

# Chapter 7—Motions

## § 7.01 Introduction

Most of the options available to the defendant in responding to a lawsuit involve the making of a motion attacking some aspect of the procedure the plaintiff employed in initiating the lawsuit. In order to make one of these motions, the defendant must understand the procedures for making motions. Accordingly, we address the general subject of motions in this chapter.

A motion is an application to the court for an order.<sup>1</sup> The procedures for making and opposing motions are specified first by statutes contained principally in the Code of Civil Procedure, by case law, by “Rules of Court” promulgated by the Judicial Council, and by “local rules” promulgated by individual courts.<sup>2</sup>

The California Constitution empowers the Judicial Council to adopt rules for court administration, practice, and procedure.<sup>3</sup> A rule adopted by the Judicial Council is binding on the courts so long as it does not conflict with a statute.<sup>4</sup> Local courts and judges are authorized to make similar rules, so long as they do not conflict with statutes or the Rules of Court.<sup>5</sup> An attorney has a professional

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<sup>1</sup> CODE CIV. PROC. § 1003.

<sup>2</sup> See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:2–:13.1 (1996); 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 148, 150, 152, 154–159 (3d ed. 1985).

<sup>3</sup> CAL. CONST. art. VI, § 6.

responsibility to know about duly adopted local rules.<sup>6</sup> Local rules may provide that

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<sup>4</sup> Cantillon v. Superior Court, 150 Cal. App. 2d 184, 187–88, 309 P.2d 890, 892–93 (1957); *see* Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 1110–11, 262 Cal. Rptr. 155, 157–58 (1989) (RULES OF CT. 325(f), requiring a noticed motion in order to [dismiss a complaint for failure to amend](#) following the sustaining of a [demurrer](#), invalidated because of conflict with CODE CIV. PROC. § 581(f)(2), which does not require a noticed motion).

<sup>5</sup> CODE CIV. PROC. § 575.1; GOV. CODE § 68070; Mann v. Cracchiolo, 38 Cal. 3d 18, 29, 694 P.2d 1134, 1139, 210 Cal. Rptr. 762, 767 (1985); Sweat v. Hollister, 37 Cal. App. 4th 603, 612 n.10, 43 Cal. Rptr. 2d 399, 404 n.10 (1995). The trial court's interpretation of its rules is binding upon a reviewing court. Villacampa v. Russell, 178 Cal. App. 3d 906, 911, 224 Cal. Rptr. 73, 76 (1986). Local rules have been held invalid when they purported to prohibit a document form permitted by the Rules of Court, Tiffany v. State Farm Mut. Auto. Ins. Co., 14 Cal. App. 4th 1763, 1768, 19 Cal. Rptr. 2d 264, 267 (1993), to shorten the time within which to file a [motion for summary judgment](#), Wells Fargo Bank, N.A. v. Superior Court, 206 Cal. App. 3d 918, 923, 254 Cal. Rptr. 68, 71 (1988), to shorten the statutory time for serving a [demand for an exchange lists of expert witnesses](#), *cf.* St. Vincent Medical Center v. Superior Court, 160 Cal. App. 3d 1030, 1033–34, 206 Cal. Rptr. 840, 842 (1984) (trial setting conference order), to add to the statutory requirements for a valid [declaration](#), *cf.* Roy Bros. Drilling Co. v. Jones, 123 Cal. App. 3d 175, 181–82, 176 Cal. Rptr. 449, 452–53 (1981) (court policy memorandum), to bar the statutorily permitted method of denying a [request for an admission](#) on information and belief, *cf.* Cohen v. Superior Court, 63 Cal. App. 3d 184, 187, 133 Cal. Rptr. 575, 576 (1976) (court discovery procedure manual), to require the filing of a joint statement of disputed and undisputed facts on a [motion for summary adjudication of issues](#), *cf.* Kalivas v. Barry Controls Corp., 49 Cal. App. 4th 1152, 1158–59, 57 Cal. Rptr. 2d 200, 204 (1996) (courtroom local rule), to impose fees for court processes, Hogoboom v. Superior Court, 51 Cal. App. 4th 653, 669, 59 Cal. Rptr. 2d 254, 266 (1996) (LOS ANGELES SUPER. CT. R. 14.4.1).

Individual judges' rules are local rules of court for purposes of the adoption, publication, comment, and filing requirements set forth in the Judicial Council rules applicable to local court rules. GOV. CODE § 575.1(c).

if any attorney or party fails to comply with a local rule, the court, on the motion of a party or on its own motion, may strike all or any part of that party's pleading, dismiss all or part of the action, enter judgment by default against that party, impose other penalties of a lesser nature, or may order the party or his attorney to pay the moving party the reasonable expenses in making the motion, including attorneys' fees.<sup>7</sup> If the failure to comply is the responsibility of the attorney and not of his client, any penalty is to be imposed on the attorney and should not adversely affect the client's cause of action or defense.<sup>8</sup> Trial courts have also adopted local "policies" regulating court procedures. To the extent that these policies have been validly adopted<sup>9</sup> they have the same force as local rules.<sup>10</sup>

### § 7.02 Meet and Confer Requirements

➡(Discovery)

The discovery statutes require a party seeking to compel discovery to confer with opposing counsel in an attempt to resolve the dispute before filing a motion. Some local rules extend such requirements to motions generally.<sup>11</sup>

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<sup>6</sup> Brekhus & Williams v. Parker-Rhodes, 198 Cal. App. 3d 788, 791, 244 Cal. Rptr. 48, 50 (1988).

<sup>7</sup> CODE CIV. PROC. § 575.2(a). A failure to comply with the local rules is an unlawful interference with the proceedings of the court. The court may order the person at fault to pay the opposing party's reasonable expenses and attorneys' fees, may order "an appropriate change in the calendar status of the action. RULES OF CT. 227.

