, and service outside California may be accomplished by registered or certified mail, or by personal service. A party who has already appeared may be served in the same manner as normal service during litigation pursuant to *C.C.P. 1010* et seq. (*supra*, §12 et seq.). (*C.C.P. 1290.4.*)

(5) *Response.* Allegations of the petition will be deemed admitted by all respondents unless a response is served and filed. (*C.C.P. 1290.*) The response must be served and filed within 10 days after service of the petition in California, or within 30 days after service outside California. (*C.C.P. 1290.6.*)

(6) *Attorneys' Fees.* In *Acosta v. Kerrigan* (2007) 150 C.A.4th 1124, 58 C.R.3d 865, in response to plaintiff's action involving an occupancy agreement between the parties, defendant sought to compel arbitration pursuant to an arbitration provision. The trial court denied the petition to compel and the Court of Appeal reversed. At the postappeal status conference, the trial court ordered arbitration and reserved jurisdiction to decide requests for costs and attorneys' fees that defendant stated he intended to seek pursuant to a provision that allowed attorneys' fees to a party who was required to respond to an action that was not an arbitration. Thus, defendant sought the fees in connection with the petition to compel arbitration. Plaintiff's contention that the request for fees was for the arbitrator to decide was rejected, and the trial court granted defendant's motion, ordering a portion of the requested fees. *Held*, affirmed.

(a) Although it is reasonable to argue that the broad arbitration language dictating that "any dispute" regarding the occupancy agreement must be arbitrated encompasses a fee award, the provision does not deprive the trial court from jurisdiction to decide the attorneys' fees issue here. Given that "the trial court is responsible for deciding a petition to compel arbitration, the trial court also should be responsible for resolving a claim for attorney fees *made in connection with that petition to compel arbitration.*" (150 C.A.4th 1130.) In addition, the arbitration provision states that a party who must resort to the court to resist the other party's attempt to avoid arbitration is entitled to recover costs and fees. Thus, "it appears both consistent with the contract language and preferable as a matter of practical policy to allow the trial judge rather than an arbitrator to decide the fee award issue which is essentially a part of the proceeding on the petition to compel arbitration." (150 C.A.4th 1131.)

(b) There is no valid reason why defendant should have to wait until after the arbitration to recover attorneys' fees in connection with the petition to compel. Defendant was not seeking recovery of fees as the party prevailing on the merits of the claim, but rather under a provision permitting the award where the fees were incurred while enforcing an independent provision of the contract. Thus, under those provisions, defendant is entitled to an interim award of attorneys' fees by virtue of prevailing on the petition to compel. (150 C.A.4th 1132.)

One justice concurred with the propriety of the interim award, but argued that the broad arbitration provision required the issue to be decided by the arbitrator. (150 C.A.4th 1133.)

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

(2) *Allegations of Petition.* A trial court must deny a petition to compel arbitration where the moving party fails to allege the existence of a written agreement that contains an arbitration provision. In *Brodke v. Alphatec Spine Inc.* (2008) 160 C.A.4th 1569, 73 C.R.3d 554, plaintiffs sued defendants for, among other things, breach of contract, and alleged four identical written contracts, one of which they attached to their complaint. The agreement had an arbitration provision for "any dispute under" the agreement. Defendant's sought arbitration, alleging "[g]ood cause exists for granting [the] Petition because the terms of the alleged Agreements that are at the heart of the allegations of this action, and which Plaintiffs affirmatively allege, compel arbitration of any disputes under the Agreements." However, defendants did not themselves affirmatively allege the existence of arbitration agreements. Also, evidence offered by defendants to prove the existence of an arbitration agreement consisted only of counsel's declaration, which attached a copy of plaintiffs' complaint. Thus, defendants neither alleged nor attempted to prove that an arbitration agreement

existed, merely that plaintiffs alleged its existence by virtue of plaintiffs' complaint. The trial court granted defendants' petition, but on remand from the Court of Appeal denied the petition for failing to allege the existence of a written agreement to arbitrate a controversy as required by *C.C.P. 1281.2*. *Held*, order denying petition affirmed.

(a) As the moving party, defendants may not circumvent *C.C.P. 1281.2* simply because plaintiffs admitted the existence of the agreements that defendants contend contained the arbitration provisions. In seeking arbitration, defendants bear the burden to allege the existence of a written agreement to arbitrate, and absent that allegation, the petition "fails to state a cause of action for specific performance." And while plaintiffs' admissions in their allegations might be appropriate for proving that an agreement exists, defendants may not rely on those allegations to meet their pleading burden. (*160 C.A.4th 1575*.)

(b) Defendants incorrectly rely on *St. Agnes Med. Center v. PacifiCare of Calif.* (2003) 31 C.4th 1187, 8 C.R.3d 517, 82 P.3d 727, text, §547, for the proposition that they may move to compel arbitration and simultaneously deny the existence of the contracts that contains the arbitration provisions. This is not so. *St. Agnes Med. Center* applies where a party challenges the *validity*, not the existence, of a contract, and does not apply here where the moving party claims "it never entered into a contract." (*160 C.A.4th 1576*.)

(c) Defendants argued that the trial court erred by not conducting a hearing as required by *Rosenthal v. Great Western Financial Sec. Corp.* (1996) 14 C.4th 394, 58 C.R.2d 875, 926 P.2d 1061, text, §525, before denying their petition. However, *Rosenthal* outlines the procedures to be followed when a petition is properly before the court. Accordingly, defendants were "not entitled to proceed with their proof of an agreement without first alleging the existence of an agreement," which they failed to do. (*160 C.A.4th 1577*.)



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b. Petition To Compel Arbitration.

2. Hearing.

6 *Witkin Cal. Proc. PWT* § 525

[§ 525] Hearing.

A petition to compel arbitration is a law and motion proceeding. (C.R.C., Rule 3.1103(a)(2).) The petition is heard in a summary way as if it were a motion, but notice of the hearing must be given at least 10 days in advance. (*C.C.P.* 1290.2; see *Brookwood v. Bank of America* (1996) 45 C.A.4th 1667, 1670, 53 C.R.2d 515 [petition to compel arbitration is determined in manner of motion; factual issues are submitted on affidavits or declarations, or on oral testimony in court's discretion].) If the petition is served on a party outside California, at least 30 days notice must be given. (*C.C.P.* 1290.4(b)(2).)

The procedure for hearing the petition was summarized in *Rosenthal v. Great Western Financial Sec. Corp.* (1996) 14 C.4th 394, 58 C.R.2d 875, 926 P.2d 1061, supra, §509, infra, §543. When a petition to compel arbitration "is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement--either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation ...--that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." The facts "are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion." (14 C.4th 413.) The trial court's role is to "resolve these factual issues," not merely to determine whether evidence opposing the petition has sufficient substantiality. (14 C.4th 414.) (See *Engalla v. Permanente Med. Group* (1997) 15 C.4th 951, 971, 64 C.R.2d 843, 938 P.2d 903, infra, §§542, 545 [improper for trial judge to treat petition to compel arbitration as type of summary judgment motion, with judge obliged only to determine whether there was legitimate factual dispute and not to resolve that dispute; following *Rosenthal*]; *Independent Assn. of Mailbox Center Owners v. Superior Court* (2005) 133 C.A.4th 396, 416, 412, 34 C.R.3d 659 [at hearing on motion to compel, trial court erred in failing to decide whether franchisees' statutory claims were subject to cost-shifting rules under *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, supra, §518]; *Hotels Nevada v. L.A. Pac. Center* (2006) 144 C.A.4th 754, 762, 50 C.R.3d 700 [trial court erred in denying

defendant's petition to compel arbitration without taking evidence and instead relying on fraud allegations in plaintiff's unverified complaint; following *Rosenthal*].)

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

See *Adajar v. RWR Homes (2008) 160 C.A.4th 563, 570, 73 C.R.3d 17* [applications for warranties, signed by plaintiff home buyers and purporting to acknowledge consent to arbitration terms contained in warranty booklets to be issued at later time, did not incorporate those provisions by reference, and defendant's failure to produce copy of booklet at hearing amounted to failure of proof that arbitration agreement actually existed].



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b. Petition To Compel Arbitration.

3. Appeal and Review.

6 *Witkin Cal. Proc. PWT* § 526

[§ 526] Appeal and Review.

(1) *In General.* An order denying or dismissing a petition to compel arbitration may be appealed by the petitioner. (*C.C.P. 1294(a)*; see *California Teachers Assn. v. Governing Bd.* (1984) 161 C.A.3d 393, 399, 207 C.R. 659 [arbitration required by contract may not be compelled by mandamus]; 9 *Cal. Proc.* (5th), *Appeal*, §141.) In contrast, an order granting a petition and compelling arbitration may not be appealed. (*State Farm Fire & Cas. v. Hardin* (1989) 211 C.A.3d 501, 506, 259 C.R. 433.) In exceptional situations, a party aggrieved by an order compelling arbitration may seek appellate review of the order by a petition for mandamus. (*Wheeler v. St. Joseph Hosp.* (1976) 63 C.A.3d 345, 353, 133 C.R. 775; *State Farm Fire Casualty v. Hardin*, *supra*, 211 C.A.3d 507.)

(2) *Petition Granted.* In *Muao v. Grosvenor Properties* (2002) 99 C.A.4th 1085, 122 C.R.2d 131, the trial court granted defendant employer's petition to compel arbitration in a wrongful termination action and also dismissed the civil action. Plaintiff appealed both orders, arguing that the order to compel was reviewable because the order included dismissal of the action at law and, alternatively, that because the Federal Arbitration Act (FAA) governed the arbitration, an immediate appeal was permitted under the Act. *Held*, plaintiff's appeal was premature and the FAA permitted no appeal; however, the matter was remanded due to the trial court's error in dismissing rather than staying the action.

(a) *C.C.P. 1294* does not provide for appeal of an order compelling arbitration. (99 C.A.4th 1088.) Nor does inclusion of dismissal of the civil action aid plaintiff. Although the dismissal is a final judgment and thus appealable under *C.C.P. 904.1*, *C.C.P. 906* provides that, where the appeal is under *C.C.P. 904.1*, the reviewing court may only review intermediate orders that involve the merits or necessarily affect the judgment appealed from or substantially affect a party's rights. The "order compelling arbitration cannot be said to involve the merits nor does it necessarily affect the order of dismissal of the action at law." (99 C.A.4th 1089.) Moreover, compelling arbitration does not substantially affect plaintiff's rights; if he loses, he can then challenge the order compelling arbitration on appeal from a judgment entered on the arbitration award. (99 C.A.4th 1089.)

(b) The FAA governs the arbitration, and had the order compelling arbitration been issued by a federal court, the

order would have been immediately appealable under 9 U.S.C., §16(a)(3). However, this provision, like other federal procedural rules, is not binding on state courts, provided the state procedures do not defeat rights granted by Congress. In enacting §16, Congress simply sought to ensure that an aggrieved party could appeal at some time. California's postponement of plaintiff's appeal until after entry of judgment following arbitration is consistent with that goal and affords plaintiff that right. Thus, the FAA does not permit review of the arbitration order. (99 C.A.4th 1090.)

(c) Defendant had initially sought a stay together with the arbitration request. This request was proper, and the trial court should have granted the stay rather than defendant's subsequent request for dismissal. (99 C.A.4th 1093.) (See *Vivid Video v. Playboy Entertainment Group* (2007) 147 C.A.4th 434, 443, 54 C.R.3d 232 [trial court's ruling on who was to decide arbitrability was sole issue in motion to compel arbitration and did not resolve issue of arbitrability; thus, ruling was not final determination giving rise to right to appeal].)

(3) *Petition Denied*. In *Sanders v. Kinko's* (2002) 99 C.A.4th 1106, 1109, 121 C.R.2d 766, the trial court denied, without prejudice, motions by defendant employer to stay the action and compel arbitration of claims by employee plaintiffs, pending resolution of class certification issues. Plaintiffs contended that the order denying arbitration *without prejudice* was not an appealable ruling. *Held*, the order was appealable. "The trial court's ruling, while not foreclosing the possibility of arbitration altogether, did have the effect of staying any arbitration until after the class certification issues are resolved." (99 C.A.4th 1109.) An order staying arbitration is the functional equivalent of an order refusing to compel arbitration. If defendant is correct that the trial court erred by not immediately ordering arbitration while staying the remainder of the action, "then its ruling, even if without prejudice until after completion of the class certification process, effectively defeated the benefits provided by the arbitration agreement. Thus, the order is appealable." (99 C.A.4th 1110.)

(4) *Limited Judicial Review*. Judicial review is limited to a determination whether the party resisting arbitration in fact agreed to arbitrate. (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1994) 23 C.A.4th 1297, 1301, 1304, 28 C.R.2d 711.) If the court determines that an arbitration agreement exists, arbitration may not be denied on the ground that the petitioner's contentions lack substantive merit. (C.C.P. 1281.2(c).)

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

(1) *In General*. See *Parada v. Superior Court* (2009) 176 C.A.4th 1554, 1567, 98 C.R.3d 743 [high cost of arbitrating before three-judge panel and time necessary to complete arbitration justified review by writ of mandamus of order compelling arbitration].



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c. Consolidation With Pending Litigation.

6 *Witkin Cal. Proc. PWT* § 527

[§ 527] Consolidation With Pending Litigation.

A trial court may consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage with the insured's pending action against third parties for all purposes, including trial, in order to avoid conflicting rulings on common issues of law or fact. In *Mercury Ins. Group v. Superior Court* (1998) 19 C.4th 332, 79 C.R.2d 308, 965 P.2d 1178, plaintiff sued a driver and the driver's employer for injuries arising from an auto accident, and also made an uninsured motorist claim on plaintiff's insurance policy with defendant insurer. Pursuant to the policy, a contractual arbitration proceeding with defendant commenced as to the uninsured motorist claim. The trial judge ordered consolidation of the arbitration with the pending personal injury action, diverted the entire matter to nonbinding judicial arbitration (*infra*, §579 et seq.), and denied defendant's motion to separate nonbinding judicial arbitration from binding contractual arbitration. *Held*, affirmed.

The uninsured motorist coverage law (*Ins.C. 11580.2*) and the contractual arbitration law (*C.C.P. 1280* et seq.) are interrelated and applicable here. Although *Ins.C. 11580.2* gives the insurer and the insured a general right to binding contractual arbitration of uninsured motorist coverage issues, there is no preemptive effect arising from that right and no requirement that arbitration is the only means for dispute resolution. (19 C.4th 345.) Moreover, *C.C.P. 1281.2(c)* permits the trial court generally to compel arbitration on petition of a party, but it need not; it may decline to do so when there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings. In that case, the court may consolidate. (19 C.4th 347.)

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



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d. Stay of Pending Litigation.

6 *Witkin Cal. Proc. PWT* § 528

[§ 528] Stay of Pending Litigation.

While plaintiffs who desire contractual arbitration ordinarily petition for an order compelling arbitration (*supra*, §524 et seq.), defendants wishing arbitration normally move for a stay of pending litigation. A stay must be granted where a court of competent jurisdiction has already ordered arbitration of the dispute involved or where an application for such an order has been made but not yet ruled on. (*C.C.P. 1281.4*; see *Marcus v. Superior Court* (1977) 75 C.A.3d 204, 209, 141 C.R. 890 [any party to judicial proceeding, whether party to arbitration agreement or not, is entitled to stay]; Judicial Council Form Nos. CM-180 [Notice of Stay of Proceedings]; CM-181 [Notice of Termination or Modification of Stay].) If the arbitrable issue is severable, the stay may be with respect to that issue only. (*C.C.P. 1281.4*.)

The litigation may be stayed until the arbitration is complete or until an earlier time as the court specifies. (*C.C.P. 1281.4*.)

Should a stay be granted, the court retains only "vestigial jurisdiction" over the matters submitted to arbitration. During that time, it may, if necessary, appoint arbitrators if the method selected by the parties fails (*infra*, §554), grant provisional remedies if the arbitration award would otherwise be rendered ineffectual (*infra*, §§529, 530), and confirm, correct, or vacate the award (*infra*, §566 et seq.). Otherwise, the arbitrator resolves all questions needed to determine the controversy. (*Titan/Value Equities Group v. Superior Court* (1994) 29 C.A.4th 482, 487, 35 C.R.2d 4 [after staying action to permit arbitration, court exceeded its authority when arbitration stalled by ordering arbitration to proceed under certain conditions, subject to reinstatement of action on trial calendar].)

In *Finley v. Saturn of Roseville* (2004) 117 C.A.4th 1253, 12 C.R.3d 561, the trial court granted defendant's motion to compel arbitration of plaintiff's wrongful termination action pursuant to the parties' arbitration agreement. The agreement also provided for review of an award by a second arbitrator at either party's written request within 10 days of the award. Over 90 days after the arbitrator found for defendant, plaintiff filed a motion with the trial court to compel review of the award by a second arbitrator, which the trial court denied based on the untimely nature of plaintiff's petition. *Held*, reversed. Once the trial court had compelled arbitration, its involvement became strictly limited until the arbitration was completed. The arbitration here was not complete until after the agreed on review process, which the parties were left to pursue without further trial court involvement. Thus, the trial court lacked jurisdiction to entertain

plaintiff's motion to compel or rule on its timeliness. Whether plaintiff was timely was a matter to be decided in the arbitration. (117 C.A.4th 1259.)

The following cases are instructive:

Federal Ins. Co. v. Superior Court (1998) 60 C.A.4th 1370, 1374, 71 C.R.2d 164 [trial judge erred in failing to grant sureties' motion to stay subcontractor's action against them pending completion of related arbitration between subcontractor and prime contractor].

Twentieth Century Fox Film Corp. v. Superior Court (2000) 79 C.A.4th 188, 192, 93 C.R.2d 896 [trial judge acted in excess of authority in denying defendant's motion to stay action where defendant's petition to compel arbitration was pending in federal court; statute contains no exception "to preclude its application for dilatory action by a party seeking to arbitrate"].

Blake v. Ecker (2001) 93 C.A.4th 728, 737, 113 C.R.2d 422, supra, §520 [trial court acted in excess of jurisdiction by granting defendants' motion to dismiss while action was stayed for arbitration; action was stayed for all purposes during arbitration and defendants' redress for plaintiff's failure to timely prosecute was under terms of agreement and in arbitration proceeding].

Independent Assn. of Mailbox Center Owners v. Superior Court (2005) 133 C.A.4th 396, 414, 34 C.R.3d 659 [in action by multiple franchisees with varying agreements, trial court erred in imposing stay on those plaintiffs whose franchise agreements contained mediation provisions but not arbitration provisions].

Dial 800 v. Fesbinder (2004) 118 C.A.4th 32, 44, 12 C.R.3d 711 [arbitration between defendant and others, not involving plaintiff, did not deprive trial court of subject matter jurisdiction to hear plaintiff's interpleader action].

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

See *Heritage Provider Network v. Superior Court* (2008) 158 C.A.4th 1146, 1153, 70 C.R.3d 645 [where arbitration was ordered of one cause of action against one set of defendants, trial court erred in failing to grant stay to other defendants for remaining causes of actions; "a single overlapping issue is sufficient to require imposition of a stay"].

In *Cardiff Equities v. Superior Court* (2008) 166 C.A.4th 1541, 83 C.R.3d 699, plaintiff and defendant entered into two agreements--a partnership agreement that contained an arbitration provision, and a guaranty that did not. The guaranty provided that it was an independent promise by defendant and could be enforced by a separate action. When plaintiff sued for breach of both agreements, the trial court found that the two agreements were "inextricably intertwined" and ordered both to arbitration. Plaintiff then dismissed the action, and brought a similar action on the guaranty alone. The trial court granted defendant's motion to stay the second action, concluding that plaintiff's dismissal of the first action did not affect the underlying order compelling arbitration. *Held*, the trial court erred in staying the second action. Had plaintiff not dismissed the entire first action, the stay would have been proper. "However, the effect of dismissal is different from a severance. With limited exceptions inapplicable here, a voluntary dismissal deprives the court of subject matter jurisdiction and personal jurisdiction in that case." In light of the voluntary dismissal of the first action, there was no agreement to arbitrate and thus no basis on which the trial court could stay the second action. (166 C.A.4th 1552.)

One justice dissented, arguing that plaintiff's actions were no more than a deliberate attempt to circumvent arbitration, that the original order compelling arbitration remained intact, and that the stay of the second action was therefore mandatory and proper. (166 C.A.4th 1553.) (On discussion of plaintiff's right to voluntarily dismiss action after order compelling arbitration, see Supp., supra, §293.)



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e. Provisional Remedies Pending Arbitration.

1. In General.

6 *Witkin Cal. Proc. PWT* § 529

[§ 529] In General.

A party to an arbitration agreement may file an application for a provisional remedy in connection with an arbitrable controversy, but only on the ground that the arbitration award may be rendered ineffectual without provisional relief. (*C.C.P. 1281.8(b)*.) Under *C.C.P. 1281.8(a)*, "provisional remedy" for these purposes includes the following:

(1) Attachments and temporary protective orders issued pursuant to *C.C.P. 481.010* et seq. (see 6 *Cal. Proc.* (5th), *Provisional Remedies* §46 et seq.). (See *Ross v. Blanchard* (1967) 251 *C.A.2d* 739, 743, 59 *C.R.* 783, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §74 [attachment was available despite arbitration provision]; *Outdoor Services v. Pabagold* (1986) 185 *C.A.3d* 676, 685, 230 *C.R.* 73 [arbitration agreement was not repudiated by attachment proceeding].)

(2) Writs of possession issued pursuant to *C.C.P. 512.010* et seq. (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §245 et seq.).

(3) Preliminary injunctions and temporary restraining orders issued pursuant to *C.C.P. 527* (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §363 et seq.; *infra*, §530).

(4) Receivers appointed pursuant to *C.C.P. 564* (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §419 et seq.).

The application may be filed in the court in which an arbitration proceeding is pending or, if an arbitration proceeding has not been commenced, in any proper court. It must be accompanied by a complaint or by copies of the demand for arbitration and any response to that demand. If accompanied by a complaint, it must also be accompanied by a statement whether the applicant is reserving the applicant's right to arbitration. (*C.C.P. 1281.8(b)*.)

A claim by the party opposing issuance of the provisional remedy that the controversy is not subject to arbitration is not grounds for denial of that remedy. (*C.C.P. 1281.8(c)*.)

C.C.P. 1281.8(c) does not supplant the statutory requirements governing the various provisional remedies to which it relates. (See *Woolley v. Embassy Suites* (1991) 227 *C.A.3d* 1520, 1529, 278 *C.R.* 719, 3 *Summary* (10th), *Agency and*

Employment, §221 [*C.C.P. 1281.8* does not preempt *C.C.P. 526* (grounds for injunctive relief, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §289 et seq.) or relieve applicant from having to show that common law requirements for injunctive relief have been met].)

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



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2. Injunctive Relief.

6 *Witkin Cal. Proc. PWT* § 530

[§ 530] Injunctive Relief.

In *Davenport v. Blue Cross of Calif.* (1997) 52 C.A.4th 435, 60 C.R.2d 641, plaintiff, suffering from ovarian cancer, was denied coverage by defendant medical insurer for combined high dose chemotherapy with autologous bone marrow transplant therapy ("HDCT with ABMT") on grounds that the treatment was excluded from the governing plan as "investigational." The therapy had an estimated cost of \$ 150,000. The plan provided for binding arbitration of all disputes exceeding the jurisdictional limits of the small claims court. Plaintiff took no action to pursue arbitration, but sued defendant for tortious breach of insurance contract and applied for a preliminary injunction to prevent defendant from denying coverage. Plaintiff submitted declarations from doctors urging the treatment and its prompt commencement. Defendant filed an opposition to the application for preliminary injunction and also filed a petition for arbitration, which plaintiff did not oppose. The trial judge issued a preliminary injunction prohibiting defendant, pending the outcome of arbitration, "from denying, refusing, excluding, limiting, or discontinuing coverage and benefits for performance" of the treatment. Pending defendant's appeal from the order granting the injunction, plaintiff received the treatment through her own resources. *Held*, reversed.

(a) *Issue, though moot, is reviewable as question of continuing public interest.* Whether injunctive relief was properly granted is a moot issue, because plaintiff has obtained the treatment on her own. Despite mootness, appellate courts may resolve important issues of substantial and continuing public importance. This case presents such an issue. (52 C.A.4th 445; on review of moot issue on ground of public interest, see 9 *Cal. Proc.* (5th), *Appeal*, §§759, 760.)

(b) *Injunction is mandatory and therefore subject to stricter standard of review.* Generally, the ruling on an application for a preliminary injunction rests in the trial judge's sound discretion, which will not be disturbed on appeal without a showing that it has been abused. However, a preliminary *mandatory* injunction is rarely granted, and is subject to stricter review on appeal than is a prohibitory injunction. Granting a mandatory injunction pending trial, before the rights of the parties in the subject matter which the injunction is designed to affect have been definitely ascertained, is permitted only in extreme cases where the right to it is clearly established and it appears that irreparable injury will flow from its refusal (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §360). The preliminary injunction in this case, though framed in prohibitory language, is mandatory because it requires defendant to perform affirmative acts of

authorizing and paying for the treatment, thereby changing the status quo. (52 C.A.4th 445.)

(c) *Standards for granting provisional relief pending arbitration are similar under Federal Arbitration Act and California law.* It is undisputed that the Federal Arbitration Act (9 U.S.C., §1 et seq., supra, §506 et seq.) applies to this medical plan as a contract affecting interstate commerce. The purpose of the Act is to ensure judicial enforcement of privately made agreements to arbitrate, and accordingly the substantive rules of the Act apply to state as well as federal courts with respect to arbitrations within the scope of the Act. The California Supreme Court has concluded that FAA *procedural* provisions are not binding on state courts, so long as applicable state procedures do not defeat the rights granted by Congress. (52 C.A.4th 448, citing *Rosenthal v. Great Western Financial Sec. Corp.* (1996) 14 C.4th 394, 58 C.R.2d 875, 926 P.3d 1061, supra, §509, infra, §543.) Here, however, there is no need to decide whether the standard for granting provisional relief is procedural (hence, subject to *Rosenthal*) or substantive, because the standard is similar under both federal and state law. C.C.P. 1281.8 authorizes a party to an arbitration agreement to seek a provisional remedy in the trial court pending arbitration "but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." Similarly, provisional relief in FAA cases is limited to situations in which the injunction has been shown to be necessary in order to preserve the status quo so the dispute can be arbitrated and the arbitration decision can have effect. (52 C.A.4th 450.) Thus, under both California law and the FAA, the trial court has authority to grant injunctive relief pending contractual arbitration only if it is necessary to preserve the effectiveness of that arbitration. (52 C.A.4th 451.)

(d) *Injunction was improperly granted in this case.* Plaintiff failed to meet her burden of showing that the provisional relief was necessary to preserve the effectiveness of the arbitration. Defendant argued that the status quo was to leave things as they were, and the status quo would be changed if defendant were required to authorize and pay for the treatment before arbitration. This position has merit. Thus, if the injunction were allowed to stand, defendant would have to authorize and pay for the treatment requested by plaintiff, even though the question of the coverage would be the central issue at arbitration. Whatever the outcome of the arbitration, the trial court's order would mean defendant had effectively already lost the case in substance. On the other hand, plaintiff's health may also be a factor in the status quo. However, she had the burden, given the strong policies in favor of arbitration and given plaintiff's assertion that the injunction was necessary because time was of the essence in obtaining the medical treatment, to show she was unable to obtain a timely resolution through arbitration. Thus, plaintiff should have made a demand for arbitration immediately after defendant's denial of coverage, and she should have requested an arbitration hearing on an accelerated basis if necessary and allowed defendant to meet her demand. If she had been unable to obtain a timely hearing, then she might have been in a position to make the necessary showing to the trial court. As it was, plaintiff never made a demand for arbitration. Nor did she make any evidentiary showing that arbitration could not be concluded within the window of opportunity available for her treatment. Accordingly, the trial judge abused his discretion in granting the mandatory preliminary injunction. (52 C.A.4th 453.) (See 6 Pepperdine Dispute Resolution L. J. 147 [preliminary injunctions in disputes subject to Federal Arbitration Act]; 44 U.C.L.A. L. Rev. 2061 [court's limited jurisdiction to grant provisional relief in arbitrable disputes].)

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

See *Jay Bharat Developers v. Minidis* (2008) 167 C.A.4th 437, 446, 84 C.R.3d 267 [in dispute between franchisor and franchisee, trial judge properly issued injunction pending outcome of arbitration where franchisor satisfied requirements of C.C.P. 1281.8(b) by showing likelihood of success on merits of dispute and that irreparable harm would result if franchisee were permitted to continue using franchise mark while in breach of franchise agreement].



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6. Defenses to Enforcement.

a. In General.

6 *Witkin Cal. Proc. PWT* § 531

[§ 531] In General.

A written arbitration agreement is enforceable, "save upon such grounds as exist for the revocation of any contract." (*C.C.P. 1281*; *C.C.P. 1281.2(b)*) [recognizing as defense to petition to compel arbitration that "[g]rounds exist for the revocation of the agreement"].) (See *Owens v. Intertec Design* (1995) 38 *C.A.4th* 72, 74, 44 *C.R.2d* 840 [trial judge erred in ruling that employee's dispute was not arbitrable under arbitration clause in employment contract because grounds existed for revocation of agreement, where employee presented absolutely no evidence of those grounds]; *Brookwood v. Bank of America* (1996) 45 *C.A.4th* 1667, 1670, 53 *C.R.2d* 515 [party's ignorance of arbitration clause was no defense to arbitration; unilateral mistake is ground for rescission only when known to, and encouraged or fostered by, other contracting party]; 70 *Proof of Facts* 3d 379 [proof of enforceability of arbitration provision in commercial contract].)

The reference to "revocation" is a misnomer in that offers are revoked, while contracts are extinguished by rescission. Thus, *C.C.P. 1281.2(b)* must be construed to mean that the petition to compel arbitration should be denied when there are grounds for rescinding the agreement. (*Engalla v. Permanente Med. Group* (1997) 15 *C.4th* 951, 973, 64 *C.R.2d* 843, 938 *P.2d* 903, *infra*, §§542, 545; see 1 *Summary* (10th), *Contracts*, §935). (On effect of expiration of agreement on right to arbitrate, see *Swift-Chaplin Productions v. Love* (1963) 219 *C.A.2d* 110, 115, 32 *C.R.* 758; *Sawday v. Vista Irr. Dist.* (1966) 64 *C.2d* 833, 836, 52 *C.R.* 1, 415 *P.2d* 816; 5 *A.L.R.3d* 1008.)

(1) The typical grounds for rescission include the following:

(2) Adhesion and unconscionability. (See *infra*, §537 *et seq.*)

(3) Unjust or unreasonable contract. (See *infra*, §540.)

(4) Fraud. (See *infra*, §541 *et seq.*)

(5) Illegality. (See *infra*, §544.)

In addition to grounds for rescission, defenses to enforcement of the arbitration agreement include the following:

- (1) The controversy is not within the scope of the arbitration agreement. (See *infra*, §532.)
- (2) The petitioner or respondent is not a party to the arbitration agreement. (See *infra*, §533 et seq.)
- (3) The petitioner waived the right to arbitration. (See *infra*, §545 et seq.)
- (4) Litigation is pending with a third party arising from the same transaction with the possibility of conflicting rulings on common issues. (See *infra*, §536.)
- (5) Litigation is pending between the parties on other issues not subject to the arbitration agreement which may resolve the case and render arbitration unnecessary. (See *infra*, §536.)
- (6) The period of limitations has expired on the claim. (See *Spear v. California State Auto. Assn.* (1992) 2 C.4th 1035, 1040, 9 C.R.2d 381 [applying C.C.P. 337 4-year period governing actions on written contracts]; *Wagner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 C.4th 19, 26, 58 C.R.3d 434, 157 P.3d 1029 [trial court may not deny petition to compel arbitration on ground that statute of limitations has run on claim parties agreed to arbitrate; question is for arbitrator to decide]; *Kennedy, Cabot & Co. v. National Assn. of Sec. Dealers* (1996) 41 C.A.4th 1167, 1175, 49 C.R.2d 66 [where claim was filed within time requirements of arbitration agreement, statute of limitations issues relating to that claim were within scope of arbitration]; cf. *Allstate Ins. Co. v. Gonzalez* (1995) 38 C.A.4th 783, 788, 45 C.R.2d 491 [insured was not barred by 4-year statute from petitioning to compel arbitration, because neither party had refused to arbitrate uninsured motorist claim, and statute does not begin to run until opposing party refuses to arbitrate controversy].)
- (7) The provisions of the arbitration agreement are void under C.C.P. 410.42 (prohibiting clauses in contracts between California contractors and subcontractors for work performed within state that require arbitration outside California or bar litigation in California). (See *Templeton Dev. Corp. v. Superior Court* (2006) 144 C.A.4th 1073, 1082, 51 C.R.3d 19, citing the text [C.C.P. 410.52 also applies to mediation; thus, provision in construction subcontract that required mediation as well as arbitration in Nevada was void].)

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



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XIV. ALTERNATIVE DISPUTE RESOLUTION

H. Contractual Arbitration.

6. Defenses to Enforcement.

b. Controversy Is Not Within Scope of Arbitration Agreement.

6 *Witkin Cal. Proc. PWT* § 532

[§ 532] Controversy Is Not Within Scope of Arbitration Agreement.

A frequent defense to enforcement of an arbitration agreement is that the controversy is not within the scope of the agreement. (*Victoria v. Superior Court* (1985) 40 C.3d 734, 738, 222 C.R. 1, 710 P.2d 833.)

In *Balandran v. Labor Ready* (2004) 124 C.A.4th 1522, 22 C.R.3d 441, defendant employed temporary laborers to work for third parties and required all applicants to sign an application agreeing that they were not considered employed until assigned to work on a job. Defendant did not consider workers to be employees at any time other than when they were on a job. When a worker finished at the end of the day, the worker was deemed to have quit until later reassigned. The application's arbitration provision required applicants to agree to arbitrate "any disputes arising out of my employment, including any claims of discrimination, harassment or wrongful termination ... and all other employment related issues." Expecting a strike, defendant's client IWC sought temporary replacement labor and requested only male workers, to which defendant agreed. Plaintiff females had applied for jobs with defendant, were not hired to work for IWC, and brought an action alleging gender discrimination. Defendant petitioned to compel arbitration, which the trial court denied. *Held*, affirmed. Plaintiffs' preemployment claims did not arise out of their employment as they only applied for work but were never employed, and under defendant's own terms, that did not constitute employment. Hence, there was no relationship and no basis to enforce the arbitration agreement. Nor did the phrase "all other employment related issues" include plaintiffs' claim. That phrase applied "only to those employment related issues which arise out of *employment*." (124 C.A.4th 1528, 1530.)

In *California Correctional Peace Officers Assn. v. California* (2006) 142 C.A.4th 198, 47 C.R.3d 717, petitioner union represented both rank-and-file correctional officers and their supervisors, but the units negotiated separately with the state. However, under written ground rules and through past practice, rank-and-file employees had been permitted to observe negotiations between the state and supervisors and vice versa. After two occasions where rank-and-file observers disrupted negotiations with supervisors, the state refused to continue with the observance practice. The two written agreements involved were the ground rules that controlled bargaining sessions and a memorandum of understanding (MOU) between petitioner and the state that governed relations with rank-and-file employees and contained complex yet broad grievance and arbitration provisions. Petitioner contended that the state's refusal to negotiate in the presence of observers violated the agreements, filed grievances over the abandoned negotiations, and

demanded arbitration under the MOU. When the state refused, petitioner sought to compel arbitration. The state opposed the petition, arguing that the matter was not arbitrable because *Govt.C. 3529(c)* excluded supervisors from participating in meet and confer sessions on behalf of rank-and-file employees, and that the court, not the arbitrator, must interpret the statute. The trial court agreed and denied the petition. *Held*, reversed.

(a) The MOU broadly states that grievances involving the interpretation, application, or enforcement of its provisions may be settled by binding arbitration. Because petitioner's grievances sought enforcement of the state's obligation to negotiate under the MOU, the arbitration provisions encompass this dispute and the state may raise with the arbitrator its refusal to comply with the obligation to negotiate because of petitioner's insistence on observers. (142 C.A.4th 206.)

(b) Although no California case has expressly ruled on the exclusive right of judges to consider otherwise arbitrable cases that raise issues of statutory interpretation, the assumptions underlying many decisions "anticipate that arbitrators will engage in statutory interpretation." (142 C.A.4th 208.) Moreover, federal decisions have rejected claims that parties to an arbitration agreement should bypass arbitration because the claims are inconsistent with statutory law or public policy. Thus, "the body of case law governing arbitration has recognized repeatedly that arbitrators may be presented with issues of statutory interpretation and are entitled to resolve those issues--at least in the first instance." (142 C.A.4th 210.)

The following cases are also instructive:

Berman v. Dean Witter & Co. (1975) 44 C.A.3d 999, 1003, 119 C.R. 130 [provision for arbitration of "any controversy" includes tort as well as contractual liabilities].

Blatt v. Farley (1990) 226 C.A.3d 621, 628, 276 C.R. 612 [investor's claim for faulty investment advice was dispute "arising out of or relating to" contract between investor and investment advisor and therefore within parties' agreement to arbitrate].

State Farm Mut. Auto. Ins. Co. v. Superior Court (1994) 23 C.A.4th 1297, 1301, 1304, 28 C.R.2d 711 [order compelling arbitration of uninsured motorist claim was vacated where trial judge failed to make advance determination of insolvency of tortfeasor's insurer, which was prerequisite to uninsured motorist coverage].

Service Employees Int. Union v. Los Angeles (1994) 24 C.A.4th 136, 145, 29 C.R.2d 357 [petition to compel arbitration was properly denied where memorandum of understanding and employee relations ordinance did not contemplate that interdepartmental grievances would be subject to arbitration].

Delta Dental Plan v. Banasky (1994) 27 C.A.4th 1598, 1605, 33 C.R.2d 381 [contracting dentists' fee dispute was not arbitrable under general arbitration provision because it fell within plan rule providing for resolution by internal review committee].

Engineers & Architects Assn. v. Community Dev. Dept. (1994) 30 C.A.4th 644, 653, 35 C.R.2d 800 [decision whether public employee could be laid off because of insufficient funds or lack of work was reserved to public agency under collective bargaining agreement and thus was not grievance subject to binding arbitration].

Frederick v. First Union Sec. (2002) 100 C.A.4th 694, 698, 122 C.R.2d 774 [arbitration provision between corporation and securities broker encompassing "all claims or controversies between the parties" was broad enough to include shareholder's derivative action alleging scheme between signatory parties to inflate stock prices artificially for insider benefits].

In re Tobacco Cases I (2004) 124 C.A.4th 1095, 1107, 21 C.R.3d 875 [arbitration provision in master settlement agreement (MSA) between parties to tobacco litigation was expressly limited to disputes involving calculations and determinations made by auditor and did not include enforcement of MSA against party who alleged failure to report

sales by subsidiary as required].

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

In *Titolo v. Cano* (2007) 157 C.A.4th 310, 68 C.R.3d 616, plaintiff sued her former treating physician for breach of fiduciary duty, violation of privacy, intentional interference with prospective economic advantage, and negligence. All the claims were based on defendant's communication to plaintiff's disability insurer that plaintiff was not disabled but was a scam artist and a fraud, and on defendant's sending plaintiff's medical file to the insurer. Plaintiff had expressly authorized disclosure of medical information from defendant to the insurer, and had signed a physician-patient arbitration agreement that required arbitration of all disputes involving medical malpractice related to medical services rendered by defendant. The agreement defined medical malpractice as medical services that were unnecessary, unauthorized, or improperly, negligently, or incompetently rendered. The trial court denied defendant's petition to compel arbitration by concluding that, because plaintiff was not seeking damages due to personal injury or death, the case did not present a claim of professional negligence under C.C.P. 1295(g) (arbitration of medical malpractice; text, §504), and hence was not within the scope of the arbitration agreement. *Held*, order denying petition reversed.

(a) The language in the arbitration agreement regarding "medical services" fully complies with C.C.P. 1295, and does not limit itself to cases involving personal injury or wrongful death. Nor does the arbitration provision quote from the statute or mention the term "professional negligence." And it is not necessary that it do so. It is the agreement that controls, and the trial court may not read more into that language. (157 C.A.4th 318.)

(b) Communications between a physician and a patient's insurer regarding diagnosis or treatment, when those communications are requested by the patient, constitute medical services. In essence, plaintiff was alleging that defendant's communications were improperly, negligently, or incompetently rendered, i.e., constituted medical malpractice involving services rendered; these claims were within the scope of arbitration agreement. (157 C.A.4th 322.)

The following cases are instructive:

Thompson v. Toll Dublin, LLC (2008) 165 C.A.4th 1360, 1370, 81 C.R.3d 736 [arbitration provision was limited to construction defect disputes and did not encompass plaintiffs' fraud-related claim].

RN Solution v. Catholic Healthcare West (2008) 165 C.A.4th 1511, 1523, 81 C.R.3d 892, Supp., infra, §536 [where broad arbitration provision was part of contract between business entities, it did not encompass battery-related tort claim arising from alleged physical assault by employee of one company against employee of other in context of intimate domestic relationship between them].

Valentine Capital Asset Management v. Agahi (2009) 174 C.A.4th 606, 627, 94 C.R.3d 526 [in action involving trade secrets allegedly stolen by former employees of plaintiff investment advisor, defendants could not compel arbitration under Financial Industry Regulatory Authority (FINRA); although all parties were deemed "associated persons" for purposes of FINRA rules, allegations did not arise out of any party's business activities as associated person of FINRA member firm].

Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 C.A.4th 1185, 1196, 94 C.R.3d 918 [where language as to what was arbitrable excluded matters that were expressly within discretion of parties, discretionary buy-out provision was beyond scope of arbitration agreement].

Fagelbaum & Heller LLP v. Smylie (2009) 174 C.A.4th 1351, 1364, 95 C.R.3d 252 [in attorney-client dispute, client subleased offices to attorneys, refused to accept rent offsets against his outstanding legal fees and costs. and instead claimed attorney malpractice; arbitration provision in sublease was broad enough to encompass fee dispute and client's cross-demand for arbitration raising this issue manifested his agreement].



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H. Contractual Arbitration.

6. Defenses to Enforcement.

c. Petitioner or Respondent Is Not Party to Arbitration Agreement.

1. In General.

6 *Witkin Cal. Proc. PWT* § 533

[§ 533] In General.

A common defense is that the petitioner or respondent is not a party to the arbitration agreement. (See *C.C.P. 1280(e)* [party to arbitration means party to arbitration agreement]; *C.C.P. 1281.2* [petition to compel arbitration by "a party to the arbitration agreement"]; *100 A.L.R.5th 481* [enforcement of arbitration agreement in construction contract by or against nonsignatory].)

In *Valley Casework v. Comfort Const.* (1999) 76 *C.A.4th* 1013, 90 *C.R.2d* 779, plaintiff subcontractor and defendant contractor entered into a construction subcontract for an apartment complex. After defendant's insurer settled a claim with the owner of the complex for defects in cabinets installed by plaintiff, both defendant and the insurer jointly sought arbitration with plaintiff pursuant to an arbitration provision in the subcontract. Plaintiff sought to enjoin the arbitration on several grounds, including that the insurer was not a party to the arbitration agreement and thus lacked standing. The trial court denied plaintiff's request, and the arbitration proceeded uncontested, resulting in an award against plaintiff. The trial court entered judgment confirming the award. *Held*, reversed.

(a) Nonparties to arbitration agreements may be permitted to enforce the agreements when there is sufficient identity of parties. For example, nonparty defendants acting as agents for a signatory party, a partner where the partnership has an arbitration agreement, or a third-party beneficiary of an arbitration agreement may be entitled to enforce an agreement. (76 *C.A.4th* 1021; citing the text.)

(b) Here, however, as a nonparty the insurer should not have been permitted to enforce the arbitration agreement. Although the insurer had the right to pursue its equitable subrogation claim against plaintiff, the insurer's interests were not sufficiently identical with those of defendant, nor was arbitration the forum to resolve the insurer's claim. And the arbitration should not have proceeded on defendant's behalf with these equitable subrogation issues unresolved. An arbitration in this case would have to be restricted to the nature and quality of the work performed under the subcontract, not the respective liabilities of all the involved parties, some of whom were not parties to the arbitration agreement. The trial court failed to properly resolve the equitable subrogation issue when it had the opportunity at the preliminary injunction hearing. It should have retained the issue and not permitted it to reach the arbitrator. (76 *C.A.4th*

1022.)

The following cases have affirmed the defense:

Southern Calif. Pipe Trades Dist. Council No. 16 v. Merritt (1981) 126 C.A.3d 530, 535, 179 C.R. 794 [award against corporation and officer; error to confirm award against officer where record did not show officer as party].

Van Luven v. Rooney Pace (1987) 195 C.A.3d 1201, 1205, 241 C.R. 248 [successor to introducing broker could not enforce arbitration provision in contract between customer and clearing broker in absence of showing of agency or third-party beneficiary relationship].

Baker v. Birnbaum (1988) 202 C.A.3d 288, 291, 248 C.R. 336, 6 Summary (10th), *Torts*, §948 [spouse of contracting party seeking loss of consortium damages].

Arista Films, Employee Profit Sharing Plan v. Gilford Sec. (1996) 43 C.A.4th 495, 501, 51 C.R.2d 35 [introducing broker could not compel arbitration with investor as third-party beneficiary of agreement between investor and closing broker; agreement reflected intent only to bind investor and closing broker].

Contra Costa v. Kaiser Foundation Health Plan (1996) 47 C.A.4th 237, 241, 54 C.R.2d 628, 6 Summary (10th), *Torts*, §949 [arbitration agreement between patient and health care provider did not bind third parties seeking equitable indemnity from health care provider; third party is not required to arbitrate claim unless benefit conferred as result of contract made him or her third-party beneficiary, or preexisting relationship with party made it equitable to require arbitration].

Benasra v. Marciano (2001) 92 C.A.4th 987, 990, 112 C.R.2d 358 [plaintiff corporate president who signed licensing agreement containing arbitration clause in his representative capacity was not party to agreement and could not be compelled to arbitrate libel action].

Buckner v. Tamarin (2002) 98 C.A.4th 140, 142, 119 C.R.2d 489 [in wrongful death action against physician, medical arbitration agreement signed by decedent was not binding on decedent's nonsignatory adult daughters].

Flores v. Evergreen At San Diego, LLC (2007) 148 C.A.4th 581, 589, 55 C.R.3d 823 [spousal relationship alone was insufficient to confer authority to agree to arbitration provision in nursing home admission contract; thus, arbitration agreement signed by husband did not bind wife where there was no evidence he was authorized to act as her agent].

Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC (2007) 150 C.A.4th 469, 474, 58 C.R.3d 585 [wrongful death action by decedent's spouse and adult children was not subject to arbitration provisions contained in healthcare facility's admittance forms; although spouse signed forms as decedent's "legal representative/agent," spouse did not sign in his personal capacity and children never signed; following *Buckner*].

Matthau v. Superior Court (2007) 151 C.A.4th 593, 602, 60 C.R.3d 93 [trial court erred in granting talent agency's petition to compel arbitration to recover commissions on profit participation payments and residual interests received by deceased actor's heirs and from loan out company through which deceased often provided services; neither heirs nor company were signatories to agreements between deceased and talent agency and no other relationship existed to bind those parties].

Smith v. Microskills San Diego L.P. (2007) 153 C.A.4th 892, 897, 63 C.R.3d 608 [vocational school could not enforce arbitration provision contained in loan agreement between student and lender].

The following cases have denied the defense:

Lovret v. Seyfarth (1972) 22 C.A.3d 841, 860, 101 C.R. 143 [wife of contracting party who accepted benefits of

arbitration could not deny that she was party].

Keller Const. Co. v. Kashani (1990) 220 C.A.3d 222, 229, 269 C.R. 259 [sole general partner of limited partnership was subject to arbitration agreement between partnership and third party, even though he had signed agreement only on behalf of partnership, and partnership itself was not before arbitrator].

Boys Club of San Fernando Valley v. Fidelity & Deposit Co. of Maryland (1992) 6 C.A.4th 1266, 1274, 8 C.R.2d 587 [agreement to arbitrate contained in construction contract was binding on performance bond surety, where bond incorporated construction contract by reference].

Macaulay v. Norlander (1992) 12 C.A.4th 1, 7, 15 C.R.2d 204 [introducing broker, though not named in investors' agreements with clearing broker, could compel arbitration as third-party beneficiary].

Slaughter v. Bencomo Roofing Co. (1994) 25 C.A.4th 744, 751, 30 C.R.2d 618 [subcontractors were subject to consolidated arbitration between general contractor and owner where subcontracts incorporated construction contract's arbitration procedures].

SUPPLEMENT: [This section is current through the latest supplement]
The following cases have affirmed the defense:

Warfield v. Summerville Senior Living (2007) 158 C.A.4th 443, 448, 69 C.R.3d 783 [in action for elder abuse where wife and husband were both residents of elder care facility, plaintiff wife was not subject to arbitration agreement signed only by husband; wife gave neither express nor implied consent to have husband act as her agent; following *Flores v. Evergreen at San Diego, LLC* (2007) 148 C.A.4th 581, 55 C.R.3d 823, text, p. 1013].

Crowley Maritime Corp. v. Boston Old Colony Ins. Co. (2008) 158 C.A.4th 1061, 1069, 70 C.R.3d 605 [nonsignatory insurers were not required to arbitrate equitable contribution claim brought by insured's other insurer where neither federal law nor third-party beneficiary or preexisting relationship exceptions applied].

In *Nguyen v. Tran* (2007) 157 C.A.4th 1032, 68 C.R.3d 906, following a real estate transaction, plaintiff buyer sued the seller, the seller's brokers, and defendant, the plaintiff's broker. The purchase agreement contained an arbitration provision stating that the buyer and seller agreed to arbitrate any dispute or claim between them and to arbitrate disputes or claims involving either or both brokers, provided either or both brokers had agreed to the arbitration prior to, or within a reasonable time after, the dispute or claim was presented to the brokers. Plaintiff and seller initialed their assent to the provision in the space provided. No space was provided for the brokers to initial and they did not do so. Defendant filed a petition to compel plaintiff and seller's broker to arbitrate plaintiff's claims. The trial court denied the petition, finding that defendant was not entitled to enforce the arbitration provision. *Held*, order denying petition to compel reversed with respect to plaintiff only.