<sup>8</sup> CODE CIV. PROC. § 575.2(b). Note that this provision, by its terms, applies only to violations of local rules and not to other transgressions potentially triggering [sanctions](#).

<sup>9</sup> GOV. CODE § 68070; RULES OF CT. 981(b)(2).

<sup>10</sup> Wisniewski v. Clary, 46 Cal. App. 3d 499, 504, 120 Cal. Rptr. 176, 180 (1975).

### § 7.03 Making a Motion

A motion consists of three parts: the notice of the motion, the evidentiary support for the motion, and the legal argument supporting the motion.

#### [A] The Notice of Motion

##### [1] Timing Issues

The first step in drafting a motion is to determine the proper timing of the motion. One must take into account rules governing how soon and how late one may file a motion, time limits affecting service of the motion papers, and the local court's scheduling of its "law and motion" calendar. The first page of the notice of motion (and of every other paper filed in conjunction with the motion) must specify immediately below the case number the date and time of the hearing.<sup>12</sup> The same information must appear in the body of the notice of motion.<sup>13</sup>

The moving party must serve and file the motion papers at least 15 calendar days before the time appointed for the hearing.<sup>14</sup> One may elect to serve the motion papers by mail, but if one does so, then one must increase the amount of notice. If the place of mailing and the place of address are both within California, the required period of notice is increased to 20 calendar days. If either the place of mailing or the

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<sup>11</sup> See, e.g., ORANGE SUPER. CT. R. 504 (moving party must file a [declaration](#) five court days before the hearing showing that the parties conferred after the motion was filed and identifying the remaining issues in dispute). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:115.1–:115.1a (1996).

<sup>12</sup> RULES OF CT. 311(b). The motion is "made" when the moving party files his paperwork, not when the motion is heard. *Sweat v. Hollister*, 37 Cal. App. 4th 603, 613, 43 Cal. Rptr. 2d 399, 405 (1995).

<sup>13</sup> CODE CIV. PROC. § 1010.

place of address is outside California but within the United States, the notice period is 25 days. If the place of mailing or the place of address is outside the United States, the notice period is 35 days. If the notice is served by fax, Express Mail, or overnight delivery, the 15-day notice period is increased by two court days.<sup>15</sup> The required notice period is computed by excluding the first day and including the last day unless the last day is a holiday, in which case the last day is also excluded.<sup>16</sup>

These time extensions correspond to general extension provisions contained in Code of Civil Procedure section 1013, which states that any prescribed period of

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<sup>14</sup> CODE CIV. PROC. § 1005(b). Special timing rules apply to {motions for summary judgment}. If the opponent appears despite defective notice and addresses the merits of the motion, the opponent forfeits any objection to defects in the notice. *Alliance Bank v. Murray*, 161 Cal. App. 3d 1, 7, 207 Cal. Rptr. 233, 237 (1984). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:30–:37, :87–:88.1 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 20, 26 (3d ed. 1985).

<sup>15</sup> CODE CIV. PROC. § 1005(b). Demurrers are subject to the same notice requirements. RULES OF CT. 325(b). Special timing rules apply to {motions for summary judgment} and {motions to confirm good faith settlements} (CODE CIV. PROC. § 877.6(a)).

<sup>16</sup> CODE CIV. PROC. § 12. “Holidays” include every Sunday, January 1st, February 12th (Lincoln Day), the third Monday in February, the last Monday in May, July 4th, the first Monday in September, September 9th (Admission Day), the second Monday in October (Columbus Day), November 11th (Veterans Day), December 25th, Good Friday from 12 noon until 3 p.m., and every day appointed by the president or governor for a public fast, thanksgiving, or holiday. If January 1st, February 12th, March 31st, July 4th, September 9th, November 11th, or December 25th falls upon a Sunday, the Monday following is a holiday. If November 11th falls upon a Saturday, the preceding Friday is a holiday. CODE CIV. PROC. § 10; GOV. CODE §§ 6700–6701. The state holiday for Good Friday was held unconstitutional in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 619, 127 Cal. Rptr. 244, 259 (1976). See generally 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 66–72 (3d ed. 1985).

notice (and any right or duty to do any act or make any response within any prescribed period or on a date certain) *after the service of a document* shall be extended if the document is served by mail, Express Mail, overnight delivery, or fax.<sup>17</sup> Section 1013 does not extend the time periods for responses triggered by some event other than “service of a document.”<sup>18</sup>

The statutes and rules of court place no outer limit on the amount of notice that the moving party may specify in his notice of motion, though some local rules do.<sup>19</sup> Presumably, if the moving party specifies an unreasonable amount of notice for some ulterior purpose, such as delay of trial or appeal, the opponent may seek an [order shortening the time](#) of the hearing.

Within these time limits, one may, in general, select a hearing date for any day on which the court hears its law and motion calendar. One must, however, consult the local rules for additional timing limitations. The Los Angeles Superior Court, for instance, requires that the moving party refrain from using the timing of a motion so

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<sup>17</sup> CODE CIV. PROC. § 1013(a), (c), (e); *cf.* RULES OF CT. 2008(b) (extension of time for response in case of service by fax). Service of motions by means other than personal delivery does not extend the recipient’s time for filing notice of his intention to move for a new trial, notice of intention to move to vacate the judgment, or notice of appeal. CODE CIV. PROC. § 1013(a), (c), (e). Section 1013 does not apply to a notice of any of the motions governed by CODE CIV. PROC. § 1005(b).

<sup>18</sup> *Camper v. Workers Compensation Appeals Bd.*, 3 Cal. 4th 679, 684–85, 836 P.2d 888, 891, 12 Cal. Rptr. 2d 101, 104 (1992).

<sup>19</sup> *See, e.g.*, ORANGE SUPER. CT. R. 520B(3) (motion may not be set more than 45 days after service without court permission); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 21(i) ([demurrers](#) and [motions to strike](#) must be noticed within 25 days after service).

as to inconvenience the opponent,<sup>20</sup> the San Diego Superior Court requires that the moving party obtain a hearing date from the law and motion clerk,<sup>21</sup> and the San Francisco Superior Court prohibits noticing motions in the same case in different departments on the same day.<sup>22</sup> A litigant may not evade a statutory time limit governing the filing of a particular motion by filing the motion, “dropping” it, and then filing it again at his leisure sometime after the statutory time limit has passed.<sup>23</sup>

### [2] Orders Shortening Time

➡ Form: Application for Order Shortening Time

If circumstances require that a party obtain an order in a shorter period of time than that permitted by the notice rules described above, the party may seek an order shortening the amount of notice required before the hearing.<sup>24</sup> The moving party may obtain the order *ex parte* but must submit a [declaration](#) stating facts showing good cause<sup>25</sup> and must comply with the requirements for [ex parte applications](#). Though the Rules of Court do not specify to whom to apply to *shorten* time, they do specify that one should submit an application to *extend* time to the judge before

<sup>20</sup> LOS ANGELES SUPER. CT. R. 7.12(b).

<sup>21</sup> SAN DIEGO SUPER. CT. R. 4.2(a).

<sup>22</sup> SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 11(b)(2).

<sup>23</sup> Bank of America Nat'l Trust & Sav. Ass'n v. Yurosek, 52 Cal. App. 4th 365, 374–75, 60 Cal. Rptr. 2d 631, 638 (1997). A court that “drops” a motion is deleting a hearing on that motion from the court’s calendar, and is not declaring the motion to be forever abandoned by the moving party or denying the motion with prejudice. *Id.* at 378, 60 Cal. Rptr. 2d at 640.

<sup>24</sup> RULES OF CT. 305. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:88.5, :364–:368 (1996).

<sup>25</sup> RULES OF CT. 305.

whom the matter is pending if he is available, otherwise to another judge of the same court.<sup>26</sup> One should consult the local rules and the clerk's office to identify the appropriate individual.<sup>27</sup>

### [3] Form of the Papers

The rules governing the form of complaints apply to motions,<sup>28</sup> except that motion papers need only state the name of the first party on each side with an appropriate indication of other parties (*i.e.*, "*et al.*").<sup>29</sup> The first page of each paper must specify below the case number:

- the date, time, and location of the hearing;
- the nature or title of any attached document other than an exhibit; and
- the trial date, if one has been set.<sup>30</sup>

Local rules may impose additional requirements.<sup>31</sup>

Documents bound together must be paginated consecutively, and the first page of the paper must specify the titles of the other documents.<sup>32</sup> If a motion paper refers to

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<sup>26</sup> RULES OF CT. 235(a).

<sup>27</sup> *See, e.g.*, ORANGE SUPER. CT. R. 501C.

<sup>28</sup> RULES OF CT. 201(a)(1), 501(a)(1). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:19–:23.1a, 9:24–:27 (1996).

<sup>29</sup> CODE CIV. PROC. § 422.40.

<sup>30</sup> RULES OF CT. 311(b).

<sup>31</sup> *See, e.g.*, ORANGE SUPER. CT. R. 435 (the first page of all documents filed in cases subject to civil case management must show, before the information required by RULES OF CT. 311(b), the judge to whom the case has been assigned and the judge's department).



a previously filed paper, the reference must include the title and the date of execution of the previously filed paper.<sup>33</sup>

**Example:** “Defendant *D* hereby demurs to Plaintiff *P*’s Complaint executed and filed on 1997.”<sup>34</sup>

The local rules may impose additional requirements relating to paragraph numbering,<sup>35</sup> “bluebacks,”<sup>36</sup> tabs on exhibits,<sup>37</sup> lodging of extra copies in the department in which the motion is to be heard,<sup>38</sup> and separate filing of separate motions.<sup>39</sup>

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<sup>32</sup> RULES OF CT. 311(b).

<sup>33</sup> RULES OF CT. 311(c).

<sup>34</sup> It is helpful to include the date of filing, as filed documents are stamped with the date of filing on the upper right-hand corner.

<sup>35</sup> *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.2(b) (paragraphs must be number consecutively throughout a motion using Arabic rather than Roman numerals, and subparagraphs must be designated with letters rather than numbers); ORANGE SUPER. CT. R. 506(A) (same); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 1(b) (same);

<sup>36</sup> *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.2(f) (motion papers must be bound in “bluebacks” with the title of the documents appearing at the bottom of the blueback).

<sup>37</sup> *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.2(f) (exhibits must be identified with tabs extending below the page); ORANGE SUPER. CT. R. 510(D) (same).

<sup>38</sup> *See, e.g.*, SAN DIEGO SUPER. CT. R. 4.1(e) (lodging of exhibits consisting of more than ten pages); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 16(d) (lodging of copies of all motion papers with the clerk of the law and motion department).

<sup>39</sup> *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.3(c); ORANGE SUPER. CT. R. 508; SAN DIEGO SUPER. CT. R. 4.1(a). These courts, however, permit a single [memorandum of points and authorities](#) in support of a [motion to strike](#) coupled with a [demurrer](#).

**[4] Content**

Code of Civil Procedure section 1010 succinctly prescribes the content of the notice of motion: “[T]he notice of motion . . . must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based.”<sup>40</sup>

Timing issues and the form of the notice are discussed above. The statement of the time of the motion is crucial.

**Example:** The court places defendant *D*’s motion on the regular law and motion calendar. Plaintiff *P* appears at the hearing but makes no argument other than to object that the notice of motion omitted the time of the hearing. The court denies the motion.

The court ruled correctly. By appearing for the sole purpose of objecting to the defective notice, *P* avoided forfeiting the objection.<sup>41</sup>

It is customary, in addition to stating the date and time of the motion, to state the department in which the motion is to be heard. If the notice of motion specifies an improper department or time, the clerk will either calendar it for the correct place and time or reject the motion papers.<sup>42</sup>

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<sup>40</sup> See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:30–:30.1, :35–:42.1 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 12–15 (3d ed. 1985).