(a) *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 C.A.4th 759, 766, 28 C.R.3d 752, text, §534, concluded that, because the broker there had a preexisting relationship as the agent for both parties to the agreement, the arbitration provision was binding on the broker as well as the buyers, and thus the broker as an agent was entitled to enforce the arbitration agreement, to which the buyer and seller had agreed. Here, the purchase agreement lists defendant as plaintiff's agent, and plaintiff signed the agreement. Thus, defendant could have been compelled to arbitrate plaintiff's claims even though defendant had not signed the agreement and was not a party to it. (157 C.A.4th 1037.) Moreover, the buyer and seller agreed to permit either or both brokers to decide whether to arbitrate claims against them. Defendant demanded it, and nothing indicates that the claim was untimely. (157 C.A.4th 1038.)

(b) Although seller's brokers were seller's agents, seller's brokers did not agree to arbitrate anything. And neither *Westra*, nor any other authority, permits one nonsignatory party to invoke an arbitration provision against another nonsignatory party based on an agreement signed only by the principals. Defendant and seller's brokers could have entered into a written arbitration agreement if that is what they desired, but they did not, and under these circumstances

there is no factual or legal basis to impose on seller's brokers an obligation to arbitrate. (157 C.A.4th 1039.)The following cases have denied the defense:

Segal v. Silberstein (2007) 156 C.A.4th 627, 636, 67 C.R.3d 426 [defendant's petition for arbitration should have been granted where disputes arose from operating agreements of two business entities even though one entity was not named party; plaintiff's allegations clearly included that entity].



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c. Petitioner or Respondent Is Not Party to Arbitration Agreement.

2. Joinder of Nonobjecting Third Party.

6 *Witkin Cal. Proc. PWT* § 534

[§ 534] Joinder of Nonobjecting Third Party.

If the arbitration agreement encompasses the issue of joinder of a nonobjecting third party, a party that has agreed to the provision cannot resist arbitration on the ground that the third party was not a signatory to the agreement. In *Zakarian v. Bekov* (2002) 98 C.A.4th 316, 119 C.R.2d 623, eye surgery patients brought an unfair competition and Consumers Act class action against a physician, E, his laser eye center corporation, and an individual, B, employed by the physician to service the physician's ophthalmic lasers. The arbitration agreement signed by the physician and patients provided for the intervention and joinder of all parties relevant to a full and complete settlement, and that an arbitrator would determine the issues of joinder and intervention. E and B filed motions to compel arbitration. Relying primarily on *Contra Costa v. Kaiser Foundation Health Plan* (1996) 47 C.A.4th 237, 241, 54 C.R.2d 628, 6 Summary (10th), *Torts*, §949, plaintiffs objected on the ground that B was neither a signatory to, nor a third-party beneficiary of, the arbitration agreement. The trial court granted E's motion but denied arbitration as to B. *Held*, order denying arbitration reversed; the issue of B's joinder and intervention must be referred to the arbitrator. *Contra Costa* is significantly distinguishable. In *Contra Costa*, defendant sought arbitration of claims of strangers who had no relationship with either party to the arbitration agreement. Here, B has a prior relationship with E, and allegations of entanglement between E and B bring the case well within the scope of the agreement's arbitration language. (98 C.A.4th 322, 325.) Also, in *Contra Costa* it was nonsignatories that resisted arbitration, while here it is the signatories who are seeking to avoid arbitration. Moreover, the agreement here "commits the very decision of whether joinder or intervention is appropriate to arbitration." (98 C.A.4th 322.) Finally, the critical and distinguishing fact here is E's desire to bring in a willing third party according to the express terms of the agreement with defendants. (98 C.A.4th 323.)

A number of other decisions involving the defense are noteworthy. (See *Frederick v. First Union Sec.* (2002) 100 C.A.4th 694, 698, 122 C.R.2d 774 [arbitration agreement between corporation and securities broker was binding on shareholder bringing derivative action because claim was being brought on behalf of corporation]; *Hope v. Bryan Cave, L.L.P.* (2002) 102 C.A.4th 1356, 1368, 126 C.R.2d 283 [trial judge properly denied arbitration sought by attorney defendants in multiple defendant legal malpractice action where defendants based their petition on arbitration provisions in settlement agreements between plaintiff and other settling defendants but failed to prove they were intended

beneficiaries of those agreements]; *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 C.A.4th 759, 766, 28 C.R.3d 752 [defense was not available to prevent nonsignatory real estate broker, acting as agent for signatory parties, from enforcing arbitration provisions contained in purchase agreement]; 10 A.L.R.6th 669 [enforcement of arbitration agreement in real estate contract by or against nonsignatory; *Westra*.]

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



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c. Petitioner or Respondent Is Not Party to Arbitration Agreement.

3. Equitable Estoppel.

6 *Witkin Cal. Proc. PWT* § 535

[§ 535] Equitable Estoppel.

In *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 C.A.4th 1705, 1 C.R.3d 328, plaintiff brought breach of contract and tort actions against defendant arising out of the sale of plaintiff's Mexico subsidiary to one of defendant's subsidiaries, G, also a Mexico corporation. The crux of plaintiff's claims was that defendant had conspired to defraud plaintiff, primarily through defendant's negotiator's representations and financial commitments involving the sale of G. Relying on those representations and commitments, plaintiff entered into a written stock purchase agreement with G that contained a broad arbitration provision that covered any controversy or claim arising out of or relating to the agreement. The trial court denied defendant's petition to compel arbitration. *Held*, reversed.

(a) Because the agreement involved transnational commerce, the Federal Arbitration Act (FAA) controlled, and whether defendant as a nonsignatory to that agreement may compel plaintiff to arbitrate is thus answered by federal law. (109 C.A.4th 1712.)

(b) Although the Ninth Circuit Court of Appeals, California federal district courts, and the United States Supreme Court have not addressed the application of equitable estoppel under the FAA to questions of arbitrability, cases from the Eleventh Circuit have done so, and are persuasive that equitable estoppel should be applied here. Those cases, construing similar arbitration provisions, hold that a party to an agreement containing arbitration provisions may be equitably estopped from avoiding arbitration demanded by a nonsignatory party under the following conditions: (1) There is a nexus between the complaining party's claims against the nonsignatory and the underlying agreement with a signatory, and (2) there is an integral relationship between the nonsignatory and a signatory to the agreement "intimately founded in and intertwined with" the underlying agreement. (109 C.A.4th 1713, 1717.)

(c) Here, the nexus between plaintiff's claims against defendant and the underlying contract with G, as well as the integral relationship between G and defendant, supports application of equitable estoppel to prevent plaintiff from avoiding arbitration by suing not G but defendant G's parent corporation. "Otherwise, the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively

thwarted." (109 C.A.4th 1718.)

Several other decisions address this issue. (See *Boucher v. Alliance Title Co.* (2005) 127 C.A.4th 262, 272, 25 C.R.3d 440 [plaintiff was estopped from avoiding arbitration with defendant A of claims arising from employment contract and arbitration agreement with F where A and F were both owned in majority part by same entity and plaintiff's pleadings presumed and referenced employment agreement in connection with both A and F; applying federal case law and *Metalclad Corp.*]; *Turtle Ridge Media Group v. Pacific Bell Directory* (2006) 140 C.A.4th 828, 834, 44 C.R.3d 817 [equitable estoppel applied where plaintiff's subcontract with C incorporated C's contract with P, which contained arbitration provisions, and plaintiff's claims were intertwined with contract containing those provisions; thus, plaintiff was compelled to arbitrate dispute with P; following *Metalclad Corp.*]; *Rowe v. Exline* (2007) 153 C.A.4th 1276, 1286, 63 C.R.3d 787 [equitable estoppel permitted defendant nonsignatories, who were alter egos of signatory corporation, to invoke arbitration provisions in plaintiff's agreement with corporation; following *Boucher*]; 22 A.L.R.6th 387 [application of equitable estoppel to compel arbitration by or against nonsignatory].)

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

In *Goldman v. KPMG, LLP* (2009) 173 C.A.4th 209, 92 C.R.3d 534, plaintiffs sought damages resulting from alleged fraudulent tax shelter schemes developed, marketed, and implemented by their former accountants, attorneys, and investment advisors. One of the schemes required the formation of limited liability companies in which plaintiffs and their investment advisors became members. The companies had operating agreements that contained broad arbitration provisions. When plaintiffs brought actions against all the parties, the accountants and attorneys, not parties to the operating agreements (nonsignatories), sought an order compelling arbitration. Relying on the doctrine of equitable estoppel, the nonsignatories argued that plaintiffs, as signatories to arbitration agreements with the investment advisors, should be equitably estopped from pursuing the court action against nonsignatories. The trial court denied the motions to compel arbitration. *Held*, the doctrine of equitable estoppel has no application here.

(a) Equitable estoppel applies only if plaintiffs' claims against the nonsignatories are dependent on, or inextricably bound up with, the obligations under the agreement plaintiffs have with the signatory defendants. Here, plaintiffs' complaint shows that they neither relied on the terms of the operating agreements in their claims against the nonsignatories, nor were the allegations founded in or bound up with the terms or obligations in the agreements. The allegations depend solely on the actions of the nonsignatories for their success. (173 C.A.4th 230.)

(b) "Parties who have not agreed to arbitrate may not be compelled to do so simply because two defendants, one with an arbitration agreement and one without, have colluded to defraud the plaintiff. After all, *every* conspiracy claim alleges interdependent and concerted misconduct. The fact that some defendants have arbitration agreements and some do not may indeed generate duplicative litigation, and may result in stays of litigation as to some parties while arbitration is ongoing for others or vice versa. But no principle of law--and certainly not the doctrine of equitable estoppel--allows us to decide that a plaintiff who did not agree to arbitrate with a defendant must do so simply because he alleges a conspiracy." (173 C.A.4th 233.)



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6. Defenses to Enforcement.

d. Pending Litigation.

6 *Witkin Cal. Proc. PWT* § 536

[§ 536] Pending Litigation.

(1) *Litigation Pending With Third Party*. Another defense to enforcement of an arbitration agreement is that litigation is pending with a third party arising from the same transaction, and there is a possibility of conflicting rulings on common issues. (*C.C.P. 1281.2(c)*.) The court may either (1) refuse arbitration and order intervention or joinder of all parties in the pending litigation, (2) order intervention or joinder as to certain issues only, (3) stay the pending court action and order arbitration to proceed among the parties who have agreed to arbitration, or (4) stay the arbitration pending the outcome of the pending court action. (*C.C.P. 1281.2(c)*.)

The following cases are instructive:

Cronus Inv. v. Concierge Services (2005) 35 *C.4th* 376, 385, 25 *C.R.3d* 540, 107 *P.3d* 217, *supra*, §511 [*C.C.P. 1281.2(c)* was not preempted by FAA in multiparty, multicontract dispute where parties' choice-of-law provision incorporated California's arbitration rules and trial court properly granted motion to stay arbitration pending outcome of litigation].

Pioneer Take Out Corp. v. Bhavsar (1989) 209 *C.A.3d* 1353, 1358, 257 *C.R.* 749 [arbitration order was stayed pending resolution of class action involving same parties and transaction].

Prudential Property & Cas. Ins. Co. v. Superior Court (1995) 36 *C.A.4th* 275, 277, 42 *C.R.2d* 227, 2 *Summary* (10th), *Insurance*, §211 [joinder of uninsured motorist arbitration proceeding involving uninsured defendant with related personal injury action against insured defendant pursuant to *C.C.P. 1281.2(c)* was proper to avoid inconsistent rulings regarding defendants' comparative fault].

Warren-Guthrie v. Health Net (2000) 84 *C.A.4th* 804, 810, 816, 101 *C.R.2d* 260 [*C.C.P. 1281.2(c)* was preempted and not available as defense to enforcement of arbitration in claim against HMO subject to FAA where parties did not expressly agree that California law would apply for all purposes; statute was specifically applicable to arbitration, thus conflicted with FAA provisions favoring enforcement of arbitration agreement except for grounds applicable to revocation of contracts generally].

Mt. Diablo Med. Center v. Health Net of Calif. (2002) 101 C.A.4th 711, 722, 726, 124 C.R.2d 607, supra, §511 [C.C.P. 1281.2(c) was not preempted by FAA where broad choice-of-law provision provided that California law would govern validity, construction, interpretation, and enforcement of entire agreement; distinguishing *Warren-Guthrie* and following *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488, supra, §511].

One World Networks Integrated Technologies v. Dutich (2002) 103 C.A.4th 1038, 1042, 127 C.R.2d 843 [only party to arbitration agreement has standing to seek order under C.C.P. 1281.2(c) to stay arbitration].

Greenbriar Homes Communities v. Superior Court (2004) 117 C.A.4th 337, 346, 11 C.R.3d 371 [C.C.P. 1281.2(c) does not apply to reference agreements].

Whaley v. Sony Computer Entertainment America (2004) 121 C.A.4th 479, 484, 17 C.R.3d 88 [trial court correctly applied C.C.P. 1281.2(c) in denying motion to compel arbitration where petitioner was also party to related litigation with another party arising out of same transaction].

(2) *Litigation Pending Between Parties*. If the court determines that there are other issues involving the parties that are not subject to arbitration and are the subject of pending litigation, the court may delay the order to arbitrate until the other issues are determined or an earlier time as the court specifies. (C.C.P. 1281.2(c); see *Helzel v. Superior Court* (1981) 123 C.A.3d 652, 660, 661, 176 C.R. 740 [stay under C.C.P. 1281.2(c) was improper where entire controversy was subject to arbitration].)

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

(1) *Litigation Pending With Third Party*. See *Best Interiors v. Millie & Severson* (2008) 161 C.A.4th 1320, 1327, 1329, 75 C.R.3d 1 [Federal Arbitration Act did not preempt C.C.P. 1281.2(c) in multiparty, multicontract dispute where parties agreed that California law would govern; trial judge properly granted plaintiff's motion to stay arbitration because two defendants were not parties to arbitration agreement and action should be litigated in single forum to avoid inconsistent results].

In *RN Solution v. Catholic Healthcare West* (2008) 165 C.A.4th 1511, 81 C.R.3d 892, plaintiff recruitment company (RNS) entered into an agreement to recruit South Korean nurses for defendant (CHW), an operator of medical facilities. The agreement contained a broad arbitration provision. Plaintiff's CEO, W, became intimately involved with R, defendant's vice president with oversight of the recruiting agreement, but the relationship deteriorated and R was ultimately prosecuted for criminal assault and false imprisonment of W. After that, the business relationship between the parties steadily declined until CHW terminated the recruiting agreement, citing RNS's inability to supply nurses with "contractually required English language skills." W viewed the termination as retaliatory for her complaints about R, and brought an action naming CHW and R as defendants and containing numerous claims in tort and contract, including battery-related tort claims against R. CHW sought arbitration of the claims against it, and R sought arbitration of all claims, or, if not all were arbitrable, for an order requiring a trial of all claims. The trial court found that some claims against both defendants were arbitrable and some not; because the claims were "so intertwined as to create a possibility of conflicting rulings on one or more common issues of fact or law" if the claims were sent to different forums, the court deemed it appropriate to deny both motions and order all claims to be tried pursuant to C.C.P. 1281.2(c). *Held*, order denying defendants' motions to compel arbitration was reversed and remanded; the trial court erred in proceeding under the third-party provisions of C.C.P. 1281.2(c).

(a) CHW and RNS are not third parties; they are both direct signatories of the arbitration agreement. W, although she signed the recruitment agreement only in her capacity as RNS's CEO, benefited financially and professionally from the agreement, as alleged in her complaint. Thus, she is bound by the arbitration provision both as an agent-employee of RNS and as a third-party beneficiary of the recruitment agreement. R was CHW's vice president and managing agent of the recruitment agreement, and as such he was also bound by the arbitration provision and entitled to enforce it. (165 C.A.4th 1520.) Because all the parties are bound by the arbitration provision, the fundamental precondition for ap-

plication of *C.C.P. 1281.2(c)*, i.e., a pending action or proceeding between a party to the arbitration agreement and a third party, is absent, and the fact that W and R could not compel arbitration of the battery-related claims does not make them third parties for purposes of the statute. (165 *C.A.4th* 1521.)

(b) The trial court should have first decided what claims were arbitrable and ordered those claims to arbitration. The trial court could then have delayed the order to arbitrate under the provision of *C.C.P. 1281.2(c)* concerning litigation pending between the parties if the trial court determined that court adjudication of the nonarbitrable claims might make the arbitration unnecessary. "Absent that determination, the arbitrable claims would proceed to arbitration and the nonarbitrable claims would continue to be litigated in court" unless a party moved successfully to stay further litigation of the nonarbitrable claims. It is this procedure the trial court is instructed to follow on remand. (165 *C.A.4th* 1521, 1524.)

See *Birl v. Heritage Care, LLC* (2009) 172 *C.A.4th* 1313, 1319, 1321, 91 *C.R.3d* 777 [in action for wrongful death of patient, joining all parties in one court action was imperative to avoid conflicting rulings; trial court did not abuse discretion in applying *C.C.P. 1281.2(c)* to deny petition by defendant nursing facility to compel arbitration where codefendant doctors were not subject to arbitration agreement and allegedly contributed to decedent's injuries].



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e. Adhesion and Unconscionability.

1. Contract of Adhesion.

6 *Witkin Cal. Proc. PWT* § 537

[§ 537] Contract of Adhesion.

A contract of adhesion is a standardized contract imposed and drafted by the party of superior bargaining strength that relegates to the subscribing party only the opportunity to adhere to the contract or reject it. The concept is invoked as a basis for modifying or nullifying harsh terms that defeat the reasonable expectations of the parties. (See 1 *Summary* (10th), *Contracts*, §323 et seq.)

Arbitration agreements have been frequently challenged on this ground. The following cases are illustrative:

Madden v. Kaiser Foundation Hosp. (1976) 17 C.3d 699, 131 C.R. 882, 552 P.2d 1178, 1 *Summary* (10th), *Contracts* §326 [arbitration provision in employee health plan contract was binding].

Spence v. Omnibus Industries (1975) 44 C.A.3d 970, 974, 119 C.R. 171, 1 *Summary* (10th), *Contracts*, §327 [arbitration provision in construction contract was contract of adhesion].

Wheeler v. St. Joseph Hosp. (1976) 63 C.A.3d 345, 361, 133 C.R. 775 [arbitration provision in hospital admission contract was contract of adhesion].

Izzi v. Mesquite Country Club (1986) 186 C.A.3d 1309, 1318, 231 C.R. 315 [arbitration provision in condominium purchase agreement was binding].

Patterson v. ITT Consumer Financial Corp. (1993) 14 C.A.4th 1659, 1664, 18 C.R.2d 563 [arbitration provision in loan agreement was contract of adhesion].

An arbitration agreement may be enforceable, even though adhesive, if the provision falls within the reasonable expectations of the weaker (or "adhering") party. (*Graham v. Scissor-Tail* (1981) 28 C.3d 807, 820, 171 C.R. 604, 623 P.2d 165, 1 *Summary* (10th), *Contracts*, §334; *Patterson v. ITT Consumer Financial Corp.*, *supra*.)

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



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2. Unconscionable Contract or Term.

6 *Witkin Cal. Proc. PWT* § 538

[§ 538] Unconscionable Contract or Term.

Under *Uniform Commercial Code* §2-302 and the California statute (C.C. 1670.5) adopting its language, a court may refuse to enforce a contract or clause that is unconscionable. (See 1 *Summary* (10th), *Contracts*, §330 et seq.) Unconscionability in the arbitration context is something that denies "minimum levels of integrity" to the process. (*Graham v. Scissor-Tail* (1981) 28 C.3d 807, 825, 171 C.R. 604, 623 P.2d 165, 1 *Summary* (10th), *Contracts*, §334; *Spinello v. Amblin Entertainment* (1994) 29 C.A.4th 1390, 1397, footnote 9, 34 C.R.2d 695 [use of term in nonarbitration cases distinguished].)

A party attacking a contract as adhesive (see *supra*, §537) may also add the challenge of unconscionable contract or term. (See *Graham v. Scissor-Tail*, *supra*, 28 C.3d 817 [arbitration provision in musical performance contract was unconscionable]; *Dryer v. Los Angeles Rams* (1985) 40 C.3d 406, 411, 220 C.R. 807, 709 P.2d 826, 1 *Summary* (10th), *Contracts*, §338 [arbitration provision in union negotiated employment contract was binding; distinguishing *Graham*]; *Hope v. Superior Court* (1981) 122 C.A.3d 147, 154, 175 C.R. 851, 1 *Summary* (10th), *Contracts*, §336 [arbitration provision in securities broker employment contract prepared by stock exchange was presumptively biased in favor of exchange members and unconscionable]; *Tonetti v. Shirley* (1985) 173 C.A.3d 1144, 1151, 219 C.R. 616, 1 *Summary* (10th), *Contracts*, §338 [*Hope* is inapplicable to securities broker employment contract subject to Federal Arbitration Act]; *Heily v. Superior Court* (1988) 202 C.A.3d 255, 260, 248 C.R. 673 [following *Tonetti*; stockbroker employment contract requiring arbitration under New York Stock Exchange procedure was not unconscionable under Federal Arbitration Act]; *Downs v. Prudential-Bache Sec.* (1988) 202 C.A.3d 616, 621, 248 C.R. 734 [following *Tonetti*; no presumed bias in arbitration under New York Stock Exchange procedures]; *Patterson v. ITT Consumer Financial Corp.* (1993) 14 C.A.4th 1659, 1667, 18 C.R.2d 563 [arbitration provision in loan agreement was unconscionable]; 22 A.L.R.6th 49 [arbitrability of issue of unconscionability].)

In *Stirlen v. Supercuts* (1997) 51 C.A.4th 1519, 60 C.R.2d 138, plaintiff was discharged as defendant's chief financial officer (allegedly after questioning irregularities in its accounting practices) and sued for wrongful termination. Defendant moved to compel arbitration under a mandatory arbitration provision in the employment contract between the parties. Under the provision, all employee claims were required to be submitted to arbitration, with remedies in

arbitration limited to actual damages for breach of contract, but prescribed claims by defendant could be brought in court. The trial judge denied the motion on grounds that the provision was so one-sided as to be unconscionable and unenforceable. *Held*, affirmed.

(a) *Scope of review.* A determination that an arbitration clause is invalid, which may be made only "upon such grounds as exist for the revocation of any contract" (*C.C.P. 1281*), is solely a judicial function unless it turns on the credibility of extrinsic evidence. Here, because no extrinsic evidence was presented at trial, the trial judge's determination of arbitrability, like the interpretation of any contractual provision, is subject to *de novo* review. (*51 C.A.4th 1527.*)

(b) *Arbitration provisions are unconscionable.* For a court to exercise discretion in refusing to enforce a contract under the doctrine of unconscionability, both "procedural" and "substantive" elements must be present. Procedural unconscionability exists when either inequality of bargaining power or surprise prevents real negotiation or assent. Substantive unconscionability exists when one-sided or oppressive terms have been imposed. (*51 C.A.4th 1530*, citing *Graham and A & M Produce Co. v. FMC Corp.* (1982) 135 C.A.3d 473, 186 C.R. 114, 1 Summary (10th), *Contracts*, §332.)

(1) The arbitration clause here was part of a contract of adhesion, thus establishing procedural unconscionability. Despite plaintiff's executive position and experience, he appears to have had no realistic ability to modify the terms of the employment contract. The terms of the contract, which were cast in generic and gender-neutral language, were presented to him after he accepted employment and were described as standard, nonnegotiable provisions. The only negotiating between the parties regarding the conditions of plaintiff's employment related to stock options, bonus and retirement plans, and other "extras," but these matters were the subject of a separate letter agreement. (*51 C.A.4th 1533.*)

(2) The arbitration provision is also substantively unconscionable. The manifest one-sidedness of the clause appears on its face. It deprives plaintiff of many remedies (e.g., statutory employment discrimination remedies and punitive damages for tort claims), while not significantly restricting any of defendant's remedies. Considering the terms of the clause in the light of the commercial context in which it operates and the legitimate needs of the parties at the time it was entered into, the terms are so extreme as to appear unconscionable. (*51 C.A.4th 1534.*)

(c) *No preemption under Federal Arbitration Act.* As plaintiff's employment undisputedly related to interstate commerce, the Federal Arbitration Act (FAA) (9 U.S.C., §1 et seq.) applies. However, the FAA does not preclude holding the arbitration clause here to be unenforceable as unconscionable under California law. Under the FAA (9 U.S.C., §2), an arbitration governing a transaction involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, state courts may invalidate arbitration clauses on grounds relating to the validity and enforceability of contracts generally (as opposed to arbitration contracts specifically). The FAA does not reflect a congressional intent to occupy the entire field of arbitration, but preempts state regulation only to the extent that it stands as an obstacle to the accomplishment of congressional purposes and objectives. Judicial refusal to enforce an arbitration clause clearly unconscionable under a general contract law principle not at all hostile to arbitration presents no obstacle to the objectives of the FAA or any other congressional purpose. The equitable doctrine of unconscionability set forth in C.C. 1670.5 provides "such grounds as exist at law or in equity for the revocation of any contract," within the meaning of the FAA, and there is therefore no federal preemption. (*51 C.A.4th 1543, 1552.*)

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



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3. Cases Deciding Issue of Unconscionability.

6 *Witkin Cal. Proc. PWT* § 539

[§ 539] Cases Deciding Issue of Unconscionability.

The following cases are instructive on the issue of unconscionability:

Armendariz v. Foundation Health Psychcare Services (2000) 24 C.4th 83, 99, 99 C.R.2d 745, 6 P.3d 669, supra, §518 [although FEHA claims are arbitrable, arbitration provisions in employment context are subject to particular scrutiny and must permit employee to vindicate all statutory rights and not be procedurally or substantively unconscionable].

Little v. Auto Stiegler (2003) 29 C.4th 1064, 1071, 130 C.R.2d 892, 63 P.3d 979, supra, §521 [provision in employment arbitration agreement stating that only awards exceeding \$ 50,000 were appealable benefited only employer and was unconscionable; provision was, however, severable]; *Fittante v. Palm Springs Motors* (2003) 105 C.A.4th 708, 725, 129 C.R.2d 659 [same].

Discover Bank v. Superior Court (2005) 36 C.4th 148, 158, 30 C.R.3d 76, 113 P.3d 1100 [provision forbidding classwide arbitration was unconscionable].

Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 C.4th 495, 505, 30 C.R.3d 787, 115 P.3d 68, supra, §513 [arbitration provision in insurance policy that required parties to share costs was proper; distinguishing and declining to extend *Armendariz*].

Gentry v. Superior Court (2007) 42 C.4th 443, 463, 64 C.R.3d 773, 165 P.3d 556, 3 Summary (10th), *Agency and Employment*, Supp., §384 [class arbitration waivers in overtime wage and hour cases are not unconscionable and unenforceable per se; trial court must determine whether class arbitration is best method to vindicate unwaivable statutory rights of affected employees, and if so, must invalidate waiver].

24 Hour Fitness v. Superior Court (1998) 66 C.A.4th 1199, 1212, 78 C.R.2d 533, supra, §520 [arbitration clause in employee handbook was not unconscionable; it provided all parties with substantially same rights and remedies;

following *Stirlen v. Supercuts* (1997) 51 C.A.4th 1519, 60 C.R.2d 138, supra, §538].

Kinney v. United HealthCare Services (1999) 70 C.A.4th 1322, 1327, 83 C.R.2d 348 [arbitration provision in employee handbook distributed by successor employer was unconscionable where it required employees to consent to arbitration as condition of continued employment, did not offer opportunity to negotiate terms, and was clearly one-sided].

Coast Plaza Doctors Hosp. v. Blue Cross of Calif. (2000) 83 C.A.4th 677, 687, 99 C.R.2d 809 [arbitration provision was not unconscionable where it was prominent, conspicuous, simple, and straightforward, and its terms and burdens applied equally to both parties; limitation on discovery rights did not render arbitration provisions unconscionable].

Bolter v. Superior Court (2001) 87 C.A.4th 900, 906, 104 C.R.2d 888 [franchise agreement's arbitration provision requiring that all disputes be arbitrated in Utah was unconscionable "place and manner" provision].

Flores v. Transamerica HomeFirst (2001) 93 C.A.4th 846, 852, 113 C.R.2d 376 [lender's motion to compel arbitration was properly denied where arbitration provision in loan agreement was unconscionable for being nonnegotiable and lacking mutual rights and remedies].

Mercurio v. Superior Court (2002) 96 C.A.4th 167, 174, 16 C.R.2d 671, supra, §519 [arbitration provisions were procedurally and substantively unconscionable where employer used oppressive tactics to secure employee's signature and provisions lacked mutuality of arbitrable claims].

Szetela v. Discover Bank (2002) 97 C.A.4th 1094, 1099, 118 C.R.2d 862 [provision in credit card arbitration agreement prohibiting class treatment of small individual claims was unconscionable and unenforceable; it was presented on "take it or leave it" basis and deprived many customers of effective redress for overcharges].

O'Hare v. Municipal Resource Consultants (2003) 107 C.A.4th 267, 273, 132 C.R.2d 116 [unconscionability "permeated" employment agreement that required employee to arbitrate disputes, permitted employer to file lawsuit, denied discovery, and contained prohibited costs provision; following *Armendariz*].

McManus v. CIBC World Markets Corp. (2003) 109 C.A.4th 76, 91, 134 C.R.2d 446 [although preemployment mandatory arbitration agreements were procedurally unconscionable, substantively unconscionable provisions (concerning costs) were severable].

Gutierrez v. Autowest (2003) 114 C.A.4th 77, 7 C.R.3d 267 [arbitration provision in adhesive auto lease agreement that conditioned arbitration on consumer posting unaffordable fees and lacked procedure for waiver or reduction of fees was procedurally and substantively unconscionable].

Abramson v. Juniper Networks (2004) 115 C.A.4th 638, 660, 9 C.R.3d 422 [nonnegotiable arbitration provision in employment agreement was unconscionable because it (a) gave plaintiff no meaningful choice regarding arbitration and (b) lacked mutuality and basic fairness by permitting judicial relief only for defendants in specified claims; following *Armendariz*]; *Martinez v. Master Protection Corp.* (2004) 118 C.A.4th 107, 113, 12 C.R.3d 663 [same]; *Fitz v. NCR Corp.* (2004) 118 C.A.4th 702, 721, 13 C.R.3d 88 [same].

Crippen v. Central Valley RV Outlet (2004) 124 C.A.4th 1159, 1165, 22 C.R.3d 189 [plaintiff failed to show that arbitration addendum in purchase contract for used motor home was procedurally unconscionable on basis of oppression and surprise; he produced no evidence of inequality of bargaining power, lack of negotiation, or lack of meaningful choice, and addendum was not hidden or in small font].

Cummings v. Future Nissan (2005) 128 C.A.4th 321, 328, 330, 27 C.R.3d 10 [second-level arbitration, provided for in employment arbitration agreement to review original arbitration, was not conducted in unconscionable manner; further, plaintiff forfeited right to appeal unconscionability of second-level provision by failing to raise it before

participating in second-level proceedings].

Jones v. Humanscale Corp. (2005) 130 C.A.4th 401, 415, 29 C.R.3d 881 [plaintiff failed to establish substantive unconscionability where employment contract's broad arbitration provision satisfied requirement of mutuality by binding both parties equally].

Independent Assn. of Mailbox Center Owners v. Superior Court (2005) 133 C.A.4th 396, 410, 412, 34 C.R.3d 659 [provisions in various franchise agreements that prohibited representative or class action arbitrations and limited arbitrators in granting otherwise statutorily authorized relief were unconscionable; following *Discover Bank*].

Aral v. EarthLink (2005) 134 C.A.4th 544, 553, 36 C.R.3d 229 [class action arbitration waiver in Digital Subscriber Line service agreement was unconscionable; following *Discover Bank*].

Higgins v. Superior Court (2006) 140 C.A.4th 1238, 1252, 45 C.R.3d 293 [arbitration provision in contract between plaintiffs, young and unsophisticated siblings who had recently lost their parents, and television defendant was both procedurally and substantively unconscionable where it appeared near end of lengthy, single-spaced document, was drafted by defendant, who knew that plaintiffs were vulnerable, and required only plaintiffs to arbitrate claims; following *Armendariz*].

Cohen v. DIRECTV (2006) 142 C.A.4th 1442, 1451, 48 C.R.3d 813 [class action waiver in satellite television subscriber agreement was unconscionable; following *Discover Bank*].

Gatton v. T-Mobile USA (2007) 152 C.A.4th 571, 585, 588, 61 C.R.3d 344 [arbitration provision in cell phone contract was procedurally and substantively unconscionable where it was adhesive and contained class action waiver; following *Discover Bank*].

SUPPLEMENT: [This section is current through the latest supplement]
The following cases are instructive on the issue of unconscionability:

Murphy v. Check 'N Go of Calif. (2007) 156 C.A.4th 138, 144, 147, 67 C.R.3d 120 [in wage and hour action, issue of unconscionability was for trial court to decide where arbitration provisions were set forth in adhesive employment dispute resolution agreement; class action waiver provision was unconscionable; following *Discover Bank v. Superior Court* (2005) 36 C.A.4th 148, 30 C.R.3d 76, 113 P.3d 1100, text, p. 1022].

Baker v. Osborne Dev. Corp. (2008) 159 C.A.4th 884, 896, 71 C.R.3d 854 [warranty booklets issued by home buyers group to home purchasers as part of new home warranty program contained arbitration provisions that were both procedurally and substantively unconscionable; provisions were not part of contract, were misleading and confusing, were nonnegotiable, and were entirely one-sided in favor of builder and seller].

Bruni v. Didion (2008) 160 C.A.4th 1272, 1291, 73 C.R.3d 395 [issue of unconscionability was properly decided by trial court where purported "agreement to arbitrate question of arbitrability" term was contained in provisions that were adhesive and violated plaintiffs' reasonable expectations; provisions were not distinguishable from other terms in dense booklet, plaintiffs were never asked to sign or initial booklet or arbitration provisions, and provisions were offered on "take-it-or-leave-it" basis].

Ontiveros v. DHL Express (USA) (2008) 164 C.A.4th 494, 505, 79 C.R.3d 471 [provision in employment-related arbitration agreement that gave arbitrator exclusive authority to decide issue of enforceability was contract of adhesion and unconscionable, and issue was properly decided by trial court; following *Murphy* and *Bruni*].

Thompson v. Toll Dublin, LLC (2008) 165 C.A.4th 1360, 1373, 81 C.R.3d 736 [arbitration provisions in condominium purchase agreements were procedurally and substantively unconscionable and so pervasive that severance was not possible; thus provisions were unenforceable].

Brown v. Wells Fargo (2008) 168 C.A.4th 938, 957, 85 C.R.3d 817 [procedural unconscionability found by trial court was not sufficient basis to deny motion to compel arbitration; arbitration provision in brokerage account agreement was not substantively unconscionable where its terms were fair and equitable as interrupted under Securities and Exchange Commission approved code].

Sanchez v. Western Pizza Enterprises (2009) 172 C.A.4th 154, 170, 181, 90 C.R.3d 818 [in wage dispute, arbitration agreement contained class arbitration waiver that was contrary to public policy, and unconscionable arbitrator selection provision that would create substantial disadvantages for low wage employees with modest claims; these and other provisions created agreement that was procedurally and substantively unconscionable, permeated by unlawful purpose, and unenforceable].

Roman v. Superior Court (2009) 172 C.A.4th 1462, 1470, 92 C.R.3d 153 [arbitration provision in employment agreement was not unconscionable despite agreement's adhesive nature; provision was not obscure and was not unilateral despite required "I agree" language; cost-splitting provision was valid, and agreement neither limited plaintiff's statutory FEHA rights nor imposed undue limitation on discovery; distinguishing *Higgins v. Superior Court (2006)* 140 C.A.4th 1238, 45 C.R.3d 293, text, p. 1024].

Olvera v. El Pollo Loco (2009) 173 C.A.4th 447, 456, 93 C.R.3d 65 [arbitration provision in employment agreement was procedurally unconscionable where low-wage employees would feel pressure to agree to new dispute resolution policy and details of policy were misleading; class action waiver was substantively unconscionable because (a) class action may be most effective way for low-wage earners, particularly ones with limited English language skills, to vindicate statutory rights, and (b) one-sided waiver benefited only employer, who would be unlikely to bring class action against employees].

Parada v. Superior Court (2009) 176 C.A.4th 1554, 1573, 1581, 98 C.R.3d 743 [arbitration provisions in investor account agreements prohibiting consolidation or joinder of claims and requiring arbitration by three-person panel were procedurally and substantively unconscionable; costs of three-person panel would be prohibitive because "no consolidation" provision would require each plaintiff to arbitrate separately and fully bear one-half of unaffordable costs and fees].



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f. Unjust or Unreasonable Provision.

6 *Witkin Cal. Proc. PWT* § 540

[§ 540] Unjust or Unreasonable Provision.

Arbitration provisions that are not "just and reasonable" will not be enforced. A proceeding to compel arbitration is a suit in equity to compel the specific performance of a contract. Under C.C. 3391(2) (see 13 *Summary* (10th), *Equity*, §39), specific performance cannot be enforced against a party to a contract that is not, as to that party, just and reasonable. (*Saika v. Gold* (1996) 49 C.A.4th 1074, 1076, 56 C.R.2d 922 [arbitration agreement between patient and doctor that permitted either party to request trial de novo if arbitration award exceeded \$ 25,000 rendered arbitration illusory remedy for patient, contravened policy favoring arbitration, and was unenforceable].) (See *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 121 S.Ct. 513, 521, 148 L.Ed.2d 373, 385 [under FAA, arbitration agreement's silence about costs and fees does not make agreement per se unenforceable]; 3 Pepperdine Dispute Resolution L. J. 133 [state of arbitral fees after *Green Tree Financial Corp.-Alabama*]; 50 U.C.L.A. L. Rev. 143 [costs and mandatory employment arbitration; *Green Tree Financial Corp.-Alabama*].)

In *Little v. Auto Stiegler* (2003) 29 C.4th 1064, 130 C.R.2d 892, 63 P.3d 979, supra, §521, plaintiff argued that an arbitration agreement's silence on costs meant that plaintiff would be statutorily compelled to share costs and that that circumstance rendered the agreement unenforceable. *Held*, the agreement was enforceable. Under *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99, 99 C.R.2d 745, 6 P.3d 669, supra, §518, when an arbitration agreement is silent on costs, the court will infer that that employer must bear all costs. (29 C.4th 1082.) *Green Tree Financial Corp.-Alabama*, supra, suggests that federal law requires only that employers not impose "prohibitively expensive" arbitration costs on employees. (29 C.4th 1084.) However, the FAA does not preempt *Armendariz*'s cost-shifting requirement, and *Armendariz* represents "the soundest approach to the problem of arbitration costs in the context of mandatory employment arbitration." (29 C.4th 1085.)

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



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1. When Issue Is Determined by Arbitrator.

6 *Witkin Cal. Proc. PWT* § 541

[§ 541] When Issue Is Determined by Arbitrator.

Unless otherwise agreed, arbitration provisions are severable from the contracts in which they appear. Accordingly, claims of fraud in the inducement of the underlying contract must be arbitrated. In *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh v. 100 Oak Street* (1983) 35 C.3d 312, 197 C.R. 581, 673 P.2d 251, plaintiff law firm leased space in an office building from defendant lessor. After complaining of defective air conditioning, plaintiff vacated the premises and brought an action for damages for breach of contract and fraud, the latter consisting of the alleged false representation that the premises were in a tenantable condition, when in fact the inadequate air conditioning made them untenable. Defendant filed a petition to compel arbitration under the lease arbitration clause, and plaintiff in response asserted that the fraud was a ground for revocation of the agreement under C.C.P. 1281.2(b) (supra, §531 et seq.). The trial judge, on the basis of plaintiff's general and unverified allegation of fraud, denied the petition to arbitrate. *Held*, reversed.

(a) *Federal and state cases.* The United States Supreme Court, interpreting the Federal Arbitration Act in accord with the liberal policy of promoting arbitration, held that the issue of fraud is determinable by arbitration, unless it is shown that the arbitration provision was itself induced by fraud. (35 C.3d 317, 318, citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270.) Nearly all states with arbitration statutes similar to ours have followed the federal rule. (35 C.3d 320, 321, discussing cases.)

(b) *California rule declared.* The California statutory provision on grounds "for the revocation of the agreement" may properly be construed to refer to the agreement to arbitrate. Moreover, the majority rule is in accord with California's public policy favoring arbitration. (35 C.3d 322.) This is particularly true in a case such as this, where parties are of presumptively equal bargaining power, and the fairness of the arbitration procedure is unchallenged. The difference between a breach of contract and fraudulent inducement to enter into a contract that the other party did not intend to perform turns upon determination of a party's state of mind; and a party should not be allowed to avoid an arbitration commitment by relying upon this distinction. (35 C.3d 322.) "Therefore, in the absence of indication of contrary intent, and where the arbitration clause is reasonably susceptible of such an interpretation, claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be

deemed subject to arbitration." (35 C.3d 323.) (See 11 A.L.R.4th 774 [arbitration of claim that contract containing arbitration provision was induced by fraud].)

The following cases are instructive:

King v. Prudential-Bache Sec. (1990) 226 C.A.3d 749, 755, 277 C.R. 214 [issue of fraudulent inducement to contract was properly submitted to arbitrators].

Rowland v. PaineWebber (1992) 4 C.A.4th 279, 285, 6 C.R.2d 20 [mere allegation of fraudulent inducement in obtaining plaintiffs' consent to arbitrate was insufficient to warrant denial of petition to compel arbitration]; *Strauch v. Eyring (1994)* 30 C.A.4th 181, 184, 35 C.R.2d 747 [same].

Britz v. Alfa-Laval Food & Dairy Co. (1995) 34 C.A.4th 1085, 40 C.R.2d 700, *infra*, §556 [applying rule that fraud must relate to arbitration clause itself in case governed by Federal Arbitration Act].

Hayes Children Leasing Co. v. NCR Corp. (1995) 37 C.A.4th 775, 781, 43 C.R.2d 650 [ordinarily facts must be alleged "from which it might be concluded that the party resisting arbitration never intended to agree to arbitrate the issues raised in the proceedings, or that its assent to the agreement to arbitrate was the product of wrongful coercion"; citing *Prima Paint* and *Ericksen*].

Rosenthal v. Great Western Financial Sec. Corp. (1996) 14 C.4th 394, 58 C.R.2d 875, 926 P.2d 1061, *infra*, §543 [claims of fraud in inducement are decided by arbitrator rather than court; following *Ericksen*].

Larian v. Larian (2004) 123 C.A.4th 751, 765, 19 C.R.3d 916 [trial court was required to grant defendant's motion to compel arbitration where there was no evidence of fraud in inception or execution of stock sale agreement as it related to arbitration provision; whether agreement for sale of plaintiff's stock was result of fraudulent concealment of company's value and business prospects was for arbitrator to decide; following *Rosenthal* and *Erickson*].

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aa. Fraud Directed to Arbitration Provision.

6 *Witkin Cal. Proc. PWT* § 542

[§ 542] Fraud Directed to Arbitration Provision.

Fraud directed to the arbitration clause itself is a defense to enforcement of arbitration. Claims of the fraud must therefore be resolved by the court, not the arbitrator. (See *Lynch v. Cruttenden & Co.* (1993) 18 C.A.4th 802, 810, 22 C.R.2d 636 [fraud claim was issue for court, where broker told clients that document containing arbitration agreement was mere formality not affecting their rights]; *Rosenthal v. Great Western Financial Sec. Corp.* (1996) 14 C.4th 394, 415, 58 C.R.2d 875, 926 P.2d 1061, *infra*, §543 [claims of fraud directed to arbitration provision specifically are determinable by court].)

In *Engalla v. Permanente Med. Group* (1997) 15 C.4th 951, 64 C.R.2d 843, 938 P.2d 903, plaintiffs were family members and representatives of decedent, who was enrolled in a health plan operated by defendants. Prior to his death, decedent was engaged in a medical malpractice dispute with defendants, alleging failure to diagnose lung cancer until it had reached an inoperable stage. Pursuant to the health plan's service agreement, the malpractice claim was submitted to arbitration. The arbitration program was designed, mandated, and administered by defendants. Although the agreement provided that three arbitrators would be appointed within 60 days, defendants delayed appointing their arbitrator and selecting a neutral arbitrator, despite knowledge of decedent's terminal condition, until 144 days had passed. Decedent died on the next day, with resulting reduction of damages payable on the claim because of merger of decedent's claim and his widow's loss of consortium claim. Statistically, delays occurred in 99% of defendants' malpractice arbitrations, and it took on the average almost 21/2 years to reach a hearing. Plaintiffs withdrew from the arbitration and filed a malpractice action against defendants, who then filed a petition to compel arbitration. The trial judge denied the petition on grounds of fraud, but the Court of Appeal reversed. *Held*, reversed and remanded. Factual questions were presented whether defendants fraudulently induced the arbitration agreement, and whether their actions constituted a waiver of their right to compel arbitration (*infra*, §545), either of which findings would require denial of their petition to compel arbitration. "[A]lthough we affirm the basic policy in favor of enforcement of arbitration agreements, the governing statutes place limits on the extent to which a party that has committed misfeasance in the performance of such an agreement may compel its enforcement." (15 C.4th 960.)

(a) *Grounds for rescinding agreement.* Plaintiffs claim fraud in the inducement of the arbitration agreement and therefore that "[g]rounds exist for the revocation of the agreement" within the meaning of *C.C.P. 1281.2(b)*. (15 *C.4th* 973.) The reference to "revocation" is something of a misnomer; offers are revoked, while contracts are extinguished by rescission. Thus, *C.C.P. 1281.2(b)* must be construed to mean that the petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement. Under *C.C. 1689(b)(1)*, fraud is one of the grounds on which a contract can be rescinded. In order to defeat a petition to compel arbitration, the opposing party must show that the asserted fraud claim goes specifically to the making of the agreement to arbitrate, rather than to the making of the contract in general. In the present case, the plaintiffs do allege, and seek to show, fraud in the making of the arbitration agreement. (15 *C.4th* 973.)

(b) *Promissory fraud.* Plaintiffs claim that decedent was fraudulently induced to enter the arbitration agreement--in essence a claim of promissory fraud. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without that intention, there is an implied misrepresentation of fact that may be actionable fraud. An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. The elements of fraud that will give rise to a tort action for deceit are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud (to induce reliance); (4) justifiable reliance; and (5) resulting injury or damage. (15 *C.4th* 973.)

(c) *Defendants' misrepresentation, knowledge, and intent.* Here, there is evidence supporting plaintiffs' claims that defendants misrepresented its arbitration agreement in that it entered into the agreement knowing that, at the very least, there was a likelihood its agents would breach the part of the agreement providing for the timely appointment of arbitrators and the expeditious progress towards an arbitration hearing; that defendants employed this misrepresentation in order to induce reliance by decedent and his employer; and that decedent relied on this misrepresentation to his detriment. Defendants' contractual representations of timely arbitration were at the very least commitments to exercise good faith and reasonable diligence to have the arbitrators appointed within the specified time, and these commitments were not met. (15 *C.4th* 974.) The systemwide nature of delays in defendants' malpractice arbitrations indicated defendants' knowledge that they would not comply with their own contractual timelines, or at least a reckless indifference to whether their agents would use reasonable diligence and good faith to comply. Intent to defraud can be reasonably inferred from defendants' misrepresentations, which are found not only in the contract but in newsletters periodically sent to subscribers touting the virtues of defendants' arbitration program in an apparent effort to induce participation in their health plan. (15 *C.4th* 975.) An inference of reliance arises wherever there is a showing that a misrepresentation was material; materiality is therefore generally a question of fact. (15 *C.4th* 976.) A material representation in this case is one that would have substantially influenced the health plan selection process of decedent's employer, acting as an agent of decedent and its employees as a class in negotiating group health benefits. (15 *C.4th* 977.) With respect to injury, there is no requirement to show pecuniary damages when fraud is the basis for a defense to a petition to compel arbitration, as here, rather than an action for damages. Of course, plaintiffs cannot defeat a petition to compel arbitration on the mere showing that defendants engaged generally in fraudulent misrepresentation about the speed of the arbitration process, but they must, and here did, show that in their particular case there was substantial delay in the selection of arbitrators contrary to their reasonable, fraudulently induced, contractual expectations. (15 *C.4th* 978.)

(d) *Resolution of conflicting factual evidence.* The trial judge, on remand, must resolve conflicting factual evidence in order to adjudicate defendants' petition to compel arbitration. (15 *C.4th* 980.) (See *Johnson v. Siegel* (2000) 84 *C.A.4th* 1087, 1095, 101 *C.R.2d* 412 [claim of fraud directed to arbitration provision in real estate purchase agreement was unfounded where provision was prominent, in bold type, and was specifically called to party's attention].)

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bb. Fraud in Inception of Contract.

6 *Witkin Cal. Proc. PWT* § 543

[§ 543] Fraud in Inception of Contract.

Arbitration will be denied where fraud is claimed in the execution of the contract, that is, deception as to the nature and effect of the documents signed so that the party opposing arbitration never voluntarily assented to any part of the purported contract, including the arbitration clause. (*Strotz v. Dean Witter Reynolds* (1990) 223 C.A.3d 208, 216, 272 C.R. 680; see *Rice v. Dean Witter Reynolds* (1991) 235 C.A.3d 1016, 1024, 1 C.R.2d 265 [arbitration provision was unenforceable where plaintiff was deceived as about nature of document she signed through misrepresentations made by her son-in-law financial manager and securities broker].) (On doctrine of fraud in inception or execution, see 1 *Summary* (10th), *Contracts*, §299.)

In *Rosenthal v. Great Western Financial Sec. Corp.* (1996) 14 C.4th 394, 58 C.R.2d 875, 926 P.2d 1061, individuals who invested in mutual funds through Great Western Financial Securities Corp. (GWFS), most of whom were also depositors with Great Western Bank (GWB), brought suit alleging that representatives of both corporations fraudulently led them to believe that GWFS representatives worked for GWB and that funds sold by GWFS were, or were as secure as, insured deposits with GWB. The value of the funds subsequently declined, and plaintiffs lost portions of their principal. The client agreements signed by plaintiffs contained an arbitration provision, and defendants petitioned for arbitration. Plaintiffs opposed arbitration, asserting (a) fraud in the execution (inception) of the contract and (b) fraud "permeating" the transaction. Plaintiffs argued that the arbitration provision was void because defendants' representatives had told them that they did not need to read the agreements because they were unimportant or merely a formality. *Held*, defendants' petition for arbitration was improperly denied. Plaintiffs failed to present legally sufficient evidence of fraud in the execution, and the doctrine of fraud permeating the entire contract was rejected.