<sup>41</sup> *Bohn v. Bohn*, 164 Cal. 532, 536–37, 129 P. 981, 983 (1913).

<sup>42</sup> See, e.g., LOS ANGELES SUPER. CT. R. 9.7; cf. SAN DIEGO SUPER. CT. R. 4.2(b) (motions filed in the wrong department may be taken off calendar); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 13 (court will not reset motion mistakenly noticed for a court holiday).

The notice of motion must state *in the opening paragraph* the nature of the order being sought and the grounds for issuance of the order.<sup>43</sup> The moving party must take care in specifying the relief sought by the motion because the court may not grant relief not specified in the notice of motion.

**Example:** *P* files a motion to compel {answers to interrogatories} propounded to *D* and states in his notice of motion that he will seek {sanctions} against *D*. The court orders sanctions against *D*'s counsel.

The court erred, for it lacked the power to render relief (sanctions against *D*'s counsel) not specified in the notice of motion.<sup>44</sup>

If, however, the notice of motion states that the motion is made on grounds expressed in the accompanying papers, the matter is properly before the court, and the court may disregard the defect in the notice.<sup>45</sup>

If the motion is of a kind that requires a factual showing to the court, the moving party must supply the court with the declarations and discovery materials—{depositions}, {interrogatories}, documents, and {admissions}—that provide the evidentiary support for the motion. The notice of motion must identify these supporting evidentiary materials.

#### [5] Subscription

The notice of motion must be signed by at least one attorney of record in the attorney's individual name. If the party does not have counsel, the party must sign

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<sup>43</sup> RULES OF CT. 311(a).

<sup>44</sup> Blumenthal v. Superior Court, 103 Cal. App. 3d 317, 320, 163 Cal. Rptr. 39, 40 (1980).

<sup>45</sup> Carrasco v. Craft, 164 Cal. App. 3d 796, 808, 210 Cal. Rptr. 599, 607 (1985).

the notice of motion. The notice of motion must also include the signer's address and telephone number. The court must strike the motion unless the attorney or party corrects the omission of his signature after the omission is called to his attention.<sup>46</sup>

By signing or filing a motion, an attorney or unrepresented party certifies that to the best of his knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*, all of the following conditions are met:

- He is not presenting the motion primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
- The legal contentions asserted in the motion are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
- The factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.<sup>47</sup>

An attorney or party who violates these provisions is subject to {sanctions}.

**[B] Ex Parte Applications**

Courts favor regularly noticed motions and entertain ex parte applications only in limited circumstances:<sup>48</sup>

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<sup>46</sup> CODE CIV. PROC. § 128.7(a).

<sup>47</sup> CODE CIV. PROC. § 128.7(b).

<sup>48</sup> See generally 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* § 42 (3d ed. 1985).

- Answering the Complaint
- Orders Shortening Time
- Extensions of Time

- applications to extend or shorten time to plead<sup>49</sup>
- applications to extend or shorten time to give notice<sup>50</sup>
- applications to file a brief exceeding the applicable page limit<sup>51</sup>
- applications for appointment of a [guardian ad litem](#)
- applications for leave to notice [{depositions}](#) during the first 20 days of the case<sup>52</sup>
- applications for leave to serve [{interrogatories}](#) during the first 10 days of the case<sup>53</sup>
- applications for leave to amend pleadings to insert the true name of a [fictitiously named defendant](#)
- applications for leave to serve process by [publication](#)
- applications to control [{deposition}](#) scheduling
- [applications for dismissal](#) for failure to amend the complaint following the sustaining of a [demurrer](#).<sup>54</sup>

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<sup>49</sup> CODE CIV. PROC. § 1054(a).

<sup>50</sup> CODE CIV. PROC. § 1054(a).

<sup>51</sup> RULES OF CT. 313(d).

<sup>52</sup> CODE CIV. PROC. § 2025(b)(2).

<sup>53</sup> CODE CIV. PROC. § 2030(b).

<sup>54</sup> CODE CIV. PROC. § 581(f)(2); *Wilburn v. Oakland Hosp.*, 213 Cal. App. 3d 1107, 1110–11, 262 Cal. Rptr. 155, 157–58 (1989).

- ➡ Challenging the Complaint
- ➡ Answering the Complaint

When the Code of Civil Procedure allows one to obtain an order after notice to the opponent, the moving party may not proceed ex parte. One may not employ an ex parte motion in the following circumstances:

- motions to extend time to plead after it has already expired<sup>55</sup>
- motions for leave to file a late [cross-complaint](#)<sup>56</sup>
- motions to shorten or extend time for responding to [{interrogatories}](#)<sup>57</sup>
- motions to shorten or extend time for responding to [{requests for admissions}](#)<sup>58</sup>
- motions to shorten or extend time for responding to [{demands for documents}](#)<sup>59</sup>
- motions to shorten or extend time for responding to [{requests for physical examinations}](#)<sup>60</sup>
- motions for leave to pursue discovery after the [{discovery cutoff date}](#).<sup>61</sup>

An ex parte application follows the same form as a noticed motion, except that the applicant must include a [declaration](#) showing

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<sup>55</sup> CODE CIV. PROC. § 426.50.

<sup>56</sup> CODE CIV. PROC. § 426.50.

<sup>57</sup> CODE CIV. PROC. § 2030(h).

<sup>58</sup> CODE CIV. PROC. § 2031(h).

<sup>59</sup> CODE CIV. PROC. § 2032(c)(5).

<sup>60</sup> CODE CIV. PROC. § 2033(h).

<sup>61</sup> CODE CIV. PROC. § 2024(e).