(a) *Arbitrability of fraud claims.*

(1) Defendants contend that plaintiffs' declarations opposing the petition for arbitration are legally insufficient to raise a nonarbitrable issue because their claims of fraud, even if believed, are not directed specifically at the arbitration clauses. Defendants rely on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 87 S.Ct. 1801, 18

L.Ed.2d 1270, in which the United States Supreme Court held that, under the Federal Arbitration Act, unless the parties have agreed otherwise, claims of fraud in the inducement of the contract generally (fraud claims not going to the "making" of the agreement to arbitrate) are to be decided by the arbitrator rather than the court. The California Supreme Court, in *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh v. 100 Oak Street* (1983) 35 C.3d 312, 322, 323, 197 C.R. 581, 673 P.2d 251, supra, §541, has interpreted C.C.P. 1281.2 to embody the same standard of enforceability. (14 C.4th 414.)

(2) To evaluate defendant's *Prima Paint* argument, it is necessary to compare the two fraud theories on which plaintiffs have relied to avoid enforcement of the arbitration agreements: (a) fraud in the execution (or "inception") of the client agreements, and (b) fraud "permeating" the agreements. With respect to fraud in the execution of a contract, the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his or her act and actually does not know what he or she is signing, or does not intend to enter into a contract at all; mutual assent is lacking, the contract is void, and it may be disregarded without the necessity of rescission. Fraud in the inducement, by contrast, occurs when the promisor knows what he or she is signing but consent is induced by fraud; mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable (i.e., the aggrieved party must rescind to escape from its obligations). (14 C.4th 415.)

(3) Defendants assert, with regard to plaintiffs' first theory, that *Prima Paint* mandates arbitration of any fraud claim, even one going to the execution of the contract, except an "independent" or "separate and distinct" challenge to the arbitration clause itself. Neither the language nor the logic of *Prima Paint* compels this reading. Where a party's apparent assent to a written contract is negated by fraud in the execution, there is simply no arbitration agreement to be enforced. In the absence of a contrary agreement, parties to a predispute arbitration agreement are presumed to have intended arbitration of controversies, including allegations of fraud in the inducement of the contract generally, that may allow rescission or reformation of the contract or part of it. They cannot, however, have intended arbitration under a contract wholly void for fraud in its execution. It must follow that *Prima Paint* does not preclude the court from deciding claims of fraud in the execution of the entire contract, as well as those directed to the arbitration clause specifically. (14 C.4th 415.)

(4) A different conclusion must be reached on plaintiffs' second theory, fraud "permeating" the agreements. This doctrine of a contract "permeated by fraud" or evidencing a "grand scheme" of fraud has developed in California courts as an ill-defined exception to *Prima Paint*'s rule of arbitrability. This doctrine conflicts with *Prima Paint* to the extent it indicates that an agreement to arbitrate may be found invalid simply because the contract as a whole was induced by fraud. To the extent that the doctrine is merely another name for fraud in the execution of a contract, it is unnecessary. Seeing, therefore, no legally valid use for the theory, this court declines further to recognize it. (14 C.4th 417.)

(5) In summary, claims that a party has employed fraud in inducing consent specifically to the arbitration agreement (e.g., by actively concealing its existence or misrepresenting its meaning or value) are, under *Prima Paint*, to be decided by the court, because they go to the valid making of the arbitration clause itself. Claims that, due to fraud in the execution of the agreement as a whole, the parties reached no contract containing an arbitration clause are also to be decided by the court. But claims that the contract as a whole was obtained through fraud in the inducement are, in the absence of evidence of the parties' contrary intent, arbitrable under *Prima Paint*. Included in this rule of arbitrability are claims of fraud "permeating" the transaction. (14 C.4th 419.)

(b) *Reasonableness of reliance is element of fraud in execution.*

(1) The central disputed question is whether plaintiffs could justifiably rely on defendants' misrepresentations without themselves ascertaining the nature of the documents they signed. The California law of contracts generally supports defendants' position that fraud does not render a written contract void for fraud in the execution where the defrauded party had a reasonable opportunity to discover the real terms of the contract, despite some prior cases holding that equitable relief, such as rescission or reformation of the contract, may be available even though the defrauded party failed to read the contract. One party's misrepresentations as to the nature or character of the writing does not negate the

other party's apparent manifestation of assent, if the second party had "reasonable opportunity to know of the character or essential terms of the proposed contract." (14 C.4th 419, 423, citing *Rest.2d, Contracts* §163.)

(2) It follows that one party's *unreasonable* reliance on the other's misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution, for permitting that party to avoid an arbitration agreement contained in the contract. Whether a fraud claim that is insufficient as a defense to an arbitration demand may, if proven, nonetheless form the basis for equitable or other relief in the arbitral forum, is a separate issue, with which the court has no concern in this case. (14 C.4th 423.)

(3) Accordingly, statements of GWFSC representatives to the effect that the client agreements were merely a formality, or did not need to be read, were insufficient, even in light of the parties' relationship, to warrant a finding of fraud in the execution of the agreements. As to those plaintiffs whose declarations disclose no additional evidence of fraud, the petition to compel arbitration should be granted. (14 C.4th 426.) (On cases formerly in conflict over validity of permeation doctrine rejected by *Rosenthal*, see *Main v. Merrill Lynch* (1977) 67 C.A.3d 19, 25, 136 C.R. 378, and *Ford v. Shearson Lehman Amer. Express* (1986) 180 C.A.3d 1011, 1023, 225 C.R. 895, in support of permeation theory; *Strotz v. Dean Witter Reynolds*, *supra*, rejecting doctrine.)

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

See *Brown v. Wells Fargo* (2008) 168 C.A.4th 938, 959, 85 C.R.3d 817 [where fiduciary relationship existed between parties, trial court erred by failing to resolve issue of constructive fraud in execution of agreement].



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h. Illegality.

6 *Witkin Cal. Proc. PWT* § 544

[§ 544] Illegality.

If a contract includes an arbitration clause, and grounds exist to revoke the entire contract for illegality, these grounds also vitiate the arbitration agreement. Even though the arbitration agreement is otherwise enforceable, a party may avoid arbitration altogether. (*Buckeye Check Cashing v. Cardegna* (2006) 546 U.S. 440, 126 S.Ct. 1204, 1209, 163 L.Ed.2d 1038, 1044 [under Federal Arbitration Act, challenge to validity of contract as whole (not specifically to arbitration provision) must go to arbitrator; thus, because plaintiffs claimed that entire contract was void due to usurious interest rates, arbitration provisions were enforceable and claim of contract's illegality was for arbitrator to decide; following *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270, supra, §543]; *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 29, 10 C.R.2d 183, 832 P.2d 899, infra, §574; *California State Council of Carpenters v. Superior Court* (1970) 11 C.A.3d 144, 157, 89 C.R. 625; *Hotels Nevada, LLC v. Bridge Banc, LLC* (2005) 130 C.A.4th 1431, 1437, 30 C.R.3d 903 [arbitrator's decision to allow trial court to decide illegality of entire contract was proper, as was trial court's decision to do so; neither action violated Federal Arbitration Act]; on effect of illegality generally, see 1 *Summary* (10th), *Contracts*, §431 et seq.)

When, in contrast, the alleged illegality goes to *only a portion* of the contract (that does not include the arbitration agreement), the entire controversy, including the issue of illegality, remains arbitrable. (*Moncharsh v. Heily & Blase*, supra, 3 C.4th 30; *Green v. Mt. Diablo Hosp. Dist* (1989) 207 C.A.3d 63, 71, 254 C.R. 689; *Wolitarsky v. Blue Cross of Calif.* (1997) 53 C.A.4th 338, 344, 61 C.R.2d 629 [alleged discriminatory nature of single provision in health insurance policy did not prohibit arbitration under policy's arbitration provision; following *Moncharsh*].)

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

See *Duffens v. Valenti* (2008) 161 C.A.4th 434, 456, 74 C.R.3d 311 [dating service contracts that failed to meet statutory standards governing those contracts were illegal, void, and unenforceable, and because arbitration provisions were not severable, they were also unenforceable].



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i. Waiver.

1. Nature of Defense.

6 *Witkin Cal. Proc. PWT* § 545

[§ 545] Nature of Defense.

(1) *In General.* It is a defense to arbitration that "[t]he right to compel arbitration has been waived by the petitioner." (C.C.P. 1281.2(a); see *Kaneko Ford Design v. Citipark* (1988) 202 C.A.3d 1220, 1228, 249 C.R. 544 [waiver by participation in settlement negotiations and failure to notify opposing party of intention to seek arbitration]; *Martinez v. Scott Specialty Gases* (2000) 83 C.A.4th 1236, 1249, 100 C.R.2d 403 [waiver found where plaintiffs' insistence in proceeding with suit and refusal to arbitrate under valid arbitration agreement amounted to steps inconsistent with intent to invoke arbitration]; 25 A.L.R.3d 1171 [effect of delay in asserting right to arbitrate]; 29 A.L.R.3d 688 [breach or repudiation of contract as affecting right to enforce arbitration provision]; 56 A.L.R.5th 757 [participation in proceedings as waiver of objections to arbitrability]; see 3 *Cal. Proc.* (5th), *Actions*, §315 et seq.)

The waiver may be by conduct as well as express. (*Davis v. Blue Cross of Northern Calif.* (1979) 25 C.3d 418, 158 C.R. 828, 600 P.2d 1060, *infra*, §551.)

The following cases have held there was no waiver under particular circumstances:

A.D. Hoppe Co. v. Fred Katz Const. Co. (1967) 249 C.A.2d 154, 162, 57 C.R. 95 [no waiver where delay was not prejudicial].

Schwartz v. Leibel (1967) 249 C.A.2d 761, 763, 57 C.R. 831 [no waiver by bringing action to enjoin violation of agreement where arbitrator lacked authority to grant injunctive relief].

New Linen Supply v. Eastern Environmental Controls (1979) 96 C.A.3d 810, 158 C.R. 251, 3 *Cal. Proc.* (5th), *Actions*, §317 [no waiver by repudiation for breach of contract].

Napa Assn. of Public Employees v. Napa (1979) 98 C.A.3d 263, 269, 271, 159 C.R. 522 [failure timely to submit labor grievance did not waive arbitration absent intentional relinquishment of right or substantial prejudice].

(2) *Misfeasance in Performing Arbitration Agreement.* *Engalla v. Permanente Med. Group* (1997) 15 C.4th 951, 64

C.R.2d 843, 938 P.2d 903, supra, §542, involved a lengthy delay in selecting arbitrators for a medical malpractice claim against a health plan. The trial judge denied defendant's petition to compel arbitration, but the Court of Appeal reversed. *Held*, reversed and remanded. Factual questions were presented whether defendant's actions constituted a waiver of its right to compel arbitration, as well as whether defendant fraudulently induced the arbitration agreement (see supra, §542).

(a) Under *C.C.P. 1281.2(a)*, a trial court must refuse to compel arbitration if it determines that "[t]he right to compel arbitration has been waived by the petitioner." Plaintiffs argue that defendants' dilatory actions constituted a waiver of their right to compel arbitration. The term "waiver" has a number of meanings in statute and case law. Generally, "waiver" denotes the voluntary relinquishment of a known right, but it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. The decisions likewise hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. No single test delineates the nature of the conduct of a party that will constitute waiver of a right to arbitrate; whether there has been waiver is ordinarily a question of fact, and a finding of waiver, if supported by sufficient evidence, is binding on an appellate court. (*15 C.4th 982.*)

(b) Here, the evidence of defendants' course of delay, which was arguably unreasonable or undertaken in bad faith, may provide sufficient grounds for a trier of fact to conclude that defendants have waived their arbitration agreement. The delay must be substantial, unreasonable, and in spite of the claimants' own reasonable diligence. The burden is on those opposing the arbitration agreement to prove that the other parties' dilatory conduct rises to such a level of misfeasance as to constitute waiver, and waiver is not to be lightly inferred. In this case, however, there is ample evidence that plaintiffs were diligent in seeking defendants' cooperation, and instead suffered from defendants' delay, a delay that was unreasonable or in bad faith. On remand, the trial judge must determine whether waiver of the right to compel arbitration has in fact occurred. (*15 C.4th 983.*)

(3) *California Law*. Under California law, the question of waiver is determined by the court, not the arbitrator. (*C.C.P. 1281.2* [court must compel arbitration "unless it determines that ... [t]he right to compel arbitration has been waived"]; *Gustafson v. State Farm Mut. Auto. Ins. Co.* (1973) 31 C.A.3d 361, 365, 107 C.R. 243; 26 A.L.R.3d 604 [issue of waiver as question for court or arbitrator].)

(4) *Federal Law*. Where federal law governs arbitration, the question of waiver is decided by the arbitrator. (*Butchers Union v. Farmers Markets* (1977) 67 C.A.3d 905, 910, 136 C.R. 894; see *Cione v. Foresters Equity Services* (1997) 58 C.A.4th 625, 639, 68 C.R.2d 167, supra, §522 [in wrongful termination dispute, failure of integrated written employment agreement to address dispute resolution did not waive employer's right, as third-party beneficiary, to compel arbitration under employee's arbitration agreement with National Association of Securities Dealers that required arbitration of employment-related disputes]; *Omar v. Ralphs Grocery Co.* (2004) 118 C.A.4th 955, 961, 13 C.R.3d 562 [where arbitration agreement was governed by FAA and plaintiff's waiver allegations involved nonlitigation conduct that necessitated interpretation of arbitration agreement, issue of waiver was for arbitrator to decide].) Under federal law, a party claiming waiver has a heavy burden of proof. (See *Thorup v. Dean Witter Reynolds* (1986) 180 C.A.3d 228, 225 C.R. 521 [employer's termination of plaintiff was not waiver of agreement to arbitrate termination disputes; termination was not inconsistent with that agreement].)

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

(1) *In General*. See *Segal v. Silberstein* (2007) 156 C.A.4th 627, 636, 67 C.R.3d 426 [defendant's appearance in litigation involving separate parties and issues not within scope of arbitration agreements was not waiver and trial court erred in denying defendant's petition to compel arbitration].



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2. Delay in Demanding Arbitration.

6 *Witkin Cal. Proc. PWT* § 546

[§ 546] Delay in Demanding Arbitration.

Delay in demanding arbitration may amount to waiver. (*Spear v. California State Auto. Assn.* (1992) 2 C.4th 1035, 1043, 9 C.R.2d 381, 831 P.2d 821; *Boys Club of San Fernando Valley v. Fidelity & Deposit Co. of Maryland* (1992) 6 C.A.4th 1266, 1275, 8 C.R.2d 587; *Allstate Ins. Co. v. Gonzalez* (1995) 38 C.A.4th 783, 790, 45 C.R.2d 491 [insured's protracted and unexplained delay in petitioning to compel arbitration of uninsured motorist claim was unreasonable as matter of law, and thus constituted waiver of his right to arbitrate claim, even without proof that insurer had been prejudiced by delay].)

When an arbitration agreement does not specify the time within which arbitration must be demanded, a reasonable time is allowed; a party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration. What constitutes a reasonable time is a question of fact, depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. Among the facts a court may consider is any prejudice the opposing party suffered because of the delay. (*Spear v. California State Auto. Assn.*, *supra*; see *Wagner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 C.4th 19, 30, 58 C.R.3d 434, 157 P.3d 1029 [party's failure to demand arbitration before statute of limitations has run on underlying claim does not in itself amount to waiver; court must undertake factual inquiry to determine issue of waiver].)

If the arbitration agreement does specify a deadline, satisfying the deadline is a condition precedent to the right to compel arbitration. In the absence of legal excuse, a party's failure to timely demand arbitration results in contractual forfeiture of the right to arbitration. (*Platt Pac. v. Andelson* (1993) 6 C.4th 307, 318, 319, 24 C.R.2d 597, 862 P.2d 158, 1 Summary (10th), *Contracts*, §781.)

However, a period specified in an agreement is tolled when, within that period, a party commences a civil action based on a controversy subject to the agreement. Time is tolled from the date the action is commenced until either (a) 30 days after a final determination by the court that the party is required to arbitrate, or (b) 30 days after the final termination of the civil action, whichever is first. (*C.C.P. 1281.12*.)

Tas-T-Nut Co. v. Continental Nut Co. (1954) 125 C.A.2d 351, 270 P.2d 43, took a tolerant view of a defendant's dilatory demand. A contract between defendant seller and plaintiff buyer contained a general arbitration clause outlining no procedure. Defendant failed to make full delivery of goods and plaintiff demanded arbitration. Defendant stalled in various ways for a long time, and finally proposed arbitration by a different body, but plaintiff filed suit and recovered damages. *Held*, reversed. Defendant's dilatory conduct gave plaintiff an election to treat the arbitration agreement as repudiated and to sue. But the record did not show that plaintiff made this unequivocal election; and, having kept alive its own right to compel arbitration, it could not prevent defendant's belated exercise of the same right. This, said the court, is simply an application of the "familiar rule that if an agreement be breached the party against whom the breach is committed may refuse to accept the breach or terminate the contract, thus keeping the contract alive, but that if he does so he keeps it alive both for the benefit of himself and for that of the other contracting party." (125 C.A.2d 356.)

Gunderson v. Superior Court (1975) 46 C.A.3d 138, 120 C.R. 35, was not so forgiving. Plaintiff signed a form contract with defendant Medical Clinic, with a mandatory arbitration clause. On November 28, 1973, plaintiff filed a complaint for malpractice. Defendant filed an answer on January 31, 1974, with no mention of arbitration; defendant demanded arbitration on February 25, 1974, but plaintiff refused, and no further demand was made. The parties engaged in discovery, plaintiff filed an at-issue memorandum, and defendant made no motion to strike it. On May 15, 1974, defendant petitioned for an order compelling arbitration, and the trial judge granted it. *Held*, mandamus issued to compel vacating the order and denial of the petition for arbitration. The record established waiver as a matter of law. In addition to failure to plead the clause by way of abatement, and delay in asserting the right through the period of preparation for trial, defendant failed to follow up its February 25th demand by designating an arbitrator pursuant to the contract. Thus, impliedly, it accepted plaintiff's refusal of the demand. (46 C.A.3d 144.) (See *Zimmerman v. Drexel Burnham Lambert* (1988) 205 C.A.3d 153, 159, 252 C.R. 115 [right was waived; plaintiffs expended \$ 400,000 during 6 years from start of action to defendants' demand to arbitrate; defendants failed to give plaintiffs copy of arbitration agreement].)

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



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aa. No Waiver by Mere Filing or Limited Participation.

6 *Witkin Cal. Proc. PWT* § 547

[§ 547] No Waiver by Mere Filing or Limited Participation.

(1) *Conduct of Party*. Merely filing a lawsuit, without some judicial litigation of the merits of arbitral issues, does not waive contractual arbitration rights. (*Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 188, 151 C.R. 837, 588 P.2d 1261 [repudiating former rule after thorough review of cases and federal approach]; see *Keating v. Superior Court* (1982) 31 C.3d 584, 605, 607, 183 C.R. 360, 645 P.2d 1192 [no waiver had been established; following *Doers*]; *Lewis v. Prudential-Bache Sec.* (1986) 179 C.A.3d 935, 940, 225 C.R. 69 [no waiver where defendant responded to complaint by demanding that plaintiff elect arbitrator, and on plaintiff's refusal, filed demurrer and petition to compel arbitration; following *Keating*]; *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 503, 227 C.R. 318 [issues litigated and waiver found].) Nor does some participation in the judicial process per se waive a party's right to seek arbitration. It is only when the conduct of a party is inconsistent with the exercise of the right to arbitrate that waiver is usually found. (See *McConnell v. Merrill Lynch* (1980) 105 C.A.3d 946, 951, 164 C.R. 751 [interpreting *Doers* opinion, and holding that defendant had litigated portions of the case and hence had waived arbitration right]; *Johnson v. Siegel* (2000) 84 C.A.4th 1087, 1095, 101 C.R.2d 412 [plaintiff's action on arbitrable claim, defeated at summary judgment, did not result in waiver of plaintiff's right to compel arbitration; following *Doers*]; *Rutter Group, Alternative Dispute Resolution*, §5:179 et seq.)

(2) *Waiver if Participation Is Prejudicial*. Parties may participate in judicial proceedings without losing the right to arbitrate so long as the participation does not substantially prejudice an opponent's rights. (*McMillin Dev. v. Home Buyers Warranty* (1998) 68 C.A.4th 896, 909, 80 C.R.2d 611 [through discovery, motions, and appeal, plaintiff was prejudiced by being exposed to expenses and risks of litigation without receiving efficiencies available under arbitration]; *Groom v. Health Net* (2000) 82 C.A.4th 1189, 1198, 98 C.R.2d 836 [plaintiff suffered no prejudice by being forced to participate in demurrer process; waiver does not occur unless there is some impairment of complaining party's ability to participate in arbitration].)

In *St. Agnes Med. Center v. PacifiCare of Calif.* (2003) 31 C.4th 1187, 8 C.R.3d 517, 82 P.3d 727, plaintiff P filed an action against defendant S and others to resolve contractual disputes under two health services agreements entered

into in 1994 and 2000. P alleged that the 2000 agreement was void from conception, and sought to have the 2000 agreement rescinded and the 1994 agreement govern. S later filed an action seeking damages and other relief for P's breach of the 2000 agreement. The 2000 agreement contained a broad arbitration provision. Following S's filing, P by letter to S, sought agreement to voluntarily arbitrate both parties' claims under the 2000 agreement. S did not agree, and 4 months later P filed a petition to compel arbitration and stay the action filed by S. S opposed arbitration, contending that P had waived arbitration by expressly repudiating the 2000 agreement and seeking its judicial rescission. The trial court denied the petition to compel arbitration, and relying on *Bertero v. Superior Court* (1963) 216 C.A.2d 213, 30 C.R. 719, found that P's complaint evidenced a clear attempt to repudiate the 2000 agreement, that S could seek judicial relief, and that once S did so, P could not retract its repudiation and compel arbitration. The Court of Appeal reversed, concluding that the record did not establish that P waived its right to arbitrate as a matter of law. *Held*, P did not waive or forfeit its contractual arbitration rights.

(a) *Challenging validity of contract is not waiver.* Significant developments in the law since *Bertero* have led many courts to hold that contractual arbitration provisions generally must be enforced where one party seeks rescission of the entire contract on the basis that it was induced by fraud, mistake, or duress, or that a breach warrants rescission. (31 C.4th 1198.) In light of these developments, *Bertero* is disapproved "to the extent it holds that a party's assertion of the invalidity of an entire contract categorically waives that party's right to arbitrate pursuant to a provision in that contract." (31 C.4th 1199.) P's legal challenge to the validity of the 2000 agreement is not inconsistent with an intent to invoke arbitration under that agreement, and P's repudiation does not amount to a waiver of its contractual arbitration rights. (31 C.4th 1200.)

(b) *Mere initiation of litigation is not waiver.* P did not initiate the action in which it seeks to compel arbitration; S did. P's lawsuit was to have the 2000 agreement declared void *ab initio*, and to enforce rights under the 1994 agreement, which contained no arbitration provision. That action was not litigated, and under *Doers*, merely filing the action did not constitute waiver of P's right under the 2000 agreement to arbitrate the claims in S's subsequent suit. (31 C.4th 1200.)

(c) *No prejudice from participating in litigation.* Under both federal and California law, whether litigation results in prejudice is critical in determining waiver. Prejudice typically is found where the petitioning party's conduct has "substantially undermined" the important public policy in favor of arbitration or has "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (31 C.4th 1204.) Neither is the case here. There is nothing to indicate that P used either action to circumvent the arbitration process, or that P's actions have impaired S's ability to have its claims resolved fairly through arbitration. (31 C.4th 1204.) (See *Simms v. NPKC Enterprises* (2003) 109 C.A.4th 233, 239, 134 C.R.2d 557 [plaintiffs' action for damages and request for preliminary injunction in commercial lease dispute did not amount to waiver; action also requested arbitration, thus putting defendants on notice, and there was no substantial evidence that defendants were otherwise prejudiced]; *Kalai v. Gray* (2003) 109 C.A.4th 768, 773, 135 C.R.2d 449, *infra*, §564 [plaintiff did not waive right to arbitrate by filing arbitrable claims in superior court where merits were not litigated because of defendant's successful summary judgment; prejudice necessary to support waiver must involve party obtaining advantage from court system, and merely incurring litigation expense is not prejudicial].)

(3) *Action To Enforce Lien.* The commencement of an action to enforce a claim of lien on a work of improvement (C.C. 3082 et seq.) is not a waiver of the right of arbitration under an agreement if, at the time of filing, the claimant either (a) includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration and intends to seek within 30 days after service an order to stay further proceedings, or (b) files with the complaint an application to stay the action pending arbitration of issues relevant to enforcement of the lien. (C.C.P. 1281.5(a).) The claimant must, within those 30 days, serve a motion and notice under C.C.P. 1281.4 (*supra*, §528) to stay the action or be deemed to have waived the right to arbitrate. (C.C.P. 1281.5(b).)

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bb. Filing Action Solely for Discovery.

6 *Witkin Cal. Proc. PWT* § 548

[§ 548] Filing Action Solely for Discovery.

Filing an action solely for discovery waives the right to arbitration. In *Christensen v. Dewor Dev.* (1983) 33 C.3d 778, 191 C.R. 8, 661 P.2d 1088, plaintiffs entered into a construction contract with defendant contractors, which contained a standard arbitration clause. After the completion of construction, plaintiffs filed a voluminous complaint stating seven causes of action, with an incidental mention of the arbitration clause and an assertion that they were entitled to arbitration. The complaint further asserted that it was their intent to reserve arbitration rights and to arbitrate the case, and that the purpose of filing the complaint was to obtain an answer and affirmative defenses so that plaintiffs "could have some feel" for what the defendants' position would be at arbitration. Defendants did not answer, but instead demurred, and the trial court sustained the demurrer. Plaintiffs then filed an amended complaint stating the same seven causes of action and asserting the right to arbitrate, and defendants again demurred and asserted that plaintiffs had waived their right to arbitration. One day before the hearing on the second demurrer, plaintiffs filed a voluntary dismissal "without prejudice," and 2 months later filed a petition to compel arbitration. The trial court denied the petition, holding that the right to arbitration had been waived. *Held*, the ruling was correct.

(a) Under the principles and policies set forth in *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 188, 151 C.R. 837, 588 P.2d 1261, *supra*, §547, arbitration is favored and waiver by a defendant does not occur by mere participation in litigation; there must be judicial litigation of the merits of arbitral issues. (33 C.3d 782.) The situation is different when a plaintiff seeks to change his or her course. A party who brings an action over a dispute that the party has agreed to arbitrate has acted in violation of this agreement, while a defendant in such an action has done no legal wrong. (33 C.3d 782.)

(b) Similar considerations apply where the plaintiff brings the action in good faith, as in *Doers*, holding that arbitration was not waived in the absence of plaintiff's knowledge of the contract (e.g., a collective bargaining agreement between plaintiff's union and plaintiff's employer) and a showing of prejudice. Here, plaintiffs intended to avail themselves of arbitration, and filed the action solely to discover their opponents' legal strategies and theories. However, arbitration agreements seek to avoid the delays, costs, and publicity of court procedures; and plaintiffs' action

not only tends to defeat the parties' expectations but to impose unnecessary burdens on the already congested court calendars. "Such procedural gamesmanship provides ample support for the trial judge's conclusion that plaintiffs filed their action in bad faith, and by doing so waived their right to arbitrate." (33 *C.3d* 784.)

(c) Defendants were prejudiced by plaintiffs' conduct. They incurred nearly \$ 300 in court costs and over \$ 2,000 in attorneys' fees, and suffered lengthy delays which resulted in faded memories and lost records by subcontractors. (33 *C.3d* 784.)

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cc. Defendant's Use of Discovery and Delay in Seeking Arbitration.

6 *Witkin Cal. Proc. PWT* § 549

[§ 549] Defendant's Use of Discovery and Delay in Seeking Arbitration.

In *Davis v. Continental Airlines* (1997) 59 C.A.4th 205, 69 C.R.2d 79, plaintiff skycap brought a sexual harassment action against her supervisor and employer. Although each defendant's answer alleged as an affirmative defense that plaintiff's action was barred by plaintiff's failure to follow the arbitration procedure specified in the employee handbook, defendants did not demand arbitration for approximately 6 months. Prior to seeking a stay and moving to compel arbitration, defendants engaged in extensive discovery that included 1,600 pages of documents and plaintiff's 2-day deposition. The trial judge denied defendants' motion to compel arbitration. *Held*, affirmed.

(a) *Test for waiver.* Waiver may be found when the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration (*supra*, §546), or (3) acted in bad faith or with wilful misconduct. (59 C.A.4th 211; citing *Christensen v. Dewor Dev.* (1983) 33 C.3d 778, 191 C.R. 8, 661 P.2d 1088, *supra*, §548.) Moreover, the party claiming waiver must show that some prejudice has resulted from the delay in seeking arbitration. (59 C.A.4th 212.)

(b) *Use of discovery.* Although it was the *plaintiffs* in *Christensen* who improperly used court proceedings to gain discovery, *Christensen's* rationale supports a finding of waiver here. Given defendants' extensive use of discovery, it is reasonable to infer that defendants unreasonably delayed their motion to compel arbitration in order to take advantage of court discovery procedures to learn plaintiff's strategies, evidence, and witnesses. (59 C.A.4th 213.)

(c) *Prejudice.* The prejudice here involves more than plaintiff incurring court costs or legal expenses. Defendants used the discovery process to gain information about plaintiff's case that defendants could not have gained in arbitration. "Defendants then belatedly sought to change the game to arbitration, where plaintiff would not have equivalent discovery rights." (59 C.A.4th 215.)

(d) *Affirmative defense.* Defendants' waiver is not erased by raising the arbitration issue as an affirmative defense. Plaintiff's opposition to defendants' belated motion to stay proceedings and compel arbitration squarely raised for the

trial judge the issue whether defendants waived the right to compel arbitration based on defendants' extensive use of discovery. Thus, the fact that defendants pleaded an affirmative defense became merely one factor for the trial judge to consider. Although the extent, significance, and consequences of the discovery were disputed, reasonable inferences support the conclusion that plaintiff suffered prejudice from defendants' delay in seeking arbitration and that defendants therefore waived the right to compel arbitration. (59 C.A.4th 217.) (See *Sobremonte v. Superior Court* (1998) 61 C.A.4th 980, 991, 998, 72 C.R.2d 43 [similar conduct by defendant bank; waiver found].)

In *Berman v. Health Net* (2000) 80 C.A.4th 1359, 96 C.R.2d 295, plaintiffs sued defendant medical insurer for various tort and contract claims arising from defendant's handling of health care claims. Counsel for the parties stipulated that defendant's answer and challenges to the complaint would not be deemed a waiver of defendant's right to compel arbitration under the insurance plan's arbitration provision. Defendant then initiated extensive discovery, lasting 6 months, before defendant sought arbitration. Applying *Davis*, the trial court denied defendant's motion to compel arbitration, finding that defendant had waived the right by engaging in substantial discovery that prejudiced plaintiff. *Held*, affirmed.

(a) The vice prohibited by *Davis* is using the discovery process of the court to gain information unavailable to defendant in arbitration, and this does not require plaintiff to show a specific disadvantage. Although the stipulation here presents a closer case than *Davis*, there was nothing in the stipulation permitting defendant to engage in extensive discovery while engaging in multiple challenges to the pleadings. The trial court could reasonably infer the discovery revealed information that could not have been gained in arbitration, with prejudice to plaintiff. (80 C.A.4th 1366.)

(b) Plaintiff's participation in discovery did not support nonwaiver. *Davis* and federal cases reaffirm that the prejudice lies in gaining information not available in arbitration, not in a lack of reciprocity. (80 C.A.4th 1369.)

(c) *Davis* does not require bad faith as a prerequisite to finding waiver. Rather, bad faith is an alternative ground for finding waiver. The crucial inquiry remains whether the party has availed itself of discovery not available in arbitration, not the subjective motive of the party seeking to compel arbitration. (80 C.A.4th 1372.) (See *Guess? v. Superior Court* (2000) 79 C.A.4th 553, 557, 94 C.R.2d 201 [defendant knew of arbitration provision and waived right to compel by answering complaint and not alleging arbitration as affirmative defense, participating in discovery process without claiming right to arbitrate, and waiting 3 months more before demanding arbitration].)

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

See *Roman v. Superior Court* (2009) 172 C.A.4th 1462, 1478, 92 C.R.3d 153 [defendant did not waive arbitration by (a) filing demurrer or objections to plaintiff's discovery requests prior to filing motion to compel arbitration, or (b) filing motion to compel plaintiff's deposition after seeking arbitration where discovery sought was not inconsistent with that available in arbitration and plaintiff was not prejudiced].



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dd. Deceptive Tactics in Settlement Process.

6 *Witkin Cal. Proc. PWT* § 550

[§ 550] Deceptive Tactics in Settlement Process.

In *Aviation Data v. American Express Travel Related Services Co.* (2007) 152 C.A.4th 1522, 62 C.R.3d 396, the trial court refused to approve a class action settlement when it concluded that defendant had misled plaintiffs in the course of negotiations by offering to make significant changes to defendant's travel insurance program that, unknown to plaintiff, defendant had already made for reasons unrelated to plaintiff's action. Defendant then moved to compel arbitration as to class members and to exclude from the class all members subject to arbitration agreements. The trial court denied the motion on the ground that defendant had waived the right to compel arbitration. The trial court noted that, although a party does not waive the right to arbitrate by invoking the judicial forum to pursue settlement, defendant waived the right through misrepresentations to plaintiff, to absent class members, and to the court regarding the basis of the settlement. *Held*, affirmed; defendant waived arbitration.

(a) *Choice of law.* The Federal Arbitration Act (FAA; *supra*, §506 et seq.) applies to arbitration provisions in agreements involving interstate commerce, and here the provisions were contained in credit card members' agreements. In addition, FAA rules require that federal law be used to decide whether a party has waived the right to arbitration. (152 C.A.4th 1535.)

(b) *Use of judicial process.* Because court involvement is often necessary to the settlement of class claims, defendant did not waive the right to arbitrate merely by pursuing judicial supervision of the class settlement. However, in pursuing settlement negotiations, defendant purposely misrepresented the principal benefits of the settlement, i.e., making significant changes in its travel insurance program, changes that it had already made. Moreover, in pursuit of settlement, defendant successfully expanded the class to obtain a nationwide release of claims, obtained a stay of court actions by class members, and engaged in court hearings and considerable discovery. Thus, defendant's use of the judicial process was extensive and constituted an attempt at judicial resolution that was incompatible with its right to arbitrate. (152 C.A.4th 1540, 1542.)

(c) *Prejudice.* Defendant solicited and gained amendment of the complaint to allege a nationwide class and then

crafted a proposed settlement that was structured around largely illusory relief. Further tactics forced plaintiff class to engage in protracted and costly discovery and appearances before the court when defendant's deception about the implementation of changes in its travel insurance program surfaced. It was only after defendant's deception was discovered and the settlement failed that defendant moved to compel arbitration. Thus, defendant's conduct "smacks" both of substantive prejudice, to the same extent as if defendant had lost on the merits and then sought to relitigate through arbitration, and of the situation in which a party postpones invoking arbitration and "thereby causes his adversary to incur unnecessary delay or expense." (152 C.A.4th 1541.)

(d) *Misuse of court authority.* The contention that defendant should not be held responsible for the settlement tactics used by defendant's former counsel is without merit. The trial court explicitly noted "its discomfiture" at the idea that a party "could appear before the Court, seek and obtain Court approval for a class settlement, mislead the Court, send out a misleading class notice, and then, when the settlement fails, assert a contractual right to arbitration that would take the claims out of the judicial system and require each putative class member to arbitrate his or her own claims individually." These findings were not restricted to defense counsel, and the trial court properly found that defendant attempted to misuse the trial court's authority in order to benefit from a court supervised settlement. (152 C.A.4th 1541.)

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4. Waiver or Forfeiture by Insurer.

aa. Failure To Inform Insured of Remedy.

6 *Witkin Cal. Proc. PWT* § 551

[§ 551] Failure To Inform Insured of Remedy.

In *Davis v. Blue Cross of Northern Calif.* (1979) 25 C.3d 418, 158 C.R. 828, 600 P.2d 1060, plaintiffs were insureds under hospitalization policies issued by defendant. They claimed benefits, and received letters denying their claims. They then brought this class action for damages for breach of contract and declaratory relief. Defendant, citing the arbitration clause of the policies, petitioned the trial court for orders to compel plaintiffs to submit their underlying disputes to arbitration. The trial judge denied the petition, concluding that defendant had waived its right by failing to inform the insureds, when the claims were rejected, of the availability of arbitration or the procedure by which they could invoke the remedy. *Held*, orders affirmed.

(a) *Established law on waiver.* Although arbitration is favored (*supra*, §500), C.C.P. 1281.2 recognizes that a party may by conduct waive the right to compel it. (25 C.3d 425.) Waiver may result from various kinds of conduct; and there is no single test. The question is ordinarily one of fact. (25 C.3d 426, 427.)

(b) *Waiver in this case.* Defendant contended that inclusion of the arbitration clause in the policy was sufficient to put the insured on notice, and that it owed no additional duty to call the remedy to the insured's attention or to explain how it could be invoked. This is unsound for the following reasons:

(1) The insurer-insured relationship gives rise to special duties that an insurer owes in relation to a claim by its insured. (25 C.3d 427; see 2 *Summary* (10th), *Insurance*, §238 et seq.) Hence, where lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, the insurer must bring to the insured's attention "relevant information" so as to enable the insured to take action to secure his rights. (25 C.3d 428.)

(2) An arbitration provision may afford important benefits to the insured as well as the insurer, by making available a speedy, economic, and inexpensive dispute-resolution process. Thus, it may be practicable for the insured to have claims resolved when it would not be financially feasible to do so by litigation. (25 C.3d 429.)

(3) These potentially significant advantages will accrue to insureds only if they are aware of the availability of arbitration and of the means of initiating the process. Here, the information was "buried in an obscure provision" of the policy; and the insured, who relies on the insurer or its agent to inform him of his rights, is not likely to be aware of this remedy. (25 C.3d 429.)

(4) Many statutory provisions "confirm the fact that in the insurance context specific advice as to the availability of arbitration is necessary if the arbitral process is to afford a meaningful remedy for insureds." (25 C.3d 430.)

(c) *Effect of insurer's practice.* "[T]he practical effect of the insurer's practice was to transform its arbitration clause into a unilateral provision, establishing a procedure to which the insurer could require its insureds to resort when Blue Cross deemed it advisable, but one that would not generally provide a speedy, economic or readily accessible remedy for the bulk of Blue Cross' uninformed insureds." (25 C.3d 430.)

Three justices dissented as follows: (a) The majority's "novel and unprecedented theory of waiver" runs counter to the strong public policy favoring arbitration. (b) The arbitration clause was neither "buried" nor "obscure," but was clearly set out in the general provisions of a four-page agreement, and it incorporated the statutory law on arbitration. (c) No suggestion was made that plaintiffs were prejudiced by failure of defendant to remind them of the unambiguous provisions of their agreement; and the complaints on their face acknowledged their prior awareness of the arbitration clause and their attempt to circumvent the procedure. (d) *Madden v. Kaiser Foundation Hosp.* (1976) 17 C.3d 699, 706, 131 C.R. 882, 552 P.2d 1178, "rejected the overly paternalistic approach" of the majority, refusing to adopt a special rule that an arbitration clause was unenforceable without proof of the plaintiff's actual knowledge of its provisions. (25 C.3d 435.)

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H. Contractual Arbitration.

6. Defenses to Enforcement.

i. Waiver.

4. Waiver or Forfeiture by Insurer.

bb. Requirement of Bad Faith Conduct.

6 *Witkin Cal. Proc. PWT* § 552

[§ 552] Requirement of Bad Faith Conduct.

In *Chase v. Blue Cross of Calif.* (1996) 42 C.A.4th 1142, 50 C.R.2d 178, an insured's action against a health insurer, the trial judge denied defendant's petition for arbitration, based on a finding that defendant had intentionally waived its right to compel arbitration because its communications with plaintiff did not mention the arbitration provision. The trial judge made no finding that defendant engaged in a course of conduct designed to mislead plaintiff. At oral argument on the petition, the judge indicated his belief that *Davis v. Blue Cross of Northern Calif.* (1979) 25 C.3d 418, 158 C.R. 828, 600 P.2d 1060, *supra*, §551, and *Sarchett v. Blue Shield of Calif.* (1987) 43 C.3d 1, 233 C.R. 76, 729 P.2d 267, 2 Summary (10th), Insurance, §122, require an insurer to inform an insured of an arbitration provision in every case. *Held*, reversed. Under *Davis* and *Sarchett*, forfeiture of the right to arbitration requires that the insurer breach the covenant of good faith and fair dealing by engaging in bad faith conduct designed to mislead the insured.

(a) *Relinquishing contractual right.* An insurer may relinquish a contractual right by: (1) waiver, an intentional relinquishment of a known right demonstrated expressly or implicitly; (2) estoppel, conduct by the insurer that reasonably causes an insured to rely to his or her detriment; or (3) forfeiture, the assessment of a penalty against the insurer for either misconduct or failure to perform an obligation under the contract. Plaintiff's claim is properly understood to be that defendant's breach of the duty of good faith resulted in its forfeiture of the right to arbitration; this was the method of relinquishment discussed in *Davis* and *Sarchett*. "Waiver" is one of the three statutory grounds for denying enforcement of an arbitration provision mentioned in C.C.P. 1281.2, and, although "forfeiture" is not specifically enumerated, the use of "waiver" in the statute includes "forfeiture" of that right as well. (42 C.A.4th 1151.)

(b) *Covenant of good faith and fair dealing in insurance contracts.* A covenant of good faith and fair dealing is implied in every contract, but the scope of the covenant varies from case to case depending on the contractual purposes. (42 C.A.4th 1151.) In the context of insurance contracts, the covenant requires the insurer to give at least as much consideration to the welfare of its insured as it gives to its own interests. Part of this requirement is the duty reasonably to inform an insured of the insured's rights and obligations under the policy. (42 C.A.4th 1152.)

(c) *Establishing that insurer forfeited right to arbitration.* To find that an insurer has forfeited the right to arbitration, *Davis* and *Sarchett* require conduct *designed* to mislead policyholders. The focus when evaluating an allegation of forfeiture must be on the subjective intent of the insurer, and in determining whether that intent is consistent with a finding of bad faith and the imposition of a penalty in the form of forfeiture. A finding of a subjective intent to mislead distinguishes forfeiture from estoppel. An insurer is estopped from asserting a right, even though it did not intend to mislead, as long as the insured reasonably relied to its detriment on the insurer's action. Forfeiture, on the other hand, requires an intent to mislead and is satisfied whether or not the insured is, in fact, misled. Consequently, even if the insured is aware of the arbitration right, bad faith tactics designed to mislead the insured merit the sanction of forfeiture. Conversely, even if the insured in fact was unaware of the arbitration right, no forfeiture occurs if the insurer did not engage in behavior designed to mislead the insured. The insurer's ability to enforce the arbitration provision cannot realistically hinge on its ability to prove that the insured had actual knowledge of the provision. A determination of bad faith involves consideration of the totality of the circumstances, including whether the insurer has knowledge of facts suggesting that the insured is unaware of the arbitration provision. Because arbitration is favored, the burden of proof is on the party asserting forfeiture, and the forfeiture must be demonstrated by clear and convincing evidence. (42 C.A.4th 1157.)

(d) *Course of conduct designed to mislead.* *Davis* and *Sarchett* do not require notification in every communication between an insurer and an insured. Although the trial judge's finding is based on a misinterpretation of the governing legal principle and requires reversal, it cannot be said that forfeiture does not lie here. The question whether defendant engaged in a course of conduct designed to mislead plaintiff is a factual one, which this court declines to resolve in the first instance. The trial judge may consider any factor bearing on whether defendant sought to mislead plaintiff about the availability of arbitration. (42 C.A.4th 1158.) (See *Wolschlager v. Fidelity Nat. Title Ins. Co.* (2003) 111 C.A.4th 784, 792, 4 C.R.3d 179 [although defendant insurer never informed plaintiff of arbitration provisions despite claims and negotiation process, there was no waiver where defendant's conduct was not designed to mislead plaintiff; arbitration provisions were not obscure but were set forth in bold font in document that was properly incorporated by reference into terms of agreement and actually in plaintiff's possession; following *Chase* and distinguishing *Davis*].)

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7. Arbitration Proceeding.

a. Commencement and Consolidation.

6 *Witkin Cal. Proc. PWT* § 553

[§ 553] Commencement and Consolidation.

(1) *Commencement of Proceedings.* When the arbitration agreement neither spells out the procedure to be followed, nor incorporates by reference a body of rules to be followed, that procedure is governed by statute. (*Conejo Valley Unified School Dist. v. William Blurock & Partners* (1980) 111 C.A.3d 983, 993, 169 C.R. 102; *American Home Assur. Co. v. Benowitz* (1991) 234 C.A.3d 192, 198, 285 C.R. 626.) (See Rutter Group, Alternative Dispute Resolution §5:378 et seq.)

Arbitration proceedings are generally commenced by sending the other party a demand for arbitration. To meet due process requirements, the other party must be named in the demand and served with a copy. (*Ikerd v. Warren T. Merrill & Sons* (1992) 9 C.A.4th 1833, 1842, 12 C.R.2d 398 [arbitrator had no jurisdiction over corporate president who was not served with demand for arbitration, even though corporation was served and president participated in proceeding].)

(2) *Consolidation.* A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings if (a) the proceedings are pending between the same parties, or one party is a party to a separate arbitration agreement or proceeding with a third party, (b) the disputes arise from the same transaction or series of related transactions, and (c) there are common issues of law or fact that create the possibility of conflicting rulings. The court may consolidate all or part of the separate proceedings. (*C.C.P. 1281.3*; see *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.* (1983) 140 C.A.3d 251, 263, 191 C.R. 15 [application of *C.C.P. 1281.3* to contract predating statute]; on consolidation of proceedings generally, see 4 *Cal. Proc.* (5th), *Pleading*, §341 et seq.)

Gordon v. G.R.O.U.P. (1996) 49 C.A.4th 998, 56 C.R.2d 914, was an action by passengers in a van that was struck by a car whose owner was uninsured, brought against the car owner, the self-insured van owner, and the driver of the van. Plaintiffs' uninsured motorist claims were subject to binding arbitration under *Ins.C. 11580.2(f)* (see 2 *Summary* (10th), *Insurance*, §208), and their third-party liability claims against the van owner and driver, and the van owner's claims against the car owner, were subject to mandatory, but nonbinding, arbitration under the judicial arbitration statute (see *C.C.P. 1141.11(a)*, *infra*, §582). *Held*, the arbitration proceedings were properly consolidated under *C.C.P. 1281.3* and the award was binding on all the parties.

(a) By adopting *C.C.P. 1281.3*, the Legislature manifested a strong policy favoring consolidating arbitrations involving common issues of law and fact. This policy has at least three important aims: the efficient settling of private disputes, judicial economy, and the avoidance of contrary results. A consolidation may be ordered even if it means that a party may be forced into a coordinated arbitration proceeding in a dispute with a party with whom he has no agreement, before an arbitrator he had no voice in selecting, and by a procedure not agreed to. (*49 C.A.4th 1006*.)

(b) Here, these legislative aims were met, and the statutory requirements of *C.C.P. 1281.3* were satisfied. Plaintiffs and defendants were parties to agreements or proceedings requiring arbitration and involving the same transactions and issues. (*49 C.A.4th 1006*.) The disputes arose from the same transaction and involved common issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator. (*49 C.A.4th 1007*.)

(c) Once the statutory criteria are satisfied, there is no reason to deny consolidation unless it would impair a substantial right or obligation of a party. There was no indication that any substantial right or obligation was thus impaired. (*49 C.A.4th 1007*.) (See *Yuen v. Superior Court (2004)* 121 C.A.4th 1133, 1138, 18 C.R.3d 127 [whether arbitrations under FAA should be consolidated is for arbitrator to decide; following *Green Tree Financial Corp. v. Bazzle (2003)* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414, supra, §506]; *Parker v. McCaw (2005)* 125 C.A.4th 1494, 1506, 24 C.R.3d 55 [trial court erred in consolidating arbitrations where employment agreement and stock incentive agreement contained conflicting provisions concerning venue, choice of law, and number of arbitrators; court also erred in resolving conflict in favor of single arbitrator because right to panel of three arbitrators pursuant to stock incentive agreement was substantial contractual right and could not be altered by court].)

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

(1) *Commencement of Proceedings*. See *Briggs v. Resolution Remedies (2008)* 168 C.A.4th 1395, 1401, 86 C.R.3d 396 [where arbitration was commenced pursuant to agreement and without resort to court, court had no jurisdiction to review arbitrator's decision to stay proceedings until party had pursued workers' compensation benefits].

(2) *Consolidation*. See 31 A.L.R.6th 433 [consolidation by state court of arbitration proceedings brought under state law].



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b. Arbitrator.

1. Selection and Appointment.

6 *Witkin Cal. Proc. PWT* § 554

[§ 554] Selection and Appointment.

(1) *Manner of Selection.* The arbitration agreement may determine the manner of choosing the arbitrator or arbitrators. (*Atlas Plastering v. Superior Court* (1977) 72 C.A.3d 63, 71, 140 C.R. 59 [court may not vary contractual method for selecting arbitrators].) Unless the arbitration agreement otherwise provides or the parties otherwise agree, there may be only one arbitrator. (C.C.P. 1282(a).) Arbitrators are chosen by the mutual consent of the parties, or are appointed by the court on petition of a party when the parties fail to choose the arbitrator or their chosen method of selection fails. (C.C.P. 1280(d), 1281.6.) (See *Engalla v. Permanente Med. Group* (1997) 15 C.4th 951, 971, 979, 64 C.R.2d 843, 938 P.2d 903, supra, §§542, 545 [C.C.P. 1281.6 provides remedy only; compliance with statute is not precondition to opposing successfully petition to compel arbitration when petitioner has engaged in fraud]; *Martinez v. Master Protection Corp.* (2004) 118 C.A.4th 107, 120, 12 C.R.3d 663 [under C.C.P. 1281.6, trial court lacked authority to appoint arbitrator after AAA, which was agreed on forum, refused to conduct arbitration; dispute must be tried in court]; 75 A.L.R.5th 595 [validity of provision for alternative method of appointing arbitrator where one party fails to follow agreement's appointment procedure]; 159 A.L.R. Fed 1 [same; Federal Arbitration Act]; 97 Am.Jur. Trials 319 [arbitrator selection and service].)

In *Maggio v. Windward Capital Management Co.* (2000) 80 C.A.4th 1210, 96 C.R.2d 168, the parties' agreement required dispute resolution by arbitration in accordance with the pertinent American Arbitration Association (AAA) procedures. When plaintiff sought arbitration through other services, defendant objected and sought arbitration before the AAA. The trial court granted plaintiff's petition, concluding that the agreement only called for using the procedures of the AAA, not necessarily its arbitrators. *Held*, reversed. The American Arbitration Association Commercial Dispute Resolution Procedures explicitly require the filing of the demand for arbitration "at any office of the AAA." Moreover, the procedures state that the AAA will confirm notice of the filing to the parties, and that counterclaims must be forwarded to the AAA with the answering statement. Thus, an arbitration conducted "in accordance with" the AAA procedures must take place before that body. (80 C.A.4th 1215.)

In *Bosworth v. Whitmore* (2006) 135 C.A.4th 536, 37 C.R.3d 560, after the trial court properly set a completion date for the arbitration proceeding in a home construction dispute, the arbitrator, D, stated that to the best of his ability and in

matters within his control the evidentiary hearings would be completed by the ordered deadline. Plaintiffs, experiencing financial pressure in their construction loan, sought replacement of the arbitrator and submitted two possible candidates. Over defendant's objection, the court found that the arbitrator's failure to guarantee completion constituted a failure to act under *C.C.P. 1281.6* and appointed a new arbitrator. *Held*, removal of D was improper. Even if D were unable to complete the arbitration by the court-imposed deadline, the inability would not be caused by a failure to act within the meaning of *C.C.P. 1281.6*. From the time of appointment, D had properly and steadily performed his duties as an arbitrator. He had conducted preliminary hearings, made various rulings, set deadlines, and directed the production of documents. The delays and continuances had been at the behest of the parties and caused by the American Arbitration Association's failure to notify necessary parties. Because the removal of D was improper, the trial court was not authorized under *C.C.P. 1281.6* to appoint a successor; thus, a subsequent award to plaintiff was void. (*135 C.A.4th* 552.)

(2) *Neutral Arbitrator*. The arbitrator, or one of the arbitrators, is generally a neutral party. (See *C.C.P. 1281.6, 1282*.) However, the statute contemplates a situation without a neutral arbitrator, in which event his or her powers and duties are exercised by a majority of the other arbitrators. (See *C.C.P. 1282(d)*.) (On ethics standards for neutral arbitrators, see *infra*, §558.)

(3) *Judge as Arbitrator*. Code of Judicial Ethics, Canon 4F prohibits a judge from acting as an arbitrator in a private capacity unless expressly authorized by law. The Advisory Committee Commentary notes that Canon 4F does not prohibit participation in arbitration performed as part of the judge's judicial duties.

(4) *Consumer Arbitrations*. Neutral arbitrators and private arbitration companies are prohibited from administering consumer arbitrations where the arbitration agreement or relevant rule requires a consumer party to pay the opposing party's fees and costs should the consumer not prevail. This includes the fees and costs of the arbitrator, provider organization, attorney, and witnesses. Moreover, a private arbitration company must waive fees and costs normally assessed to a consumer party, exclusive of arbitrator fees, where the consumer is indigent. Accordingly, the company must provide written notice of the right to a waiver, and a consumer exercising that right may establish eligibility by declaration under oath on a form provided by the company. No further proof of indigency may be required. All identifying and financial information about the consumer obtained by the arbitration company must be kept confidential. (*C.C.P. 1284.3*.)

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2. Arbitral Immunity.

6 *Witkin Cal. Proc. PWT* § 555

[§ 555] Arbitral Immunity.

Individual arbitrators, as well as their sponsoring organizations, are immune from civil liability in the performance of their duties, and the immunity extends to liability for bias or for failure to stay arbitration proceedings. In *Stasz v. Schwab* (2004) 121 C.A.4th 420, 17 C.R.3d 116, plaintiff sought to avoid the effect of an arbitration provision contained in a settlement agreement. Under the provision, all disputes involving the settlement would be arbitrated by the AAA. Following an arbitration, plaintiff sued the AAA, alleging, among other claims, that the AAA was biased against plaintiff and that the AAA should have stayed the proceedings pending the outcome of plaintiff's appeal, in which she challenged the arbitration provision. The trial court granted the AAA's demurrer on the ground that, under California common law, the AAA was immune from liability. *Held*, affirmed.

(a) California and federal courts have long supported arbitral immunity to protect arbitrators from civil liability for actions taken in the arbitrators' quasi-judicial capacity so that arbitrators may be free from undue influence and render independent judgments without fear of legal action. (121 C.A.4th 431.)

(b) Similarly, California and federal courts have extended that immunity to organizations that sponsor arbitrations, such as the AAA. "As a practical matter, a grant of immunity to the arbitrator must be accompanied by a grant of the same immunity to the AAA, an entity as indispensable to the arbitrator's job of arbitrating as are the courts to the judge's job of judging." (121 C.A.4th 433.)

(c) The remedy for alleged bias of an arbitrator lies not in suing the arbitrator or the provider, but in challenging the award through a motion to vacate, a mechanism available under both California and federal law. (121 C.A.4th 438.) (See *Morgan Phillips v. JAMS/Endispute, L.L.C.* (2006) 140 C.A.4th 795, 800, 44 C.R.3d 782 [arbitral immunity does not extend to claims for breach of contract where arbitrator fails to make decision; thus, arbitral immunity did not bar plaintiff's claims for breach of contract and negligent breach of duty to provide binding arbitration services where, after completion of evidence, argument, and failed settlement talks, arbitrator withdrew without giving reason and without rendering award]; 5 Pepperdine Dispute Resolution L. J. 325 [immunizing arbitrators from claims for equitable relief].)

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3. Disclosures and Disqualification.

aa. Judicial Requirements.

6 *Witkin Cal. Proc. PWT* § 556

[§ 556] Judicial Requirements.

(1) *Impression of Possible Bias.* Disclosure and disqualification requirements are imposed on arbitrators judicially as well as by statute. Thus, even in the absence of specific statutory authorization, arbitrators are required to disclose to the parties "any dealings that might create an impression of possible bias." (*Commonwealth Coatings Corp. v. Continental Cas. Co.* (1968) 393 U.S. 145, 149, 89 S.Ct. 337, 339, 21 L.Ed.2d 301, 305; see *Johnston v. Security Ins. Co.* (1970) 6 C.A.3d 839, 842, 86 C.R. 133; *Neaman v. Kaiser Foundation Hosp.* (1992) 9 C.A.4th 1170, 1177, 11 C.R.2d 879 [arbitrators had substantial business relationship with one party that should have been fully disclosed to other party]; *Betz v. Pankow* (1993) 16 C.A.4th 931, 936, 20 C.R.2d 841 [impression of bias existed where arbitrator's former law firm represented business entities in which defendant was owner, and this relationship was not disclosed to plaintiff, who was entitled to hearing on merits in trial court]; *Kaiser Foundation Hosp. v. Superior Court* (1993) 19 C.A.4th 513, 517, 23 C.R.2d 431 [substantial business relationship with party]; *Gebers v. State Farm General Ins. Co.* (1995) 38 C.A.4th 1648, 1651, 45 C.R.2d 725 [arbitration award was required to be vacated where appraiser selected by insurer was currently retained as its expert witness in two other pending actions; policy term requiring appraisers to be "independent" must yield to *Ins.C. 2071* requirement that they be "disinterested"]; *Ceriale v. AMCO Ins. Co.* (1996) 48 C.A.4th 500, 504, 55 C.R.2d 685 [arbitrator in binding contractual arbitration was required, when one of attorneys was appointed arbitrator in nonbinding arbitration involving another matter, to disclose her representation of party to that arbitration]; cf. *Banwait v. Hernandez* (1988) 205 C.A.3d 823, 830, 252 C.R. 647 [relationship need not be disclosed where it is insufficient to raise reasonable impression of possible bias]; *Betz v. Pankow* (1995) 31 C.A.4th 1503, 1508, 38 C.R.2d 107 [vacation of award for arbitrator bias after remand was error where arbitrator was unaware of relationship between his former law firm and defendant]; 45 *Hastings L. J.* 113 [disclosure required under impression of possible bias rule].)

(2) *Discrimination.* The "impression of possible bias" rule, applicable to challenges based on conflict of interest, is not exhaustive as to the obligations of impartiality placed on arbitrators. An arbitrator may be challenged, for example, on grounds of gender or other discrimination. In *Betz v. Pankow*, supra, plaintiff, a woman involved in a partnership

dispute with defendant, a man, sought to vacate an arbitration award in his favor, alleging gender bias. The parties, who had formed a partnership for the purpose of owning and operating property, submitted a dispute over dissolution terms to a three-member panel of arbitrators, two men and one woman. The male arbitrators rendered an award in favor of defendant; however, the female arbitrator executed a declaration stating that the male arbitrators had improperly considered matters outside the record. She alleged that the men expressed a belief, unsupported by the evidence, that the two partners had been engaged in a long-term sexual relationship that unduly influenced defendant. The trial judge found no bias. *Held*, affirmed; the declaration failed to state sufficient facts to support plaintiff's charge of bias.

(a) Although there is strong public policy against discrimination, the issue is whether plaintiff has demonstrated that the trial court erred in refusing to vacate the award. There is a presumption favoring validity. (16 C.A.4th 923.)

(b) With regard to claims of racial, ethnic, religious, or gender bias, arbitrators should be held to the same standard as judicial officers; they should be disqualified if a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial. Defendant advocated the "impression of possible bias" test, under which the record must reveal facts that might create an impression of possible bias. However, this standard, based on federal law, applies only where an arbitrator's fairness is challenged based on conflict of interest. While arbitrators enjoy greater freedom in their professional and personal associations than do judges, they are under the same duty as judges to render decisions free from consideration of race, ethnic origin, or gender of the parties. (16 C.A.4th 924, 926.)

(c) However, the female arbitrator's declaration was entirely conclusional; it failed to state sufficient facts to support the charge of bias. Moreover, her opinion was irrelevant, because the test is objective and judged by the perspective of the hypothetical reasonable person. Proof that the parties traveled together and that defendant had given plaintiff gifts of jewelry was in evidence. These offered a reasonable explanation of why the parties' relationship may have been discussed, such as the necessity for distinguishing between partnership and personal assets. To the extent that the intent of documents had to be determined by parol evidence, the parties' relationship at the time of execution would be equally relevant. Parties in a close personal relationship frequently enter into agreements or collaborate in ways uncommon among persons not so related. (16 C.A.4th 929.)

(3) *Waiver of Right To Object to Conflict of Interest*. The right to object to an arbitrator's conflict of interest or some other ground for disqualification may be waived. In *Britz v. Alfa-Laval Food & Dairy Co.* (1995) 34 C.A.4th 1085, 40 C.R.2d 700, plaintiffs sought to vacate an adverse arbitration award for the arbitrator's failure to disclose two conflicts of interest: (a) that the arbitrator had received business referrals from a law firm that had represented defendants in earlier proceedings in the trial court; and (b) that the arbitrator had been retained by the same law firm as an expert witness starting only a few weeks before the arbitration and continuing to the present proceeding. *Held*, defendants waived their objections as to the first conflict of interest, but not as to the second conflict of interest.

(a) *Waiver of first conflict of interest*. Plaintiffs waived their objections, where one plaintiff had knowledge of the referrals when the arbitrator was appointed and plaintiffs did not seek further disclosure. (34 C.A.4th 1096.)

(b) *No waiver of second conflict of interest*. Although plaintiffs knew that the arbitrator had been similarly retained 6 years prior to the arbitration, that did not put them on notice that there might be a current relationship. The new engagements established a current monetary connection between the arbitrator and the law firm, which relationship, as a matter both of perception and of reality, was wholly different from the earlier employment. (34 C.A.4th 1097.) The arbitrator had a duty to disclose his potential conflict of interest, which was not adequately supplanted by the outdated and ambiguous information plaintiffs possessed about the arbitrator's service as an expert witness, and plaintiffs were entitled to rely on that duty. (34 C.A.4th 1102.)

(c) *Remand for de novo review of second conflict of interest*. Although the law firm (which represented defendants in the trial court both before and after arbitration was compelled) did not conduct the arbitration hearing on their behalf, on one occasion a member of the firm had written to the arbitrator on firm letterhead requesting issuance of a subpoena on behalf of defendants, and the arbitrator responded to it. Accordingly, there was no explanation for the arbitrator's

representations, in his subsequent disclosures of his relationship with the law firm, that he was unaware of the law firm's representation of defendants. On remand, the question before the trial court would not be, as in most cases, whether the relationship between the arbitrator and the law firm was substantial enough to raise questions, because it was, but rather whether the relationship between the attorneys and the party to the arbitration was substantial enough to create a reasonable impression of possible bias on the part of the arbitrator. (34 C.A.4th 1103, 1104.)

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3. Disclosures and Disqualification.

bb. Statutory Requirements.

6 *Witkin Cal. Proc. PWT* § 557

[§ 557] Statutory Requirements.

(1) *Disclosures for Neutral Arbitrators.* In any contractual arbitration, the proposed neutral arbitrator must disclose all matters that could cast doubt on the nominee's impartiality, including any ground specified in *C.C.P. 170.1* for judicial disqualification, matters required to be disclosed by ethics standards for neutral arbitrators (*infra*, §558), and specified information regarding prior or pending cases involving the parties or their attorneys in which the nominee served or presently serves as a neutral or party arbitrator. In addition, with respect to a party to the arbitration or the party's attorney, the nominee must disclose any past or present attorney-client relationship or professional or significant personal relationship between the nominee, or the nominee's spouse or minor child, and a party or the party's attorney. (*C.C.P. 1281.9(a)*.) (See *Michael v. Aetna Life & Cas. Ins. Co.* (2001) 88 C.A.4th 925, 934, 106 C.R.2d 240 [party-selected appraiser must disclose what *C.C.P. 1281.9(a)* requires arbitrators to disclose]; *International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States & Canada, Local No. 16 v. Laughon* (2004) 118 C.A.4th 1380, 1385, 14 C.R.3d 341, *infra*, §572 [arbitrator's failure to disclose prior arbitration in which plaintiff's counsel participated violated disclosure requirements and served as ground to vacate award]; *Evans v. CenterStone Dev. Co.* (2005) 134 C.A.4th 151, 162, 35 C.R.3d 745 [there is no statutory or ethical requirement that arbitrator disclose lack of conflicts]; *Guseinov v. Burns* (2006) 145 C.A.4th 944, 958, 51 C.R.3d 903 [disqualification was not required where arbitrator's role as uncompensated mediator in prior matter involving K, attorney for party in current arbitration, did not constitute "professional relationship" between arbitrator and K within meaning of *C.C.P. 1281.9(a)*].)

The nominee is also required to disclose whether he or she has a *current* arrangement with a party to the proceeding concerning prospective compensated services as a dispute resolution neutral, or is discussing or has discussed the matter with a party within the last 2 years. (*C.C.P. 1281.9(a)(1)*.)

The nominee must disclose these matters to all parties within 10 calendar days of service of notice of the proposed nomination or appointment. (*C.C.P. 1281.9(b)*.)

For purposes of *C.C.P. 1281.9*, "prior cases" means noncollective bargaining cases in which an arbitration award was rendered within 5 years prior to the proposed nomination or appointment of the neutral arbitrator. (*C.C.P. 1281.9(d)*.)

(2) *Disqualification*. A proposed neutral arbitrator may be disqualified for failure to comply with *C.C.P. 1281.9*, or on the basis of the disclosure statement. (*C.C.P. 1281.91(a)*, (b)(1).) A party may also disqualify one court-appointed arbitrator without cause, and may petition the court to disqualify a subsequent appointee on a showing of cause. (*C.C.P. 1281.91(b)(2)*.) A party waives the right to disqualify a proposed arbitrator by failing to serve the notice within 15 calendar days after the nominee's failure to disclose or after service of the disclosure statement, unless the nominee makes a material omission or material misrepresentation in the disclosure. However, these provisions do not limit the right of a party to vacate an award under *C.C.P. 1286.2* (*infra*, §569 *et seq.*) or to disqualify an arbitrator under another law or statute. (*C.C.P. 1281.91(c)*.)

Except in arbitrations conducted under a collective bargaining agreement, if any ground specified in *C.C.P. 170.1* exists, a neutral arbitrator must disqualify himself or herself on the demand of any party made before the conclusion of the arbitration. (*C.C.P. 1281.91(d)*.)

The disqualification provisions of *C.C.P. 1281.9* and *C.C.P. 1281.91* may not be waived. (*Azteca Const. v. ADR Consulting* (2004) 121 C.A.4th 1156, 1168, 18 C.R.3d 142 [California's statutory scheme took priority over conflicting American Arbitration Association (AAA) rule that gave AAA conclusive authority over disqualification of arbitrator].)

(3) *Requirement in Cases Involving Home Construction Contracts*. In any binding arbitration of a claim exceeding \$ 3,000 under a contract for the construction or improvement of residential property having one to four units, the arbitrator must disclose in writing to each party (a) any past or present professional affiliation between the arbitrator, the arbitrator's employer, or the arbitration service, and either party, and (b) whether the arbitrator has been selected as an arbitrator by either party in another transaction. (*C.C.P. 1281.95(a)*.)

This disclosure must be made within 10 days following the appointment. (*C.C.P. 1281.95(a)*.) Either party may disqualify the arbitrator for failing to comply with *C.C.P. 1281.95(a)* or where disclosure reveals an affiliation with either party or selection as an arbitrator by either party in another arbitration. (*C.C.P. 1281.95(b)*.)

(4) *Requirement in Consumer Arbitrations*. A private arbitration company may not administer a consumer arbitration, or render related services, where the company has, or has had within the preceding year, a financial interest in a party or attorney for a party. The prohibition also applies where a party or attorney for a party has, or has had within the preceding year, a financial interest in the private arbitration company. (*C.C.P. 1281.92*.)

A private arbitration company must make available to the public on its company website, and on paper when requested, specified information regarding consumer arbitrations (e.g., parties, nature of claims, dispositions, awards, arbitration fees) that it has administered within the preceding 5 years. (*C.C.P. 1281.96*.)

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

(1) *Disclosures for Neutral Arbitrators*. In *Jakks Pac. v. Superior Court* (2008) 160 C.A.4th 596, 72 C.R.3d 914, the parties were unable to select arbitrators according to their agreed on method and so they applied to the court under *C.C.P. 1281.6* (text, §554) for assistance. After the court furnished the required five names, one party asserted that under *C.C.P. 1281.9(b)*, the nominees were obligated to provide disclosures required at that time; the other party disagreed. *Held*, the arbitrator's disclosure obligations are not triggered until the arbitrator is actually notified that he or she has been selected by the parties or appointed by the court to serve as a neutral arbitrator. (160 C.A.4th 604.)

See *Agri-Systems v. Foster Poultry Farms* (2008) 168 C.A.4th 1128, 1140, 85 C.R.3d 917 [under reasonable objective standard of *C.C.P. 1281.9*, arbitrator could be impartial, even though another attorney in arbitrator's firm had represented, in bankruptcy proceeding 2 years earlier, third-party debtor of party in pending arbitration].(2)

Disqualification. See *Advantage Med. Services, LLC v. Hoffman* (2008) 160 C.A.4th 806, 820, 72 C.R.3d 935 [trial court erred in disqualifying arbitrator where arbitrator had issued interim award before defendant discovered arbitrator's failure to disclose his connections to insurer linked to plaintiff; vacation was proper remedy (Supp., infra, §572)].

In *Luce, Forward, Hamilton & Scripps, LLP v. Koch* (2008) 162 C.A.4th 720, 75 C.R.3d 869, plaintiff law firm sought recovery of fees from defendant and successfully petitioned to compel arbitration under the fee agreement. The parties appointed retired Superior Court Judge H to serve as the arbitrator. H sent the parties a written disclosure that he had served as a mediator in three cases in which plaintiff was a party and where other members of plaintiff's firm participated, but that none of the mediations concerned the issues in the present controversy. No party challenged the disclosure. While preparing for the case, H discovered that attorney S, not previously listed, would appear for plaintiff, and that plaintiff listed attorney M as an expert witness. At the arbitration, H explained to all parties that, although he had known both M and S professionally for many years and had served on several professional boards with both, this would not affect his ability to be fair and impartial. H denied a defense challenge to disqualify himself, and ultimately issued an award for plaintiff. Defendant sought to vacate the award on the ground that H was disqualified from hearing the matter because of his disclosures regarding M and S. The trial court confirmed the award, and determined that, because H was not required to disclose that he had served on professional boards with S, there was no basis for his disqualification on the ground that he nevertheless revealed that information. *Held*, order confirming award affirmed.

(a) The trial judge was correct in finding that H was not legally required to make disclosures regarding M or S in that a reasonable person would not have an impression of bias under the facts. The disclosure requirements are concerned with close personal or business relationships that might give rise to an inference of bias, and the business relationship must be substantial and involve financial considerations. Here, H's contact with M and S was limited to serving with each on the boards of directors of two professional organizations, and that alone is insufficient to invoke the disclosure requirement. Disclosure is not required when contact between the arbitrator and counsel is "slight or attenuated." (162 C.A.4th 734.)

(b) H was required to disqualify himself only if he was requested to do so based on the disclosures required by C.C.P. 1281.91. C.C.P. 1281.91 does not suggest that disqualification is a matter of right when an arbitrator makes additional oral disclosures at the arbitration that are not required. Thus, H was not obligated to disqualify himself at defendant's request, and the award need not be vacated for his refusal to do so. (162 C.A.4th 735.)



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b. Arbitrator.

3. Disclosures and Disqualification.

cc. Ethics Standards for Neutral Arbitrators.

6 *Witkin Cal. Proc. PWT* § 558

[§ 558] Ethics Standards for Neutral Arbitrators.

(1) *In General.* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, part of the California Rules of Court, were adopted in 2002 by the Judicial Council pursuant to *C.C.P. 1281.85*. They are applicable to arbitrators appointed on or after July 1, 2002. (Standard 3.) The Standards were adopted to "establish the minimum standards of conduct for neutral arbitrators," and promote public confidence in the "integrity and fairness of the process." (Standard 1.) The Comment to Standard 1 suggests that, although grounds for vacating an arbitration award are statutory, "an arbitrator's violation of these standards may, under some circumstances, fall within one of those statutory grounds." "Arbitrator" and "neutral arbitrator" mean an arbitrator who is subject to California's Ethics Standards for Neutral Arbitrators and who is to serve impartially, whether selected or appointed. (Standard 2(a)(1).) (On grounds for vacating award, see *infra*, §612.) (See 23 California Lawyer 37 (November 2003) [challenges of arbitrator bias based on race, ethnicity, gender, or sexual orientation].)

(2) *Required Disclosures.* Of the 17 California Standards, Standard 7, dealing with disclosures, is the most extensive, and requires a person nominated as an arbitrator to disclose all matters that would "cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial." (Standard 7(d).) Matters that must be disclosed include the following:

(a) Family relationships with a party; family relationships with an attorney in the arbitration. (Standard 7(d)(1), (d)(2).)

(b) A significant personal relationship with an attorney or party. (Standard 7(d)(3).)

(c) Current or previous specified service as an arbitrator, attorney, or other dispute resolution neutral for a party or attorney for a party. (Standard 7(d)(4), (d)(5).)

(d) Current arrangements with a party concerning prospective employment or "other compensated service" as a

dispute resolution neutral, or specified discussions regarding prospective services for a party. (Standard 7(d)(6).)

(e) Attorney-client relationships with a party or attorney for a party. (Standard 7(d)(7).)

(f) Other professional relationships the arbitrator or a member of the arbitrator's immediate family has or had with a party. (Standard 7(d)(8).)

(g) Specified financial interests. (Standard 7(d)(9), (d)(10), (d)(11).)

(h) Knowledge of disputed facts. (Standard 7(d)(12).)

(i) Membership in organizations practicing discrimination. (Standard 7(d)(13).)

The proposed arbitrator must make the disclosures in writing, to all parties, and within 10 calendar days of service of notice of the proposed nomination. If the arbitrator later learns of a matter that requires disclosure, the arbitrator must disclose it in writing to all parties within 10 calendar days of becoming aware of the matter. (Standard 7(c).)

For purposes of the disclosure requirements, the terms "cases" and "any arbitration" do not include collective bargaining cases or arbitrations involving collective bargaining agreements. (Standard 7(b).)

(3) *Other Requirements.* The remaining Standards include the following:

(a) Definitions. (Standard 2.)

(b) Duration of duty to comply with Standards. (Standard 4.)

(c) General duty to uphold integrity and fairness of the arbitration process. (Standard 5.)

(d) Duty to refuse appointment due to impartiality. (Standard 6.)

(e) Additional disclosures in consumer arbitrations. (Standard 8.)

(f) Arbitrator's duty to inform self about disclosure requirements. (Standard 9.)

(g) Disqualification. (Standard 10.)

(h) Duty to refuse gift or favor. (Standard 11.)

(i) Limitations regarding future professional relationships or employment. (Standard 12.)

(j) Duty to conduct fair and diligent proceedings. (Standard 13.)

(k) Ex parte communications. (Standard 14.)

(l) Confidentiality. (Standard 15.)

(m) Compensation. (Standard 16.)

(n) Truth and accuracy in marketing services. (Standard 17.)

(4) *Special Rules in Securities Arbitration.* These standards are not the only ethics standards applicable to neutral arbitrators. The National Association of Securities Dealers (NASD), a self-regulatory organization that licenses and regulates broker-dealers in the national securities industry, has adopted procedures that also contain disclosure and disqualification requirements. The NASD Code of Arbitration Procedure is available at the NASD website:

www.nasd.com. Because these standards conflict with California's standards, in arbitrations administered under the NASD dispute resolution rules, federal securities law preempts *C.C.P. 1281.85* and California's disclosure and disqualification requirements. (*Jevne v. Superior Court* (2005) 35 C.4th 935, 949, 956, 28 C.R.3d 685, 111 P.3d 954.)

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

(1) *In General.*

(*New*) *Ethics requirements and standards are nonnegotiable:* The ethics requirements and standards for neutral arbitrators in contractual arbitrations that are adopted by the Judicial Council are nonnegotiable and may not be waived. (B. & P.C. 1281.85(c), added in 2009.)

(2) *Required Disclosures.*(e) *Attorney-client relationships with party or attorney for party:* See *Agri-Systems v. Foster Poultry Farms* (2008) 168 C.A.4th 1128, 1139, 85 C.R.3d 917 [reference in Standard 7(d)(7) to "attorney-client relationship with a party" means arbitrator must have acted as attorney for party in pending matter and does not encompass representation of third-party not participating in current arbitration; thus, disclosure was not required of prior representation by another attorney in arbitrator's firm in bankruptcy proceeding involving debtor of party in current arbitration].



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b. Arbitrator.

4. Powers.

6 *Witkin Cal. Proc. PWT* § 559

[§ 559] Powers.

The arbitrator's powers are derived from and limited by the arbitration agreement. (*Furlough v. Transamerica Ins. Co.* (1988) 203 C.A.3d 40, 46, 249 C.R. 703; *Hall v. Superior Court* (1993) 18 C.A.4th 427, 436, 22 C.R.2d 376.)

The Arbitration Act prescribes various specific powers of arbitrators in the absence of agreement to the contrary. (See C.C.P. 1282.2 [conducting hearing]; C.C.P. 1282.6 [issuing subpoenas]; C.C.P. 1282.8 [administering oaths]; C.C.P. 1283 [ordering depositions]; C.C.P. 1283.05 [enforcing discovery]; C.C.P. 1283.4 et seq. [making award]; C.C.P. 1284 [correcting award].) (On determination of fraud issues, see *supra*, §§541 et seq.; on determination of waiver issues, see *supra*, §545.)

The following cases are illustrative of the authority of the arbitrator to determine various issues:

Howsam v. Dean Witter Reynolds (2002) 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491, 498 [applicability of National Association of Securities Dealers' 6-year time limit rule in which to submit dispute to arbitration was for arbitrator to decide].

Morris v. Zuckerman (1968) 69 C.2d 686, 690, 72 C.R. 880, 446 P.2d 1000 [construing meaning and extent of arbitration agreement is for arbitrator]; *Jones v. Kvistad* (1971) 19 C.A.3d 836, 843, 97 C.R. 100 [same].

East San Bernardino County Water Dist. v. San Bernardino (1973) 33 C.A.3d 942, 954, 109 C.R. 510 [court cannot determine issues except in extraordinary circumstances].

United Food & Commercial Workers Union v. Clougherty Packing Co. (1984) 154 C.A.3d 282, 287, 201 C.R. 183 [arbitrator properly determined legality of contract provision where that determination was necessary for resolution of conflict].

Oakland v. United Public Employees (1986) 179 C.A.3d 356, 365, 224 C.R. 523 [arbitrator properly interpreted contract in determining issues necessary for resolution of controversy].

Summit Industrial Equipment v. Koll/Wells Bay Area (1986) 186 C.A.3d 309, 316, 230 C.R. 565 [on issue of valuation of real property, arbitrator had authority to interpret contract to determine whether lease terminated on lessee's exercise of option to purchase].

American Builder's Assn. v. Au-Yang (1990) 226 C.A.3d 170, 179, 276 C.R. 262 [arbitrator was without power to determine whether nonsignatory to arbitration agreement was undisclosed principal].

Spellman v. Securities, Annuities & Ins. Services (1992) 8 C.A.4th 452, 460, 10 C.R.2d 427 [arbitration of employment discrimination claim].

Reed v. Mutual Service Corp. (2003) 106 C.A.4th 1359, 1369, 131 C.R.2d 524, *infra*, §571 [arbitrators did not exceed their authority by disposing of case at prehearing stage on basis of NASD's 6-year limitation rule; NASD's rules expressly permit arbitrators to make "gateway" determination of ineligibility issues].

Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Trans. Authority (2003) 107 C.A.4th 673, 686, 132 C.R.2d 207 [it was for arbitrator to determine merits of employee's return to work and back pay claim and to interpret and decide interrelationship of two collective bargaining agreements and applicability of attorneys' fees provision].

Dream Theater v. Dream Theater (2004) 124 C.A.4th 547, 557, 21 C.R.3d 322 [American Arbitration Association (AAA) rules specify that arbitrator will decide disputes over scope of arbitration agreement; thus, parties' agreement to arbitrate according to AAA rules was "clear and unmistakable evidence" of their intent that arbitrator would decide arbitrability of claim].

J.C. Gury Co. v. Nippon Carbide Industries (USA) (2007) 152 C.A.4th 1300, 1306, 62 C.R.3d 118 [arbitrator did not exceed powers in declaring warranty provision in contract between parties unconscionable where parties "unequivocally submitted the issue of unconscionability to arbitration"].

Unless the parties provide otherwise, the question whether they have agreed to arbitrate the dispute is for the court. (*Parker v. Twentieth Century-Fox Film Corp.* (1981) 118 C.A.3d 895, 901, 173 C.R. 639; *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 C.A.4th 119, 129, 18 C.R.2d 626 [issue of consent to arbitration is for court]; cf. *University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 C.A.3d 942, 952, 953, 191 C.R. 346 [agreement to submit to arbitrator issue whether dispute was arbitrable].)

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

Parties agreement to arbitrate: See *Baker v. Osborne Dev. Corp.* (2008) 159 C.A.4th 884, 894, 71 C.R.3d 854 [trial court properly decided arbitrability where purported arbitration agreement was ambiguous whether arbitrator was to decide that issue]; *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 C.A.4th 1185, 1190, 94 C.R.3d 918 [arbitrators did not have authority to decide arbitrability where agreement was silent and American Arbitration Association rules at time of agreement had no provision granting arbitrators power to decide their own jurisdiction].



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c. Discovery and Subpenas.

6 *Witkin Cal. Proc. PWT* § 560

[§ 560] Discovery and Subpenas.

Except for tort claims for personal injury and wrongful death, parties do not have the right to conduct normal discovery unless permitted by their arbitration agreement. (*C.C.P. 1283.1.*) Even when discovery is allowed, depositions may be taken for discovery only after permission is granted by the arbitrator. (*C.C.P. 1283.05(e).*) (See *Miranda v. 21st Century Ins. Co. (2004) 117 C.A.4th 913, 920, 12 C.R.3d 159* [superior court has exclusive jurisdiction of discovery disputes in uninsured motorist arbitrations (2 *Summary* (10th), *Insurance*, §208 et seq.)].)

The arbitrator has the same power as a superior court judge to control discovery by imposing terms, sanctions, and penalties, except that the arbitrator may not order the arrest or imprisonment of a person. (*C.C.P. 1283.05(b).*)

A neutral arbitrator may issue a subpoena for the attendance of witnesses and for the production of other evidence on the application of a party or on the arbitrator's own decision. (*C.C.P. 1282.6.*) If a witness cannot be compelled to attend the arbitration, a neutral arbitrator may order the deposition of the witness for use as evidence, but not for discovery. (*C.C.P. 1283.*)

The parties have the right to demand the exchange of a list of witnesses and copies of documents to be presented at the hearing, provided the amount in controversy is in excess of \$ 50,000 and the arbitrator is informed of this fact by a written notice personally served or mailed by registered or certified mail before scheduling the hearing. This limited discovery does not apply to an arbitration pursuant to a collective bargaining agreement or involving injury or death claims. (*C.C.P. 1282.2(a)(2).*)

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

(*New*) *Discovery from nonparties:* Arbitration discovery disputes that involve discovery from nonparties must be submitted to the arbitrator, not the court, and orders involving nonparties are subject to full judicial review. In *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P. (2008) 44 C.4th 528, 79 C.R.3d 370, 187 P.3d 86*, plaintiff's claims against multiple defendants arose from medical care and treatment and was ordered to arbitration pursuant to the agreement of the parties. Plaintiff then served a discovery subpoena for the production of documents from defendant surgery center, ALSC, relevant to the claim that a defendant physician was impaired through abuse of narcotics.

Although a defendant in plaintiff's original complaint, ALSC was a nonparty to the arbitration agreement, and had settled with plaintiff. When ALSC asserted that the documents were privileged, plaintiff filed with the arbitrator a motion to compel production, which the arbitrator granted. The trial court denied ALSC's motion for a protective order, ruling that the arbitrator, not the court, had jurisdiction over the discovery subpoena and was empowered to compel. The Court of Appeal agreed, and also held that an arbitrator's discovery order against a nonparty is subject to full judicial review. *Held*, judgment of Court of Appeal affirmed.

(a) *C.C.P. 1283.05* grants parties to an arbitration the right to discovery, including discovery from nonparties, and empowers the arbitrator to enforce those discovery rights. Thus, "it is reasonable to infer that the Legislature intended discovery disputes arising out of arbitration to be initially litigated before the arbitrator." (44 *C.4th* 536.)

(b) Under *C.C.P. 1283.05(c)*, arbitration discovery orders are "as conclusive, final, and enforceable as an arbitration award on the merits," and are thus linked to arbitration awards generally and subject to limited judicial review (see text, §574, and Supp., *infra*, §576). One way to construe the statute is to impose a restricted judicial review on an arbitrator's discovery order, whether sought by a party or a nonparty. But that construction violates the principle that nonparties to arbitration agreements, not having consented to arbitration, are not bound by an arbitrator's decision and may seek full judicial review. (44 *C.4th* 536.)

(c) The most reasonable construction of *C.C.P. 1283.05* is to allow full judicial review of an arbitrator's discovery order against nonparties. Although a full review might impose greater burdens on judicial resources, it will promote the judiciary's primary function of protecting legal rights, in this case the rights of nonparties who have not consented to arbitration in the first instance. (44 *C.4th* 537.) Moreover, nothing "in the statutory scheme governing an arbitrator's discovery decisions indicates an intent by the Legislature to deprive a nonparty to the arbitration agreement ... of full judicial review of an adverse discovery order by the arbitrator." (44 *C.4th* 539.)



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d. Hearing.

6 *Witkin Cal. Proc. PWT* § 561

[§ 561] Hearing.

(1) *In General.* Absent an agreement to the contrary, the parties at the arbitration hearing are entitled to be heard, to be represented by counsel, to present and cross-examine witnesses, and to submit other evidence. (*C.C.P. 1282.2(d)*, 1282.4; see *Horn v. Gurewitz* (1968) 261 C.A.2d 255, 262, 67 C.R. 791 [right to counsel].) However, the arbitration is intended to be informal, and the rules of evidence and judicial procedure do not need to be observed. (*C.C.P. 1282.2(d)*.) Also, the parties may agree to procedures for conducting the hearing. (*C.C.P. 1282.2*.) And the arbitration agreement may even provide that there will be no formal evidentiary hearing at all. (*Coopers & Lybrand v. Superior Court* (1989) 212 C.A.3d 524, 260 C.R. 713 [accountant's audit was binding and uncontestable by parties].) (See *Brink v. Allegro Builders* (1962) 58 C.2d 577, 579, 25 C.R. 556, 375 P.2d 436 [provision for unilateral proceeding before one party's arbitrator where other party refuses to appoint his or her arbitrator]; *Davey Tree Surgery Co. v. International Brotherhood of Electrical Workers* (1976) 65 C.A.3d 440, 448, 135 C.R. 300 [posthearing evidence; arbitration board was not required to meet again before issuing opinion]; 92 Proof of Facts 3d 1 [arbitrability disputes: proving what facts to whom].) (On certification procedures that permit nonresident attorneys who are not licensed in California to appear in California arbitration proceedings, see *C.C.P. 1282.4(b)*, (c); 1 *Cal. Proc.* (5th), *Attorneys*, §387.)

A neutral arbitrator may base the award on information not obtained at the hearing, but must disclose the information and give the parties an opportunity to respond. (*C.C.P. 1282.2(g)*.)

(2) *Use of Summary Adjudication Procedure.* In *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 C.A.4th 1096, 47 C.R.2d 650, a dispute between an attorney and his former law firm over payments due on resignation, an arbitrator disposed of the principal issues by way of two motions for summary adjudication (see *supra*, §267 et seq.), and ultimately rendered an award in favor of the firm. The attorney petitioned the superior court to vacate the award, asserting that the Arbitration Act precluded the use of summary adjudication motions in an arbitration proceeding. *Held*, dismissal of petition affirmed.

(a) *Arbitrator was authorized to rule on summary adjudication motions.* An arbitrator has implicit authority to rule on summary adjudication motions. While an authorizing statute may be necessary to permit summary adjudication motions in an action at law, *C.C.P. 1282.2(d)* provides that the rules of judicial procedure need not be observed in an

arbitration. (40 C.A.4th 1104.) The requirement that an arbitration award be vacated if the rights of a party were substantially prejudiced by the arbitrator's refusal to hear evidence material to the controversy (*infra*, §569 *et seq.*) does not mean that the evidence must be presented orally through witnesses. An arbitrator "hears" evidence by providing a "legal hearing," that is, by affording an opportunity to present one's side of a case or by considering a motion on presentation by counsel; a hearing does not necessarily include an opportunity to present live testimony or be subject to cross-examination. (40 C.A.4th 1105.) C.C.P. 1282.2(d), which entitles a party to cross-examine witnesses if they appear at a hearing, does not give a party an absolute right to present oral testimony in every case. C.C.P. 1282.2(c), giving arbitrators all powers relating to the conduct of the hearing, is sufficiently broad to permit an arbitrator to conduct a hearing on a summary adjudication motion in lieu of a hearing with oral testimony. (40 C.A.4th 1106.)

(b) *Refusal to vacate award here was proper.* Under former C.C.P. 1286.2(e) (now C.C.P. 1286.2(a)(5)), a challenge to an arbitrator's evidentiary rulings or limitations on discovery did not provide a basis for vacating an award unless the error substantially prejudices a party's ability to present material evidence. Here, the parties filed declarations and memoranda of points and authorities; and the arbitrator, on the first motion, simply held that certain tolls imposed where the attorney competed with the firm were valid, if reasonable. This ruling addressed a pure question of law; the attorney suffered no prejudice from the fact that the ruling was made before discovery. The arbitrator then permitted discovery regarding reasonableness. The attorney submitted considerable evidence, and a different result on the second motion would not have been reached had he been allowed additional discovery. He was not precluded from offering material evidence and had a fair opportunity to present his case. (40 C.A.4th 1110.)

(c) *Factors for assessing propriety of summary adjudication.* The propriety of summary adjudication motions will depend on a variety of factors, including the nature of the claims and defenses, the provisions of the arbitration agreement, the rules governing the arbitration, the availability of discovery, and the opportunity to conduct adequate discovery before making or opposing a motion. Especially where the arbitration lacks an explicit procedure for dispositive motions, courts must ensure that the party opposing the motion is afforded a fair opportunity to present that party's position. (40 C.A.4th 1112.)

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



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8. Arbitration Award.

a. In General.

6 *Witkin Cal. Proc. PWT* § 562

[§ 562] In General.

(1) *Form and Content of Award.* The arbitration award must be in writing and signed by the arbitrator, and must include a determination of all questions that were submitted and resolved to determine the controversy. (*C.C.P.* 1283.4.) However, findings of fact are not required, and the arbitrator need not disclose the rationale or reasons for the award. (*Cothron v. Interinsurance Exchange* (1980) 103 C.A.3d 853, 861, 163 C.R. 240; *Arco Alaska v. Superior Court* (1985) 168 C.A.3d 139, 148, 214 C.R. 51; *Baldwin Co. v. Rainey Const. Co.* (1991) 229 C.A.3d 1053, 1058, footnote 3, 280 C.R. 499.)

(2) *Time for Making Award.* The award must be made within the time fixed by the arbitration agreement, or as ordered by the court on a party's petition. An objection that the award was not made within the required time is waived unless the objecting party gives the arbitrator written notice before the party is served with a copy of the award. (*C.C.P.* 1283.8.)

Where the parties have not set an arbitration completion deadline by agreement, *C.C.P.* 1283.8 gives the trial court "the power, on petition of a party to the arbitration, to set a date by which the arbitration proceeding must be completed and the award rendered." (*Bosworth v. Whitmore* (2006) 135 C.A.4th 536, 550, 37 C.R.3d 560, citing the text [disagreeing with *Titan/Value Equities Group v. Superior Court* (1994) 29 C.A.4th 482, 35 C.R.2d 4, supra, §528, and *Blake v. Ecker* (2001) 93 C.A.4th 728, 113 C.R.2d 422, supra, §520, to extent they suggest otherwise; neither case considered *C.C.P.* 1283.8].)

The arbitrator must serve the award on each party personally, by registered or certified mail, or as provided in the agreement. (*C.C.P.* 1283.6.)

(3) *Basis of Award.* Unless the agreement requires the arbitration to be determined solely by the application of principles of law, the award may be based on "broad principles of justice and equity." (*Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 10, 10 C.R.2d 183, 832 P.2d 899, infra, §574; *Nogueiro v. Kaiser Foundation Hosp.* (1988) 203 C.A.3d 1192, 1194, 250 C.R. 478.)

(4) *Effect of Award*. An award that has not been confirmed or vacated has the same force and effect as a written contract between the parties to the arbitration. (C.C.P. 1287.6.) Also, unless vacated or corrected by the court, an award is entitled to res judicata and collateral estoppel effect. (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1989) 211 C.A.3d 5, 14, 259 C.R. 50 [collateral estoppel effect as to issues "actually, necessarily, and finally" resolved in arbitration]; *Thibodeau v. Crum* (1992) 4 C.A.4th 749, 755, 759, 6 C.R.2d 27, 7 Cal. Proc. (5th), *Judgment*, §362 [res judicata doctrine applies to arbitration award, even though unconfirmed, barring subsequent assertion of claims within scope of arbitration]; 35 U.C.L.A. L. Rev. 623 [res judicata and collateral estoppel effect].)

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



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H. Contractual Arbitration.

8. Arbitration Award.

b. Remedies.

6 *Witkin Cal. Proc. PWT* § 563

[§ 563] Remedies.

(1) *Form of Relief*. Absent an agreement otherwise, the award may include any form of relief that a party might recover in a court action; arbitration "serves as a *substitute* for proceedings in court." (*Baker v. Sadick* (1984) 162 C.A.3d 618, 628, 208 C.R. 676 [arbitrator had authority to award punitive damages]; see 27 *Santa Clara L. Rev.* 735 [punitive damages: proposed statutory reform]; 83 *A.L.R.3d* 1037 [punitive damages].) The following decisions are illustrative:

Mastrobuono v. Shearson Lehman Hutton (1995) 514 U.S. 52, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76, 83 [Federal Arbitration Act (supra, §506 et seq.), which permits private punitive damages awards, preempts contrary state laws].

Pacific Inv. Co. v. Townsend (1976) 58 C.A.3d 1, 10, 129 C.R. 489 [authority to award equitable relief].

Tate v. Saratoga Savings & Loan Assn. (1989) 216 C.A.3d 843, 854, 265 C.R. 440 [punitive damages].

Southern Calif. Rapid Transit Dist. v. United Trans. Union (1992) 5 C.A.4th 416, 424, 6 C.R.2d 804 [where transit district violated collective bargaining agreement in transferring bus lines to new operator, award compelling district to withdraw consent to transfer was proper].

J. Alexander Sec. v. Mendez (1993) 17 C.A.4th 1083, 1091, 21 C.R.2d 826 [award of punitive damages under Federal Arbitration Act].

Creative Plastering v. Hedley Builders (1993) 19 C.A.4th 1662, 1666, 24 C.R.2d 216 [arbitrator's determination of prevailing party and award of attorneys' fees was proper notwithstanding that monetary award was less than amount stipulated to by parties].

Paramount Unified School Dist. v. Teachers Assn. of Paramount (1994) 26 C.A.4th 1371, 1385, 32 C.R.2d 311 [award of compensatory damages for termination of teacher's employment was proper where contract permitted remedy as arbitrator "judges to be proper" and award did not modify or remake contract, or violate public policy].

Rifkind & Sterling v. Rifkind (1994) 28 C.A.4th 1282, 1291, 33 C.R.2d 828 [due process does not require judicial review of punitive damages award].

Hightower v. Superior Court (2001) 86 C.A.4th 1415, 1437, 104 C.R.2d 209 [arbitrator had authority to issue partial or interim award and to reserve jurisdiction to issue final award on remaining issues; incremental award process is within broad scope of arbitrator's authority to fashion appropriate remedy].

Roehl v. Ritchie (2007) 147 C.A.4th 338, 351, 54 C.R.3d 185 [arbitrator properly reserved jurisdiction in first confirmed award to issue incremental or multistep subsequent awards regarding trust distributions that would benefit estate in light of future developments; following *Hightower*].

The remedy awarded "must bear some rational relationship to the contract and the breach." However, the arbitrator is not precluded from awarding a party benefits different from those the party could have acquired through performance of the contract. (*Advanced Micro Devices v. Intel Corp.* (1994) 9 C.4th 362, 381, 383, 36 C.R.2d 581, 885 P.2d 994, *infra*, §577 [equitable remedies fashioned for breach of technology transfer agreement].)

The amount awarded may be in excess of that sought in the demand. (*Blatt v. Farley* (1990) 226 C.A.3d 621, 625, 276 C.R. 612 [American Arbitration Association demand for arbitration form filed pursuant to contractual arbitration agreement was not submission agreement defining amount involved in dispute; thus, award in excess of demand was proper]; *Grubb & Ellis Co. v. Bello* (1993) 19 C.A.4th 231, 241, 23 C.R.2d 281 [award in excess of demand was proper; C.C.P. 580, limiting award to prayer, has no application to arbitration proceedings].)

Remedies may be limited, of course, by the terms of the arbitration agreement. (See *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 C.A.3d 518, 530, 265 C.R. 868 [award of tort damages for emotional distress was improper where arbitration clause of contract was limited in scope ("should there be a dispute arising from this agreement")].)

(2) *Award of Sanctions.* Sanctions under C.C.P. 128.5 may be awarded under an arbitration agreement that confers on the arbitrator the power to "grant any remedy or relief to which a party is entitled under California law." Although C.C.P. 128.5 refers specifically only to trial courts and judicial arbitration proceedings, there is nothing in that statute to suggest that the Legislature intended to prohibit an award of sanctions in a nonjudicial arbitration where the parties have agreed to confer on the arbitrator the right to grant any remedy or relief available under California law. (*David v. Abergel* (1996) 46 C.A.4th 1281, 1284, 54 C.R.2d 443.) (On sanctions awards in judicial arbitration, see *infra*, §604.)

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c. Costs and Attorneys' Fees.

1. In General.

6 *Witkin Cal. Proc. PWT* § 564

[§ 564] In General.

Generally, the arbitrator may not award a party costs of arbitration or attorneys' fees. Each party must pay his or her own fees and expenses, together with a pro rata share of the fees and expenses incurred or approved by the neutral arbitrator. (*C.C.P.* 1284.2; see *Woodard v. Southern Calif. Permanente Med. Group* (1985) 171 *C.A.3d* 656, 666, 217 *C.R.* 514 [statutes providing for recovery of costs and interest after favorable award following rejection of compromise offer are not applicable to arbitration]; *Thompson v. Jespersen* (1990) 222 *C.A.3d* 964, 967, 272 *C.R.* 132 [arbitrator's award of attorneys' fees was improper where arbitration contract did not provide for fees, and where one party did not agree to submit issue]; *Turner v. Superior Court* (1998) 67 *C.A.4th* 1432, 1438, 80 *C.R.2d* 84 [patient who was compelled to arbitrate dispute with health care provider could not shift financial responsibility for arbitrator's fee to provider where there was no proof of indigence or hardship]; 57 *A.L.R.3d* 633 [liability of parties for costs, fees, and expenses].)

However, the agreement may authorize an award of fees and costs. (See *DiMarco v. Chaney* (1995) 31 *C.A.4th* 1809, 1814, 37 *C.R.2d* 558 [as prevailing party under terms of parties' contract, defendant was entitled to attorneys' fees and costs in successful defense of real estate sales dispute].)

In *Kahn v. Chetcuti* (2002) 101 *C.A.4th* 61, 123 *C.R.2d* 606, a dispute involving the sale of a home, the agreement called for mediation followed by arbitration should mediation fail, and provided that the prevailing party in arbitration was entitled to reasonable attorneys' fees except where that party had resisted mediation. When selection of a mediator became protracted, plaintiff filed a complaint merely to protect the statute of limitations. The parties proceeded to arbitration where the arbitrator found for plaintiff and awarded attorneys' fees and costs. The trial court confirmed the award. *Held*, affirmed. The agreement permitted the arbitrator to award fees and was broad enough to authorize the arbitrator to determine whether plaintiff's act of filing a complaint before the obligatory mediation barred the award. The evidence that plaintiff only filed the complaint to preserve rights under the statute of limitations was sufficient to support the arbitrator's decision and award. (101 *C.A.4th* 65.)