- that the applicant informed the opponent or his attorney within a reasonable time<sup>62</sup> before the application when and where the application would be made,<sup>63</sup> or
- that the applicant attempted in good faith to inform the opponent or his attorney but could not do so, specifying the efforts made, or
- that for reasons specified the applicant should not be required to inform the opponent or his attorney.<sup>64</sup>

In some cases, the notice must be in writing.<sup>65</sup>

Even when the applicable law permits an ex parte application, an attorney should make diligent efforts to notify the opponent and should make reasonable efforts to

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<sup>62</sup> Some courts require 24 hours notice. *E.g.*, SAN DIEGO SUPER. CT. R. 4.3(a)(1); *cf.* SAN FRANCISCO SUPER. CT. R. 3.5 (24-hour notice deemed reasonable). Others require notice no later than noon of the court day before the appearance. *E.g.*, LOS ANGELES SUPER. CT. R. 9.37(c); ORANGE SUPER. CT. R. 501(A).

<sup>63</sup> The notice should include the date, time, and place of the appearance, the relief sought, the parties against whom relief is sought, and the grounds for the application. *E.g.*, LOS ANGELES SUPER. CT. R. 9.37(b); ORANGE SUPER. CT. R. 510(B); SAN DIEGO SUPER. CT. R. 4.3(a).

<sup>64</sup> RULES OF CT. 379; *see* LOS ANGELES SUPER. CT. R. 9.37(d) (notice must be given to all parties who have appeared in the action, parties who have been served and have not defaulted, and parties not yet served who may be affected by the relief sought). Some courts do not require notice of an application for leave to amend a complaint to state the true name of a fictitious defendant *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.19(f).

<sup>65</sup> *See, e.g.*, RULES OF CT. 313(d). Some local rules require that the applicant attach proof of receipt to the writing and include it in the [declaration](#) of notification. *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.37(b); SAN DIEGO SUPER. CT. R. 4.3(a).

accommodate the opponent's schedule to permit the opposing party to be represented on the application. When the rules permit an ex parte application, an attorney should make the application (including an application to shorten time) only if the client would be prejudiced by making the application by means of a regular motion.<sup>66</sup>

### [C] Points and Authorities

A party filing a notice of motion, except for a new trial, must serve and file with the motion a memorandum of points and authorities.<sup>67</sup> If the moving party fails to file a memorandum of points and authorities, the court may construe the absence as an admission that the motion is meritless.<sup>68</sup> The memorandum must contain a statement of facts, a concise statement of the law, evidence, and arguments relied upon, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced.<sup>69</sup>

The opening and responding memoranda may not exceed 15 pages in length, except in the case of a {motion for summary judgment} or {summary adjudication}, in which case the opening and responding memoranda may not exceed 20 pages in length. The reply memorandum may not exceed ten pages in length. The page limit does not include exhibits, declarations, attachments, and the table of contents. A

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<sup>66</sup> LOS ANGELES SUPER. CT. R. 7.12(j)(2), (3).

<sup>67</sup> See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:64–81.1 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* § 16 (3d ed. 1985).

<sup>68</sup> RULES OF CT. 313(a). In the case of a demurrer, the court may construe the absence of a memorandum of points and authorities as a waiver of all grounds not supported. *Id.*



memorandum that violates these limits is treated the same as a late filed paper—the court may refuse to consider it.<sup>70</sup> A party may apply to the court, *ex parte* but with written notice<sup>71</sup> of the application to the other parties at least 24 hours before the memorandum is due, for permission to file a longer memorandum. The application must state why the applicant cannot make his argument within the applicable limit. A memorandum that exceeds ten pages must include a table of contents and a table of authorities. A memorandum that exceeds 15 pages must also include an opening summary of argument.<sup>72</sup>

Some local rules require the preparation of a proposed order.<sup>73</sup>

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<sup>69</sup> RULES OF CT. 313(b). A case citation should include the official report volume and page number and the year of decision. *Id.* 313(c). The memorandum must follow the style defined in either the *California Style Manual* or the *Uniform System of Citation*. RULES OF CT. 313(e). Local rules sometimes require citation of the pages within an opinion that contain the relevant matter, *see, e.g.*, LOS ANGELES SUPER. CT. R. 9.4(c); SAN DIEGO SUPER. CT. R. 4.1(f); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 4(c), and attachment of copies of out-of-state cases and statutes, *see, e.g.*, LOS ANGELES SUPER. CT. R. 9.4(b); ORANGE SUPER. CT. R. 508(C); SAN DIEGO SUPER. CT. R. 4.1(f); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 4(e).

<sup>70</sup> RULES OF CT. 317(c).

<sup>71</sup> There is no requirement that the party applying for leave to file a longer memorandum serve the written notice of the application with the same formality as the motion papers, but local rules sometimes require that the party include proof of receipt with the declaration showing notice. *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.37(b).

<sup>72</sup> RULES OF CT. 313(d).

**[D] Evidentiary Support for Motion**

Unless the motion is one that does not require evidentiary support (*e.g.*, a {motion for judgment on the pleadings}), the parties must bring to the court's attention the facts justifying their positions. This is done by means of supporting documentary evidence—declarations (and affidavits), answers to {interrogatories}, {admissions}, and {deposition} transcripts—accompanying the moving papers,<sup>74</sup> unless a party demonstrates good cause for the court to expend the time necessary to hear oral testimony.<sup>75</sup>

**[1] Oral Testimony**

The court has the discretion to refuse to hear oral evidence pertaining to a motion.<sup>76</sup> A party desiring to introduce testimonial evidence (other than in rebuttal to oral evidence presented by the other side) must obtain permission from the court

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<sup>73</sup> See, *e.g.*, LOS ANGELES SUPER. CT. R. 9.17 (moving party must lodge with the court and serve on the opponent a separately bound and blue-backed proposed order); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 74 (both parties must submit proposed orders on motions for summary judgment and summary adjudication). According to the Los Angeles Superior Court Rules, the proposed order should not set forth the name of the moving party or of his attorney in the upper left-hand corner of the first page, as is the usual practice with the other motion papers. LOS ANGELES SUPER. CT. R. 9.17.

<sup>74</sup> CODE CIV. PROC. § 1005(b). On a motion for summary judgment the court may consider documentary evidence accompanying the moving party's reply papers. *Weiss v. Valenzuela*, 204 Cal. App. 3d 1094, 1098–99, 251 Cal. Rptr. 727, 729 (1988). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:43–:45.1 (1996).

<sup>75</sup> RULES OF CT. 323(a).

<sup>76</sup> *Eddy v. Temkin*, 167 Cal. App. 3d 1115, 1120–21, 213 Cal. Rptr. 597, 601 (1985).



I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_ (Date) \_\_\_\_\_ (Signature)

One may use an affidavit in place of a declaration, but there is little reason to do so, for an affidavit carries no greater evidentiary force than a declaration<sup>79</sup> but entails the added burden that it must be sworn to before an officer authorized to administer oaths, such as a notary public.<sup>80</sup>

The declaration must present evidence that lays the foundation for the admission of the matters stated in the declaration. This means that the declaration must show that the witness has personal knowledge of the matters set forth in the declaration.<sup>81</sup> The witness must state facts showing that he saw or heard the matters alleged and therefore has personal knowledge of those matters.<sup>82</sup> Unless the state of the declarant’s state of mind is at issue, a declaration “on information and belief” does not present admissible evidence based on personal knowledge.<sup>83</sup> Declarations of counsel not based on personal knowledge are similarly deficient.<sup>84</sup> Submission of a

<sup>79</sup> CODE CIV. PROC. § 2015.5.

<sup>80</sup> CODE CIV. PROC. § 2012.

<sup>81</sup> Cf. CODE CIV. PROC. § 437c(d) (“Supporting and opposing affidavits or declarations [to a [motion for summary judgment](#)]] shall be made . . . 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.”)

<sup>82</sup> Cf. *O’Laskey v. Sortino*, 224 Cal. App. 3d 241, 250, 273 Cal. Rptr. 674, 679 (1990) (attorney’s declaration that he listened to a tape and that a transcript of the tape was accurate established the accuracy of the transcript but not of the tape).

motion based on inadmissible evidence may subject the moving party to {sanctions}.<sup>85</sup> If, however, the opponent fails to object to inadmissible evidence contained in declarations or affidavits, he forfeits his objections, and the court may consider the evidence.<sup>86</sup>

For purposes of obtaining a {preliminary injunction}, one may rely either on a declaration (or affidavit) or on a verified complaint.<sup>87</sup> When, however, an attorney verifies the complaint because the parties are absent from the county where he has his office or for some other reason cannot verify it, the complaint may not be used as a declaration establishing the facts alleged in the complaint. The same is true of a complaint verified by an officer on behalf of a corporation or public agency.<sup>88</sup>

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<sup>83</sup> *Star Motor Imports, Inc. v. Superior Court*, 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721, 723 (1979). *But see* *City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 87, 776 P.2d 222, 229, 260 Cal. Rptr. 520, 527–28 (1989) (declarations on information and belief are permitted “where the facts to be established are incapable of positive averment”—to show good cause to discover police personnel records); *Brown v. Happy Valley Fruit Growers*, 206 Cal. 515, 520–21, 274 P.2d 977, 979 (1929) (declarations on information and belief are permitted to state a defendant’s residence in a [motion to change venue](#)).

<sup>84</sup> *Star Motor Imports, Inc. v. Superior Court*, 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721, 723 (1979).

<sup>85</sup> *Lieppman v. Lieber*, 180 Cal. App. 3d 914, 919–20, 225 Cal. Rptr. 845, 847–48 (1986).

<sup>86</sup> *Rader v. Thrasher*, 22 Cal. App. 3d 883, 889, 99 Cal. Rptr. 670, 674 (1972); *cf.* CODE CIV. PROC. § 437c(d) (“Any objections . . . shall be made at the hearing [on a [motion for summary judgment](#)] or shall be deemed waived.”).

<sup>87</sup> CODE CIV. PROC. § 527(a).

<sup>88</sup> CODE CIV. PROC. § 446.

### [3] Discovery Materials

If the opponent will not stipulate to the use of copies, the moving party should attach to the motion copies of the {interrogatory answers}, {admissions}, and {deposition} extracts upon which he intends to rely and lodge the originals with the court. Material lodged with the court must be accompanied by a stamped, self-addressed envelope so that the clerk may return the material after determination of the motion.<sup>89</sup>

The first page of any deposition used as an exhibit must state the deponent's name and the date of the deposition. Other than the title page, the exhibit should include only the relevant pages of the transcript, with the original page number of any deposition page clearly visible at the bottom of the page. The relevant portion of any testimony in the deposition should be marked in a manner that calls attention to the testimony (*i.e.*, by underlining or highlighting).<sup>90</sup>

### [4] Documentary Evidence

If a party seeks to rely on documentary evidence to support his motion, he must adduce evidence sufficient to lay a foundation for the admissibility of the documentary evidence.<sup>91</sup> This usually entails attaching the document to a

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<sup>89</sup> RULES OF CT. 319(b). Some local rules require that a party lodging materials with the court serve and file a notice listing the documents lodged. *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.8(f); SAN DIEGO SUPER. CT. R. 6.10. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:50–:52 (1996).

<sup>90</sup> RULES OF CT. 316.

<sup>91</sup> EVID. CODE § 1401(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:53–:53.2 (1996).