In *Kalai v. Gray* (2003) 109 *C.A.4th* 768, 135 *C.R.2d* 449, plaintiff homeowner sued defendant contractor for

breach of contract and related claims. The parties' agreement provided for arbitration and for an award of attorneys' fees to "the party who prevails in the arbitration." Defendant, rather than filing a motion to compel arbitration, successfully obtained summary judgment on the ground that the parties had agreed to arbitrate their disputes. In opposing plaintiff's later attempt to initiate arbitration, defendant also sought attorneys' fees in superior court based on the arbitration agreement, as the prevailing party. Although the court agreed with plaintiff that the agreement related only to arbitration, which had not taken place, the court nevertheless awarded defendant the fees. *Held*, reversed. The court erred in awarding the fees because the agreement clearly and unambiguously permitted fees only to the prevailing party in an arbitration. Here, there was no arbitration. However, because the fee provision was fairly broad, including all fees "incurred by said prevailing party *in connection with* the Arbitration proceedings," should defendant prevail in an arbitration his recovery could include the fees incurred in connection with the court action. (109 C.A.4th 777.)

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c. Costs and Attorneys' Fees.

2. Proceeding To Confirm Award.

6 *Witkin Cal. Proc. PWT* § 565

[§ 565] Proceeding To Confirm Award.

(1) *In General.* In a proceeding to confirm an award, the usual rules on costs apply to the judicial proceeding. (*C.C.P.* 1293.2.) However, the court cannot award arbitration costs as part of the costs awarded to the prevailing party. (*Austin v. Allstate Ins. Co.* (1993) 16 *C.A.4th* 1812, 1816, 21 *C.R.2d* 56 [prevailing plaintiff was entitled only to recover cost of filing motion to confirm]; *Rifkind & Sterling v. Rifkind* (1994) 28 *C.A.4th* 1282, 33 *C.R.2d* 828 [award for attorneys' fees incurred in enforcing agreement was proper where agreement provided for attorneys' fees in event of arbitration or litigation to enforce agreement]; *Carole Ring & Associates v. Nicastro* (2001) 87 *C.A.4th* 253, 258, 104 *C.R.2d* 519 [in arbitration resolving breach of real estate listing agreement, although arbitrator exercised right to direct parties to bear their own attorneys' fees and costs, defendant was entitled to *postarbitration* fees and costs under *C.C.P.* 1293.2 and court was not bound by arbitrator's award]; *Ajida Technologies v. Roos Instruments* (2001) 87 *C.A.4th* 534, 552, 104 *C.R.2d* 686 [contract provision that permits recovery of fees in arbitration is broad enough to include fees in related judicial proceedings, including appeal from judgment confirming award]; *Weinberg v. Safeco Ins. Co. of America* (2004) 114 *C.A.4th* 1075, 1084, 8 *C.R.3d* 224 [court properly confirmed arbitrator's award for insured in excess of policy limits and properly approved plaintiff's memorandum submitted prior to entry of judgment seeking expert costs and prejudgment interest based on *C.C.P.* 998 offer even though arbitrator had not determined issues of cost and prejudgment]; *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Woodman Inv. Group* (2005) 129 *C.A.4th* 508, 515, 28 *C.R.3d* 584 [trial court properly awarded attorneys' fees and costs under *C.C.P.* 1293.2 to parties who prevailed on their cross-petition to vacate arbitration award; for purposes of costs and fees, order vacating award that did not order rehearing was final even though belated clarification expressed court's intent that parties should have rehearing of arbitration]; *MBNA America Bank, N.A. v. Gorman* (2006) 147 *C.A.4th* Supp. 1, 7, 54 *C.R.3d* 724 [trial court properly granted defendant costs and attorneys' fees following denial of plaintiff's petition to confirm award]; 60 *A.L.R.5th* 669 [awarding attorneys' fees in arbitrations].) (On confirmation of award generally, see *infra*, §566.)

(2) *Failure To Submit Issue of Fees and Costs to Arbitrator.* In *Corona v. Amherst Partners* (2003) 107 *C.A.4th* 701, 132 *C.R.2d* 250, plaintiff prevailed in an arbitration following defendant's breach of a real estate purchase contract and was awarded damages. Because plaintiff had not requested them, the award contained no provisions for fees and

costs. Plaintiff sought confirmation of the award and also requested that the court award attorneys' fees and costs, including the arbitrator's fees, in connection with the arbitration and the judicial proceedings. The court confirmed the award, but denied the motion for fees and costs on the ground that only the arbitrator could make that award. *Held*, affirmed, except as to attorneys' fees and costs in connection with the judicial proceedings.

(a) The parties' stipulation to arbitrate did not limit the issues to be decided. Thus, plaintiff's entitlement to attorneys' fees and costs was subject to determination in the arbitration. (*107 C.A.4th 705.*)

(b) A court is not permitted to determine the prevailing party and make an award where the parties failed to ask the arbitrator for that determination in the first place. The court may only correct or vacate an award under specified statutory grounds. Under that statutory scheme, "a party's failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award." (*107 C.A.4th 706.*)

(c) A court must award costs in a judicial proceeding to confirm, correct, or vacate an arbitration award. Here, defendants had conceded before the trial court that plaintiff was entitled to recover attorneys' fees and costs relating to the judicial proceedings. Thus, the court erred in denying plaintiff's request to that extent. (*107 C.A.4th 707.*)

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d. Confirmation of Award.

6 *Witkin Cal. Proc. PWT* § 566

[§ 566] Confirmation of Award.

(1) *In General.* Until an arbitration award is confirmed by court judgment, it has only the effect of a contract between the parties. (*C.C.P. 1287.6* (see *supra*, §562).) If a petition or response requesting confirmation is duly filed and served, the court must confirm the award as made, unless it corrects or vacates the award or dismisses the proceeding. (*C.C.P. 1286*; see *Horn v. Gurewitz* (1968) 261 C.A.2d 255, 258, 67 C.R. 791 [confirmation of written award made pursuant to oral agreement was proper]; *Pacific Law Group: U.S.A. v. Gibson* (1992) 6 C.A.4th 577, 580, 7 C.R.2d 878 [confirmation of portion of award already paid was not erroneous]; *Valsan Partners Ltd. Partnership v. Calcor Space Facility* (1994) 25 C.A.4th 809, 819, 30 C.R.2d 785 [trial judge had no power to amend award to include sum certain for damages not included in award as rendered]; *Weinberg v. Safeco Ins. Co. of America* (2004) 114 C.A.4th 1075, 1084, 8 C.R.3d 224 [court properly confirmed award where arbitrator awarded damages to insured in excess of policy limits and insurer failed to timely petition to vacate or correct]; *Dial 800 v. Fesbinder* (2004) 118 C.A.4th 32, 48, 12 C.R.3d 711 [California court had authority to confirm award rendered by rabbinical arbitrators in Israel]; 6 *Pepperdine Dispute Resolution L. J.* 229 [whether court's confirmation of award of punitive damages constitutes state action that requires application of constitutional protections such as due process].)

(2) *Procedure.* A party may seek confirmation by filing and serving a petition at least 10 days, but no more than 4 years, after service of the award on that party. (*C.C.P. 1288, 1288.4*; see Judicial Council Form No. ADR-106 [Petition to Confirm, or Vacate Contractual Arbitration Award (Alternative Dispute Resolution)]). The petition must name as respondents all parties to the arbitration and may name any other persons bound by the award. (*C.C.P. 1285*; see *Walter v. National Indem. Co.* (1970) 3 C.A.3d 630, 634, 83 C.R. 803 [representative of estate of deceased party is necessary and proper party to confirmation petition].) Also, a response to a petition to correct or vacate an award (*infra*, §569 et seq.) may request confirmation. (*C.C.P. 1285.2*.) The petition or response must also set forth the substance of the arbitration agreement or have a copy attached, name the arbitrator, and set forth or have attached a copy of the award and the arbitrators' written opinion, if any. (*C.C.P. 1285.4*.) Service and hearing are governed by the same provisions as petitions to compel arbitration. (See *C.C.P. 1290* et seq., *supra*, §524 et seq.) An order confirming the award is subject to reconsideration by a trial judge under *C.C.P. 1008* (*supra*, §46 et seq.). (*Ikerd v. Warren T. Merrill & Sons* (1992) 9 C.A.4th 1833, 1844, 12 C.R.2d 398.)

(3) *Effect of Confirmation*. When the award is confirmed, an enforceable judgment is entered with the same force and effect as a judgment in a civil action of the same jurisdictional classification. (*C.C.P. 1287.4*; see *Britz v. Alfa-Laval Food & Dairy Co.* (1995) 34 C.A.4th 1085, 1106, 40 C.R.2d 700, supra, §556 [in action to vacate arbitration award in proceedings conducted under Federal Arbitration Act (supra, §506 et seq.), judgment confirming award properly awarded prejudgment interest, even though such interest was not demanded in confirmation petition]; *Hall, Goodhue, Haisley & Barker v. Marconi Conference Center Bd.* (1996) 41 C.A.4th 1551, 1554, 49 C.R.2d 286 [judgment confirming arbitration award could be amended to add additional judgment debtor as alter ego]; *Pierotti v. Torian* (2000) 81 C.A.4th 17, 26, 96 C.R.2d 553 [court erred in failing to award postaward, prejudgment interest under C.C. 3287(a) (1 Summary (10th), *Contracts*, §888 et seq.) as requested by plaintiff in petition to confirm award].)

(4) *Appeal*. A judgment confirming an award is appealable (*C.C.P. 1294(d)*), as is an order dismissing a petition to confirm an award (*C.C.P. 1294(b)*). (See *Rubin v. Western Mut. Ins. Co.* (1999) 71 C.A.4th 1539, 1544, 84 C.R.2d 648 [judgment confirming appraisal award was not appealable where merits of original complaint remained unresolved]; 9 Cal. Proc. (5th), *Appeal*, §142.)

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

(3) *Effect of Confirmation*. For a judgment entered under *C.C.P. 1287.4* to have the same force and effect as a judgment in a civil action, the judgment and the award must be in conformity. In *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange* (2008) 162 C.A.4th 1498, 77 C.R.3d 88, the parties submitted their disagreement on the value of a loss due to fire to an appraisal panel pursuant to the insurance policy's appraisal provision. The panel's award determined two categories of replacement cost values for a total of \$ 129,939.87, but also stated that the breakdown was "made without consideration of any deductible amount or any coverage or other provision of the above policy which might affect the amount of the insurer's liability." The insurer opposed the insured's petition to confirm the award, arguing that a confirmation order would necessarily create liability to pay the valuation irrespective of coverage and deductible issues, which would be contrary to the award and its limiting language. The trial court confirmed the appraisal award and ordered judgment for the insured in the amount of \$ 129,939.87. *Held*, judgment vacated and remanded for a new judgment consistent with the appraisal award. By ordering judgment in the sum determined in the award, the trial court in essence found the insurer liable for that amount, which was contrary to the language in the award. The award did not decide liability, but merely the replacement cost values. "Under these circumstances, the court's statutory authority was limited to the issuance of a judgment which brought finality to the dollar amount of the replacement cost values, and nothing more. It went beyond this authority in its judgment." (162 C.A.4th 1506.)

See *Wade v. Schrader* (2008) 168 C.A.4th 1039, 1047, 85 C.R.3d 865 [losing party in arbitration was entitled to settlement credit as matter of law, and because arbitrator did not take credit into account in making award, applying credit in satisfaction of judgment was not modification of award on which judgment was based; postjudgment motion seeking application of credit was proper].



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e. Correction of Award.

6 *Witkin Cal. Proc. PWT* § 567

[§ 567] Correction of Award.

(1) *Correction by Arbitrator.* A party to the arbitration may apply to the arbitrator to correct an award if there is an evident miscalculation, misidentification, or formal imperfection. (*C.C.P. 1284, 1286.6(a), 1286.6(c)*; see *Severtson v. Williams Const. Co. (1985) 173 C.A.3d 86, 94, 220 C.R. 400* [arbitrator lacks authority to correct mistake of fact that does not fall within the narrow statutory grounds].)

In *Landis v. Pinkertons (2004) 122 C.A.4th 985, 18 C.R.3d 890*, the original arbitration award in favor of plaintiff was issued and served on August 5. Both parties filed motions for correction with the arbitrator, defendant seeking to strike damages not sought by plaintiff, and plaintiff seeking to amend his pleadings to conform to proof. Under *C.C.P. 1284*, corrections to the award had to be served no later than September 4. On August 30, the arbitrator signed an "amended" award granting defendant's motion and denying plaintiff's motion, thus reducing the original award. However, the amended award was not served on the parties until October 14. On September 13, plaintiff moved ex parte to enforce the August 5 award, or alternatively, to prevent issuance of an amended award due to lack of jurisdiction. The trial court confirmed the August 5 award, finding that the parties agreed to be bound by the arbitrator's award and that the original award should stand unless contrary to public policy. *Held*, affirmed.

(a) *C.C.P. 1284* gave the arbitrator only 30 days in which to rule on the motions for correction. The motions were deemed denied when no ruling was served within 30 days, and the parties did not waive the statutory requirements by submitting their motions to the arbitrator. (*122 C.A.4th 991*.)

(b) Under *C.C.P. 1286.6*, an arbitrator's power to correct an award is limited to evident miscalculations of figures or descriptions of persons or property, or nonsubstantive matters of form that do not affect the merits of the controversy. The arbitrator may not reconsider the merits of the original award and make a new award "under the guise of correction of the award." (*122 C.A.4th 992*.)

(c) An arbitrator may issue an amended or supplemental award if the arbitrator inadvertently omitted a ruling on a submitted issue. However, the award must be issued within the time limits of *C.C.P. 1284*. Here, the "amended" award was not of this category; it purported to amend or correct the original award, not add a ruling on an issue submitted for

decision but not addressed. Thus, it was beyond the arbitrator's authority. (122 C.A.4th 992, following *Century City Med. Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 C.A.4th 865, 103 C.R.2d 605, *infra*, §568.)

(2) *Correction by Court*. The court may correct an award if it determines (a) that there was an evident miscalculation or misidentification, (b) that the award was imperfect as to form, or (c) that the arbitrator exceeded his or her powers, but the award may be corrected without affecting the merits of the decision. (C.C.P. 1286.6; see *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 33, 10 C.R.2d 183, 832 P.2d 899, *infra*, §574 [statutory grounds are exclusive]; *Jones v. Humanscale Corp.* (2005) 130 C.A.4th 401, 412, 29 C.R.3d 881 [trial court had authority to correct arbitration award and should have done so rather than vacate entire award because of arbitrator's erroneous division of arbitration fees and expenses; following *Armendariz v. Foundation Health Psychcare Services* (2000) 24 C.4th 83, 99 C.R.2d 745, 6 P.3d 669, *supra*, §518]; *Taylor v. Van-Catlin Const.* (2005) 130 C.A.4th 1061, 1068, 30 C.R.3d 690 [trial court erred in correcting award and striking attorneys' fees on basis that arbitrator exceeded his powers; arbitrator correctly interpreted law permitting attorneys' fees in construction disputes, but had he not, that would have been error of law and not subject to judicial review]; *Allstate Ins. Co. v. Superior Court* (2006) 142 C.A.4th 356, 362, 48 C.R.3d 266 [trial court erred in vacating award and remanding to arbitrator for further hearing where arbitrator exceeded his powers by stating reasons for decision, contrary to parties' agreement that specifically prohibited written opinion; award was easily correctable by deleting surplusage and limiting award to amount owed to plaintiff].) (On amendment of award as distinct from correction, see, *infra*, §568.)

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

(2) *Correction by Court*. See *Law Offices of David S. Karton, a Law Corp. v. Segreto* (2009) 176 C.A.4th 1, 10, 97 C.R.3d 329 [where trial court is unable under statute to correct award as requested and denies petition, it must confirm award as rendered by arbitrator; trial court erred by not confirming original award and by instructing party seeking correction to return to arbitrators for requested changes].



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f. Amendment of Award.

6 Witkin Cal. Proc. PWT § 568

[§ 568] Amendment of Award.

A distinction between *correction* of an award (supra, §567) and *amendment* of an award was made in *A.M. Classic Const. v. Tri-Build Dev. Co.* (1999) 70 C.A.4th 1470, 1476, 83 C.R.2d 449. Plaintiff subcontractor brought actions against the contractor for breach of contract and against a school district on a stop payment notice claim. The parties stipulated that the entire dispute would be resolved by binding arbitration. The arbitrator's decision awarded contract damages to plaintiff, but the award did not resolve the claim against the school district. After receiving an ex parte letter and phone call from plaintiff's counsel, the arbitrator issued an amended award that included a finding favorable to plaintiff on the stop payment notice. In a declaration, the arbitrator explained that he inadvertently had not resolved one cause of action and that when contacted by plaintiff's counsel he explained that he had all the information from the evidence submitted during the arbitration to decide the omitted claim. The trial court granted plaintiff's petition to confirm the amended award. *Held*, affirmed.

(a) The amendment of the award did not fall within the provisions of *C.C.P. 1284* or *1286.6* (supra, §567) in that it did not involve a matter of miscalculation of amounts, a mistaken description of a person or property, or a defect in the form of the award. Rather, the arbitrator was "resolving the remainder of the dispute submitted to him." (70 C.A.4th 1476.)

(b) The absence of a statute authorizing amendment of an award does not deprive the arbitrator of jurisdiction to do so. Here, the parties agreed that the arbitrator had authority to decide the entire dispute, including the stop notice claim. Moreover, the amendment was made promptly, was consistent with the provisions of the original award, and did not substantially prejudice the interest of a party. "[T]he arbitrator was simply finishing his assignment by making a complete and full award on the matters submitted to him for resolution." (70 C.A.4th 1476.)

(c) Plaintiff counsel's ex parte communications were inappropriate and under more egregious circumstances might require vacation of an award. However, "California's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any

party." (70 C.A.4th 1478.)

In *Century City Med. Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 C.A.4th 865, 103 C.R.2d 605, parties to a landlord-tenant dispute submitted the matter to contractual arbitration and stipulated that applicable interest, attorneys' fees, and costs could be awarded as permitted by statute or under the parties' contract. The arbitrator's original award resolved only the issue of the tenant's liability for damages. Following a request by the landlord, the arbitrator issued a subsequent award, denominated the "Final Award of Arbitrator," which determined and awarded interest, attorneys' fees, and costs to the landlord. The trial court confirmed the original award and denied the final award on the ground that an arbitrator in a contractual arbitration has no power to amend, modify, or supplement an award once it has been published to the parties. *Held*, reversed. Where an arbitrator's mistake results in the inadvertent omission from an award of an intended ruling on a submitted issue on which the parties anticipated and are entitled to a ruling, the arbitrator may modify or amend the award provided the supplemental award (a) is requested and acted on within the time allowed by statute or rule for the *correction* of an award, (b) is made prior to confirmation of the original award, (c) is not inconsistent with other findings on the merits and (d) does not cause demonstrable prejudice to a party's legitimate interest. (86 C.A.4th 881, relying and elaborating on *A.M. Classic Const.*)

Thus, although *Century City Med. Plaza* agreed with *A.M. Classic Const.* as to an arbitrator's authority to amend an award to reflect a mistakenly omitted ruling, *Century City Med. Plaza* added an additional time requirement of doing so according to the statute or rule applicable to correction of an award.

Delaney v. Dahl (2002) 99 C.A.4th 647, 121 C.R.2d 663, followed the reasoning of both *A.M. Classic Const.* and *Century City Med. Plaza* in concluding that an arbitrator may amend an award, but found the time requirement added by *Century City Med. Plaza* to be unnecessary. *Delaney* involved an attorney malpractice action in which defendant attorneys also sought recovery of fees. The dispute was arbitrated pursuant to provisions in the retainer agreements signed by plaintiff D. The arbitrator found that defendants did not commit malpractice and were entitled to their fees in the underlying action and also fees and costs incurred in the arbitration. After issuing a final award, the arbitrator amended it to add the name of D mistakenly omitted from the original disposition portion of the award. The trial court confirmed the amended final award, denied plaintiff's petition to vacate, and entered judgment. *Held*, affirmed.

(a) Both *A.M. Classic Const.* and *Century City Med. Plaza* permit amendment of a final award due to the arbitrator's inadvertence or mistake if the amendment is consistent with other findings on the merits and the amendment does not cause demonstrable prejudice to a party's legitimate interests. Both these standards were met in this case and the amendment to add D's name was proper. (99 C.A.4th 654.)

(b) "The temporal requirement set forth in *A.M. Classic*--that the amendment must be made before judicial confirmation of the award--is a reasonable, bright-line test. To permit amendment until the trial court confirms the award furthers the policies set forth in *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 29, 10 C.R.2d 183, 832 P.2d 899, *infra*, §574, and its progeny of ensuring finality of, and limiting judicial intervention in, the arbitration process. The additional time requirement imposed in *Century City Medical Plaza* is not necessary to achieve these goals." (99 C.A.4th 659.) (See *Landis v. Pinkertons* (2004) 122 C.A.4th 985, 992, 18 C.R.3d 890, *supra*, §567 [award issued after motions for correction was not amended or supplemental award; it struck prior damages and did not rule on issue submitted for decision but not addressed in original award; following *Century City Med. Plaza*].)

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



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8. Arbitration Award.

g. Vacation of Award.

1. In General.

6 *Witkin Cal. Proc. PWT* § 569

[§ 569] In General.

The court may vacate an award under the following circumstances:

- (1) "The award was procured by corruption, fraud or other undue means." (*C.C.P. 1286.2(a)(1)*; see *infra*, §570.)
- (2) "There was corruption in any of the arbitrators." (*C.C.P. 1286.2(a)(2)*.) (See *Michael v. Aetna Life & Cas. Ins. Co.* (2001) 88 C.A.4th 925, 937, 106 C.R.2d 240 [failure to disclose matters required to be disclosed by *C.C.P. 1281.9* (*supra*, §557) constitutes one form of corruption for this purpose].)
- (3) "The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator." (*C.C.P. 1286.2(a)(3)*.)
- (4) "The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (*C.C.P. 1286.2(a)(4)*; see *infra*, §571.)
- (5) The rights of the party were substantially prejudiced by the arbitrators' refusal to postpone the hearing on sufficient cause being shown, by their refusal to hear evidence material to the controversy, or by other conduct of the arbitrators contrary to the Arbitration Act. (*C.C.P. 1286.2(a)(5)*.) (See *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 C.A.4th 1096, 1104, 47 C.R.2d 650, *supra*, §561 [former *C.C.P. 1286.2(e)* (now *C.C.P. 1286.2(a)(5)*) did not require that evidence be presented orally through witnesses; summary adjudication may be proper]; *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 C.A.4th 1181, 1198, 58 C.R.3d 904 [trial court erred in vacating award where arbitrators exercised sound discretion in refusing to continue arbitration; plaintiff's request came 3 years after initiating arbitration, more than 1 year after original hearing date, and after plaintiff had refused to appear and had twice brought legal actions against defendant]; 75 A.L.R.3d 132 [refusal of arbitrators to receive evidence or permit briefs or argument on particular issues].)
- (6) An arbitrator making the award failed to timely disclose a ground for disqualification or was subject to

disqualification under *C.C.P. 1281.91* (supra, §557) but failed to disqualify himself or herself after receiving a timely demand to do so. This provision does not apply to arbitrations under collective bargaining agreements. (*C.C.P. 1286.2(a)(6)*; see infra, §572.)

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

(5) *Rights of party are substantially prejudiced by arbitrator's refusal to hear material evidence:* See *Burlage v. Superior Court* (2009) 178 C.A.4th 524, 531, 100 C.R.3d 531 [in arbitration involving claim that defendant seller failed to disclose encroachment issue in real estate sale, vacating award for plaintiff was proper where arbitrator refused to permit evidence that title company cured problem by payment to adjoining property owner that gave plaintiff clear title prior to arbitration; excluded evidence directly affected issue of damages, and exclusion substantially prejudiced defendant's ability to dispute plaintiff's claims].



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g. Vacation of Award.

2. Corruption, Fraud, or Undue Means.

6 *Witkin Cal. Proc. PWT* § 570

[§ 570] Corruption, Fraud, or Undue Means.

The court may vacate an award that was procured by corruption, fraud, or other undue means. (*C.C.P. 1286.2(a)(1)*; see *Pacific Crown Distributors v. Brotherhood of Teamsters & Auto Truck Drivers, Local 70* (1986) 183 *C.A.3d* 1138, 1147, 228 *C.R.* 645 [fraud may be perpetrated by arbitrator or party]; 22 *A.L.R.4th* 366 [what constitutes corruption, fraud, or undue means justifying avoidance of award]; 112 *A.L.R.5th* 263 [review of state cases containing argument that arbitration awards reinstating discharged employees should be vacated on public policy grounds].)

In *Pour Le Bebe v. Guess?* (2003) 112 *C.A.4th* 810, 5 *C.R.3d* 442, licensor G sought arbitration of a dispute with licensee P. After G successfully obtained withdrawal of P's counsel due to an alleged conflict of interest, P sought disqualification of G's counsel and law firm M, claiming that M's past and concurrent representation of P created a conflict. The arbitrators denied the request and found for G. The court confirmed the award, and P sought its vacation under *C.C.P. 1286.2(a)*, arguing that "undue means" includes representation of a prevailing party by an attorney with a potential conflict of interest. The court denied P's petition. *Held*, affirmed.

(a) The term "undue means" is generally held to include conduct amounting to fraud or wrongful behavior that deprives either party of a fair and impartial hearing and results in substantial prejudice. This concept involves a party's opportunity to discover and reveal an alleged undue means at the arbitration hearing. (112 *C.A.4th* 827, 831.)

(b) Whether M's representation of G involved use of confidential information about P was presented in summary fashion at the arbitration and thus it is not clearly evident that P discovered and revealed the alleged undue means at the hearing. However, even if established, the conflict issue and corresponding breach of loyalty do not necessarily amount to undue means sufficient to vacate the award. To vacate, the conflict and alleged use of confidential information must have impacted some aspect of the arbitrator's award, and the moving party must establish the nexus. P, represented by independent counsel, failed to establish by clear and convincing evidence that a conflict existed and that it had a substantial impact on the arbitrators' award. Thus, "the trial court did not err in refusing to vacate the award on the ground that it was procured by undue means." (112 *C.A.4th* 837.)

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



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3. Arbitrator Exceeded Powers.

6 *Witkin Cal. Proc. PWT* § 571

[§ 571] Arbitrator Exceeded Powers.

One of the most common grounds for vacation is that the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision. (*C.C.P. 1286.2(a)(4)*.) There are numerous decisions on the issue, as illustrated by the following:

Advanced Micro Devices v. Intel Corp. (1994) 9 *C.4th* 362, 373, 36 *C.R.2d* 581, 885 *P.2d* 994, *infra*, §577 [unauthorized remedy].

Delta Lines v. International Brotherhood of Teamsters (1977) 66 *C.A.3d* 960, 966, 136 *C.R.* 345 [award purporting to decide unsubmitted issues will be vacated as in excess of arbitrator's powers].

Hacienda Hotel v. Culinary Workers Union (1985) 175 *C.A.3d* 1127, 1133, 223 *C.R.* 305 [parties are bound by award if arbitrator did not exceed powers regardless of invalid ground or incorrect decision].

Citibank v. Crowell, Weedon & Co. (1992) 4 *C.A.4th* 844, 849, 5 *C.R.2d* 906 [arbitrator did not exceed powers under securities board arbitration rules].

Grill v. Hunt (1992) 6 *C.A.4th* 73, 79, 7 *C.R.2d* 768 [vacation of award based on arbitrator's alleged error in assigning burden of proof was erroneous].

Pacific Gas & Elec. Co. v. Superior Court (1993) 15 *C.A.4th* 576, 592, 19 *C.R.2d* 295 [vacation would be proper for application or construction of contract that presents "such an egregious mistake that it amounts to an arbitrary remaking of the contract"].

Hall v. Superior Court (1993) 18 *C.A.4th* 427, 436, 22 *C.R.2d* 376 [vacation of award was error; arbitrator did not exceed jurisdiction by finding that defendants were partners when complaint merely alleged agency].

Blue Cross of Calif. v. Jones (1993) 19 *C.A.4th* 220, 229, 23 *C.R.2d* 359 [award requiring delivery of medical

benefits without regard to undisputed financial limits of policies exceeded arbitrator's power, although award was correctable and would be remanded for modification].

Marsch v. Williams (1994) 23 C.A.4th 238, 248, 28 C.R.2d 402 [unauthorized remedy; arbitration panel exceeded its powers by appointing receiver; receiver must be appointed by court].

Bonshire v. Thompson (1997) 52 C.A.4th 803, 810, 60 C.R.2d 716 [award should have been vacated where arbitrator exceeded authority by relying on extrinsic evidence when integration clause prohibited its introduction].

California Faculty Assn. v. Superior Court (1998) 63 C.A.4th 935, 950, 953, 75 C.R.2d 1 [award was vacated where arbitrator exceeded limited deferential review specifically described in collective bargaining agreement and instead engaged in decisionmaking process regarding grievant's performance and qualifications for university tenure and promotion].

Alternative Systems v. Carey (1998) 67 C.A.4th 1034, 1041, 79 C.R.2d 567, 1 Cal. Proc. (5th), Attorneys, §221 [arbitrator exceeded authority by purporting to render binding award under arbitration clause in attorney-client fee agreement that was preempted by mandatory fee arbitration statutes (B. & P.C. 6200 et seq.)].

Palo Alto v. Service Employees Int. Union (1999) 77 C.A.4th 327, 338, 91 C.R.2d 500 [award ordering city to reinstate worker who was under injunction to refrain from contact with coworker and workplace was irreconcilable with public policy requiring obedience to court orders].

Alexander v. Blue Cross of Calif. (2001) 88 C.A.4th 1082, 1087, 106 C.R.2d 431 [arbitrator did not exceed authority in failing to impose discovery sanctions].

Trabuco Highlands Community Assn. v. Head (2002) 96 C.A.4th 1183, 1190, 117 C.R.2d 842 [trial judge relying solely on arbitrator's letter that said arbitration was binding abdicated his function to determine whether arbitrator exceeded his powers by issuing binding award after parties agreed only to nonbinding arbitration; remanded for court to consider evidence offered by parties on issue of nonbinding nature of arbitration].

Reed v. Mutual Service Corp. (2003) 106 C.A.4th 1359, 1369, 131 C.R.2d 524 [arbitrators did not exceed their authority in conducting prehearing proceedings to decide dispositive issue of staleness under procedural rules of National Association of Securities Dealers which parties agreed would govern; implicit in arbitrators' express power to deem claim ineligible for arbitration was corresponding authority to make that determination at prehearing stage].

O'Flaherty v. Belgium (2004) 115 C.A.4th 1044, 1061, 9 C.R.3d 286 [in dispute involving partners withdrawing from law firm, arbitrator exceeded authority by (a) granting remedy (forfeiture of capital account) not provided for in partnership agreement, and (b) purporting to adjudicate claims that were under exclusive jurisdiction of receiver].

Malek v. Blue Cross of Calif. (2004) 121 C.A.4th 44, 56, 16 C.R.3d 687 [arbitrator exceeded authority by reexamining whether parties were bound by arbitration provision in insurance enrollment form; decision was province of trial court, which had previously determined arbitrability].

Patchett v. Bergamot Station, Ltd. (2006) 143 C.A.4th 1390, 1397, 49 C.R.3d 941 [where agreement was silent about selection of arbitrator beyond initial mutual choice, arbitrator who decided initial dispute did not exceed his authority in construing agreement as authorizing him to act as arbitrator for subsequent dispute].

Department of Personnel Administration v. California Correctional Peace Officers Assn. (2007) 152 C.A.4th 1193, 1200, 62 C.R.3d 110 [award was properly vacated where arbitrator exceeded her powers by reforming memorandum of understanding (MOU) after it had been ratified and approved by Legislature pursuant to Dills Act (Govt.C. 3524); changing terms of MOU violated Dills Act and important public policy of legislative oversight of state employee contracts].

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

There are numerous decisions on the issue of arbitrators exceeding their powers, as illustrated by the following:

Gueyffier v. Ann Summers, Ltd. (2008) 43 C.4th 1179, 1185, 77 C.R.3d 613, 184 P.3d 739 [arbitrator did not exceed powers in excusing performance, on equitable grounds, of contract's notice and cure provision where performance would have been futile; contract did not unambiguously prohibit arbitrator from excusing performance and to do so was not modification of contract but determination that provision was not applicable, which arbitrator was empowered to do].

California School Employees Assn. v. Bonita Unified School Dist. (2008) 163 C.A.4th 387, 408, 77 C.R.3d 486 [although *Educ.C. 45113(e)* permitted school district to review arbitrator's award under *C.C.P. 1286.2*, district improperly applied statutory standards in determining that arbitrator had exceeded powers and erred in vacating arbitrator's award and substituting its own].

Mossman v. Oakdale (2009) 170 C.A.4th 83, 93, 87 C.R.3d 764 [in employment arbitration, where parties elected to arbitrate in lieu of adjustment board hearing but did not specify that 30-day time limit for board decision was applicable to arbitration, arbitrator did not exceed powers by not issuing award within 30 days; employer waived time limit by failing to inform arbitrator of time limit requirement for award].

Bak v. MCL Financial Group (2009) 170 C.A.4th 1118, 1126, 88 C.R.3d 800 [arbitrators did not exceed powers by ordering monetary sanctions against attorney in discovery dispute who made copy of privileged material inadvertently supplied by another party; by voluntarily appearing in arbitration, which included prehearing discovery, attorney subjected himself to jurisdiction of arbitration panel and its rulings].



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4. Arbitrator's Failure To Disclose.

6 *Witkin Cal. Proc. PWT* § 572

[§ 572] Arbitrator's Failure To Disclose.

An award may be vacated where (1) the arbitrator failed to timely disclose a ground for disqualification of which the arbitrator was then aware, or (2) the arbitrator was subject to disqualification under *C.C.P. 1281.91* (supra, §557) but failed to disqualify himself or herself after receiving a timely demand to do so. (*C.C.P. 1286.2(a)(6)*.) (See 63 *A.L.R.5th* 675 [vacating award in insurance appraisal or arbitration on ground of arbitrator's interest or bias]; 64 *A.L.R.5th* 475 [vacating award in tort arbitration on ground of arbitrator's interest or bias]; 66 *A.L.R.5th* 611 [vacating award in labor dispute arbitration on ground of arbitrator's interest or bias]; 67 *A.L.R.5th* 179 [vacating award in commercial, business, or real estate transaction arbitration on ground of arbitrator's interest of bias].)

In *International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States & Canada, Local No. 16 v. Laughon* (2004) 118 *C.A.4th* 1380, 14 *C.R.3d* 341, defendant sought to vacate an adverse arbitration award for the arbitrator's failure to disclose that he served as the neutral arbitrator in a noncollective bargaining matter in which plaintiff's counsel represented a party. The arbitrator's former service surfaced on the first day of the arbitration hearing when plaintiff introduced as an exhibit the arbitrator's prior award. However, the arbitrator neither acknowledged that he had failed to disclose his service in the previous matter, nor alerted defendant's counsel that the service might be grounds for disqualification in the present arbitration. In a subsequent deposition, defendant's counsel stated that he recalled the introduction of the award, but viewed it only in terms of evidence and considered its evidentiary value unimportant. Thus, he had no reason to question at the time whether plaintiff's counsel had been involved in the prior award. The trial court found that once information regarding the prior award became known there appeared to have been a conscious decision not to pursue the disclosure issue even though ample opportunity existed to do so and that, under the circumstances, this constituted a knowing, voluntary, and intelligent waiver. *Held*, reversed.

(a) *Failure to disclose*. The arbitrator should have disclosed the prior arbitration and parties as required by *C.C.P. 1281.9*. Had he done so, defendant would have been entitled to disqualify him within 15 days. However, defendant could still seek vacation of the award under *C.C.P. 1286.2(a)(6)(A)* on the ground that the arbitrator failed to timely disclose a ground for disqualification of which the arbitrator was then aware. Moreover, the statute's explicit language that the court "shall" vacate the award supports defendant's argument that the trial court was required to do so once it

was shown that the arbitrator did not timely disclose. (118 C.A.4th 1386.)

(b) *Waiver*. Defendant did not waive her right to disqualify the arbitrator. The waiver provisions of C.C.P. 1281.91(c) apply when there has been timely disclosure but a party fails to timely seek disqualification. Here, there was no disclosure, either before or during the arbitration. Neither the arbitrator nor plaintiff called attention to the issue of possible bias or conflict based on the prior award. There is no waiver when the record fails to demonstrate that a party actually knew, understood, and acknowledged the possibility of an arbitrator's conflict. Here, there was no effective disclosure of the disqualifying information. At the very least, defendant "was entitled to the functional equivalent of the disclosure mandated by statute, i.e., an explicit, formal proffer of the disqualifying information ... and an opportunity to object." (118 C.A.4th 1390.)

(c) *Bias*. Actual bias is not necessary. C.C.P. 1281.9(a) requires that an arbitrator "disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial" and clearly defines those areas in which those matters might arise. The arbitrator's failure to disclose the prior award "constitutes a failure to disclose facts that would give rise to a reasonable doubt of impartiality and is certainly grounds on which to vacate the arbitration award." (118 C.A.4th 1393.)

The following cases are instructive:

Kaiser Foundation Hosp. v. Superior Court (1993) 19 C.A.4th 513, 517, 23 C.R.2d 431 [vacation of award was proper where neutral arbitrator failed to disclose prior business relationship with defendants].

Britz v. Alfa-Laval Food & Dairy Co. (1995) 34 C.A.4th 1085, 1098, 40 C.R.2d 700, supra, §556 [failure to disclose conflicts of interest].

Ceriale v. AMCO Ins. Co. (1996) 48 C.A.4th 500, 504, 55 C.R.2d 685 [failure by arbitrator in binding contractual arbitration, when one of attorneys was appointed arbitrator in nonbinding arbitration involving another matter, to disclose her representation of party to that arbitration].

Roitz v. Coldwell Banker Residential Brokerage Co. (1998) 62 C.A.4th 716, 724, 73 C.R.2d 85 [arbitrator's refusal to continue hearing and waive fee did not exhibit bias or furnish grounds for disqualification when request for continuance was made without good cause and fee refund policy did not apply].

Reed v. Mutual Service Corp. (2003) 106 C.A.4th 1359, 1370, 131 C.R.2d 524, supra, §571 [arbitrators' previous grant of prehearing motions in unrelated matters was not indicative of actual or potential bias].

Azteca Const. v. ADR Consulting (2004) 121 C.A.4th 1156, 1169, 18 C.R.3d 142 [award was vacated where arbitrator's prearbitration disqualification was mandatory when invoked by plaintiff but arbitrator was permitted to hear matter under American Arbitration Association's rule that conflicted with California's statutory disqualification scheme].

Ovitz v. Schulman (2005) 133 C.A.4th 830, 845, 35 C.R.3d 117 [award was properly vacated where arbitrator failed to disclose that he accepted appointment as arbitrator in future case involving counsel in current arbitration; because arbitrator's initial disclosures contained material omission, claimant did not waive right to vacate award by failing to exercise earlier challenge].

Fininen v. Barlow (2006) 142 C.A.4th 185, 190, 47 C.R.3d 687 [trial court properly denied defendant's motion to vacate where defendant had recognized arbitrator M from prior case in which M acted as mediator and defendant consented to M as arbitrator in present case after M advised all parties that he could not serve without their consent; distinguishing *Azteca Const.* and *International Alliance of Theatrical Stage Employees*].

Roscco Holdings v. Bank of America (2007) 149 C.A.4th 1353, 1365, 58 C.R.3d 141 [it was premature to vacate

arbitration award solely on basis that order compelling arbitration was void act of disqualified judge; remanded to decide original motion to compel arbitration].

Hayden v. Robertson Stephens (2007) 150 C.A.4th 360, 368, 58 C.R.3d 333 [trial court properly denied vacating award where arbitrator failed to disclose potential dispute resolution services for bank that acquired party in midarbitration; bank had no involvement in relationship and events that gave rise to dispute and thus was not party].

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

See *Advantage Med. Services, LLC v. Hoffman* (2008) 160 C.A.4th 806, 818, 72 C.R.3d 935 [award was properly vacated where arbitrator failed to disclose his law firm's ties to major insurer on learning that plaintiff was insured through syndicate of that insurer; defendants did not waive their statutory right to seek vacation by agreeing to arbitrate under American Arbitration Association rules; following *Azteca Const. v. ADR Consulting* (2004) 121 C.A.4th 1156, 18 C.R.3d 142, text, p. 1083]; *Casden Park La Brea Retail LLC v. Ross Dress For Less* (2008) 162 C.A.4th 468, 478, 75 C.R.3d 763 [trial court erred in vacating award for failure of neutral arbitrator B to disclose his prior monetary contribution to party arbitrator's past mayoral campaign; contribution was ordinary and insubstantial and B had no personal substantial business relationships that required disclosure]; *Dornbirer v. Kaiser Foundation Health Plan* (2008) 166 C.A.4th 831, 841, 846, 83 C.R.3d 116 [denial of petition to vacate award was proper where, although arbitrator's disclosure did not supply dates and precise number of cases he had arbitrated involving defendant, by acknowledging prior relationship with defendant and defendant's counsel, arbitrator sufficiently supplied grounds for disqualification by putting plaintiff on notice of potential bias after which plaintiff proceeded to arbitration without objection or further inquiry].



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h. Procedure To Correct or Vacate Award.

6 *Witkin Cal. Proc. PWT* § 573

[§ 573] Procedure To Correct or Vacate Award.

(1) *Petition.* A party may request the court to correct or vacate the award by filing a petition (*C.C.P. 1285*) or by filing a response to an opponent's petition to confirm the award (*C.C.P. 1285.2*). (See *Melander v. Hughes Aircraft Co. (1987) 194 C.A.3d 542, 546, 239 C.R. 592* [employee who was not party to collective bargaining agreement between union and employer lacked standing to petition to vacate arbitration award]; Judicial Council Form No. ADR-106 [Petition to Confirm, Correct, or Vacate Contractual Arbitration Award (Alternative Dispute Resolution)].) Petitions to vacate an award under *C.C.P. 1285* are subject to the certification requirements of *C.C.P. 128.7* (7 *Cal. Proc. (5th), Trial*, §237 et seq.). (*C.C.P. 1286.2(b)*.)

(2) *Contents.* The petition must name as respondents all parties to the arbitration and may name any other persons bound by the award. (*C.C.P. 1285*.) The petition must set forth the grounds on which the request is made. (*C.C.P. 1285.8*.) The petition or response must set forth the substance of the arbitration agreement or have a copy attached, name the arbitrators, and set forth or have attached a copy of the award and the arbitrators' written opinion, if any. (*C.C.P. 1285.4*.)

(3) *Service and Filing.* The petition must be served as required by the arbitration agreement, or in the same manner as normal service during litigation (see *C.C.P. 1010*), or as required for the service of a summons if the respondent has not previously appeared or been served. (*C.C.P. 1290.4*.) The petition must be filed at least 10 days but not more than 100 days after the date the award was served on the petitioner. (*C.C.P. 1288, 1288.4*; on 100-day limitations period, see 3 *Cal. Proc. (5th), Actions*, §687.) However, where a petition to confirm is filed, the response seeking to vacate or correct the award must be filed within 10 days after service of the petition (*C.C.P. 1290.6*) but not later than 100 days after service of the award (*C.C.P. 1288.2*). (See *Elden v. Superior Court (1997) 53 C.A.4th 1497, 1511, 62 C.R.2d 322* [petition to vacate award filed more than 8 months after service of award was untimely]; *Louise Gardens of Encino Homeowners' Assn. v. Truck Ins. Exchange (2000) 82 C.A.4th 648, 658, 98 C.R.2d 378* [party's acceptance of award's proceeds, failure to move to vacate, and request for confirmation of award precluded that party from later attacking award by appealing judgment following confirmation order]; *Eternity Inv. v. Brown (2007) 151 C.A.4th 739, 746, 60 C.R.3d 134* [award was properly confirmed where petition to vacate was filed only in response to petition to confirm, which was filed 3 weeks after 100-day period had expired].)

(4) *Appeal*. An order vacating an award is appealable unless a rehearing in arbitration is ordered. (*C.C.P. 1294(c)*.) An order dismissing the petition to correct or vacate is appealable. (*C.C.P. 1294(b)*.) (See 9 *Cal. Proc.* (5th), *Appeal*, §142.)

(5) *Correction by Arbitrator*. The procedure for correction by *arbitrators* is also statutorily prescribed. (See *C.C.P. 1284*.) (See *In re Marriage of Bereznak* (2003) 110 *C.A.4th* 1062, 1067, 2 *C.R.3d* 351 [party's letter to arbitrator requesting "reconsideration and modification" was not equivalent to formal application for correction; subsequent application filed beyond statutory deadlines was untimely].)

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

(3) *Service and Filing*. In *Taheri Law Group, A.P.C. v. Sorokurs* (2009) 176 *C.A.4th* 956, 98 *C.R.3d* 634, the arbitrator in a fee dispute between plaintiff law firm and defendant client issued an award for plaintiff, but in an amount far below that requested. Plaintiff filed a petition to vacate the award, citing all statutory grounds set forth in *C.C.P. 1286.2*. Defendant did not respond to the petition, and after the 10-day deadline sought confirmation of the award. The trial court granted defendant's petition to confirm. *Held*, this was proper. *C.C.P. 1290* states that the allegations in a petition that is properly served are deemed to be admitted if there is no response. However, under the plain language of the statute, the only allegations deemed admitted when a petition to vacate is not timely opposed are the factual allegations, not legal conclusions pleaded. Thus, the trial court is not required to grant an unopposed petition, but has the power and duty to draw its own legal conclusions and may confirm, correct, or vacate the award as it deems appropriate. (176 *C.A.4th* 962.)



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XIV. ALTERNATIVE DISPUTE RESOLUTION

H. Contractual Arbitration.

8. Arbitration Award.

i. Scope of Judicial Review.

1. General Rule of Finality.

6 *Witkin Cal. Proc. PWT* § 574

[§ 574] General Rule of Finality.

Except on statutory grounds for correction or vacation of the award (see *C.C.P.* 1286.2, 1286.6, *supra*, §§567, 569 et seq.), or as otherwise agreed by the parties, an arbitration award is final and not subject to judicial review. "[A]n arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (*Moncharsh v. Heily & Blase* (1992) 3 *C.4th* 1, 6, 10 *C.R.2d* 183, 832 *P.2d* 899.)

In *Moncharsh*, plaintiff, an attorney, was hired by defendant law firm as an associate attorney. The employment contract contained a clause in which he agreed not to induce defendant's clients to substitute him as attorney, and provided that, in the event he did, defendant would receive 80% of the fee. Plaintiff, after terminating his employment with defendant, signed retainer agreements with some of defendant's clients. Plaintiff offered to settle the matter for a quantum meruit share of the fees, but defendant refused, and the parties then invoked the arbitration clause of the employment agreement. The arbitrator ruled in favor of defendant, and plaintiff petitioned the superior court to vacate the award for errors of law. The superior court denied plaintiff's petition and granted defendant's petition to confirm the award. The Court of Appeal affirmed, and the Supreme Court granted review to decide the extent to which a trial court may review an arbitrator's decision for errors of law. *Held*, judgment of Court of Appeal affirmed.

(a) "Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. ... Through this detailed statutory scheme, the Legislature has expressed 'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (3 *C.4th* 9, quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh v. 100 Oak Street* (1983) 35 *C.3d* 312, 197 *C.R.*581, 673 *P.2d* 251, *supra*, §541.) The arbitration clause in the employment agreement states that the arbitrator's decision would be both binding and final; but that would be true even without such an expression of intent. (3 *C.4th* 9.)

(b) "Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized. ... Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid

potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so*. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain." (3 C.4th 10.)

(c) Moreover, arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. (3 C.4th 10.) Thus, the merits of the controversy are not subject to judicial review; a court may not review the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitrator's award. (3 C.4th 11.)

(d) "In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons. First, by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute." (3 C.4th 11.) A second reason is that the Legislature has reduced the risk in circumstances involving serious problems with the award or fairness of the arbitration process. C.C.P. 1286.2 provides that the court "shall vacate the award" if it determines that the award was procured by corruption, fraud, or other undue means; there was corruption in any of the arbitrators; the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator; the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision; or the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing despite a showing of sufficient cause, by refusal of the arbitrators to hear material evidence, or by other conduct contrary to the provisions of the statute. (3 C.4th 12.) In addition, C.C.P. 1286.6 provides grounds for correction of an award. (3 C.4th 13.)

Two justices joined in a concurring and dissenting opinion, that the correct result was reached and therefore that the award was not substantially unjust. (3 C.4th 33.) (See *Pacific Gas & Elec. Co. v. Superior Court* (1993) 15 C.A.4th 576, 582, 19 C.R.2d 295 [Moncharsh rule that arbitrator's award is ordinarily not reviewable for errors of fact or law applies even when issues submitted are qualified, that is, where arbitrator is directed to apply law as would court]; *Marsch v. Williams* (1994) 23 C.A.4th 238, 245, 28 C.R.2d 402 [no provision for expanded review; following Moncharsh]; 20 Pepperdine L. Rev. 1582 [Moncharsh].)

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



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i. Scope of Judicial Review.

2. Illustrations of Finality Rule.

6 *Witkin Cal. Proc. PWT* § 575

[§ 575] Illustrations of Finality Rule.

In *Caro v. Smith* (1997) 59 C.A.4th 725, 69 C.R.2d 306, plaintiff sued defendant employer for personal injuries received while holding defendant's horse during an acupuncture treatment. Defendant had no workers' compensation insurance. Shortly after the mandatory settlement conference, defendant's attorney, B, provided by defendant's liability insurer, informed plaintiff's attorney that the insurer would stipulate to binding arbitration to settle all issues of liability and damages. B, purporting to act on defendant's behalf, signed a written "Stipulation Re Binding Arbitration." All parties and attorneys were present at the arbitration and although defendant never personally signed the stipulation, the arbitrator began the proceedings by asking both plaintiff and defendant if they understood the binding nature of the proceedings and that there "would be no appeal of his award." Both audibly responded "yes." Subsequent to an award to plaintiff, B, displeased with the award of attorneys' fees, attacked the stipulation on the ground that defendant had not signed it. The trial judge found that defendant had actual knowledge that the arbitration was binding and entered judgment confirming the award. *Held*, affirmed, and plaintiff awarded sanctions for B's frivolous appeal.

(a) An attorney may not renege on an agreement for binding arbitration because he or she is displeased by an award. This is precisely the type of procedural gamesmanship *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 10 C.R.2d 183, 832 P.2d 899, *supra*, §574, sought to halt by requiring that challenges to the legality of an agreement be brought before completion of the arbitration process. (59 C.A.4th 731.)

(b) Here, there was no question that all participants, attorneys and litigants intended that the arbitration be a binding mechanism to resolve the dispute: Defendant's insurer had accepted responsibility and had put itself in defendant's shoes. Moreover, defendant's verbal assent at the hearing and her failure to ever repudiate it ratified the written agreement signed on her behalf. (59 C.A.4th 732.)

Moshonov v. Walsh (2000) 22 C.4th 771, 94 C.R.2d 597, 996 P.2d 699, involved a multiparty real estate purchase dispute in which plaintiff buyers alleged multiple tort claims. Prior to trial the parties stipulated to binding arbitration without limitation on the issues. The arbitrator found for defendant sellers. The real estate purchase agreement contained a provision for reasonable attorneys' fees to the prevailing party. In addition, the complaints and

cross-complaints sought attorneys' fees. But the stipulation did not expressly address fees. Although finding that defendants were the prevailing parties on the complaint and cross-complaint, the arbitrator refused to award fees, reasoning that the contractual attorneys' fees provision was not broad enough to encompass the noncontractual claims against defendants. The trial court denied defendant's motion to correct the award under *C.C.P. 1286(b)* to award them attorneys' fees. *Held*, affirmed.

(a) Under *Moncharsh*, judicial review of binding arbitration awards is generally limited to the statutory grounds for vacating (*C.C.P. 1286.2*) or correcting (*C.C.P. 1286.6*) an award. Arbitrators do not exceed their powers within the meaning of those provisions by rendering an erroneous decision on a legal or factual issue as long as the issue was within the scope of the controversy submitted for arbitration. (22 *C.4th* 775.)

(b) Under former C.R.C., Rule 1614(a)(7) (now C.R.C., Rule 3.824(a)(7)), the arbitrator was empowered to decide the law and facts of the case and make an award accordingly. Because all pleadings prayed for attorneys' fees and there were no limitations on the issues to be arbitrated, the arbitrator had the power to decide the entire matter of recovery of attorneys' fees, this being one of the contested issues of law and fact submitted for decision. Thus, the arbitrator's decision was final and could not be judicially reviewed for error. (22 *C.4th* 776.)

(c) The arbitrator expressly based her decision against awarding fees on an interpretation of the contractual fees provision in the purchase contract and found that it did not apply to this action. This interpretation was within the matter submitted to arbitration, and "such an interpretation could amount, at most, to an error of law on a submitted issue, which we have held is not in excess of the arbitrator's powers within the meaning of" *C.C.P. 1286.2* or *1286.6*. (22 *C.4th* 779.) Thus, regardless of whether the arbitrator's contractual interpretation and related ruling denying fees was legally correct, it was final and binding. (22 *C.4th* 779.)

In *Moore v. First Bank of San Luis Obispo* (2000) 22 *C.4th* 782, 94 *C.R.2d* 603, 996 *P.2d* 706, involving an action by borrowers against a bank over the validity and enforcement of secured loan agreements, the court ordered arbitration pursuant to arbitration provisions contained in those agreements. The arbitrators granted plaintiffs equitable relief only and ordered the parties to bear their own attorneys' fees. Plaintiffs' petition for correction of the award to grant them attorneys' fees was denied. *Held*, affirmed. Following *Moncharsh*, the principle of arbitral finality applied, and the arbitrators' award could not be judicially corrected to award plaintiffs their attorneys' fees. As in *Moshonov*, the entire controversy, including all questions as to the ingredients of the award, was submitted to the arbitrators. "Plaintiffs submitted the question of fees to the arbitrators, first, by submitting the entire controversy created by the pleadings, including the prayer for fees contained in their complaint, and, second, by actually requesting an award of fees from the arbitrators themselves. Having submitted the fees issue to arbitration, plaintiffs cannot maintain the arbitrators exceeded their powers" within the meaning of *C.C.P. 1286.6(b)*, even if they decided it incorrectly. (22 *C.4th* 787.)

The following cases are also instructive:

Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 *C.A.4th* 1096, 1109, 47 *C.R.2d* 650, *supra*, §561 [stating general rule and citing *Moncharsh*].

Porter v. Golden Eagle Ins. Co. (1996) 43 *C.A.4th* 1282, 1287, 51 *C.R.2d* 338, 2 *Summary* (10th), *Insurance*, §214 [judicial review of uninsured motorist arbitration proceedings, although mandated by *Ins.C. 11580.2*, is limited to grounds specified in Arbitration Act for vacating or correcting award; citing *Moncharsh*].

Lindenstadt v. Staff Builders (1997) 55 *C.A.4th* 882, 889, 64 *C.R.2d* 484, *infra*, §578 [stating general rule and requirement of *de novo* review when issue of illegality is raised in opposition to petition to confirm award].

Swan Magnetics v. Superior Court (1997) 56 *C.A.4th* 1504, 1510, 66 *C.R.2d* 541, *infra*, §577 [arbitration result was final with respect to subsequent challenges to merits in court system].

Siegel v. Prudential Ins. Co. of America (1998) 67 *C.A.4th* 1270, 1275, 1290, 79 *C.R.2d* 726 [federal law and

United States Arbitration Act do not preempt California's rule precluding judicial review of merits of arbitrator's decision].

Pierotti v. Torian (2000) 81 C.A.4th 17, 23, 96 C.R.2d 553 [arbitrator's determination of prevailing party for purpose of attorneys' fees is question of law and fact and, even if erroneous, is not reviewable].

Harris v. Sandro (2002) 96 C.A.4th 1310, 1313, 117 C.R.2d 910 [party's contentions were rejected on appeal because claimed errors were legal and factual and not subject to judicial review; sanctions awarded for frivolous appeal].

Jones v. Humanscale Corp. (2005) 130 C.A.4th 401, 411, 29 C.R.3d 881 [where arbitration agreement authorized arbitrator to determine applicable law and enforceability of covenant not to compete, trial court violated doctrine of arbitral finality by vacating award because it disagreed with arbitrator's findings that New Jersey law applied and that limited noncompetition provision was valid].

Taylor v. Van-Catlin Const. (2005) 130 C.A.4th 1061, 1068, 30 C.R.3d 690 [award of attorneys' fees in construction dispute was proper and should not have been disturbed by trial court; arbitrator correctly interpreted case law and statute that permitted fees, and had he not, that would have been error of law and not subject to judicial review].

Baize v. Eastridge Cos., LLC (2006) 142 C.A.4th 293, 300, 47 C.R.3d 763 [where parties to wrongful termination action agreed to binding arbitration under agreement that required arbitrator to apply California law, trial court correctly concluded that it lacked jurisdiction to review arbitrator's award for errors of law as urged in motion to vacate; there was no indication that arbitrator applied other than California law and award was not reviewable on claim that arbitrator applied law incorrectly; following *Moncharsh*].

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



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i. Scope of Judicial Review.

3. Effect of Agreement Extending Scope of Review.

6 *Witkin Cal. Proc. PWT* § 576

[§ 576] Effect of Agreement Extending Scope of Review.

In *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 C.A.4th 631, 53 C.R.2d 50, two insurers involved in litigation over a coverage dispute stipulated to arbitration. The stipulation provided for entry of judgment confirming the arbitrator's decision, pursuant to prescribed statutory provisions, that "the judgment shall be treated as a judgment of the Superior Court for all purposes, including, without limitation, the right of any party adversely affected by said judgment to seek review of the findings of fact, conclusions of law, or judgment as if this matter had been tried to the Court without a jury and judgment entered thereon." (45 C.A.4th 635.) *Held*, judgment confirming award affirmed; the Court of Appeal lacks jurisdiction to hear the appeal.

(a) Under *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 10 C.R.2d 183, 832 P.2d 899, *supra*, §574, the scope of judicial review of the decisions of contractual arbitrators does not include the merits of the controversy. The parties here nevertheless attempted, by their stipulation, to empower this court to review the legal correctness of the award. This attempt is inconsistent with some of the primary purposes of arbitration--quicker results and early finality. Furthermore, because of the flexibility in the consideration of both evidence and law afforded to arbitrators, appellate courts are ill suited to extend plenary appeal rights to a party to an agreement to arbitrate. (45 C.A.4th 638.)

(b) Most importantly, however, it is the function of Courts of Appeal to review judgments. Because the trial judge entered judgment in accordance with the stipulation of the parties, there is nothing for this court to review. There is no suggestion that the trial judge erred in having the judgment entered. (45 C.A.4th 638.) No appeal can be taken except from an appealable order or judgment, as defined in the statutes and developed by case law. There is no constitutional right to an appeal, and the parties cannot by their stipulation confer jurisdiction on an appellate court where none exists. (45 C.A.4th 639.)

In *Crowell v. Downey Community Hosp. Foundation* (2002) 95 C.A.4th 730, 115 C.R.2d 810, plaintiff physician and defendant hospital entered into an agreement regarding hospital emergency department services. The agreement required arbitration of certain disputes in accordance with California's Arbitration Act (C.C.P. 1280 et seq.), except that the arbitrator was required to prepare written findings of fact and conclusions of law that "shall be supported by law and

substantial evidence." The parties also agreed that the arbitrator's decision was final and binding except that on petition of either party the superior court would have the authority to review the arbitration transcript and award and could vacate the award if it was not supported by substantial evidence or was based on an error of law. When defendant notified plaintiff to cease operations, plaintiff demanded arbitration, to which defendant agreed, with reservations. No proceedings were initiated, and after 2 years plaintiff sought declaratory relief on the validity and enforceability of the arbitration agreement. Defendant demurred, contending that the parties agreed to do something that does not exist, i.e., conduct an arbitration under *C.C.P. 1280* et seq. with a guaranteed right of judicial review of the merits, thus making the arbitration provision unenforceable. The trial court agreed. *Held*, affirmed.

(a) The parties agreed to an arbitration provision that expanded the scope of judicial review of an award. Although no California case has examined precisely the permissibility of such an agreement, *Moncharsh* concluded that the statutory bases for vacating and correcting arbitration awards are exclusive, and that permitting the parties to expand that review by agreement would undermine the benefits of arbitration and the goals of the Act. (95 C.A.4th 735.)

(b) *C.C.P. 1286.2* and *1286.6* set forth the grounds for vacating and correcting arbitration awards, none of which suggests "that a court can review the merits of an award for errors of law or lack of adequate supporting evidence." (95 C.A.4th 737.) The Legislature also evidenced the intention that an award could not be reviewed on its merits, even by the parties' agreement, when it specifically authorized, under *C.C.P. 1296* (supra, §503 et seq.), that the parties to a public construction contract arbitration could agree to such a review. Because no similar review is authorized for other forms of arbitration, this suggests "the legislative intent that parties cannot agree to a review on the merits. If that were not the case section 1296 would be superfluous." (95 C.A.4th 738.)

One justice dissented, arguing that parties may agree to have a trial court act beyond its statutory authority, and if they do so, they are estopped from later complaining. (95 C.A.4th 740.)

In *Oakland-Alameda County Coliseum Authority v. CC Partners* (2002) 101 C.A.4th 635, 124 C.R.2d 363, in which the trial court confirmed an arbitration award in favor of plaintiff, defendant relied on *Crowell* and argued that a provision in the arbitration agreement permitting a party to request a de novo review of questions of law rendered the arbitration agreement invalid because it impermissibly expanded judicial review. *Held*, affirmed. Although the primary holding in *Crowell*, that parties cannot by contract expand the statutory limitations on review is correct, the agreement here is not void. *Crowell* is distinguishable for several reasons. First, *Crowell* was not reviewing a judgment confirming an award, but was reviewing an order sustaining a demurrer to a complaint filed prior to arbitration seeking declaratory relief. Here, the arbitration had been completed, and an "improper attempt to expand the scope of judicial review is not among the statutory grounds for vacating an arbitration award." (101 C.A.4th 646.) Second, *Crowell* did not involve a severance provision. Here, the agreement contained a broad, unambiguous severance provision that permitted enforcement of the arbitration provisions. (101 C.A.4th 646.) (See *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Nationwide Ins. Co.* (1999) 69 C.A.4th 709, 714, 82 C.R.2d 16 [parties could not consent to submit their dispute to binding arbitration with "all parties retaining their right to appeal"; parties cannot agree to create appellate jurisdiction that otherwise does not exist].)

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

(New) *Parties may by agreement alter scope of judicial review:* In *Cable Connection v. DIRECTV* (2008) 44 C.4th 1334, 82 C.R.3d 229, 190 P.3d 586, arbitration agreements, contained in sales agency agreements between plaintiff and defendant, provided in part that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." The agreements did not mention classwide arbitration. Thus, when plaintiff filed a class action to recover commissions and charges, the matter was submitted to arbitration to determine whether class arbitration was authorized by the agreements. The majority of the arbitration panel found that, although the agreements were silent regarding classwide arbitration, classwide arbitration was authorized under California decisional law. Defendant sought vacation of the award, contending that, even if the arbitrators had not exceeded their authority, the award reflected errors of law, which the arbitration agreements placed beyond their powers, and thus, the award was subject to judicial review. The trial

court vacated the award. The Court of Appeal reversed, holding that the trial court exceeded its jurisdiction by reviewing the merits of the award. In so holding, the Court of Appeal relied on *Crowell v. Downey Community Hosp. Foundation* (2002) 95 C.A.4th 730, 115 C.R.2d 810, text, p. 1091, and *Oakland-Alameda County Coliseum Authority v. CC Partners* (2002) 101 C.A.4th 635, 124 C.R.2d 363, text, p. 1092, for the proposition that that the parties to an arbitration agreement may not expand the scope of judicial review. *Held*, reversed; *Crowell, Oakland-Alameda County Coliseum*, and other "Court of Appeal opinions refusing to enforce specific provisions for judicial review of the merits are disapproved." (44 C.4th 1361.)

(a) The Federal Arbitration Act (FAA) contains criteria for review and vacation of arbitration awards that are similar to those in C.C.P. 1286.2 (text, §569 et seq.). *Hall Street Associates, L.L.C. v. Mattel* (2008) 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254, declared that the FAA provides the exclusive criteria for the review of arbitration awards and that an arbitration agreement that provides for vacation of an award where the arbitrator's findings are not supported by substantial evidence or if the arbitrator's conclusions of law are erroneous is not enforceable. (44 C.4th 1348.) However, it is doubtful that *Hall Street Associates* declared a policy with preemptive effect on all cases involving interstate commerce. It "was a federal case governed by federal law; the court considered no question of competing state law. It reviewed the application of FAA provisions for judicial review that speak only to the federal courts. The court unanimously left open other avenues for judicial review, including those provided by state statutory or common law." (44 C.4th 1353.)

(b) The general rule in California is that, in the absence of some limiting provision in an arbitration agreement, the merits of an award may not be reviewed except as provided by C.C.P. 1286.2 (see *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 6, 10 C.R.2d 183, 832 P.2d 899, text, §574). And although Courts of Appeal have rejected claims that review of the merits of an award may be authorized inferentially from various contract provisions, the courts have suggested that an expanded scope of review would be available under a provision that was "specifically tailored for that purpose." (44 C.4th 1345.)

(c) Although rejecting a claim that an award was reviewable for error of law on its face, the court in *Moncharsh* centered not on statutory restrictions on the contractual options, but on the parties' intent and the powers of the arbitrators as defined by the agreement. In that light, agreements for an expanded scope of review should be enforced. "If the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties' agreement. Their expectation is not that the result of the arbitration will be final and conclusive, but rather that it will be reviewed on the merits at the request of either party." (44 C.4th 1355.)

(d) To avoid the general rule restricting judicial review, "the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts. Here, the parties expressly so agreed, depriving the arbitrators of the power to commit legal error. They also specifically provided for judicial review of such error." (44 C.4th 1361.)

(e) Enforcing agreements that expand the scope of judicial review provides benefits for the parties, the courts, and evolving law. "Incorporating traditional judicial review by express agreement preserves the utility of arbitration as a way to obtain expert factual determinations without delay, while allowing the parties to protect themselves from perhaps the weakest aspect of the arbitral process, its handling of disputed rules of law." In addition, when reviewing courts function merely to enforce or deny an arbitration award with no opportunity "to discuss the reasoning for the arbitral decision, the advancement of the law is stalled, as arbitral decisions carry no precedential value. Thus, expansion of judicial review gives the courts of first instance the opportunity to establish a record, and to include the reasoning of expert arbitrators into the body of the law in the form of written decisions." (44 C.4th 1363.)

Four justices concurred, with one justice writing separately to highlight the majority's point that arbitration agreements are as enforceable as other contracts, but not more so. (44 C.4th 1366.)

One justice, joined by a second justice, concurred and dissented, agreeing that parties may define an arbitrator's powers in a way to broaden "somewhat the scope of judicial review," but arguing that parties are not permitted to require courts to undertake "full-scale judicial review of legal error in arbitration awards." (44 C.4th 1367.)

See *Christensen v. Smith* (2009) 171 C.A.4th 931, 937, 90 C.R.3d 57 [trial court properly confirmed award where agreement did not expressly deprive arbitrator of power to commit legal error and did not provide for expanded review; agreement was governed by Federal Arbitration Act, which does not permit parties to contract for judicial review for legal error; distinguishing *Cable Connection*]; 29 California Lawyer 45 (April 2009) [judicial review in arbitration; *Cable Connection*].



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6 *Witkin Cal. Proc. PWT* § 577

[§ 577] Review of Remedies Granted by Arbitrator.

The general rule of arbitral finality has been applied to review of the arbitrator's decision not only on the merits, but also on the remedy. *Advanced Micro Devices v. Intel Corp.* (1994) 9 C.4th 362, 36 C.R.2d 581, 885 P.2d 994, involved a contractual arbitration between two microchip manufacturers. The arbitrator found that defendant had breached a technology transfer agreement by secretly deciding not to accept any more of plaintiff's products, while maintaining the public posture that plaintiff would be a second source for a new microprocessor manufactured by defendant, which delayed plaintiff's entry into that market. The arbitrator awarded plaintiff a permanent, nonexclusive and royalty-free license to any intellectual property of defendant embodied in the microchip plaintiff developed through reverse engineering, and also awarded plaintiff a further 2-year extension of certain patent and copyright licenses, insofar as they related to the new microprocessor, that originated in a prior and extended agreement. The trial judge confirmed the award, but the Court of Appeal reversed, concluding that the relief fashioned by the arbitrator was in excess of his authority. *Held*, reversed.

(a) *Arbitrator's authority to fashion relief in general.*

(1) In providing for judicial vacation or correction of an award by a private arbitrator for exceeding his powers, the applicable statutes do not distinguish between the arbitrator's power to decide an issue and his authority to choose an appropriate remedy; in either instance the test is whether the arbitrator has exceeded those powers. (9 C.4th 373.) An arbitrator's discretion to determine the extent of remedies is as great as the arbitrator's discretion to determine the related question of what issues must be decided to arrive at the decision. (9 C.4th 374.) In contractual arbitrations, arbitrators, unless specifically restricted by the agreement to follow legal rules, may base a decision on broad principles of justice and equity. (9 C.4th 374, 375.) Were courts to reevaluate independently the merits of a particular remedy, the parties' contractual expectation of a decision according to the arbitrator's best judgment would be defeated. Independent reevaluation by a court, moreover, is unlikely to be either expeditious or accurate. (9 C.4th 375.)

(2) However, an arbitrator's exercise of discretion in ordering relief is not unrestricted or unreviewable, as the powers of an arbitrator derive from, and are limited by, the agreement to arbitrate. Awards in excess of those powers

may be corrected or vacated by the court. Unless the parties have conferred on the arbitrator the power to determine his own jurisdiction, the courts retain the ultimate authority to overturn awards as beyond the arbitrator's powers. Nevertheless, review of remedies cannot be de novo. An "appropriately deferential review starts not from the beginning, but from the arbitrator's own rational assessment of his or her contractual powers and is dependent on (that is, rests on acceptance of) this and any other factual or legal determination made by the arbitrator." (9 C.4th 375, 376.)

(b) *Arbitrator's authority to fashion relief in breach of contract cases.*

(1) The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is compelled to infer the award was based on an extrinsic source. Arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find that the relief granted was authorized by a specific term of the contract. The remedy, however, must bear some rational relationship to the contract and the breach. The required link may be to the contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract's general subject matter, framework, or intent. The award must be related in a rational manner to the breach (as expressly or impliedly found by the arbitrator). Where the damage is difficult to determine or measure, the arbitrator enjoys correspondingly broader discretion to fashion a remedy. An award is rationally related to the breach if it is aimed at compensating for or alleviating the effects of the breach. In a close case, the arbitrator's decision must stand. (9 C.4th 381.)

(2) The arbitrator is not precluded from awarding a party benefits different from those the party could have acquired through performance of the contract. No exact correspondence is required between the rights and obligations of a party had the contract been performed and the remedy an arbitrator may provide for the other party's breach. (9 C.4th 382.) Unless expressly restricted by the agreement of the parties, the arbitrator enjoys the authority to fashion relief the arbitrator considers just and fair under the circumstances existing at the time of arbitration, so long as the remedy is rationally derived from the contract and the breach. Thus, parties entering into commercial contracts with arbitration clauses, if they wish the arbitrator's remedial authority to be specially restricted, should set out such limitations explicitly and unambiguously in the arbitration clause. (9 C.4th 383.)

(3) The equitable remedies fashioned by the arbitrator here did not exceed his authority. The arbitrator found the amount of actual damages indeterminable and nominal damages alone inequitable, and thus properly determined that the appropriate remedy was to block defendant's interference with plaintiff's own attempts to mitigate its damages by marketing its reverse-engineered chip. The award was thus rationally related to the arbitrator's plausible findings as to the subject matter of the contract and the effects of the breach. The award did not require exact correspondence with the benefits plaintiff would have received had the contract been fully performed, and the arbitrator did not exceed his jurisdiction by fashioning a remedy to prevent defendant from taking advantage of its own bad faith conduct. The parties did not by agreement restrict the arbitrator to remedies available in a court of law, and the applicable arbitration rule authorized "any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement." (9 C.4th 383.)

A strong and lengthy dissent by three justices in a single opinion argued that an arbitrator's award should both fall within the range of remedies that a court may award for the same claim, and in case of a contract dispute, bear a rational relationship to the contract, and that the arbitrator's award here failed to do either. (9 C.4th 392) (See *DiMarco v. Chaney* (1995) 31 C.A.4th 1809, 1814, 37 C.R.2d 558 [arbitrator exceeded his powers in denying defendant's request for attorneys' fees and costs in his successful defense of real estate sales dispute, because defendant was entitled to them as prevailing party under parties' contract; discussing and distinguishing *Advanced Micro Devices*]; 46 *Hastings L. J.* 1907 [Advanced Micro Devices]; 23 *Pepperdine L. Rev.* 247 [same].)

In *Swan Magnetics v. Superior Court* (1997) 56 C.A.4th 1504, 66 C.R.2d 541, involving arbitration of a breach of a noncompetition agreement, the arbitrator awarded a permanent injunction prohibiting defendant from manufacturing or selling a specified product. After the trial judge confirmed the award, defendant sought limited expedited discovery to

show changed circumstances and requested that the injunction be modified. The trial judge granted the request. *Held*, mandamus issued directing trial judge to vacate the discovery order and deny defendant's application with prejudice.

(a) *Modification of injunction.* C.C. 3424 (see 6 Cal. Proc. (5th), *Provisional Remedies*, §399) permits modification and dissolution of court-issued final injunctions, and nothing in California's Arbitration Act indicates that this rule is not applicable to an arbitrated controversy. (56 C.A.4th 1509.) Nor does the strong judicial and legislative policy favoring arbitral finality imbue an injunction with greater finality by being the product of arbitration. Arbitration results are not inherently more final than judicial decisions. Rather, the arbitral process is final with respect to subsequent challenges to the merits in the court system. Hence, injunctions issued by an arbitrator may be modified or dissolved on a material change of circumstances. (56 C.A.4th 1510.)

(b) *Proper forum is arbitration.* Although neither statutory nor case law addresses the issue of judicial modification or dissolution of an injunction issued by an arbitrator, the judicial policy of deference to an arbitrator's judgment provides guidance. Consistent with an agreement to arbitrate, the parties typically expect their dispute to be resolved without resort to the courts. Moreover, the parties generally understand that an arbitrator, unless restricted by the agreement, may base his or her decision on broad principles of justice and equity, as long as the remedy is rationally related to the contract and the breach. The resulting award must be upheld by the reviewing court unless it is clear that the award was based on an extrinsic source. (56 C.A.4th 1511.) A judicial decision on the continuing appropriateness of an injunction issued by an arbitrator would invite reexamination of facts the arbitrator has already determined, thus contravening the parties' expectation of avoiding a judicial forum. Hence, the continuing appropriateness of the injunction must be decided by a new arbitration proceeding. (56 C.A.4th 1512.) (See *Broughton v. Cigna Healthplans of Calif.* (1999) 21 C.4th 1066, 1078, 90 C.R.2d 334, 988 P.2d 67, supra, §500 [injunctive relief under Consumers Legal Remedies Act (C.C. 1750 et seq., 4 Summary (10th), Sales, §296) is public benefit and is not subject to arbitration; distinguishing private dispute circumstances in *Swan Magnetics*]; *Hightower v. Superior Court* (2001) 86 C.A.4th 1415, 1437, 104 C.R.2d 209 [arbitrator had authority to issue partial or interim award and to reserve jurisdiction to issue final award on remaining issues]; *Ajida Technologies v. Roos Instruments* (2001) 87 C.A.4th 534, 545, 546, 104 C.R.2d 686 [arbitrators acted properly by including in award that original agreement's arbitration requirements and attorneys' fees provisions would apply to future disputes arising out of award].)

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

See *Mossman v. Oakdale* (2009) 170 C.A.4th 83, 90, 92, 87 C.R.3d 764 [in employment arbitration, award that required employee to "be made whole" but left details to parties was determination of remedy and was valid; however, matter should be remanded to arbitrator to declare what actions employer must take to make employee whole in order for award to be enforceable].



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CHAPTER VII - Proceedings Without Trial

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XIV. ALTERNATIVE DISPUTE RESOLUTION

H. Contractual Arbitration.

8. Arbitration Award.

i. Scope of Judicial Review.

5. Exceptions to Finality Rule.

6 *Witkin Cal. Proc. PWT* § 578

[§ 578] Exceptions to Finality Rule.

(1) *In General.* The judicial deference generally accorded to an arbitrator's decision is not without restriction. (*Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 32, 10 C.R.2d 183, 832 P.2d 899, supra, §574; *Advanced Micro Devices v. Intel Corp.* (1994) 9 C.4th 362, 375, 36 C.R.2d 581, 885 P.2d 994, supra, §577; *Pacific Gas & Elec. Co. v. Superior Court* (1993) 15 C.A.4th 576, 590, 19 C.R.2d 295; *Britz v. Alfa-Laval Food & Dairy Co.* (1995) 34 C.A.4th 1085, 1098, 40 C.R.2d 700, supra, §556.) Thus, the following exceptions to the finality rule have been recognized:

(2) *Protection of Statutory Rights.* In *Board of Education v. Round Valley Teachers Assn.* (1996) 13 C.4th 269, 52 C.R.2d 115, 914 P.2d 193, plaintiff school district, in notifying a probationary teacher that he would not be rehired for the following school year, failed to either inform him of the reasons for its decision or allow for an appeal. Both were violations of the collective bargaining agreement between plaintiff district and defendant teachers association. The teacher filed a grievance, and the trial court ordered the matter into arbitration. The arbitrator found that plaintiff district had violated the collective bargaining agreement and ordered it to comply. Plaintiff then petitioned to vacate the award, asserting that provisions of the Education Code allowing school districts to decline to rehire probationary employees without cause or a hearing, together with provisions of the Government Code, preempted the procedural safeguards set forth in the collective bargaining agreement. The trial court granted the petition and vacated the award, but the Court of Appeal reversed. *Held*, the arbitrator exceeded his powers and award vacated.

(a) In light of the strong public policy in favor of private arbitration, judicial review of an arbitrator's award is quite limited. *Moncharsh* limited judicial review to the statutory grounds set forth in C.C.P. 1286.2 (vacation of award) or C.C.P. 1286.6 (correction of award). Of these grounds, the only one that may apply here is contained in former C.C.P. 1286.2(d) (now C.C.P. 1286.2(a)(4)), under which a court must vacate the award if the arbitrator exceeded his or her powers in making the award and the award cannot be corrected without affecting the merits of the decision on the controversy submitted. (13 C.4th 275.)

(b) Under *Moncharsh* and *Advanced Micro Devices*, circumstances permitting limited review include cases in which granting finality would be "inconsistent with the protection of a party's *statutory rights*." (13 C.4th 275.)

(c) Plaintiff asserts both that (1) it had the statutory right under the Education Code to elect not to retain a probationary teacher (without cause and without a hearing), and that (2) the entire reelection issue cannot, pursuant to the Government Code, be made the subject of collective bargaining. Therefore, plaintiff argues, the subject of the reelection of probationary teachers was improperly included in the collective bargaining agreement at the outset, and thus was never properly subject to the arbitration provisions of the agreement. In short, plaintiff district asserts that the arbitrator exceeded his powers by granting relief under the terms of the collective bargaining agreement that violated its specific statutory rights as set forth in the *Education and Government Codes*. (13 C.4th 276.)

(d) If plaintiff is correct concerning the scope of its statutory rights, this case presents an exceptional circumstance that allows for judicial review of the arbitrator's decision. Should plaintiff's interpretation of the law prevail, the Court would be faced with an explicit legislative expression of public policy that issues involving the reelection of probationary teachers not be subject to arbitration. This expression of public policy would conflict with the expressed legislative intent to limit private arbitration awards to statutory grounds for judicial review. Thus, rigidly insisting on arbitral finality here would be "inconsistent with the protection of a party's statutory rights," i.e., those of plaintiff school district. (13 C.4th 277.)

(3) *Violation of Public Policy. Jordan v. Department of Motor Vehicles* (2002) 100 C.A.4th 431, 123 C.R.2d 122, involved the review of an arbitration award of \$ 88 million for attorneys' fees and expenses in settlement of *Jordan v. Department of Motor Vehicles* (1999) 75 C.A.4th 449, 89 C.R.2d 333 (*Jordan I*), a case holding that a smog impact fee was unconstitutional (see 9 Summary (10th), Taxation, §384). *Jordan I* found that the efforts of plaintiffs and their counsel resulted in a common fund of over \$ 363 million. The trial court awarded 5% of this fund, \$ 18 million, in fees and expenses. The Court of Appeal upheld the trial court's finding of unconstitutionality, but held that the trial court exceeded its jurisdiction in fashioning a remedy for taxpayers generally who were not properly before the court. The Governor approved the decision and directed the Department of Motor Vehicles and Department of Finance to prepare for the Legislature a workable plan to refund smog impact fees to everyone from whom fees were collected. The result was Rev.C. 6909, which created a refund account in excess of \$ 665 million. The statute also provided that costs, fees, and expenses specifically connected with *Jordan I* be determined through binding arbitration and paid with funds from the account. The parties submitted the fee matter to arbitration by a written agreement, under which plaintiff attorneys could argue for any unspecified fee amount according to any theory and defendants could oppose the amount as they deemed appropriate. The arbitration panel determined that the case was a common fund case, viewing the refund account as the fund in question, and awarded 13.3% of that fund, \$ 88 million, as attorneys' fees and expenses. The state sought reconsideration, arguing that Rev.C. 6909 sets a limit on the award of \$ 18 million, as decided in *Jordan I*. The panel denied reconsideration but the trial court vacated the award, finding that the panel acted in excess of its jurisdiction. *Held*, affirmed.

(a) Although the scope of judicial review is circumscribed under *Moncharsh*, "this case falls in the limited and exceptional circumstance justifying judicial review of an award that violates an explicit expression of public policy." (100 C.A.4th 438.)

(b) The award in excess of \$ 88 million in public monies under the authority of Rev.C. 6909(b) for an arbitration in settlement of the \$ 18 million dispute constitutes an unconstitutional gift of public funds. "While the limitation on the arbitration award may not be explicit in section 6909(b), the prohibition against gifts of public funds is a clear public policy set forth in" Cal. Const., Art. XVI, §6. (100 C.A.4th 450, 452.) (See *Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 C.A.4th 1193, 1200, 62 C.R.3d 110 [trial court properly vacated award where arbitrator exceeded her powers by reforming memorandum of understanding (MOU) after it had been ratified and approved by Legislature pursuant to Dills Act (Govt.C. 3524); changing terms of MOU violated Dills Act and important public policy of legislative oversight of state employee contracts].)

(4) *Underlying Contract or Transaction is Illegal*. In *Lindenstadt v. Staff Builders* (1997) 55 C.A.4th 882, 64 C.R.2d 484, defendant submitted evidence in opposition to a petition to confirm an arbitration award granting finder's fees to plaintiff for two business acquisitions. Defendant contended that plaintiff, acting as an unlicensed broker, was

statutorily barred from compensation and that hence, under real estate law, the award was based on illegal contracts or transactions. At oral argument, the trial judge refused to review the illegality issue de novo, stating that the parties had already litigated the issue in the arbitration. *Held*, reversed. It did not matter that the illegality issue had been submitted to and decided by the arbitrator. The trial court is charged with determining issues of illegality on the evidence presented to it, and any preliminary determination of legality by the arbitrator is not binding on the trial court. (55 C.A.4th 892.)

(5) *Other Exceptions*. Judicial review is also available where "the consent to arbitrate precedes the dispute and the error of law involves an application of the contract that is so bizarre as to be unforeseeable." (*Pacific Gas & Elec. Co. v. Superior Court*, *supra*, 15 C.A.4th 591.) Here, (a) consent to arbitrate contractual disputes precedes the actual dispute and (b) an alleged error of law by the arbitrator presents such an "egregious mistake" as to be completely outside the expectations of the parties, in effect, amounting to an "*arbitrary remaking of the contract*." (*Pacific Gas & Elec. Co. v. Superior Court*, *supra*, 15 C.A.4th 592.) This is a "narrow exception," applicable only to "the most serious claims of abuse." So long as the arbitrator's reading and application of the contract is "clearly within the range of ambiguity, i.e., within the ordinary bounds of semantic possibility," there can be no tenable claim that the contract has been arbitrarily remade. (*Pacific Gas & Elec. Co. v. Superior Court*, *supra*, 15 C.A.4th 594 [arbitrators did not "remake" contracts at issue, and thus award satisfied this limited standard of review].)

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

(2) *Protection of Statutory Rights*. See *Sunnyvale Unified School Dist. v. Jacobs* (2009) 171 C.A.4th 168, 183, 89 C.R.3d 546 [award was vacated where arbitrator exceeded powers in adjudicating issue of school district's decision not to retain probationary teacher; claim that nonretention was retaliatory for teacher's labor activity was preempted under state law that required adjudication before Public Employment Relations Board; following *Board of Education of the Round Valley Unified School Dist. v. Round Valley Teachers Assn.* (1996) 13 C.4th 269, 52 C.R.2d 115, 914 P.2d 193, text, p. 1097].



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XIV. ALTERNATIVE DISPUTE RESOLUTION

I. Judicial Arbitration.

1. Nature of System.

a. In General.

6 *Witkin Cal. Proc. PWT* § 579

[§ 579] In General.

(1) *Purpose.* Under judicial arbitration, certain civil actions are heard and decided by a court-appointed arbitrator before they become eligible to proceed to a court or jury trial. (See *C.C.P. 1141.10* et seq.; on actions subject to judicial arbitration, see *infra*, §582.) However, the term "judicial arbitration" is something of a misnomer. As the court said in *Dodd v. Ford* (1984) 153 C.A.3d 426, 432, footnote 7, 200 C.R. 256: " 'Judicial Arbitration' is obviously an inept term, for the system it describes is neither judicial nor arbitration. The hearing is not conducted by a judge, and the right to a trial de novo removes the finality of true arbitration. 'Extrajudicial mediation' would be closer to correct." (See *Nanfito v. Superior Court* (1991) 2 C.A.4th 315, 319, 2 C.R.2d 876 [quoting *Dodd*]; C.E.B., 2 Civil Proc. Before Trial 4th, Chap. 37; Rutter Group, Alternative Dispute Resolution §§1:65, 4:29 et seq.; Rutter Group, 3 Civil Proc. Before Trial, Chap. 13; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §4.1 et seq.; Cal. Civil Practice, 4 Procedure §26:33 et seq.)

Regardless of characterization, the process serves as a useful alternative to conventional litigation for small civil actions. (See C.E.B., Effective Use of ADR, §11.3; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §4.2.)

C.C.P. 1141.10(a) sets forth the following legislative findings:

(a) Litigation involving small civil claims "can be so costly and complex that efficiently resolving these civil cases is difficult."

(b) "Resulting delays and expenses may deny parties their right to a timely resolution of minor civil disputes."

(c) Arbitration has proven to be "an efficient and equitable method for resolving small claims," and "courts should encourage or require the use of arbitration for such actions whenever possible."

(2) *Governing Law.* Judicial arbitration is governed by *C.C.P. 1141.10* et seq., C.R.C., Rule 3.810 et seq., and local court rules that are consistent with the statutory scheme and statewide rules. (See C.E.B., Effective Use of ADR §11.2;

C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §4.3; Rutter Group, Alternative Dispute Resolution, §4:31.)

The Rules of Court include the following significant features:

(a) The parties may agree on any person as arbitrator and on the maximum amount of the award. (C.R.C., Rule 3.815(a); see *infra*, §§585, 588.)

(b) Unless selected by stipulation, arbitrators are assigned from superior court panels under a procedure combining random selection with the right of each party to reject at least one of the names selected. (C.R.C., Rules 3.814, 3.815; see *infra*, §§589, 590.)

(c) At arbitration hearings, normal rules of evidence apply but are modified to encourage the use of written reports, affidavits, and depositions while protecting the right to cross-examine the author of documentary evidence. (C.R.C., Rule 3.823; see *infra*, §595 et seq.)

(d) Within 30 days after an arbitration award, either side may request a trial de novo. If, however, the trial result is less favorable than the arbitration award to the party who requested the trial, that party may be penalized by an award of costs under *C.C.P. 1141.21*. (C.R.C., Rule 3.826; see *infra*, §§616, 626 et seq.)

(e) If neither side makes a timely request for a trial de novo, the arbitration award is final and cannot be vacated except on prescribed grounds. (C.R.C., Rule 3.827; see *infra*, §§610, 612.)

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I. Judicial Arbitration.

1. Nature of System.

b. Contractual Arbitration Distinguished.

6 *Witkin Cal. Proc. PWT* § 580

[§ 580] Contractual Arbitration Distinguished.

(1) *In General.* Judicial arbitration differs from contractual arbitration under *C.C.P. 1280* et seq. (supra, §499 et seq.) in the following ways:

(a) Contractual arbitration applies only if the parties have agreed to resolve the dispute by arbitration, rather than by litigation. (See supra, §512 et seq.) Judicial arbitration, on the other hand, is not dependent on an agreement between the parties but may be ordered by the court, although the parties may stipulate to submit the case to judicial arbitration. (See *C.C.P. 1141.11, 1141.12*, infra, §582.)

(b) A contractual arbitration award is ordinarily binding (see *C.C.P. 1285* et seq., supra, §562); any party dissatisfied with a judicial arbitration award has an absolute right to a trial de novo (see *C.R.C.*, Rule 3.826, infra, §614).

(c) Contractual arbitration usually dispenses with rules of evidence (see *C.C.P. 1282.2(d)*, supra, §561); judicial arbitration follows those rules subject only to specific modifications to facilitate evidentiary use of certain kinds of documents (*C.R.C.*, Rule 3.823(b); see infra, §600 et seq.).

(d) Judicial control over contractual arbitration can be invoked only by a special proceeding commenced by petition (see *C.C.P. 1290* et seq., supra, §524 et seq.); a case in judicial arbitration remains pending in the superior court, which retains continuing jurisdiction to determine the case by trial de novo on proper application under Rule 3.826 (infra, §614 et seq.). (See *Parker v. Babcock* (1995) 37 *C.A.4th* 1682, 1686, 44 *C.R.2d* 602 [opportunity for de novo trial "is what principally distinguishes" judicial from conventional arbitration].)

(e) Discovery under contractual arbitration is usually available only in personal injury cases (see *C.C.P. 1283.1*, supra, §560); in judicial arbitration the parties have full discovery rights (*C.R.C.*, Rule 3.822; see infra, §§594, 603).

(2) *Contractual Arbitration Is Independent of Judicial Arbitration.* The provisions of the judicial arbitration statute and those for judicial enforcement of arbitration agreements (*C.C.P. 1280* et seq.) are "mutually exclusive and

independent of each other." (*C.C.P. 1141.30.*)

The judicial arbitration rules do not preclude arbitration pursuant to agreement under *C.C.P. 1280* et seq. However, neither the ADR committee nor the ADR administrator may participate in any arbitration outside the rules other than by complying with the parties' joint request for a randomly selected list of three names from the court's arbitration panel. (*C.R.C., Rule 3.830.*) (On ADR committee and ADR administrator, see *infra*, §581.)

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XIV. ALTERNATIVE DISPUTE RESOLUTION

I. Judicial Arbitration.

1. Nature of System.

c. Administration.

6 *Witkin Cal. Proc. PWT* § 581

[§ 581] Administration.

(1) *Arbitration Administrator*. The presiding judge of the superior court must designate the ADR administrator selected under C.R.C., Rule 10.783 (ADR program administration) to serve as the arbitration administrator. The administrator supervises the operation of the court's arbitration program and the selection of arbitrators. (C.R.C., Rule 3.813.)

(2) *Administrative Committee*. Each superior court having 18 or more judges must have an ADR committee. Other courts may establish a committee; otherwise the committee functions are performed by the presiding or designated judge. (C.R.C., Rule 10.783(b).) (On committee membership, see C.R.C., Rule 10.783.)

The administrative committee appoints and removes arbitration panel members (*infra*, §589), establishes procedures for selecting arbitrators (*infra*, §590), and generally reviews the operation of the arbitration program. (C.R.C., Rule 3.813(b).)

(3) *Administrative Costs*. Administrative costs, including the compensation of arbitrators, are generally paid by the court in which the arbitration costs are incurred. (*C.C.P. 1141.28(a)*; on payment of arbitrators' fees, see *infra*, §§592, 593.)

If, after a trial de novo, the judgment is not more favorable to the party requesting the trial than the arbitration award, that party is ordinarily chargeable with specified costs and fees. (See *C.C.P. 1141.21*, *infra*, §626 et seq.)

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I. Judicial Arbitration.

2. Cases That Must Be Arbitrated.

6 *Witkin Cal. Proc. PWT* § 582

[§ 582] Cases That Must Be Arbitrated.

The following cases must be arbitrated:

(1) *Unlimited Civil Cases*. Subject to specified exceptions (*infra*, §583), unlimited civil cases must be submitted to arbitration in the following circumstances:

(a) *Superior Courts with 18 or More Judges*: If the amount in controversy in the opinion of the judge will not exceed \$ 50,000 for each plaintiff. (*C.C.P. 1141.11(a)*; C.R.C., Rule 3.811(a)(1).)

(b) *Superior Courts with Fewer Than 18 Judges*: When the court determines it to be in the best interests of justice, and elects to so provide by local rule, if the amount in controversy in the opinion of the judge will not exceed \$ 50,000 for each plaintiff. (*C.C.P. 1141.11(b)*; C.R.C., Rule 3.811(a)(2).)

(2) *Limited Civil Cases*. Limited civil cases (except cases heard in the small claims division) in courts that so provide by local rule, where the case involves a claim for money damages against a single defendant resulting from a motor vehicle collision. (*C.C.P. 1141.11(c)*; C.R.C., Rule 3.811(a)(3).)

(3) *Stipulation*. On stipulation, limited or unlimited civil cases in any court, regardless of the amount in controversy. (C.R.C., Rule 3.811(a)(4).)

(4) *Award Not To Exceed \$ 50,000*. Limited or unlimited civil cases in any court, when all plaintiffs file an election in which each plaintiff agrees that the award will not exceed \$ 50,000 "as to that plaintiff." (*C.C.P. 1141.12(b)*; C.R.C., Rule 3.811(a)(5).)

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



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I. Judicial Arbitration.

3. Cases Excluded From Arbitration.

6 *Witkin Cal. Proc. PWT* § 583

[§ 583] Cases Excluded From Arbitration.

The following cases are excluded from arbitration:

(1) Actions in which the amount in controversy exceeds \$ 50,000, unless the parties stipulate for arbitration. (See *C.C.P. 1141.11(a)*, (b); *C.C.P. 1141.12(b)*; see *C.C.P. 1141.16(a)*, *infra*, §586 [if parties stipulate that amount in controversy exceeds \$ 50,000 limit, case may not be ordered to arbitration].)

(2) Actions that include a prayer for equitable relief, unless the prayer is "frivolous or insubstantial." (*C.C.P. 1141.13*; *C.R.C.*, Rule 3.811(b)(1).)

(3) Class actions. (*C.C.P. 1141.11(c)*; *C.R.C.*, Rule 3.811(b)(2).)

(4) Small claims actions. (*C.C.P. 1141.11(c)*; *C.R.C.*, Rule 3.811(b)(3).)

(5) Unlawful detainer actions. (*C.C.P. 1141.11(c)*; *C.R.C.*, Rule 3.811(b)(4).)

(6) Family Law Act proceedings. (*C.R.C.*, Rule 3.811(b)(5).)

(7) Actions found by the court to be "not amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation" (*C.R.C.*, Rule 3.811(b)(6)) or excluded by local rule on the same ground (*C.R.C.*, Rule 3.811(b)(7)).

(8) Actions involving multiple causes of action or a cross-complaint, if the court determines that the amount in controversy as to any cause or the cross-complaint exceeds \$ 50,000. (*C.R.C.*, Rule 3.811(b)(8).)

(9) Actions involving elderly litigants entitled to trial preference under *C.C.P. 36*. The litigant cannot be compelled to submit the matter to mandatory arbitration; i.e., *C.C.P. 36* prevails over *C.C.P. 1141.11*. (*Vinokur v. Superior Court* (1988) 198 C.A.3d 500, 503, 243 C.R. 683, 7 Cal. Proc. (5th), Trial, §69.)

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I. Judicial Arbitration.

4. Submission to Arbitration.

a. On Stipulation.

6 *Witkin Cal. Proc. PWT* § 584

[§ 584] On Stipulation.

An action is set for arbitration "forthwith" when the parties stipulate to arbitration. The stipulation must be filed no later than the time the initial case management statement is filed, unless the court orders otherwise. (C.R.C., Rule 3.812(a).) (See C.E.B., *Effective Use of ADR*, §11.6; Rutter Group, *Alternative Dispute Resolution* §4:46 et seq.; Rutter Group, *3 Civil Proc. Before Trial* §13:34 et seq.; *Cal. Civil Practice*, 4 Procedure §26:33.)

A stipulation to arbitration is effective only with the actual consent of the parties. In the absence of consent by the client, an attorney has no authority to waive the client's right to a jury trial. (*Blanton v. Womancare* (1985) 38 C.3d 396, 402, 212 C.R. 151, 696 P.2d 645, 1 Cal. Proc. (5th), *Attorneys*, §252; *Sanker v. Brown* (1985) 167 C.A.3d 1144, 1146, 1147, 213 C.R. 768 [following *Blanton*]; *Lazarus v. Titmus* (1998) 64 C.A.4th 1242, 1247, 75 C.R.2d 676 [stipulation signed only by parties' attorneys was void; following *Blanton*]; 48 A.L.R.4th 127 [validity of attorney's stipulation to arbitration, or amendment of arbitration agreement, without client's knowledge or consent].)

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4. Submission to Arbitration.

b. On Plaintiff's Election To Limit Award.

6 *Witkin Cal. Proc. PWT* § 585

[§ 585] On Plaintiff's Election To Limit Award.

A plaintiff may submit an action to arbitration on filing a written request agreeing to limit recovery to the amount in controversy specified in *C.C.P. 1141.11* (\$ 50,000). In this event, the action is set for arbitration "forthwith." (*C.C.P. 1141.12(b)*; C.R.C., Rule 3.812(b).) The plaintiff's election must be filed no later than the time when the initial case management statement is filed, unless the court orders otherwise. (C.R.C., Rule 3.812(b).) (See C.E.B., *Effective Use of ADR*, §11.10; Rutter Group, *Alternative Dispute Resolution* §4:50 et seq.; Rutter Group, *3 Civil Proc. Before Trial* §13:37 et seq.; Cal. Civil Practice, 4 Procedure §26:33.)

The defendant may move to delay the arbitration hearing "for good cause." (C.R.C., Rule 3.812(b).)

In actions involving a cross-complaint where all plaintiffs have elected to arbitrate, the action must be removed from the arbitration list if (1) the cross-complainant so moves within 15 days "after notice of the election to arbitrate," and (2) the court determines that the amount in controversy relating to the cross-complaint exceeds \$ 50,000. (C.R.C., Rule 3.812(c).)

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I. Judicial Arbitration.

4. Submission to Arbitration.

c. On Order of Court.

6 *Witkin Cal. Proc. PWT* § 586

[§ 586] On Order of Court.

(1) *Determining Amount in Controversy.* Absent the parties' stipulation or election to arbitrate, the court must determine the amount in controversy and refer a case to arbitration after all named parties have either appeared or defaulted. The determination is made at a case management conference or on the written submission of the parties, and must be based on the total amount of damages. The judge may not consider questions of liability, comparative negligence, or other defenses. The court must also determine whether requests for equitable relief (which would remove the case from arbitration under *C.C.P. 1141.13*) are frivolous or insubstantial. Neither the determination of the amount in controversy nor the appropriateness of equitable relief is appealable. (*C.C.P. 1141.16(a)*; *C.R.C.*, Rule 3.812(d).) (See *C.E.B.*, Effective Use of ADR, §11.12 et seq.; Rutter Group, Alternative Dispute Resolution §4:56 et seq.; Rutter Group, 3 Civil Proc. Before Trial §13:61 et seq.; *Cal. Civil Practice*, 4 Procedure §26:35.)

"If the amount in controversy is disputed, the parties should offer representations in the nature of an offer of proof of damages. The trial court can form an opinion based on these representations, akin to opening statements concerning what the admissible evidence revealed in discovery will show with respect to potential damages." (*Sharpley v. Chole* (1994) 29 *C.A.4th* 1213, 1219, 35 *C.R.2d* 208, *infra*, §627.)