**declaration** containing statements supporting a finding that the document is what the proponent of the document claims it is.<sup>92</sup> If the opponent will not stipulate to the use of a copy, the best evidence rule requires the proponent of a writing to produce the original at the hearing for inspection by the opponent.<sup>93</sup> There are, however, several exceptions to the best evidence rule that often come into play in connection with motions. The best evidence rule does not preclude the use of a copy if

- the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence<sup>94</sup>
- the original is not reasonably procurable by the proponent by means of a subpoena or otherwise<sup>95</sup>
- the opponent has control of the writing but fails to produce the original at the hearing after having received notice that the original would be needed at the hearing<sup>96</sup>
- the writing is not closely related to the controlling issues and it would be inexpedient to require its production<sup>97</sup>

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<sup>92</sup> EVID. CODE § 1400.

<sup>93</sup> EVID. CODE §§ 1500, 1510. The term “writing” means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letter, words, pictures, sounds, or symbols, or combinations thereof. EVID. CODE § 250.

<sup>94</sup> EVID. CODE § 1501.

<sup>95</sup> EVID. CODE § 1502.

<sup>96</sup> EVID. CODE § 1503(a).

<sup>97</sup> EVID. CODE § 1504.

- the writing is in the custody of a public entity<sup>98</sup>
- the writing has been recorded in the public records and the record or an attested or certified copy of the record is made evidence of the writing by statute.<sup>99</sup>

A duplicate is admissible, however, unless the opponent raises a genuine question as to the authenticity of the original or it would be unfair, under the circumstances, to admit the duplicate in lieu of the original.<sup>100</sup>

#### [5] Judicial Notice

A party, in supporting a motion, may rely on evidentiary matters of which the court must take **judicial notice**. Evidence Code sections 451 and 452 list many items of which the court must take judicial notice. The item of greatest relevance to motion practice is “Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.”<sup>101</sup> In order to enable the court to take judicial notice of court records, one must give the opponent sufficient notice of the request for judicial notice to enable the opponent to prepare the meet the request and must furnish the court with sufficient information to enable it to take judicial notice of the matter (*i.e.*, a copy of the material).<sup>102</sup> By custom, this is accomplished by providing the court certified copies of the pertinent records.<sup>103</sup>

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<sup>98</sup> EVID. CODE § 1506.

<sup>99</sup> EVID. CODE § 1507.

<sup>100</sup> EVID. CODE § 1511.

<sup>101</sup> EVID. CODE § 452(d); *see* County of San Diego v. State, 15 Cal. 4th 68, ?? n.7, 931 P.2d 312, 320 n.7, 61 Cal. Rptr. 2d 134, 142 n.7 (1977). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:54–:56.2 (1996).

<sup>102</sup> EVID. CODE § 453; RULES OF CT. 323(b).



**[E] Service****[1] Who Must Be Served**

A defendant appears in an action

- when he [answers](#)
- when he [demurs](#)
- when he files a notice of a [motion to strike](#)
- when he files a notice of [motion for a change of venue](#)
- when he gives the plaintiff written notice of his appearance
- when an attorney gives notice of appearance for him.

After a defendant makes an appearance, the defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. If a defendant has not appeared, other parties need not make service of notice or papers upon him.<sup>104</sup>

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<sup>103</sup> LOS ANGELES SUPER. CT. R. 9.16(c); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 43(b). If the material is part of a file in the court in which the matter is pending, the party must specify in writing the part of the court file sought to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the time of the hearing. RULES OF CT. 323(b). Some local rules require the party seeking judicial notice to file his request for judicial notice a certain amount of time before the hearing to enable the clerk to locate the file. *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.16(c) (request must be filed at least five days before the hearing); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 42 (same).

<sup>104</sup> CODE CIV. PROC. § 1014. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:82–:83.1 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 17–19 (3d ed. 1985).

If a party who has appeared in the action lives outside California and has no attorney, one may serve him by service on the clerk. If a party has an attorney, one must serve papers on the attorney instead of the party, except for subpoenas, writs, other process issued in the suit, and papers to bring the party into contempt.<sup>105</sup>

**Example:** *H* appeals from an interlocutory decree of divorce. *W* serves *H*'s attorneys with an order to show cause after *H* fails to pay alimony and attorneys' fees. The attorneys informally notify *W*'s counsel that they have withdrawn as *H*'s attorneys except as to matters pending on appeal.

*W* effectively served *H*.<sup>106</sup>

If a party's sole attorney has no known office in California, one may serve notices and papers by leaving a copy with the court clerk unless the attorney has filed the address of a place at which notices and papers may be served upon him.<sup>107</sup>

If more than two parties have appeared in a case and are represented by different counsel, the plaintiff named first in the complaint must maintain a current list of the parties and the addresses for service of notice on each party and furnish a copy of the list on request to any party or the court. Each party is required to furnish the first-named plaintiff with its current address for service of notice when it first appears in the action, furnish the first-named plaintiff with any changes in its address for service of notice, and serve a copy of the list any time it serves an order, notice, or pleading on a party who has not yet appeared in the action.<sup>108</sup>

<sup>105</sup> CODE CIV. PROC. § 1015.

<sup>106</sup> Kottemann v. Kottemann, 150 Cal. App. 2d 483, 486–87, 310 P.2d 49, 52 (1957).

<sup>107</sup> CODE CIV. PROC. § 1015.

**[2] Manner of Delivery****[a] Personal Service**

➔ [Form: Proof of Service  
by Personal Delivery](#)

One may serve motion papers by personal delivery to the party or attorney on whom the service is required to be made. Alternatively, one may serve papers on an attorney by leaving the papers with the receptionist or person in charge of the attorney's office. The papers must be contained in an envelope or package clearly labeled to identify the attorney being served. If there is no one in the office with whom the papers may be left, one may serve the papers by leaving them between 9:00 a.m. and 5:00 p.m. in a conspicuous place in the office. If the attorney's office is not open, then one may leave the papers at the attorneys' residence with someone over 17 years old, provided that the attorney's residence is in the same county as he office. If the attorneys' residence is unknown or is not in the same county as his office, then one may mail the papers to the attorney at his office, if known, otherwise to his residence. The same is true if the attorney's office is not open or if no one is found there who is over 17 years old. If the attorney's office and residence addresses are unknown, one may deliver the papers to the address of the attorney or party as designated in the court papers or by delivering the papers to the clerk of the court for the attorney.<sup>109</sup>

As an alternative to personal delivery to a party, one may serve the party by leaving the motion papers at the party's residence between the hours of 8:00 a.m.