(2) *Early Submission to Arbitration.* Generally, the arbitration may not be held until 210 days after the complaint is filed, or 240 days after the complaint is filed if the parties have stipulated to a continuance under *Govt.C. 68616(d)*. (*C.C.P. 1141.16(c)*.) However, a case may be submitted earlier under the following conditions:

(a) The parties stipulate to an earlier arbitration. (*C.C.P. 1141.16(c)(1)*.)

(b) On the written request of all plaintiffs, subject to objection by a defendant for good cause shown. (*C.C.P. 1141.16(c)(2)*.)

(c) When the parties have stipulated, or the court has ordered, that discovery is permitted following the arbitration award. (*C.C.P. 1141.16(c)(3)*.)

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4. Submission to Arbitration.

d. Effect of Submission.

6 *Witkin Cal. Proc. PWT* § 587

[§ 587] Effect of Submission.

(1) *Determination of Amount in Controversy Is Not Binding.* Neither the court's determination nor a stipulation that an action involves less than \$ 50,000 (*supra*, §586) is binding on the arbitrator or in a subsequent trial de novo. (*C.C.P. 1141.16(b).*)

(2) *Tolling of Time Periods.* Submission of an action to arbitration ordinarily does not toll the running of the time periods specified in *C.C.P. 583.110* et seq. relating to dismissal for delay in prosecution (*supra*, §315 et seq.). (*C.C.P. 1141.17(a).*) However, if an action is or remains submitted to arbitration more than 4 years and 6 months after the action was commenced, the period commencing 4 years and 6 months after the filing of the action and ending when a request for a trial de novo is filed is not included in computing the 5-year period for bringing an action to trial specified in *C.C.P. 583.310* (*supra*, §413). (*C.C.P. 1141.17(b).*)

(3) *Submission Commences Period To Select Arbitrator.* The 15-day period within which the arbitration administrator must make a random selection of names from the arbitration panel starts when a case is set for arbitration by stipulation of the parties under C.R.C., Rule 3.812 (*supra*, §584). (C.R.C., Rule 3.815, *infra*, §590.)

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I. Judicial Arbitration.

5. Arbitrator.

a. Selection.

1. In General.

6 *Witkin Cal. Proc. PWT* § 588

[§ 588] In General.

(1) *Time for Appointment.* In cases submitted to judicial arbitration under *C.C.P. 1141.11* or *1141.12* (supra, §582), an arbitrator must be assigned within 30 days from the time of submission. (*C.C.P. 1141.18(c)*; *C.R.C.*, Rule 3.815(c); see *C.E.B.*, Effective Use of ADR, §§11.18, 11.20.)

(2) *Experience.* Attorneys selected to serve as arbitrators "should have experience with cases of the type under dispute." (*C.C.P. 1141.10(b)(3)*.)

(3) *Selection by Stipulation.* The parties may by stipulation select any person to serve as an arbitrator. However, if the selected person is not on the court's arbitration panel, the stipulation will be effective only if (a) the person consents in writing and takes the required oath, and (b) both the consent and oath are attached to the stipulation. The stipulation must be filed no later than 10 days after the case has been set for arbitration under *C.R.C.*, Rule 3.812. (*C.R.C.*, Rule 3.815(a).)

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5. Arbitrator.

a. Selection.

2. Arbitration Panels.

6 *Witkin Cal. Proc. PWT* § 589

[§ 589] Arbitration Panels.

(1) *Panels Are Mandatory.* Every court is required to have a panel of arbitrators for personal injury cases, and additional panels as the presiding judge determines are needed. (C.R.C., Rule 3.814(a).) Lists of panel arbitrators available to hear cases must be available for public inspection in the ADR administrator's office. (C.R.C., Rule 3.814(e).) (See C.E.B., *Effective Use of ADR*, §11.19.)

(2) *Composition.* The panels must be composed of active or inactive California attorneys, retired court commissioners who were licensed to practice law before appointed commissioners, and retired judges. A former California judicial officer is only eligible if he or she is an active or inactive member of the State Bar. (C.R.C., Rule 3.814(b).)

The ADR committee (*supra*, §581) determines the size and composition of the panels, but is encouraged to ensure that the personal injury panel contain an equal number of persons who usually represent plaintiffs and persons who usually represent defendants. (C.R.C., Rule 3.814(c).)

(3) *Service on Panel.* Persons may serve on arbitration panels in more than one county, and serve at the pleasure of the ADR committee. Appointment is effective when the appointee (a) agrees to serve, (b) certifies that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics (see 2 *Cal. Proc.* (5th), *Courts*, §60) and the rules governing judicial arbitration, and (c) files an oath or affirmation to "justly try all matters submitted to him or her." (C.R.C., Rule 3.814(d).)

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5. Arbitrator.

a. Selection.

3. Manner of Selection.

6 *Witkin Cal. Proc. PWT* § 590

[§ 590] Manner of Selection.

(1) *Standard Procedure.* If the parties have not stipulated to an arbitrator, and the court has not adopted local rules or procedures for selection, the administrator must do the following within 15 days after a case is set for arbitration:

- (a) Determine the number of clearly adverse sides. (C.R.C., Rule 3.815(b)(1).)
- (b) Select at random a number of names equal to the number of sides, plus one. (C.R.C., Rule 3.815(b)(2).)
- (c) Mail the list of names to counsel for the parties. (C.R.C., Rule 3.815(b)(2).)

Disputes over sides are decided by the presiding judge in the manner of disputes in determining sides entitled to peremptory challenges of jurors. (C.R.C., Rule 3.815(b)(1).)

Each side has 10 days from the date of mailing to file a written rejection of one name; if there are two or more parties on a side, they must join in the rejection of a single name. (C.R.C., Rule 3.815(b)(3).) On the expiration of the 10-day period, the administrator appoints at random a person on the list who has not been rejected, assigns the case to that person, and gives notice of the appointment to the arbitrator and all parties. (C.R.C., Rule 3.815(b)(4), (b)(5).) (See C.E.B., *Effective Use of ADR*, §11.21.)

(2) *Alternative Procedure.* Courts may, by local rule or procedures adopted by the ADR committee, establish an alternate method for selecting arbitrators provided that the method is fair, affords each side at least one peremptory challenge to a listed arbitrator, and ensures the appointment of an arbitrator within 30 days from the submission of a case. The local rule or procedure may require that all steps leading to the selection take place during or immediately following the case management conference or review under C.R.C., Rule 3.700 et seq. at which the court determines the amount in controversy and suitability for arbitration. (C.R.C., Rule 3.815(c).)

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I. Judicial Arbitration.

5. Arbitrator.

b. Disqualification.

6 *Witkin Cal. Proc. PWT* § 591

[§ 591] Disqualification.

(1) *Disqualification for Cause.* A proposed arbitrator is disqualified to serve for the same reasons that a judge is disqualified, or, in certain circumstances, if another member of the arbitrator's law firm would be disqualified to serve as a judge. (*C.C.P. 1141.18(d)*; *C.R.C.*, Rule 3.816(a).) (On judicial disqualification, see *C.C.P. 170.1*; 2 *Cal. Proc.* (5th), *Courts*, §93 et seq.) An arbitrator must disqualify himself or herself, on demand of any party to the arbitration made before the conclusion of the arbitration proceedings, on any of the grounds specified in *C.C.P. 170.1*. (*C.C.P. 1141.18(d)*.) If the arbitrator fails to do so, the party may move "as promptly as possible" to vacate the arbitrator's appointment, and the court must do so if any of the grounds specified in *C.C.P. 170.1* exists. In such a case, the arbitrator's name is returned to the list of those available to hear cases, "unless the court orders that the circumstances of the disqualification be reviewed ... for appropriate action." (*C.R.C.*, Rule 3.816(d).) (See *C.E.B.*, *Effective Use of ADR*, §§11.24, 11.25.)

An arbitrator has an affirmative duty to determine whether any ground for disqualification exists. Then, unless the ground is disclosed to the parties in writing and "is expressly waived by all parties in writing," the arbitrator must promptly notify the administrator and another arbitrator must be selected. (*C.R.C.*, Rule 3.816(a).)

In addition to other required disclosures, an arbitrator must disclose to the parties matters subject to disclosure under Canon 6D(5)(a) and (5)(b) of the Code of Judicial Ethics and significant present or past personal or professional relationships with a party, attorney, or law firm in the case, including the number and nature of other proceedings in the past 24 months in which the arbitrator has been privately compensated for specified services by a party, attorney, law firm, or insurance company. The disclosures must be made no later than 5 days prior to the deadline for parties to file a motion for disqualification of the arbitrator under *C.C.P. 170.6* or, if the arbitrator is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable. (*C.R.C.*, Rule 3.816(b).)

(2) *Peremptory Disqualification.* In addition, a party may use a peremptory challenge to disqualify a particular arbitrator. (*C.C.P. 1141.18(d)*.) (On peremptory challenge, see *C.C.P. 170.6*; 2 *Cal. Proc.* (5th), *Courts*, §129 et seq.) A request for disqualification of an arbitrator on grounds specified in *C.C.P. 170.6* must be made within 5 days after the arbitrator is named. (*C.C.P. 1141.18(d)*.)

(3) *Sending Request to Administrator.* A copy of any request for disqualification must be sent to the ADR administrator. (C.R.C., Rule 3.816(c).)

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I. Judicial Arbitration.

5. Arbitrator.

c. Fees.

1. In General.

6 *Witkin Cal. Proc. PWT* § 592

[§ 592] In General.

An arbitrator's compensation is \$ 150 per case or \$ 150 per day, whichever is greater, unless waived in whole or in part; but the superior court may set higher rates. (*C.C.P. 1141.18(b)*; see C.E.B., Effective Use of ADR §11.48.) Active judges who act as arbitrators receive no additional compensation. (*C.C.P. 1141.18(a)*.) Attorneys selected "are urged to volunteer their services without compensation whenever possible." (*C.C.P. 1141.10(b)(3)*.)

No compensation may be paid until the award is timely filed, or the case is settled by the parties. (*C.C.P. 1141.18(b)*; C.R.C., Rule 3.819(a).) The court has power for good cause to authorize payment when the award is not timely filed or when the arbitrator has devoted a substantial amount of time to a case that is settled without a hearing. (C.R.C., Rule 3.819(b).) (On arbitrator's fee statement, see C.R.C., Rule 3.819(c).)

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5. Arbitrator.

c. Fees.

2. Source of Payment.

6 *Witkin Cal. Proc. PWT* § 593

[§ 593] Source of Payment.

The arbitrators' fees are generally paid by the court in which the arbitration costs are incurred. (*C.C.P. 1141.28(a)*.)

In an action not otherwise subject to judicial arbitration, which is conducted according to the arbitration statutes "solely because of the stipulation of the parties," the cost of compensation must be paid in equal shares by the parties. However, if the imposition of these costs would create "a substantial economic hardship for any party as not to be in the interest of justice," that party's share is paid by the court in which the arbitration costs are incurred. The determination of substantial economic hardship is made by the arbitrator and may be reviewed by the court. (*C.C.P. 1141.28(b)*.)

If, after a trial de novo, the judgment to the party requesting the trial is not more favorable than the arbitration award, that party is ordinarily chargeable with the arbitrator's fees. (See *C.C.P. 1141.21*, *infra*, §626 et seq.)

If the case is settled, each party seeking affirmative relief must notify the arbitrator and the court as required by C.R.C., Rule 3.1385 (*supra*, §127). (C.R.C., Rule 3.829.) If the party fails to notify the arbitrator at least 2 days before the scheduled hearing, the court may order the party to compensate the arbitrator in an amount up to \$ 150. (C.R.C., Rule 3.1385(a).)

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I. Judicial Arbitration.

6. Discovery.

6 *Witkin Cal. Proc. PWT* § 594

[§ 594] Discovery.

(1) *Discovery Is Authorized.* The parties have all the conventional rights and obligations of discovery provided for civil actions (see 2 *Cal. Evidence (4th), Discovery*, §1 et seq.). (C.R.C., Rule 3.822 [discovery as provided by *C.C.P. 2002* et seq.].) (On discovery authorized for arbitrations under economic litigation statutes (*C.C.P. 90* et seq.), see 2 *Cal. Proc. (5th), Courts*, §§253 254; C.E.B., *Effective Use of ADR*, §11.27.)

(2) *Time for Discovery.* Discovery must be completed not later than 15 days before the arbitration hearing unless the court extends the time for good cause. (C.R.C., Rule 3.822(b).)

Once an action is ordered submitted to judicial arbitration, *C.C.P. 2024.020*, providing for discovery up to 30 days before trial, is superseded by C.R.C., Rule 3.822. (*C.C.P. 2024.040(a)*.) Thus, *C.C.P. 2024.020* does not preclude discovery once a trial date is vacated and the case is assigned to judicial arbitration. (*Zinn v. Superior Court (1980) 108 C.A.3d 583, 588, 166 C.R. 640* [construing former *C.C.P. 2024(a)* (now *C.C.P. 2024.020*) and former C.R.C., Rule 222 (now C.R.C., Rule 3.1380); deposition set for 11 days before vacated trial date, but more than 15 days before arbitration hearing, was proper].)

(3) *Effect of Postponement of Arbitration Hearing.* In *Roe v. Superior Court (1990) 224 C.A.3d 642, 273 C.R. 745*, plaintiff filed an at-issue memorandum on September 20, 1989. The case was ordered to arbitration on February 28, 1990, with a hearing date of March 8, 1990. But before arbitration could be held, plaintiff was granted leave to amend his complaint and the trial judge struck the at-issue memorandum. This had the effect of vacating the arbitration proceedings, including the hearing date of March 8, 1990. On March 12, plaintiff served interrogatories and requests for production, and defendant notified plaintiff that he would not respond because, under former C.R.C., Rule 1612 (now C.R.C., Rule 3.822), discovery had closed 15 days before the date set for hearing. Plaintiff then moved to compel response, and the trial judge denied the motion. *Held*, mandamus issued to compel granting of the motion.

(a) Defendant's position is that under the Rules of Court, the initial date set for the arbitration agreement is controlling, and that all discovery must therefore be completed within 15 days before that date. In limiting discovery by reference to that date, the Legislature "is without a doubt aware of the possibilities for abuse and for interference with the orderly preparation for trial, if a party is freely permitted to recommence discovery after every delay in trial,

however trivial." (224 C.A.3d 646, 647.)

(b) However, where arbitration proceedings are completely vacated by striking the at-issue memorandum and the case is removed from the civil active list, no principle or policy prevents reopening discovery. "[I]n many cases the content of an amendment might make the case obviously unsuitable for arbitration, or might introduce issues legitimately requiring new discovery. If that is not the case here, as defendant suggests, the error, if any, was in the order permitting the amendment and striking the at-issue memorandum." (224 C.A.3d 647.) Because this order cannot be reviewed in this mandamus proceeding, the judge's reasons for making it are not relevant. (224 C.A.3d 647.)

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I. Judicial Arbitration.

7. Arbitration Hearing.

a. In General.

6 *Witkin Cal. Proc. PWT* § 595

[§ 595] In General.

(1) *Conduct of Hearing.* *C.C.P. 1141.10(b)* states the following guidelines:

(a) "Arbitration hearings ... shall provide parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes." (*C.C.P. 1141.10(b)(1)*.)

(b) "Arbitration hearings shall be as informal as possible and shall provide the parties themselves maximum opportunity to participate directly in the resolution of their disputes, and shall be held during nonjudicial hours whenever possible." (*C.C.P. 1141.10(b)(2)*.) (See *C.E.B., Effective Use of ADR*, §11.40 et seq.; *Rutter Group, Alternative Dispute Resolution* §4:98 et seq.; *Rutter Group, 3 Civil Proc. Before Trial* §13:98 et seq.; *Cal. Civil Practice*, 4 Procedure §26:37 et seq.)

(2) *Powers of Arbitrator.* The arbitrator has "the powers necessary" to perform duties under the judicial arbitration statutes and as prescribed by the Judicial Council. (*C.C.P. 1141.19*.) The arbitrator can swear in witnesses, take adjournments, permit evidence to be offered and rule on its admissibility, examine any relevant site or object, invite trial briefs, decide the law and facts of the case, and make an award on the merits and for statutory costs. Other questions are for the court. (*C.R.C., Rule 3.824(a)*.)

(3) *Representation by Counsel.* Each party is entitled to be represented by counsel at any arbitration proceeding or hearing. The right to counsel may be waived, but a waiver may be revoked, and, on revocation, the other party is entitled to a reasonable continuance to obtain counsel. (*C.R.C., Rule 3.821(a)*.)

(4) *Communication With Arbitrator.* No offer of settlement by any party may be disclosed to the arbitrator before the award is filed. (*C.R.C., Rule 3.820(a)*.) In addition, an arbitrator must not initiate, permit, or consider ex parte communications concerning a pending arbitration. However, the arbitrator may communicate with a party about administrative matters (e.g., time, place, and conduct of hearing) if the arbitrator (a) reasonably believes the communication will not result in a procedural or tactical advantage for the party, and (b) promptly informs the other parties of the communication and provides an opportunity to respond prior to a determination of the matter discussed.

(C.R.C., Rule 3.820(b).) (See C.E.B., Effective Use of ADR, §11.26.)

(5) *Record of Proceedings.* No record of the hearing is allowed to be made except for the arbitrator's personal use. A record prepared for the arbitrator is immune from discovery and may not be delivered to anyone other than the arbitrator's employee, unless it is subpoenaed in a criminal investigation or prosecution for perjury. (C.R.C., Rule 3.824(b); see C.R.C., Rule 3.826(c), *infra*, §624 [prohibiting reference to arbitration proceeding at subsequent trial of case].)

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I. Judicial Arbitration.

7. Arbitration Hearing.

b. Subpenas.

6 *Witkin Cal. Proc. PWT* § 596

[§ 596] Subpenas.

Witnesses may be subpoenaed for the hearing as generally provided in civil actions. Counsel must modify the subpoena form to show that it is for an arbitration hearing at a specified time and place. (*C.C.P.* 1282.6; *C.R.C.*, Rule 3.823(c); see *C.E.B.*, *Effective Use of ADR*, §11.39.)

A subpoenaed witness who refuses to attend or testify can be subjected to contempt proceedings. Nonappearance of a subpoenaed witness is also a ground for a continuance or adjournment of the hearing. (*C.R.C.*, Rule 3.823(c).)

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7. Arbitration Hearing.

c. Time and Place of Hearing.

6 *Witkin Cal. Proc. PWT* § 597

[§ 597] Time and Place of Hearing.

(1) *Time of Hearing.* The arbitrator sets the date and time for the hearing, as follows:

(a) Unless the parties and arbitrator agree otherwise, the arbitration may not be set earlier than 30 days from the date the arbitrator gives notice of the hearing (*infra*, §598), and may not be scheduled on Saturdays, Sundays, or holidays. (C.R.C., Rule 3.817(b).)

(b) The hearing must be completed within 90 days, including continuances, from the date the case is assigned to the arbitrator. (C.R.C., Rule 3.817(c).)

(2) *Continuance.* The parties may stipulate to a continuance on the arbitrator's consent for good cause shown. Notice of the continuance must be sent to the ADR administrator. (C.R.C., Rule 3.818(a).)

The continuance may not extend beyond 90 days after the assignment of the case to the arbitrator, including time due to continuances, except by court order on motion of a party and for good cause shown. (C.R.C., Rule 3.818(c).)

If the arbitrator does not consent to a continuance, the court may grant it on motion with a showing of good cause. The moving party must then notify the arbitrator, who must reschedule the hearing and give notice to all parties. (C.R.C., Rule 3.818(b); on continuance of commenced hearing for nonappearance of witness, see C.R.C., Rule 3.823(c), *supra*, §596.)

(3) *Place of Hearing.* The arbitrator sets the place of hearing, in "appropriate facilities provided by the court or selected by the arbitrator." (C.R.C., Rule 3.817(d).)

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d. Notice of Hearing.

6 *Witkin Cal. Proc. PWT* § 598

[§ 598] Notice of Hearing.

The arbitrator must give the parties and the ADR administrator written notice of the hearing date within 15 days after being appointed. (C.R.C., Rule 3.817(a).) It is anticipated that arbitrators usually will consult with the parties' counsel before giving formal notice of the hearing. (See C.R.C., Rule 3.820 [permitting ex parte communications for purpose of scheduling hearing].) (See C.E.B., *Effective Use of ADR*, §11.37.)

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e. Persons Present.

6 *Witkin Cal. Proc. PWT* § 599

[§ 599] Persons Present.

Evidence must be taken in the presence of the arbitrator and of all parties who do not either waive the right to be present or absent themselves after being given due notice. (C.R.C., Rule 3.823(a).)

The arbitration may proceed in the absence of any party who, after due notice, fails to be present and to obtain a continuance. However, an award may not be based solely on a party's absence; if the defendant defaults, the plaintiff must submit evidence to support the award. (C.R.C., Rule 3.821(b).)

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f. Evidence.

1. In General.

6 *Witkin Cal. Proc. PWT* § 600

[§ 600] In General.

The general rules of evidence ordinarily apply to arbitration hearings. (C.R.C., Rule 3.823(b).) However, there are special provisions for admitting documentary evidence, including written reports (*infra*, §601), written statements (*infra*, §602), and depositions (*infra*, §603), in lieu of testimony if copies are delivered to the opposing parties at least 20 days, or mailed at least 25 days, before the hearing. (See C.R.C., Rule 3.823(b), (d).)

Production of evidence of a party's financial condition under C.C. 3295 for purposes of assessing punitive damages (see 2 *Cal. Evidence (4th)*, *Discovery*, §17) may not be required at a judicial arbitration proceeding, unless the court authorizes pretrial discovery of that evidence under that statute. (*C.C.P. 1141.19.5*.)

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f. Evidence.

2. Reports and Records.

6 *Witkin Cal. Proc. PWT* § 601

[§ 601] Reports and Records.

The following reports and records are admissible at arbitration hearings (C.R.C., Rule 3.823(b)(1)):

- (1) Written reports of expert witnesses.
- (2) Medical records and bills.
- (3) Documents showing loss of income.
- (4) Property damage repair bills or estimates (but estimates must be accompanied by an itemization of repairs actually made and a receipted bill for their cost).
- (5) Police reports of an accident underlying the case (but the arbitrator may not consider any opinion in the report as to ultimate fault).
- (6) Bills and invoices, purchase orders, checks, written contracts, and similar documents prepared and maintained in the ordinary course of business.

A party intending to offer any of these documents must deliver copies to opposing parties at least 20 days, or mail them at least 25 days, before the hearing. (C.R.C., Rule 3.823(b)(1), (d).) Any other party may subpoena the author or custodian of the document for cross-examination. (C.R.C., Rule 3.823(b)(1).)

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3. Written Statements.

6 *Witkin Cal. Proc. PWT* § 602

[§ 602] Written Statements.

The written statements of any other witnesses, if "made by declaration under penalty of perjury," are admissible in an arbitration hearing. The arbitrator must disregard any portion of the statement that would be inadmissible as testimony, but the inclusion of inadmissible material does not make the entire statement inadmissible. (C.R.C., Rule 3.823(b)(2).)

Copies must be delivered to all opposing parties at least 20 days, or mailed at least 25 days, before the hearing. (C.R.C., Rule 3.823(b)(2), (d).)

Any opposing party may prevent admission of the statement by delivering a demand to the proponent, at least 10 days before the hearing, that the author of the statement be produced to testify in person. (C.R.C., Rule 3.823(b)(2).)

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4. Depositions.

6 *Witkin Cal. Proc. PWT* § 603

[§ 603] Depositions.

Depositions may be received in evidence at arbitration hearings, notwithstanding that the deponent is not "unavailable as a witness" (see *Ev.C. 240, 1 Cal. Evidence (4th), Hearsay, §18* et seq.) and no exceptional circumstances exist, under the following conditions (C.R.C., 3.823(b)(3)):

(1) The deposition must be taken within the time allowed for discovery (see C.R.C., Rule 3.822, *supra*, §594).

(2) Notice of intent to offer the deposition in evidence must be delivered to all opposing parties at least 20 days, or mailed at least 25 days, before the hearing. (On manner of delivery of notice, see C.R.C., 3.823(d).) (On rules governing introduction of depositions generally, see 3 *Cal. Evidence (4th), Presentation at Trial, §153* et seq.)

The opposing party, on receiving the notice, may subpoena the deponent, in which case the arbitrator may either (1) exclude the deposition from evidence or (2) admit the deposition and permit the opposing party to cross-examine the deponent. (C.R.C., 3.823(b)(3).)

The restrictions provided in C.R.C., Rule 3.823(b)(3) only apply to depositions not otherwise admissible at trial. (C.R.C., 3.823(b)(3); on admissibility of depositions generally, see *C.C.P. 2025.620, 3 Cal. Evidence (4th), Presentation at Trial, §153*; C.E.B., *Effective Use of ADR, §11.334*.)

Depositions admitted under C.R.C., Rule 3.823(b)(3) are subject to the usual objections to deposition procedure. (C.R.C., Rule 3.823(b)(3); on objections to deposition procedure, see *C.C.P. 2025.410* et seq., 2 *Cal. Evidence (4th), Discovery, §48*.)

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g. Sanctions for Failure To Participate.

6 *Witkin Cal. Proc. PWT* § 604

[§ 604] Sanctions for Failure To Participate.

In *Lyons v. Wickhorst* (1986) 42 C.3d 911, 231 C.R. 738, 727 P.2d 1019, plaintiff sued defendants for false arrest and false imprisonment. Because the damages claimed did not exceed the then limit under C.C.P. 1141.11 (\$ 25,000), the trial court ordered mandatory arbitration. Plaintiff refused to present any evidence in support of his case, and defendants did not attend the hearing after informing the arbitrator that attendance would be futile. The arbitrator made an award in favor of defendants, and plaintiff requested a trial de novo pursuant to C.C.P. 1141.20. On defendants' motion, the trial court dismissed the action on the ground that plaintiff's refusal to offer evidence bordered on contempt and was a wilful rejection of the arbitration program. *Held*, reversed; the trial court has no authority to dismiss an action for failure to participate in the mandatory arbitration procedure.

(a) C.C.P. 581 states a number of grounds for dismissal, none of which is shown here. (42 C.3d 914.) Neither the judicial arbitration statutes nor the rules of judicial arbitration authorize dismissal for failure to present evidence. C.C.P. 128.5, applicable to judicial arbitration, provides for monetary sanctions against bad faith actions or tactics that are frivolous or intended solely to cause unnecessary delay, but does not authorize dismissal. (42 C.3d 915.)

(b) The cases have recognized a limited inherent discretionary power to dismiss a claim with prejudice for failure to prosecute it or where it is fictitious or sham. (42 C.3d 915.) However, the use of this discretionary power "has been tightly circumscribed." (42 C.3d 916.)

(c) The federal courts have similarly construed F.R. Civ. P., Rule 41(b). Literally read, it would authorize dismissal with prejudice for trivial noncompliance with procedural rules or court orders, the federal courts have held that this drastic sanction should be used only in extreme situations where lesser sanctions would not serve the best interests of justice. (42 C.3d 917.)

(d) "An immediate and unconditional dismissal entered at the first suggestion of noncooperation is too drastic a remedy in light of the fact that arbitration was not intended to supplant traditional trial proceedings, but to expedite the resolution of small civil claims." (42 C.3d 919.)

Lyons was followed in *Zatkin v. Cesare* (1988) 199 C.A.3d 756, 245 C.R. 222, an action for damages for personal injuries and property damage in which plaintiff elected arbitration, then moved for relief from arbitration on the ground that his claim for loss of earnings might necessitate a judgment in excess of the statutory limit. The motion was denied without prejudice, the matter proceeded to arbitration, and plaintiff did not present any evidence on the earnings issue. The arbitrator awarded plaintiff \$ 4,500, and he requested a trial de novo. Defendant moved to strike the request on the ground that plaintiff had intended to seek a trial de novo regardless of the outcome of the arbitration in order to present evidence on loss of earnings. The trial judge found that plaintiff had abused the arbitration process, ordered the request stricken, and entered judgment on the award, thus effectively ending plaintiff's action. *Held*, under *Lyons* this was too severe a penalty.

There is no policy basis for defendant's attempt to distinguish *Lyons*, a mandatory arbitration case, from the present election of arbitration. "To find that a plaintiff's action could be dismissed if the plaintiff elects arbitration, but not if the court orders arbitration, would defeat the purpose of the legislation and discourage voluntary elections by plaintiffs who would fear the potential consequences. The policy of the law is to encourage participation by litigants. Thus, even though it would have been preferable for appellant to have properly withdrawn from the arbitration process ... rather than to abuse the arbitration system, to draw the distinction urged by respondent would discourage participation in alternative judicial forums." (199 C.A.3d 761.) (See *Jansen Associates v. Codercard* (1990) 218 C.A.3d 1166, 1171, 267 C.R. 516 [defendant's wilful failure to attend arbitration hearing was insufficient to justify sanctions against his attorney for failure to attend]; *Salowitz Organization v. Traditional Industries* (1990) 219 C.A.3d 797, 807, 268 C.R. 493 [upholding \$ 6,000 sanction against defendant who twice failed to attend arbitration hearing and engaged in numerous other delaying tactics].)

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8. Arbitration Award.

a. Form and Content.

1. In General.

6 *Witkin Cal. Proc. PWT* § 605

[§ 605] In General.

The arbitration award must be in writing and signed by the arbitrator. (*C.C.P. 1141.23*; C.R.C., Rule 3.825(a).) (On arbitration award generally, see C.E.B., *Effective Use of ADR*, §11.46 et seq.; Rutter Group, *Alternative Dispute Resolution* §4:129 et seq.; Rutter Group, *3 Civil Proc. Before Trial* §13:119 et seq.; Cal. Civil Practice, 4 *Procedure* §§26:41, 26:42.)

The award should express the arbitrator's ultimate determinations in the manner of a verdict. Findings of fact and conclusions of law are not required. (C.R.C., Rule 3.825(a).) These will rarely be needed given that the correctness of the award is not subject to judicial review. (See *infra*, §611.)

The award must dispose of all the issues properly raised by the pleadings; e.g., it must specify an amount of damages to be recovered (see *infra*, §606) and costs to be awarded (see *infra*, §607). (C.R.C., Rule 3.825(a).)

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a. Form and Content.

2. Amount of Damages.

6 *Witkin Cal. Proc. PWT* § 606

[§ 606] Amount of Damages.

The award must include a determination of any damages to be recovered. (C.R.C., Rule 3.825(a).)

Generally, the amount of the award may exceed the \$ 50,000 limit set forth in *C.C.P. 1141.11*. (*C.C.P. 1141.16(b)*, *1141.26*.) However, the amount may be limited by stipulation (see C.R.C., 3.815(a), *supra*, §§584, 585), or by the plaintiff's election to arbitrate (see *C.C.P. 1141.12(b)(ii)* and C.R.C., Rule 3.811(a)(5), *supra*, §§582, 585).

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a. Form and Content.

3. Award of Costs.

6 *Witkin Cal. Proc. PWT* § 607

[§ 607] Award of Costs.

(1) *When Awarded.* The award may include costs, "if appropriate" (C.R.C., Rule 3.825(a)), but costs may not "exceed the statutory costs of suit" (C.R.C., Rule 3.824(a)(8)). (See *Bennett v. California Custom Coach* (1991) 234 C.A.3d 333, 339, 285 C.R. 649 [improper to award attorneys' fees as costs, where damage award was based only on claim for money had and received].)

(2) *Procedure.* "There is evidently no uniform statewide practice for the determination of costs (including attorney fees as an element of costs) upon judicial arbitration. ... In some courts, the arbitrator will merely decide *whether* costs are to be awarded, after which counsel will file a costs bill seeking a specific amount, and any disputes as to costs will be decided by the court. In other courts, however, the arbitrator will make a *specific award* of costs. ... We urge all courts to follow the latter procedure rather than the former. If the purpose of judicial arbitration is to avoid traditional litigation, then that avoidance should be as complete as possible, with the arbitrator deciding *all* disputed issues including the amount of costs to be awarded, which will then be subject to judicial determination only upon a request for trial de novo." (*Dickens v. Lee* (1991) 230 C.A.3d 985, 988, 281 C.R. 783.) (See *Wagy v. Brown* (1994) 24 C.A.4th 1, 10, 29 C.R.2d 48 [cost award based on compromise offer under C.C.P. 998 (supra, §110 et seq.) and C.C. 3291 (6 Summary (10th), Torts, §1646 et seq.) may only be made after judgment, and hence may not be made by arbitrator]; *Kelley v. Bredelis* (1996) 45 C.A.4th 1819, 1823, 53 C.R.2d 536, infra, §620 [motion for order setting attorneys' fees after arbitrator awarded fees but did not determine their amount]; 60 A.L.R.5th 669 [awarding attorneys' fees in arbitrations].)

In *Guevara v. Brand* (1992) 8 C.A.4th 995, 10 C.R.2d 780, an award was made in favor of plaintiff for specified damages *with no mention of costs*. After entry of judgment on the award, plaintiff's attorney filed a memorandum of costs. Against defendant's objection the trial judge ruled that, as the prevailing party, plaintiff was entitled to costs as a matter of law. *Held*, affirmed.

(a) C.C.P. 1141.23 states that an arbitration award has the same force and effect as a judgment in a civil action or proceeding. Accordingly, under former C.R.C., Rule 1615(a) (now C.R.C., Rule 3.825) and C.C.P. 1032(b), plaintiff is

entitled to costs as a matter of right, and it is proper to file a memorandum of costs even though the judgment failed to include them in the award. (8 C.A.4th 997.)

(b) Permitting the cost bill to be filed after entry of judgment does not compromise the losing party's opportunity to challenge either the merits of the award or the subsequent award of costs. As to the merits, the losing party can request a trial de novo within 30 days; the losing party may challenge costs by a motion to strike or tax costs. And filing a cost bill provides a mechanism for the parties to resolve disputes over the amount of costs when the arbitrator has determined only the entitlement to them. (8 C.A.4th 998.)

(c) "Unquestionably it is preferable for the issue of costs to be resolved by the arbitrator when he or she renders the decision on the merits." (8 C.A.4th 998.) "Nevertheless, absent any statutory or judicial authority requiring the determination of costs to be made at the time of the arbitration award, a prevailing party is not precluded from claiming those costs by the procedure employed in similar circumstances after a civil judgment. We therefore decline defendant's oblique request that a prevailing party be punished for the oversight of the arbitrator." (8 C.A.4th 998.)

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b. Filing.

6 *Witkin Cal. Proc. PWT* § 608

[§ 608] Filing.

The arbitrator must file the award "in the court in which the action is pending." (*C.C.P. 1141.23*.)

Normally, the award must be filed within 10 days after the hearing is concluded, but the court may grant the arbitrator's application for no more than 20 days' additional time if the case is unusually long or complex. (*C.R.C.*, Rule 3.825(b).) The court may also authorize an arbitrator's fee despite failure to file the award on time. (*C.R.C.*, Rule 3.819(b).) (See *Mentzer v. Hardoin* (1994) 28 *C.A.4th* 1365, 34 *C.R.2d* 214, *infra*, §616 [criticizing practice of holding arbitration awards outside court file until expiration of time to request trial de novo].)

The arbitrator may serve and file an amended award, but only before expiration of the time for filing the original award. (*C.R.C.*, Rule 3.825(b).)

The 10-day filing period of *C.R.C.*, Rule 3.825(b) is directory only, and failure to comply (in the absence of prejudice from the delay) does not justify reversal of the judgment. (*Koll Hancock Torrey Pines v. Biophysica Foundation* (1989) 215 *C.A.3d* 883, 885, 264 *C.R.* 36; *Lopes v. Millsap* (1992) 6 *C.A.4th* 1679, 1686, 8 *C.R.2d* 814.)

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c. Service.

6 *Witkin Cal. Proc. PWT* § 609

[§ 609] Service.

Although there is no express statutory provision for service of the award on the parties, the arbitrator must file the award "with proof of service on each party to the arbitration." (C.R.C., Rule 3.825(b)(1).)

The service provision of Rule 3.825(b) carries out the basic principle of notice as an element of due process, and is therefore jurisdictional. In *Oats v. Oats* (1983) 148 C.A.3d 416, 196 C.R. 20, the arbitrator filed an award in favor of plaintiff on November 13, but did not serve defendant, and the clerk served copies of the award on December 4. Defendant served a request for a trial de novo on December 17, but the clerk, on December 15, had already served notice of entry of judgment. Defendant moved to set aside the judgment under C.C.P. 473 (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144). *Held*, order denying motion reversed.

(a) Former C.R.C., Rule 1615(b) (now C.R.C., Rule 3.825(b)) recognized that "actual service is as essential to confer upon the court jurisdiction to act further in an arbitration proceeding as in any other proceeding." Hence, the filing of the award was ineffective until service was made on December 4. (148 C.A.3d 420.)

(b) Former C.R.C., Rule 1616(a) (now C.R.C., Rule 3.826) provides for a request for trial de novo within 20 days (now 30 days) after the arbitration award is filed; and, in view of the jurisdictional function of service of the award, the 20-day period does not commence to run until such service. Hence, the clerk was without authority to enter the award as a judgment until 20 days after December 4. (148 C.A.3d 421.)

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d. Effect.

6 *Witkin Cal. Proc. PWT* § 610

[§ 610] Effect.

Unless a trial de novo is requested (infra, §614) or the award is vacated (infra, §612), "the award shall be entered in the judgment book in the amount of the award." (*C.C.P. 1141.23*.) This is done 30 days after the award is filed. (C.R.C., Rule 3.827(a).) (See C.E.B., Effective Use of ADR, §11.47.)

The award then has the "same force and effect as a judgment in any civil action or proceeding," except that it is not appealable (infra, §611) and may not be "attacked or set aside" except as provided by *C.C.P. 473* or *C.C.P. 1286.2* or by Judicial Council Rule (infra, §612). (*C.C.P. 1141.23*; C.R.C., Rule 3.827(c).) The judgment so entered may be enforced as if it has been rendered by the court in which it is entered. (C.R.C., Rule 3.827(c).)

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e. Appealability.

6 *Witkin Cal. Proc. PWT* § 611

[§ 611] Appealability.

(1) *Arbitration Award*. An arbitration award entered as a judgment "is not subject to appeal." (*C.C.P. 1141.23*; *C.R.C.*, Rule 3.827(c).)

(2) *Prearbitration Rulings*. In *Supple v. Los Angeles* (1988) 201 C.A.3d 1004, 247 C.R. 554, plaintiff sued defendant city and two police officers for assault and battery and negligence, and then attempted to amend to state causes of action for deprivation of constitutional rights. The trial court sustained a demurrer without leave to amend to these causes on the ground that the statute of limitations had run. Plaintiff then elected arbitration, and the arbitrator made a \$ 4,500 award in his favor. Plaintiff did not request a trial de novo, the award became final, and judgment was entered. Plaintiff then appealed from that part of the judgment in favor of defendants, asserting error in the order sustaining the demurrer. *Held*, appeal dismissed.

(a) Plaintiff contended that the judgment necessarily included not only the arbitration award but also any prior interlocutory order that could affect that judgment, and that the portion of the judgment including the order was appealable even if the final award was not. "The thrust of his position is that he wants ... the award in the sum of \$ 4,500, and ... judicial resolution of the previously stricken causes of action for alleged civil rights violations." (201 C.A.3d 1011.)

(b) Plaintiff's position is untenable. "In a judicial proceeding, interlocutory judicial orders which can affect the final judgment are reviewable on appeal from such final judgment. In arbitration proceedings, however, a final arbitration award which has been entered as a judgment is not subject to appeal; therefore, such previous interlocutory judicial orders are not reviewable on appeal from the judgment." (201 C.A.3d 1011.)

(c) The effect of plaintiff's election was to substitute the arbitration procedure for his civil action, and he was not deprived of any procedural or substantive right by that election. If he wished to have the trial court's interlocutory order reviewed by an appellate court, he could have petitioned for an extraordinary writ. Alternatively, he could have requested a de novo trial, which would nullify the arbitration award and resurrect the judicial proceeding; thereafter he could attack the interlocutory order on appeal from the resulting judgment. He did neither, and the order was not

reviewable on appeal from the award entered as a judgment. (201 C.A.3d 1012.)

In *Jennings v. Marralle* (1994) 8 C.4th 121, 32 C.R.2d 275, 876 P.2d 1074, the California Supreme Court disapproved *Supple* on the following reasoning. "The statutory scheme for judicial arbitration provides that a party who is dissatisfied with an arbitration award may elect a trial de novo by court or jury. ... It is the availability of this remedy that justifies and explains the prohibition of appeal from judicial arbitration awards. This remedy does not affect pre-arbitration judicial rulings foreclosing claims that were not submitted to arbitration, however. Those rulings are reviewable only by appeal from the judgment. If the submission of some, but less than all, of the claims in a civil action foreclosed appellate review of pre-arbitration rulings on the remaining claims, there would be a substantial disincentive to judicial arbitration. This could be inconsistent with the legislative intent that arbitration be encouraged." (8 C.4th 128.)

(a) "To avoid this disincentive, and thus to encourage parties to stipulate to judicial arbitration, we conclude that a judgment on an arbitration award is appealable as to pre-arbitration judicial rulings on claims not submitted to arbitration which are independent of the arbitrated claim." (8 C.4th 129.)

(b) This conclusion is consistent with C.C.P. 1141.23. Under that provision, it is the arbitration award itself that is "not subject to appeal." The judgment incorporating the award is appealable (C.C.P. 904.1(a)(1)), "and brings before the appellate court for review all intermediate judicial rulings on independent claims that were not submitted to arbitration." (8 C.4th 129.)

(3) *Postarbitration Orders*. A cost award based on a rejected compromise offer under C.C.P. 998 and C.C. 3291 (supra, §110 et seq.; 6 *Summary* (10th), *Torts*, §1646 et seq.) is appealable, because the award can only be made after judgment and hence may not be made by the arbitrator. (*Wagy v. Brown* (1994) 24 C.A.4th 1, 10, 29 C.R.2d 48 [trial court's order striking plaintiff's cost request was appealable].) (See *Kelley v. Bredelis* (1996) 45 C.A.4th 1819, 53 C.R.2d 536, *infra*, §620 [trial judge's order setting amount of attorneys' fees awarded by arbitrator was appealable where arbitrator's award did not determine amount of fees; there could be no request for trial de novo under Arbitration Act as to those fees because trial judge determined their amount in first instance, and thus order awarding fees must be appealable because otherwise there would be no opportunity for appellate review].)

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XIV. ALTERNATIVE DISPUTE RESOLUTION

I. Judicial Arbitration.

8. Arbitration Award.

f. Vacation.

6 *Witkin Cal. Proc. PWT* § 612

[§ 612] Vacation.

(1) *Statement of Grounds.* Under *C.C.P. 1141.23*, a judicial arbitration award "may not be attacked or set aside except as provided by *C.C.P. 473*" (mistake, inadvertence, surprise, or excusable neglect), *C.C.P. 1286.2* (grounds to vacate contractual arbitration award), or Judicial Council Rule. *C.C.P. 1141.22* provides that Judicial Council Rules "shall specify the grounds upon which the arbitrator or the court, or both, may correct, modify or vacate an award." Under *C.R.C.*, Rule 3.828(a), "a party against whom a judgment is entered under an arbitration award may move to vacate the judgment on the ground that the arbitrator was subject to a disqualification not disclosed before the hearing and of which the arbitrator was then aware, or upon one of the grounds set forth" in *C.C.P. 473* or *1286.2(a)(1)*, (a)(2), and (a)(3), "and on no other grounds." (See *Pierson v. Honda* (1987) 194 C.A.3d 1411, 1415, 240 C.R. 148 [court lacked jurisdiction to modify final arbitration award to reflect setoff for previously settled claim, in absence of motion to vacate judgment on grounds specified in *C.C.P. 473*, *C.C.P. 1286.2*, or former *C.R.C.*, Rule 1615(d) (now *C.R.C.*, Rule 3.828(a))].)

(2) *Incorporated Grounds for C.C.P. 1286.2 Motion.* *C.R.C.*, Rule 3.828(a), by referring to the provisions in *C.C.P. 1286.2*, incorporates only the following three of the statutes grounds for vacating contractual arbitration awards (*supra*, §569 et seq.):

(a) The award was procured by corruption, fraud, or other undue means. (*C.C.P. 1286.2(a)(1)*.)

(b) There was corruption in any of the arbitrators. (*C.C.P. 1286.2(a)(2)*.)

(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. (*C.C.P. 1286.2(a)(3)*.)

However, *C.C.P. 1141.23* refers generally to *C.C.P. 1286.2*, thus incorporating the following additional grounds:

(a) The arbitrator exceeded his or her powers. (*C.C.P. 1286.2(a)(4)*.)

(b) The rights of the party were substantially prejudiced by refusal of postponement, refusal to hear evidence, or

other improper conduct. (*C.C.P. 1286.2(a)(5).*)

(c) The arbitrator, when subject to disqualification, failed to disqualify himself or herself on timely demand. (*C.C.P. 1286.2(a)(6).*) (See C.E.B., *Effective Use of ADR*, §11.54; 63 *A.L.R.5th* 675 [vacating award in insurance appraisal or arbitration on ground of arbitrator's interest or bias]; 64 *A.L.R.5th* 475 [vacating award in tort arbitration on ground of arbitrator's interest or bias]; 66 *A.L.R.5th* 611 [vacating award in labor dispute arbitration on ground of arbitrator's interest or bias]; 67 *A.L.R.5th* 179 [vacating award in commercial, business, or real estate transaction arbitration on ground of arbitrator's interest of bias].) (On violation of ethics standard as providing ground for vacation under certain circumstances, see Comment to Standard 1, *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, *supra*, §558.)

(3) *Incorporated Grounds for C.C.P. 473 Motion.* Both *C.C.P. 1141.23* and C.R.C., Rule 3.828(a) specifically incorporate the grounds of mistake, inadvertence, surprise, or excusable neglect under *C.C.P. 473*. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.)

(4) *Procedure.* The procedure for a motion to vacate the award is as follows:

(a) The motion must be made within 6 months after the judgment is entered. (C.R.C., Rule 3.828(a).)

(b) Notice must be given to the adverse parties and to the arbitrator. (C.R.C., Rule 3.828(b).)

(c) The motion may be granted only "upon clear and convincing evidence that the grounds alleged are true, and that the motion was made as soon as practicable after the moving party learned of the existence of those grounds." (C.R.C., Rule 3.828(b).)

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8. Arbitration Award.

g. Res Judicata and Collateral Estoppel.

6 *Witkin Cal. Proc. PWT* § 613

[§ 613] Res Judicata and Collateral Estoppel.

A final judicial arbitration award, if clear and unambiguous, is *res judicata* in any subsequent proceeding on the same cause of action. On the other hand, it is not *res judicata* when the later proceeding involves a distinct cause of action. (*Flynn v. Gorton* (1989) 207 C.A.3d 1550, 255 C.R. 768.) There is some conflict whether an arbitrator's determination of an issue may lead to collateral estoppel in subsequent litigation. (Cf. *Flynn v. Gorton*, *supra* [no collateral estoppel effect from judicial arbitration] with *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1989) 211 C.A.3d 5, 259 C.R. 50 [collateral estoppel applicable under particular facts].) (On *res judicata* and collateral estoppel generally, see 7 *Cal. Proc.* (5th), *Judgment*, §334 et seq.)

In *Flynn v. Gorton*, F and G were involved in an automobile collision, in which G and her passenger B were injured. The accident gave rise to two complicated legal actions: (1) In the first action, G sued F, alleging that his negligence caused the collision. G then elected judicial arbitration, agreeing that any award would not exceed \$ 25,000, and received an award of \$ 20,281.08, which F satisfied. (2) In the second action, B sued F and G, alleging that both were negligent. F cross-complained against G for implied indemnity, seeking a determination of each party's comparative negligence and an apportionment of damages. G demurred, contending that the cross-complaint presented the same claim as that finally determined by the judicial arbitration award. *Held*, the award was neither *res judicata* nor a collateral estoppel.

(a) *Not res judicata*. If F's indemnity action had involved the same cause of action as G's arbitrated claim, it would have been barred. However, G's negligence claim was based on her primary right to recover for personal injury, while F claimed equitable indemnity against third-party damages. (207 C.A.3d 1555.)

(b) *No collateral estoppel*. It would be unfair and unwise to give collateral estoppel effect to judicially arbitrated resolutions of issues, for the following reasons:

(1) No record is made of arbitration proceedings, and generally no findings of fact or conclusions of law are required. Thus, it is difficult to determine from the award alone what issues were litigated. (207 C.A.3d 1556.)

(2) It is unfair to bind parties to judicially arbitrated resolutions of issues. The low monetary amount in controversy and the option of trial de novo can leave parties without a serious incentive to litigate, and they may be willing to accept a compromise position. (207 C.A.3d 1556.)

(3) It is unlikely that parties would expect a judicial arbitration award to have collateral estoppel effect in other proceedings where the stakes may be higher. If they did, the result might be intensified litigation, delays and costs, and an increased rate of de novo election. "Such a development would be directly contrary to the purposes underlying judicial arbitration legislation." (207 C.A.3d 1556.)

In *State Farm Mut. Auto. Ins. Co. v. Superior Court*, the court disagreed with the *Flynn* collateral estoppel proposition, holding that the collateral estoppel doctrine applied to judgments based on judicial arbitration awards, as in the case of other judgments. Thus, a judicial arbitration award determining an insured's liability in a personal injury action would be given collateral estoppel effect in a subsequent bad faith action against the insurer: "Here, the *only* issue with which we are concerned is whether State Farm's insureds had *any* liability to the claimant seeking to prosecute the bad faith action. That issue was *actually, necessarily and finally* resolved in plaintiffs' favor by the judgment arising from the arbitration award. Clearly, without such a finding of liability, there could be no basis for the arbitrator's award. This was a final resolution of the issue of their insureds' liability and therefore State Farm would be collaterally estopped by such judgment from relitigating that issue in the bad faith action." (211 C.A.3d 14.)

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9. Trial De Novo After Arbitration.

a. Right to Trial.

1. In General.

6 *Witkin Cal. Proc. PWT* § 614

[§ 614] In General.

Any party to judicial arbitration "may elect to have a de novo trial, by court or jury, both as to law and facts." (*C.C.P. 1141.20(b)*; see *Robinson v. Superior Court* (1984) 158 C.A.3d 98, 102, 204 C.R. 366, *infra*, §615; *Merritt v. Marks* (1985) 175 C.A.3d 825, 827, 828, 221 C.R. 88 [motion for trial de novo must be granted even though moving party failed to appear at arbitration hearing; motion before arbitrator to set aside default is not required]; C.E.B., *Effective Use of ADR*, §11.49 et seq.; Rutter Group, *Alternative Dispute Resolution* §4:149 et seq.; Rutter Group, 3 *Civil Proc. Before Trial* §13:143 et seq.; Cal. Civil Practice, 3 *Procedure* §§26:43, 26:44; Judicial Council Form No. ADR-102 [Request for Trial De Novo After Judicial Arbitration].)

The right granted is unconditional, and a rule imposing a procedural restriction that impairs the right is invalid. Thus, in *Hebert v. Harn* (1982) 133 C.A.3d 465, 184 C.R. 83, plaintiff sued for damages arising out of an automobile accident, and the matter was set for compulsory arbitration. Defendant declined to appear at the hearing and the arbitrator made an award in favor of plaintiff. Defendant promptly requested a trial de novo. Then, after being advised that an Orange County local rule required a noticed motion from a party who did not appear at the hearing, defendant filed such a motion, but the trial judge denied it for lack of a showing of "good cause." *Held*, reversed; the local rule was in violation of the statute.

(a) In enacting the judicial arbitration statutes, the Legislature, to comply with the constitutional right to jury trial, authorized an unconditional request for a trial de novo. A similar right to trial de novo is set forth in the statutes governing small claims court proceedings; but it is there provided that a defaulting defendant must first move to vacate the judgment and appear at the hearing. (133 C.A.3d 469, 470.)

(b) There are no such procedural prerequisites imposed on a defaulting defendant in a judicial arbitration proceeding, and the omission is significant. It reflects the intent of the Legislature that access to the court for a new trial following a judicially ordered arbitration should be procedurally unfettered. "Although we might view the local rule as salutary, it is beyond the scope of the present legislation. Presumably, if the Legislature determines that the administration of the judicial arbitration statute can be improved by imposing conditions similar to those now required

by Orange County, it will amend the statute or delegate to superior courts the right to make such amendments." (133 C.A.3d 470.)

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9. Trial De Novo After Arbitration.

a. Right to Trial.

2. Waiver by Plaintiff Electing Arbitration and Receiving Maximum Award.

6 *Witkin Cal. Proc. PWT* § 615

[§ 615] Waiver by Plaintiff Electing Arbitration and Receiving Maximum Award.

The general rule that every party to a judicial arbitration has an unconditional right to request a trial de novo (supra, §614) does not apply to a plaintiff who unilaterally elects to arbitrate (supra, §585) and receives the maximum award. In *Robinson v. Superior Court* (1984) 158 C.A.3d 98, 204 C.R. 366, three minors--Williams, R, and W--filed a complaint for damages for personal injuries sustained when they were hit by a car driven by defendant Robinson. They filed elections to arbitrate by agreeing to the amount in controversy limit specified in *C.C.P. 1141.11* (then \$ 25,000). However, before the hearing, Williams' counsel advised defense counsel and the arbitrator that his client's injuries were much more extensive than originally anticipated, that her damages would exceed the limit, and that he would request a trial de novo for his client regardless of the outcome of the arbitration. He then asked the arbitrator to indicate in the award the amount of damages he believed Williams had suffered. Defense counsel did not object to either request. The arbitrator found that R and W had suffered damages in the amounts of \$ 1,000 and \$ 5,000 respectively, and awarded those sums to them; he found that Williams had suffered damages in the amount of \$ 150,000, but awarded her \$ 25,000. Williams' counsel requested a trial de novo and defense counsel moved to confirm the \$ 25,000 award. The trial judge denied the motion to confirm and defendant sought mandamus. *Held*, writ denied.

(a) *C.C.P. 1141.20* imposes only one condition on the right to a trial de novo--timely request (infra, §616). However, the statute must be construed with other provisions to carry out the legislative purpose. (158 C.A.3d 102, 103.)

(b) There are three ways in which a case may proceed to arbitration: (1) voluntary arbitration, through stipulation by the parties; (2) compulsory arbitration, i.e., court imposed arbitration when the judge determines that the amount will not exceed the amount in controversy limit specified in *C.C.P. 1141.11* (here \$ 25,000); and (3) hybrid arbitration, i.e., election by the plaintiff forcing the defendant into arbitration where the plaintiff agrees to limit the award to the amount in controversy limit. (158 C.A.3d 103.) The rules governing the hearing and its effect depend on which form of arbitration is involved; the question here is whether the form of arbitration also affects the seemingly absolute right to a trial *de novo*. (158 C.A.3d 103.)

(c) *C.C.P. 1141.16(b)* provides that the determination of the amount in controversy shall be without prejudice at the hearing or at a subsequent trial de novo when the arbitration is compulsory or by stipulation but there is no corresponding provision for the hybrid (election) form. *C.C.P. 1141.26* also distinguishes the compulsory from the hybrid form by allowing the arbitrator to make an award in excess of the limit only in compulsory cases. (*158 C.A.3d 104.*) Thus, the legislative intent appears to be to vary the rules depending on which form of arbitration is involved, and ordinarily, a plaintiff who elects arbitration cannot demand a trial de novo after an award of the limit. (*158 C.A.3d 102, 104.*)

(d) *Hebert v. Harn* (1982) 133 C.A.3d 465, 469, 184 C.R. 83, supra, §614, cited by plaintiff, merely holds that no procedural restrictions may be imposed on the right to a de novo trial, and in any event, the case is distinguishable and not controlling: (1) *Hebert* involved compulsory arbitration, as a result of which both the plaintiff and defendant were forced into the arbitral forum; here, plaintiff's unilateral election forced the defendant into the arbitral forum. (2) In *Hebert*, the defendant, forced into arbitration, was requesting a de novo trial; here plaintiff, having sought arbitration, is now seeking the judicial forum. (*158 C.A.3d 105.*)

(e) *Genovia v. Cassidy* (1983) 145 C.A.3d 452, 456, 457, 193 C.R. 454 (affirming dismissal as a sanction for attempted circumvention of arbitration), cited by defendant, is likewise not controlling, for the record here does not show that Williams was trying to avoid the arbitration process in bad faith. Her counsel, on discovery of extensive damages, sought to avoid the \$ 25,000 limit rather than the arbitral process; i.e., his request to the arbitrator to state a damage figure in excess of the limit may have been an attempt to determine the value of the case for settlement purposes. (*158 C.A.3d 106.*) However, one of the reasons given in the *Genovia* opinion--unfairness to the defendant--may apply here. "Unfairness is manifest when a plaintiff forces a defendant into the arbitral forum where the defendant's potential liability is limited, and later after receiving the maximum award, forces the defendant into the judicial forum where liability is potentially unlimited. We believe a limitation on the right to trial de novo in that situation is warranted to protect the defendant from, in effect, defending two actions instead of one. Moreover, in most situations no unfairness will flow to the plaintiff by imposing this limitation. Usually a plaintiff is aware of the total amount of her damages by the time she files her election to arbitrate. By filing such an election she agrees to limit her recovery in exchange for prompt and inexpensive resolution of the dispute. When the maximum amount is awarded she has received everything she asked for according to her own election to arbitrate." (*158 C.A.3d 106.*)

(f) The legislative objectives would be frustrated by allowing the claimed unlimited right to obtain a trial de novo: "If a plaintiff can obtain arbitration by agreeing to a maximum award and then obtain a court trial even if she receives that maximum, both of the legislative goals are frustrated. First, the arbitration has caused a delay in resolving the controversy rather than resolving the controversy more efficiently. This is obvious since the parties will submit the dispute to two forums instead of only one. Likewise resolution of the dispute becomes more expensive instead of more economical. The parties must pay costs incident to two proceedings instead of only one. Moreover, the defendant's payment of the costs for arbitration amount to throwing money down the drain. He has nothing to gain from arbitration if regardless of the outcome he will have to pay for defending in court anyway." (*158 C.A.3d 107.*)

(g) Plaintiff's counsel, on discovery of the extensive damages, should have moved to withdraw from arbitration before the hearing was held. Although there is no express statutory provision or rule on withdrawal from an election to arbitrate, former C.R.C., Rule 1600.5(f) (now C.R.C., Rule 3.811(b); supra, §583), exempting a case that the former trial judge determines is not amenable to arbitration, implies the authority to remove the case where damages exceed the jurisdictional limit; and *Invicta Plastics, U.S.A., Ltd. v. Superior Court* (1981) 120 C.A.3d 190, 193, 174 C.R. 476, provides authority for this practice. (*158 C.A.3d 106*, footnote 12, 108.)

(h) In view of the unique circumstances (involving the interest of a minor), the case should be remanded to the trial court "to determine, in its discretion, whether Williams should be excused from failing to make that motion." (*158 C.A.3d 108.*)

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9. Trial De Novo After Arbitration.

b. Request for Trial.

1. Time for Request.

6 *Witkin Cal. Proc. PWT* § 616

[§ 616] Time for Request.

(1) *Request Is Required Within 30 Days After Award Is Filed.* "An arbitration award shall be final unless a request for a de novo trial is filed within 30 days after the date the arbitrator files the award with the court." (*C.C.P. 1141.20(a)*.) (See *C.R.C.*, Rule 3.826(a) [to same effect]; *C.E.B.*, Effective Use of ADR, §11.49; Rutter Group, Alternative Dispute Resolution, §4:153.) (On attempt to withdraw request after 30-day period has run, see *infra*, §621.)

The period "may not be extended." (*C.R.C.*, Rule 3.826(a).) Hence *C.C.P. 1013*, extending time where the service of a document is by mail (*supra*, §30), is not applicable. (*Amoroso v. Superior Court* (1979) 89 *C.A.3d* 240, 241, 242, 152 *C.R.* 398; see *Karamzai v. Digitcom* (1996) 51 *C.A.4th* 547, 551, 59 *C.R.2d* 139 [no statutory provision authorizes court to shorten time within which party may request de novo trial].)

Although *C.R.C.*, Rule 3.826 does not mention service of the award as triggering the 30-day period for filing a request for a trial de novo, the 30-day period does not properly begin to run until a party has actual notice of the award. In *Domingo v. Los Angeles County Metropolitan Trans. Authority* (1999) 74 *C.A.4th* 550, 88 *C.R.2d* 224, the arbitrator mailed defendant's copy of the award to the wrong address twice. When defendant's attorney finally received the award, he filed for a trial de novo 4 days later. However, the trial judge received the request 1 day beyond the 30-day period and denied the request. *Held*, reversed. Several reasons support requiring actual notice before the 30-day period begins. First, it harmonizes former *C.R.C.*, Rule 1616 (now *C.R.C.*, Rule 3.826) with former *C.R.C.*, Rule 1615 (now *C.R.C.*, Rule 3.825; *supra*, §609), which requires the arbitrator to file the award with proof of service on each party. Second, long-standing notions of due process prohibit adverse action against a party without notice. Third, social and judicial efficiency would be served. Parties ought to be able to rely on the arbitrator's discharge of duty to serve the award as required by the Rules of Court; otherwise, the parties would need to repeatedly examine the court files to protect themselves from expiration of the period, an exercise that would be needlessly burdensome to the court clerk and unnecessarily costly to the parties. (74 *C.A.4th* 554.)

(2) *Request Before Award Is Filed.* A request for trial filed after the parties are served with a copy of the award, but before the award is filed with the clerk, is valid and timely filed. (*C.R.C.*, Rule 3.826(a).)

(3) *Effect of Holding Award Outside Court File.* In *Mentzer v. Hardoin* (1994) 28 C.A.4th 1365, 34 C.R.2d 214, an arbitration award in plaintiff's favor was promptly served, and 4 days later was date stamped by the court clerk. However, the superior court had adopted the practice of holding arbitration awards outside the court file until the expiration of the time to request trial de novo, in order to comply with the mandate of *Weber v. Kessler* (1981) 126 C.A.3d 1033, 1036, 179 C.R. 299, *infra*, §625, barring consideration of the arbitrator's findings in a subsequent trial. Accordingly, plaintiff's award was not file stamped until 30 days later. Defendant filed a request for trial de novo 28 days after the first date stamped and 2 days before the date of the file stamp. The trial court granted plaintiff's motion to strike the request for trial de novo as untimely because it was filed more than 30 days after the award was served on the parties. *Held*, reversed with directions to return the case to the civil active list.

(a) Under C.C.P. 1141.20(a) and former C.R.C., Rule 1616(a) (now C.R.C., Rule 3.826(a)) a request for trial de novo is timely if filed within 30 days of the filing of the award. (28 C.A.4th 1369.) Defendant's request was therefore timely regardless of which date the award was "filed" in this case; although the request was filed 2 days before the second date, former C.R.C., Rule 1616(a) expressly provides that a request filed after the award is served but before it is filed is deemed timely. (28 C.A.4th 1371.)

(b) The practice of holding awards outside the file is "invalid, unwise, and unnecessary." The date the award is filed is critical in the judicial arbitration process. (28 C.A.4th 1371.) Holding the award outside the file is inconsistent with the filing requirements of Govt.C. 69846.5, and contributes to the confusion over the filing date of the award that was created in this case. (28 C.A.4th 1371.) Furthermore, *Weber* does not require such a practice; a jury can easily be insulated from knowing of a prior arbitration award, and a judge sitting as trier of fact can be expected to disregard such an award as required by law. (28 C.A.4th 1371, 1372.)

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b. Request for Trial.

2. Form of Request.

6 *Witkin Cal. Proc. PWT* § 617

[§ 617] Form of Request.

No form is prescribed for the request for trial de novo, and *substantial compliance* will be sufficient. (*Hanf v. Sunnyview Dev.* (1982) 128 C.A.3d 909, 180 C.R. 718; *Fox Industrial Realty v. Dio Dix* (1982) 136 C.A.3d 787, 186 C.R. 449.) (See Judicial Council Form No. ADR-102 [Request for Trial De Novo After Judicial Arbitration].)

In *Hanf v. Sunnyview Dev.*, defendants filed a "Rejection of Arbitrator's Award" declaring that they "hereby reject the Arbitrator's Award made herein." This document was filed within the then time period of 20 days; after the period had expired, they filed another document entitled "Trial De Novo," declaring that they "having previously rejected the arbitrator's award herein, hereby request that this Court set the matter for trial De Novo." The trial judge entered judgment on the award. *Held*, reversed.

(a) Neither the statute nor the rules deal with the question of substantial compliance, but analogous holdings in other areas of the law support its application here. (128 C.A.3d 913, 914, listing many examples including decisions on claims filed under the Tort Claims Act and claims against estates of decedents, as well as former C.R.C., Rule 1(a) (now C.R.C., Rule 8.100) on the form of notice of appeal.)

(b) The legislative object--to provide a "simplified and economical" resolution of disputes--"is served by a combined form of notice which, in substance, promptly and adequately informs both the court and any adverse party of the intent to elect a trial de novo." (128 C.A.3d 916.)

(c) Substantial compliance "means *actual* compliance in respect to the substance essential to every reasonable objective of the statute," as distinguished from imperfections of form. And here the "Rejection" document sufficiently alerted both the trial court and plaintiffs of defendants' election to take the case to trial. (128 C.A.3d 916.)

In *Fox Industrial Realty v. Dio Dix*, *supra*, plaintiff brought an action to recover a \$ 15,000 commission on the sale of defendant's business. The matter was assigned to compulsory arbitration and the arbitrator made an award to plaintiff of the full amount sought. Defendant wanted a trial de novo but was unfamiliar with the procedure and, relying on a

clerk's advice, filled out the form of an at-issue memorandum (see 7 *Cal. Proc.* (5th), *Trial*, §40) with a reference to former C.R.C., Rule 1616 (on request for trial de novo; now C.R.C., Rule 3.826). *Held*, the filing of this paper was a substantial compliance with the requirement of "request for trial." The at-issue memorandum form is designed to inform the court, with notice to opposing parties, that the moving party wishes to have his case placed on the civil list for trial; and defendant also informed the court and opposing counsel that former Rule 1616 was the reason underlying the request. "It seems clear to us that the at-issue memorandum was intended to be a request for trial de novo and rejection of the arbitrator's award, and that it achieved its purpose." (136 *C.A.3d* 792.)

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3. Filing and Service.

6 *Witkin Cal. Proc. PWT* § 618

[§ 618] Filing and Service.

The request for trial de novo must be filed with the clerk, with proof of service of a copy on all other parties appearing in the case. (C.R.C., Rule 3.826(a); see *Dobrick v. Hathaway* (1984) 160 C.A.3d 913, 922, 923, 207 C.R. 50 [evidence was insufficient to support finding that request was properly served; no averment of address to which notice was mailed and no proof of service filed].)

The service requirement is not jurisdictional. The only purpose of service of the request is to notify opposing parties that they may not rely on the arbitration award. Accordingly, if the opposing parties are shown to have had actual notice of the request within the statutory period and to have suffered no prejudice from the omission of service, the defect may be disregarded. (*Lum v. Mission Inn Foundation* (1986) 180 C.A.3d 967, 970, 971, 226 C.R. 22 [abuse of discretion to dismiss for failure to serve and to attach proof of service to request for trial de novo].)

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4. Request by One of Several Coparties.

6 *Witkin Cal. Proc. PWT* § 619

[§ 619] Request by One of Several Coparties.

While *C.C.P. 1141.20* authorizes "any party" to elect to have a trial de novo (*supra*, §614), it does not address a request by one of several coparties. Thus, disagreement exists on the effect of a request for a trial de novo by one of several coparties. One court has held that the court may require a trial of the entire action if the various claims are interrelated so that the award as to one party may have affected the outcome as to others. (See *Trump v. Superior Court* (1981) 118 C.A.3d 411, 173 C.R. 403.) On the other hand, it has been held that if the several claims are separate and independent, the court may permit the award to stand as to the coparties not electing de novo trial and conduct a trial only on the claim of the person challenging the award. (See *Demirgian v. Superior Court* (1986) 187 C.A.3d 372, 231 C.R. 698.) A third case finds no authority to permit entry of judgment in any instance in which a trial de novo is requested. (See *Lewco Iron Metals v. Superior Court* (1999) 76 C.A.4th 837, 90 C.R.2d 671.)

In *Trump v. Superior Court*, plaintiff brought an action against defendants T and C for breach of contract and fraud, and T filed a compulsory cross-complaint for breach of contract. The arbitrator awarded plaintiff \$ 13,500 general damages plus \$ 8,000 punitive damages against C, and awarded T \$ 7,500 on the cross-complaint. On the day before the end of the then 20-day period, C filed a request for trial de novo as to himself only. Two days later, plaintiff filed her request for trial de novo, which was denied as untimely; she then moved for an order setting aside C's request and confirming the arbitration award. The trial judge denied this motion and ordered the trial to proceed "as to all parties and all issues." T then sought prohibition to prevent trial except as limited to the issues presented by plaintiff's action against C. *Held*, writ denied.

(a) The statutes do not contemplate the division of an award as sought by T; if a trial de novo is requested, the case is tried as though no arbitration proceedings had occurred. (118 C.A.3d 415.)

(b) Although plaintiff did not prevail against T, the arbitration award as a whole was favorable to plaintiff, and she was willing to abide by it. Plaintiff promptly sought trial on the remaining issues on receiving C's request, but due to its timing she was too late. To accept T's contention would force plaintiff to accept the adverse part of the award while denying her its favorable aspects. (118 C.A.3d 416.)

(c) Moreover, a partial trial would offer the opportunity for unfair advantage in a case in which multiple theories of liability are asserted and the arbitrator accepts some but rejects others. "By simply waiting until nearly the end of the filing period to file such a limited request, a party could effectively deprive the opposing party of trial upon issues which were determined adversely to him at the arbitration hearing." (118 C.A.3d 416.)

(d) The cross-complaints in this case arose out of the same transaction as plaintiff's cause of action and hence were compulsory (see 5 Cal. Proc. (5th), *Pleading*, §1177). "If plaintiff's claims against the various defendants were totally unrelated, both legally and factually, a better argument could be made in favor of a subsequent partial trial de novo. Here, however, where the claims emanate from a single integrated set of facts, and where resolution of a factual issue may affect several theories of liability, the resulting award is more appropriately treated as indivisible for purposes of subsequent trial." (118 C.A.3d 417.)

Trump was distinguished in *Demirgian v. Superior Court*, *supra*. Plaintiffs S and his mother V sued defendant L for damages for injuries arising out of an automobile collision. S settled with L, but later filed a supplemental complaint alleging a cause of action for L's breach of the settlement contract. Both causes of action were ordered to arbitration, and the arbitrator ruled in favor of both plaintiffs. Defendant L did not request a trial de novo on either count, but plaintiff V requested a trial on her personal injury award. Plaintiff S then moved for an order entering judgment on his breach of settlement contract award, defendant L opposed, and the trial court denied the motion. *Held*, mandamus issued to compel granting S's motion.

(a) In *Trump* the claims and cross-claims were so interrelated that a disposition of one would affect the disposition of the others. Here, there was one defendant and no cross-complaints; and the claims of the two plaintiffs as to liability and damages were independent. Hence, defendant would not be penalized if S's award was converted into a judgment and V was given a trial *de novo*. (187 C.A.3d 377, 378.)

(b) Although the two plaintiffs were members of the same family, the two claims originated in the same automobile accident, and the claims were consolidated in a single proceeding, the claims remained distinct. "The same judge, jury, or arbitrator--or different judges, juries, or arbitrators--could have found petitioner's claim was valid but his mother's not, or vice versa. We believe to involuntarily require petitioner to retry his case, simply because a coparty requested a trial de novo, is inconsistent with the purpose of the arbitration act to provide parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes." (187 C.A.3d 377.) (See *Southern Pac. Trans. Co. v. Mendez Trucking* (1998) 66 C.A.4th 691, 694, 696, 78 C.R.2d 236 [one party's de novo trial request operates to vacate entire arbitration award, including award on factually and legally related cross-complaint; limited exception in *Demirgian* is applicable only when two or more arbitration awards from same arbitration "are based on facts and law wholly independent of each other"].)

Lewco Iron Metals v. Superior Court, *supra*, disagreed with *Demirgian* and found nothing in the governing statutes and court rules that would permit entry of judgment in any case in which a trial de novo is requested, "including cases involving 'unrelated' claims." (76 C.A.4th 842.) A father and son brought a combined action for wrongful death and personal injuries. Judicial arbitration awarded damages to each. Only the son requested a trial de novo, and judgment was entered for the father on his award. Defendants objected to entry of the judgment and moved to vacate based on the son's trial de novo request. The trial court denied the motion. *Held*, mandamus issued directing the trial court to vacate the judgment.

(a) C.C.P. 1143.23 and former C.R.C., Rule 1615(c) (now C.R.C., Rule 3.827(a); *supra*, §610) plainly state that judgment may be entered if there is no trial de novo request. Neither provision states or implies that judgment may be entered despite a trial de novo request if the request comes from a party whose claim is not related to the claim on which judgment is sought. Moreover, former C.R.C., 1616(b) (now C.R.C., Rule 3.826(b); *infra*, §622) requires the case to be restored to the civil active list for prompt disposition. There are no provisions for partial trial *de novo*. (76 C.A.4th 842.)

(b) *Demirgian* concluded that the purposes underlying judicial arbitration would be better served by allowing entry of judgment on claims that are unrelated to the claims on which a trial de novo is requested. However, the Legislature seems to have concluded that the benefit of permitting entry of judgment in these circumstances is outweighed by the concern expressed in *Trump*. *Trump* warned that allowing a partial trial de novo would force a party who was satisfied with the award to seek a trial de novo anyway to protect against an adverse party's last-minute partial trial de novo request, which would eradicate the favorable aspects of the award and leave the unfavorable aspects to proceed to a nonappealable judgment. Thus, neither the *Demirgian* exception nor any other exception that would permit entry of judgment despite a trial de novo request can be reconciled with the plain terms of the governing statutes. (76 C.A.4th 844.)

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b. Request for Trial.

5. Subsequent Voluntary Dismissal.

6 *Witkin Cal. Proc. PWT* § 620

[§ 620] Subsequent Voluntary Dismissal.

A party to an arbitration award cannot deprive the opposing party of the rights granted under the judicial arbitration statute by requesting trial de novo and then voluntarily dismissing the action. In *Herbert Hawkins Realtors v. Milheiser* (1983) 140 C.A.3d 334, 338, 189 C.R. 450, plaintiff sued defendants for breach of contract, and defendants asserted defenses and claimed attorneys' fees and costs. The matter was referred to judicial arbitration, a hearing was held, and an award was filed in favor of defendants with \$ 1,043 in costs (including attorneys' fees). Plaintiff made a timely request for trial de novo and the case was restored to the civil active list; then plaintiff had a voluntary dismissal without prejudice entered by the clerk under former C.C.P. 581(1) (now C.C.P. 581(b); supra, §283). A local rule provided that a request for trial de novo could not be withdrawn except by a written agreement of counsel for all parties authorizing entry of a nonappealable judgment on the arbitration award. Defendants moved for an order of dismissal with prejudice, and the trial judge denied the motion on the theory that plaintiff had not sought withdrawal under the local rule, but had moved for dismissal under the statute. *Held*, reversed, with directions to vacate plaintiff's dismissal and enter the award as a judgment.

(a) Plaintiff relied on the statutory absolute right to voluntarily dismiss without prejudice before actual commencement of a trial. However, all provisions of the Code of Civil Procedure must be construed to effect their objects and promote justice, potentially conflicting provisions should be reconciled, and the construction should be one that carries out the legislative policy of the judicial arbitration statutes. (140 C.A.3d 338.)

(b) To permit plaintiff to voluntarily dismiss without prejudice would defeat the express legislative purpose of expediting and removing complexities from the judicial process relating to small civil claims, and would produce "absurd consequences" and promote "mischievous lawyering." (140 C.A.3d 339.) No party has the right to avoid an award at his whim. The party requesting a trial de novo may either proceed with that trial or allow the award to be entered as a judgment. "When parties withdraw requests for a trial de novo or voluntarily dismiss their complaints, they repudiate their previous election for a trial de novo. This factually restores the repudiating parties to their legal positions before electing the trial de novo, and triggers award finalization under section 1141.20. Accordingly, we hold a party is not entitled to a voluntary dismissal without prejudice within the judicial arbitration setting merely to avoid an

unfavorable arbitration award." (140 C.A.3d 340.) (See *Corell v. Law Firm of Fox & Fox* (2005) 129 C.A.4th 531, 28 C.R.3d 310, 1 Cal. Proc. (5th), Attorneys, §231 [attorney's dismissal of trial de novo following mandatory fee arbitration award amounted to retraction of trial de novo request and rendered prior award final and binding; applying *Herbert Hawkins Realtors*].)

Kelley v. Bredelis (1996) 45 C.A.4th 1819, 53 C.R.2d 536, applied the voluntary dismissal rule of *Herbert Hawkins Realtors* to a voluntary dismissal *with* prejudice. Regardless of the type of dismissal, without prejudice (as in *Herbert Hawkins Realtors*) or with prejudice (as here), there is no reason that a dissatisfied party should be able to render the entire arbitration proceeding a judicial nullity by the simple procedural tactic of requesting a trial de novo and then dismissing that request. "To allow such absolute right merely because plaintiffs have entitled the dismissal as *with* prejudice results in an unreasonable reconciliation of the judicial arbitration and dismissal statutes." (45 C.A.4th 1827.)

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6. Subsequent Withdrawal of Request.

6 *Witkin Cal. Proc. PWT* § 621

[§ 621] Subsequent Withdrawal of Request.

A party to an arbitration award cannot deprive the opposing party of the rights granted under the judicial arbitration statute by requesting trial de novo and then withdrawing the request. In *Marracino v. Brandstetter* (1993) 14 C.A.4th 543, 17 C.R.2d 700, the plaintiffs obtained an award of \$ 53,112.96 plus costs on November 6, 1989. Defendant filed a request for trial de novo on November 14, 1989. In May 1990, defendant filed a document entitled "Withdrawal of Request for Trial de Novo and Stipulation to Judgment Based on Arbitrator's Award." Plaintiffs thereupon moved to have the award "corrected" to include a finding of fraud and for entry of judgment based on the award as modified, and defendant moved for entry of judgment based on the unmodified award. The trial judge denied both motions. A court trial then followed at which defendant did not appear, and plaintiffs were awarded \$ 327,433.83, including prejudgment interest, punitive damages, and court costs. Defendant appealed, contending that the judge erred in determining that he lacked discretion to set aside the request for a trial de novo after the 30-day period of C.C.P. 1141.20(a) and former C.R.C., Rule 1616(a) (now C.R.C., Rule 3.826(a)) had run. *Held*, judgment affirmed.

(a) Nothing in the statutory scheme or in the Judicial Council Rules gives the court the power to permit withdrawal of a request for trial de novo after the 30-day period has run; and the Contra Costa Superior Court has not enacted a local rule permitting such unilateral withdrawal. (14 C.A.4th 546.) The absence of any statute or rule is critical. Under C.C.P. 1141.20(a) and former C.R.C., Rule 1616(a), a judicial arbitration award becomes final only if *neither* party requests a trial de novo within the statutory period. "Thus, where one party timely requests trial de novo, an adverse party who is also dissatisfied with the arbitrator's award need take no action to preserve his or her right to trial following arbitration." (14 C.A.4th 547.)

(b) If the party who requested trial de novo is permitted to withdraw the request after the 30-day period has expired, may the adverse party then demand trial? The statutory scheme makes no provision for such an eventuality, and a trial demand at this time would seemingly be precluded by the statement in former C.R.C., Rule 1616(a) that the period "may not be extended." (14 C.A.4th 547.) "Thus, allowing the unilateral withdrawal of a request for trial de novo after the statutory period has run would, we believe, create an impermissible risk of denying those adverse parties who relied on the original request their right to trial following judicial arbitration." (14 C.A.4th 547.) In this case, "[w]hile we

cannot know to a certainty that plaintiffs *would* have demanded trial de novo within the statutory period had defendant not done so, such a request seems at least likely in light of plaintiffs' own unsuccessful motion to modify the award to include a finding of fraud and to have judgment on the award as modified." (14 C.A.4th 547.)

(c) "This is not to say procedures might not be established, by legislation or by rule, whereby a party could withdraw a request for trial de novo without injury to the adverse parties' due process rights. ... In the absence, however, of any such procedural safeguards to the right to trial following compulsory arbitration, we conclude the trial court correctly rejected defendant's unilateral attempt to withdraw his request for trial de novo." (14 C.A.4th 547.)

Marracino was criticized and an alternative approach suggested in *Calderon v. Kane* (1995) 36 C.A.4th 1663, 1667, 43 C.R.2d 480. The losing party in the arbitration withdrew her request for trial de novo, and the trial judge ordered that judgment be entered in accordance with the arbitration award previously rendered. *Held*, affirmed.

(a) The evident purpose underlying the *Marracino* holding is to prevent a nonfiling party from being penalized for having justifiably relied on the adverse party's trial de novo request. Unfortunately, it accomplishes this laudable purpose by automatically guaranteeing that a trial de novo be held, notwithstanding the fact that neither party may desire that the dispute be taken to a judicial forum. (36 C.A.4th 1667.)

(b) An approach that "safeguards the rights of all parties to a trial following compulsory arbitration, while at the same time, attempts minimal interference in the arbitration process" is possible. If a party dismisses a request for a trial de novo after the 30-day period has run, the court has discretion to vacate the dismissal and reinstate the arbitration award or, on a showing of prejudice by the nonfiling party, to vacate the dismissal and proceed with a trial de novo. "However, because the withdrawal of a request for trial de novo undoubtedly affects the rights of the adverse party, the preferable procedure is to seek such withdrawal by a noticed motion. The court should grant the motion if unopposed and enter judgment on the arbitrator's award. It should deny the motion if the adverse party demonstrates prejudice by having justifiably relied on the dismissing party's request for a trial de novo. Accordingly, the parties to the arbitration, and not the court, will make the ultimate decision whether the matter will be brought to trial." (36 C.A.4th 1668.)

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1. Calendaring.

6 *Witkin Cal. Proc. PWT* § 622

[§ 622] Calendaring.

The trial must be calendared, "insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration." If this is not possible, it "shall receive civil priority on the next setting calendar." (*C.C.P. 1141.20(b)*; see *C.E.B., Effective Use of ADR*, §11.49.)

The related Judicial Council Rule is worded somewhat differently. The rule provides that "[i]f a party makes a timely request for a trial, the case must proceed as provided under an applicable case management order." If there is no pending order for the case, the court must promptly schedule a case management conference.; (*C.R.C., Rule 3.826(b)*; see *Moran v. Superior Court (1983) 35 C.3d 229, 241*, footnote 10, *197 C.R. 546, 673 P.2d 216*, *supra*, §415 [*C.C.P. 1141.20(b)*], which governs, appears to require more than Judicial Council Rule, i.e., not only placement of case in preferred spot on civil active list, but also that trial be calendared in same position as before arbitration].)

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2. Discovery.

6 *Witkin Cal. Proc. PWT* § 623

[§ 623] Discovery.

(1) *Limitation on Discovery.* In cases ordered to arbitration pursuant to *C.C.P. 1141.11*, absent a stipulation to the contrary, no discovery other than that permitted by *C.C.P. 2034.010* et seq. is permissible after an arbitration award except by leave of court "upon a showing of good cause." (*C.C.P. 1141.24*.) Thus, the only discovery ordinarily permissible in these cases is an exchange of expert witness lists under *C.C.P. 2034.010* et seq. (see 2 *Cal. Evidence (4th)*, *Discovery*, §178 et seq.). (See *McMillan v. Superior Court* (1983) 146 *C.A.3d* 1014, 1018, 194 *C.R.* 670 [prohibition of postarbitration discovery applies only to compulsory (court-ordered) arbitration under *C.C.P. 1141.11*]; *C.E.B.*, *Effective Use of ADR*, §11.50.)

(2) *"Good Cause" for Discovery.* In *Regan v. Lanet* (1987) 197 *C.A.3d* 353, 243 *C.R.* 20, the court laid down guidelines for determining whether "good cause" is shown for postarbitration discovery: "(1) the necessity and reasons for the discovery; (2) the diligence of the party seeking discovery; (3) whether delay in the trial of the action will result; (4) whether the purposes of arbitration, namely prompt, equitable and efficient resolution of cases, is being served; (5) whether the party seeking discovery is also the party who requested trial de novo; and (6) prejudice and hardship to both parties." (197 *C.A.3d* 361.) Although here new counsel was substituted for defendant's former counsel, who conducted virtually no discovery, the court nevertheless upheld the trial court's order denying the motion; a concurring justice, agreeing with the statement of factors to be considered, argued that defendant's showing was sufficient. (197 *C.A.3d* 362.)

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3. No Reference to Arbitration.

6 *Witkin Cal. Proc. PWT* § 624

[§ 624] No Reference to Arbitration.

The case in the trial de novo "must be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial." (C.R.C., Rule 3.826(c).) (On confidentiality of arbitration hearing record, see C.R.C., Rule 3.824(b), *supra*, §595.)

In *Jimena v. Alesso* (1995) 36 C.A.4th 1028, 1030, 43 C.R.2d 18, involving an automobile accident, each side called an expert accident reconstructionist who verified its version of events. The trial judge ruled that one reconstructionist's inconsistent testimony in a prior judicial arbitration hearing was not admissible to impeach his testimony at the trial. *Held*, affirmed.

(a) The Judicial Council Rule provides that a witness' testimony from a judicial arbitration is not admissible to impeach his testimony at a subsequent trial de novo. Various Evidence Code provisions, on the other hand, collectively permit attacks on witness credibility by the use of prior inconsistent statements. The question is whether, because these Evidence Code provisions cannot be reconciled with the rule, the rule must give way to the statutes. (36 C.A.4th 1030.)

(b) The rule is a reflection of the Legislature's strong endorsement of the use of arbitration as an alternative to the court system. The courts honor the legislative intent to protect the integrity and finality of dispute resolution from unending litigation. Under C.C.P. 1141.14, the Judicial Council must provide by rule for practice and procedure in judicial arbitration, "[n]otwithstanding any other provision of law except the provisions of this chapter." The statute provides overarching authority for the adoption of those rules. Thus, the prohibitions of the rule against reference to the arbitration proceeding, and against the use of evidence given at the arbitration proceeding for any purpose at trial are clear, unequivocal, and comprehensive in furtherance of the goal that trial after judicial arbitration be truly *de novo*. (36 C.A.4th 1030.)

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4. Adoption of Arbitrator's Findings Is Improper.

6 *Witkin Cal. Proc. PWT* § 625

[§ 625] Adoption of Arbitrator's Findings Is Improper.

In *Weber v. Kessler* (1981) 126 C.A.3d 1033, 179 C.R. 299, plaintiff sued defendant for money due on a contract. The matter was assigned to arbitration, and the arbitrator made findings and an award in favor of plaintiff on all the issues. Defendant obtained a trial de novo, and after a 2-day trial, the judge decided it in favor of plaintiff, adopting the arbitrator's memorandum as his own findings of fact. *Held*, judgment reversed.

(a) Former C.R.C., Rule 1616(c) (now C.R.C., Rule 3.826(c)), to assure the party requesting a trial that he or she will be able to start with a "clean slate" and to prevent the trier of fact from being unduly influenced by the arbitrator's findings, requires that the case be tried "as though no arbitration proceedings had occurred," with no reference to the arbitration award or even to the fact that the arbitration took place. However, *C.C.P. 1141.21* (infra, §626 et seq.) provides that, if the party requesting the trial de novo does not obtain a more favorable judgment than the award, the party must reimburse the court for the arbitrator's compensation and pay the opposing party's trial costs. Hence, in order to comply with *C.C.P. 1141.21*, the judge must "refer" to the arbitrator's findings at some point prior to entry of judgment. (126 C.A.3d 1036.)

(b) This apparent conflict may be resolved by interpreting the prohibition of the rule as applicable to that portion of the proceeding during which the trier of fact hears the evidence and makes the decision on that evidence. "It is imperative in cases such as these that the trier of fact reach its decision independently and without any reference to the arbitrator's findings, and in order for a judgment to be upheld, such independent decision must be clearly shown by the record." (126 C.A.3d 1036.) "[T]he court's hasty adoption of the arbitrator's memorandum in this case suggests to us that it was the arbitrator's findings, and not the court's, which formed the basis for the decision in this case." (126 C.A.3d 1037.)

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d. Costs and Fees.

1. In General.

6 *Witkin Cal. Proc. PWT* § 626

[§ 626] In General.

(1) *Assessment of Costs and Fees Against Unsuccessful Requesting Party.* If the judgment in the trial de novo is not more favorable to the party requesting the trial, either in terms of the damages awarded or the type of relief granted, the court must order that party to pay specified costs and fees (*infra*, §629). (*C.C.P. 1141.21(a)(1)*; *C.R.C.*, Rule 3.826(d); see *Muega v. Menocal* (1996) 50 *C.A.4th* 868, 876, 57 *C.R.2d* 697 [award of costs was proper; plaintiffs' request for *partial* trial de novo against one defendant was ineffective because original claim against multiple defendants arose from single integrated set of facts].) However, there are three limitations on this requirement:

(a) No party electing a trial de novo is subject to *C.C.P. 1141.21* "if the judgment upon the trial de novo is in excess of the amount in controversy" specified in *C.C.P. 1141.11* (*supra*, §582). (*C.C.P. 1141.26*; see *C.E.B.*, *Effective Use of ADR*, §11.52.)

(b) When "the court finds in writing and upon motion that the imposition of these costs and fees would create such a substantial economic hardship as not to be in the interest of justice." (*C.C.P. 1141.21(a)(1)*.)

(c) If the party failing to obtain a more favorable judgment brought the action *in forma pauperis*, the costs and fees awarded the other parties "shall be imposed only as an offset against any damages awarded in favor of that party," and the arbitrator's compensation will be paid to the court "only to the extent that there remains a sufficient amount in the judgment after the amount offset ... has been deducted from the judgment." (*C.C.P. 1141.21(b)* and (c).)

(2) *Denial of Costs to Unsuccessful Requesting Party.* A party who elects a trial de novo and fails to obtain a more favorable judgment likewise cannot recover costs. (*C.C.P. 1141.21(a)(1)(B)*.) (See *Phelps v. Stostad* (1997) 16 *C.4th* 23, 65 *C.R.2d* 360, 939 *P.2d* 760, 2 *Summary* (10th), *Workers' Compensation*, §80 [although party electing trial de novo following workers' compensation arbitration received less favorable judgment and was precluded by *C.C.P. 1141.21(a)(1)(B)* from recovering costs, judgment proceeds were nevertheless subject to allocation under *Lab.C. 3856*, including payment of litigation expenses and attorneys' fees].)

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d. Costs and Fees.

2. Improper Assignment of Case to Arbitration.

6 *Witkin Cal. Proc. PWT* § 627

[§ 627] Improper Assignment of Case to Arbitration.

In *Sharples v. Chole* (1994) 29 C.A.4th 1213, 35 C.R.2d 208, plaintiffs brought an action against defendant physician for battery and medical malpractice. In their at-issue memorandum they checked the box indicating that the case was exempt from judicial arbitration because damages were in excess of \$ 50,000. Defendant's response indicated that the case was suitable for arbitration. The trial court referred the case to arbitration, and the arbitrator found in favor of defendant. Plaintiffs elected a trial de novo, which also ended in a defense victory. Defendant then claimed deposition and expert witness costs. Plaintiffs moved to strike costs, contending that the major portion of the costs were predicated on C.C.P. 1141.21 (supra, §626) and that the statute was inapplicable, because the matter should not have been submitted to arbitration. This motion was denied. *Held*, judgment reversed insofar as it awarded costs under C.C.P. 1141.21. The trial judge erred in assigning the case to judicial arbitration, and C.C.P. 1141.21 was inapplicable.

(a) *Error in assigning case to arbitration.* The trial judge either abused or failed to exercise his discretion in assigning the dispute to judicial arbitration pursuant to C.C.P. 1141.11(a) (submission to arbitration where damages do not exceed \$ 50,000). The at-issue memorandum showed only that plaintiffs claimed that the amount in controversy exceeded \$ 50,000 and defendant asserted that the matter was suitable for arbitration. Ordinarily, all intendments and presumptions must be indulged to support the judgment on matters as to which the record is silent. However, plaintiffs advanced their damages demand in association with a complaint alleging physical injury accompanied by medical expenses and wage loss arising from medical malpractice. Under C.C.P. 1141.16 (supra, §586), the trial judge was constrained to presume liability and to disregard defenses. Under C.C.P. 1141.11 and 1141.16, the trial judge must have a factual basis for believing that the damages, considered in isolation, are significantly inflated and can be discounted below the \$ 50,000 level. On appeal, defendant suggested no facts on which the trial judge might have predicated such an opinion. (29 C.A.4th 1217.)

(b) *C.C.P. 1141.21 is not applicable.* Because submission of the case to arbitration was erroneous, the trial judge likewise erred in awarding costs predicated on C.C.P. 1141.21. Under C.C.P. 1141.26, if the arbitration award exceeds the \$ 50,000 measure of C.C.P. 1141.11 and the judgment also exceeds that amount, the cost award provision (C.C.P. 1141.21) does not apply. Defendant suggests that, because C.C.P. 1141.26 expressly addresses costs in one

circumstance where the arbitration award exceeds \$ 50,000, it means that costs in all other circumstances must be awarded regardless of whether there has been an erroneous assignment to arbitration. Defendant's reasoning is faulty. Where the amount in controversy incontestably exceeds \$ 50,000, a matter may be assigned to arbitration without error pursuant to a stipulation by the parties (*C.C.P. 1141.12*, supra, §582). *C.C.P. 1141.26* is presumably addressed to these lawful circumstances and bears no implication of a legislative policy choice to impose *C.C.P. 1141.21* costs regardless of a nonconsensual imposition of arbitration as the result of an abuse of discretion under *C.C.P. 1141.11*. (29 *C.A.4th* 1220.)

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CHAPTER VII - Proceedings Without Trial

Witkin Summary of California Law

XIV. ALTERNATIVE DISPUTE RESOLUTION

I. Judicial Arbitration.

9. Trial De Novo After Arbitration.

d. Costs and Fees.

3. Effect of Rejection of Statutory Offer To Compromise.

6 *Witkin Cal. Proc. PWT* § 628

[§ 628] Effect of Rejection of Statutory Offer To Compromise.

In *Bhullar v. Tayyab* (1996) 46 C.A.4th 582, 54 C.R.2d 17, a dispute arising from a contract to sell a liquor store, plaintiff declined an offer by defendant and cross-complainant to settle pursuant to C.C.P. 998 (supra, §110 et seq.), and the matter went to judicial arbitration. The arbitrator awarded nothing to either party, and plaintiff requested a trial de novo. Following a jury trial, the trial court entered a judgment in favor of defendant on the cross-complaint, but denied defendant's request for attorneys' fees on the ground that the plaintiff had reasonably rejected the settlement offer. *Held*, reversed, with directions to award appropriate attorneys' fees to defendant pursuant to C.C.P. 1141.21 (supra, §626).

(a) Former C.C.P. 1021.1, which was applicable here, made it discretionary for the trial judge to award attorneys' fees when a party refused a settlement offer. However, C.C.P. 1141.21 made it mandatory to award costs (including attorneys' fees, if authorized) when a party refused to accept a judicial arbitration award. Legislative purpose and policy required application of the latter statute here. (46 C.A.4th 587.)

(b) Judicial arbitration, unlike contractual arbitration, is not binding, and any party dissatisfied with an award may elect a trial de novo. However, the Legislature, seeking to encourage finality of judicial arbitration awards, has enacted disincentives to trial de novo. For example, a party requesting trial de novo who does not obtain a more favorable judgment is liable under C.C.P. 1141.21 for significant costs and fees. Discouraging trial de novo is essential to the proper functioning of the judicial arbitration system, which is intended to ease court case loads. (46 C.A.4th 589.)

(c) When a party refuses to accept a settlement offer under C.C.P. 998, the trial judge has a broad discretion to award or not to award attorneys' fees. These offers of settlement normally come well before trial at a time when a very great expenditure of judicial resources has not yet occurred, and there may be substantial reason not to accept a particular settlement offer. Asking for a trial de novo after arbitration is quite another matter. Of necessity, each party at that stage will have had to prepare the entire case, and will have presented all the evidence, oral and written, to a neutral arbiter. The parties and the judicial system will essentially have invested significantly in a "trial" of the merits of the action. (46 C.A.4th 589.)

(d) *C.C.P. 1141.21* limits the court's discretion. Under *C.C.P. 1141.21(a)*, the only time the trial judge is authorized to refuse to award costs is when the judge "finds in writing and upon motion that the imposition of these costs and fees would create such a substantial economic hardship as not to be in the interest of justice." (*C.C.P. 1141.21(a)*). Here, there was no such motion, and no such finding. (46 *C.A.4th* 590.) (See *Parker v. Babcock* (1995) 37 *C.A.4th* 1682, 1687, 44 *C.R.2d* 602 [*C.C.P. 998* applies to judicial arbitration proceedings].)

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XIV. ALTERNATIVE DISPUTE RESOLUTION

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d. Costs and Fees.

4. Items Awarded.

6 *Witkin Cal. Proc. PWT* § 629

[§ 629] Items Awarded.

Subject to the statutory limitations (*supra*, §626), the court must order payment of the following:

(1) The compensation actually paid the arbitrator by the court or by the other party or parties (*supra*, §593). (*C.C.P. 1141.21(a)(1)(A)*, (a)(1)(D).)

(2) All costs of the other party or parties. (*C.C.P. 1141.21(a)(1)(B)* [costs specified in *C.C.P. 1033.5*; see 8 *Cal. Proc.* (5th), *Judgment*, §117].) (See *Gibson v. Bobroff* (1996) 49 *C.A.4th* 1202, 1207, 57 *C.R.2d* 235 [recoverable costs could include, in trial court's discretion, reasonably necessary expenses of court-ordered mediation (*supra*, §489 et seq.)].)

(3) Fees of expert witnesses who are not regular employees of any party, "actually incurred or reasonably necessary in the preparation or trial of the case." (*C.C.P. 1141.21(a)(1)(C)*.)

Except for the arbitrator's compensation, these costs and fees are limited to amounts incurred after the election of a de novo trial. (*C.C.P. 1141.21(a)*.)

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IX. SUMMARY JUDGMENT

B. Motion.

5. (New) Stipulation To Circumvent Motion Requirements.

6 *Witkin Cal. Proc. Proceedings Without Trial* § 216A

[§ 216A] (New) Stipulation To Circumvent Motion Requirements.

In *Magana Cathcart McCarthy v. CB Richard Ellis* (2009) 174 C.A.4th 106, 94 C.R.3d 109, without filing a motion for summary judgment or separate statements of undisputed facts, and for purposes of creating appellate review of pretrial rulings, the parties to a complex litigation case stipulated that the trial court would have granted summary judgment in favor of defendant based on its ruling on "threshold issues." The stipulation stated that the parties recognized that the trial court's determination of the threshold issues was not a substitute for future summary adjudication motions. Simultaneous briefs on the merits were filed by the parties on the threshold issues. The trial court entered judgment pursuant to the stipulation, and plaintiff appealed. *Held*, judgment reversed.

(a) The procedure employed by the parties "impermissibly conflicts with the mandatory requirements of summary judgment," and there is no authority that permits this type of deviation from the requirements set forth in *C.C.P. 437c* and *C.R.C.*, Rule 3.1350. (174 C.A.4th 116.) Moreover, the parties' attempt to create appellate review by stipulating that the trial court would have granted summary judgment based on its ruling of threshold issues "fails at the outset as there is nothing before this court that remotely complies with the requirements for summary judgment motions." (174 C.A.4th 116.)

(b) The procedure urged by the parties is not appropriate. There were no separate statements of undisputed facts, and there was no moving party requesting summary judgment. The need for separate statements is not a mere technical requirement but an indispensable part of the summary judgment process. The formatting of the parties' opening and reply briefs did not comply with the requirements for summary judgment and did not provide an adequate record for review. Moreover, decisional law is clear that a trial court may not grant summary judgment in favor of a party who has not filed a motion for summary judgment. (174 C.A.4th 117, 119.)

(c) Authorities "are in accord in allowing appellate review of a stipulated judgment where the intent of the parties is not to resolve the action by stipulation, but instead to obtain appellate review of a dispositive adverse ruling." However, unlike the present case, the appeals in those cases followed a dispositive ruling on a properly litigated motion for summary judgment. Thus, there must be a properly filed motion for review. "We simply cannot review the merits of a motion that was never made and which is in direct contravention of the mandated rules of procedure." The stipulated judgment, which provided that the trial court would have granted summary judgment based on its ruling of threshold

issues, must be reversed. (*174 C.A.4th 121.*)

A dissenting justice argued that, although the procedure used was unconventional, the issues had been sufficiently briefed below and on appeal to enable a thorough review and decision on the dispositive issues and, because the parties were in agreement, neither party was aggrieved or prejudiced by the procedure. (*174 C.A.4th 123.*)

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