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<sup>108</sup> RULES OF CT. 387.

<sup>109</sup> CODE CIV. PROC. § 1011(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:85–85.3 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* § 21 (3d ed. 1985).

and 6:00 p.m. with someone over 17 years old, unless a statute specifically provides for a different manner of service in the particular case. If no one is found who is over 17 years old, one may serve the papers by mail. If the party's residence is not known, then one may deliver the papers to the court clerk.<sup>110</sup>

**[b] Service by Mail**

One may serve motion papers by mail.<sup>111</sup> To do so, one must deposit the papers in a post office, mail box, mail chute, or similar facility maintained by the United States Postal Service, in a sealed envelope with postage paid, addressed to the person to be served,

- at the office address last given by him on any document filed in the case, or
- at the recipient's residence.<sup>112</sup>

Service is complete at the time of mailing, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a certain date after the service of the motion papers is extended five days if the place of address is within California, ten days if the place of address is outside

<sup>110</sup> CODE CIV. PROC. § 1011(b).

<sup>111</sup> CODE CIV. PROC. § 1012. The Los Angeles local rules provide that one should serve motion papers personally or by fax if it is likely that service by mail will prejudice the opposing party. LOS ANGELES SUPER. CT. R. 7.12(b)(4). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:86--86.5 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 22-26 (3d ed. 1985).

<sup>112</sup> A party or attorney whose address changes while an action is pending must serve on all parties and file written notice of the change of address. RULES OF CT. 385. The use of the recipient's correct street address is satisfactory, even if the floor or suite number is omitted. *Jackson v. Bank of Am.*, 141 Cal. App. 3d 55, 58-59, 190 Cal. Rptr. 78, 80 (1983).

California but within the United States, and 20 days if the place of address is outside the United States.<sup>113</sup>

➡ Form: Proof of Service by Mail

One may prove proper service by mail by means of a **declaration** (or affidavit)

- setting forth the exact title of the document served and filed in the case
- showing the name and residence of business address of the person making the service
- showing that the server resides or is employed in the county where the mailing occurs
- showing that the server is over the age of 18 years and is not a party to the case
- showing the date and place of deposit in the mail
- showing the name and address of the person served as shown on the envelope, and
- showing that the envelope was sealed and deposited in the mail with the postage fully prepaid.<sup>114</sup>

In lieu of depositing the envelope in a Postal Service facility, one may deposit it in the firm's mail box. The declaration of service by mail must show that the server is readily familiar with the business's practice for collection and processing of

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<sup>113</sup> CODE CIV. PROC. § 1013(a). The extension does not apply to extend the time for filing a notice of intention to move for a new trial, a notice of intention to move to vacate a judgment, or to a notice of appeal. *Id.*

<sup>114</sup> CODE CIV. PROC. § 1013a(1). The hearsay statement of a Postal Service employee contained in a postal receipt proves only that something was mailed and not its contents. *Preis v. American Indem. Co.*, 220 Cal. App. 3d 752, 758–59, 269 Cal. Rptr. 617, 621 (1990).

correspondence for mailing with the Postal Service, that the correspondence would be deposited with the Postal Service that same day in the ordinary course of business, and that the envelope was sealed and placed for collection and mailing on that date following ordinary business practices. However, service by this method is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit contained in the declaration.<sup>115</sup> An attorney may serve papers by mailing them in a county in which he neither resides nor is employed, but his certificate of service, in addition to containing the same information as an ordinary declaration of service by mail, must also show that he is an active member of the State Bar of California.<sup>116</sup>

The copy of the paper served by mail must bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the declaration or certificate of mailing.<sup>117</sup>

**[c] Express Mail and Overnight Delivery Service**

➡ [Form: Proof of Service by Express Mail](#)

➡ [Form: Proof of Service by Overnight Delivery Service](#)

One may serve motion papers by Express Mail or by a private, overnight delivery service. In the case of service by Express Mail, one must deposit the envelope in a Postal Service facility regularly maintained by the Postal Service for receipt of Express Mail, with Express Mail postage prepaid. In case of service by overnight delivery service, one must deposit the motion papers in a facility regularly maintained by the express service carrier or deliver them to an authorized courier or

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<sup>115</sup> CODE CIV. PROC. § 1013a(3).

<sup>116</sup> CODE CIV. PROC. § 1013a(2).

<sup>117</sup> CODE CIV. PROC. § 1013(b). This provision, however, is merely “directory,” *id.* § 1013(g), thus implying that a failure to comply does not invalidate service.

driver authorized by the express service carrier to receive documents. One should package the papers in an envelope or package designated by the express service carrier with delivery fees paid or provided for. In all other respects, service by Express Mail or by overnight delivery service must satisfy the same requirements as service by ordinary mail. As with service by ordinary mail, service by Express Mail or by overnight delivery service extends the recipient's time to respond (if the time to respond is measured from the moment of service), but by only two days.<sup>118</sup>

The motion papers must bear a notation of the date and place of deposit or be accompanied by an unsigned copy of the declaration or certificate of deposit.<sup>119</sup>

#### [d] Fax

One may serve motion papers by fax if the parties have confirmed in writing their agreement to service by this method.<sup>120</sup> One must transmit the motion papers to a fax machine maintained by the intended recipient at the fax machine telephone

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<sup>118</sup> CODE CIV. PROC. § 1013(c). The extension does not apply to extend the time for filing a notice of intention to move for a new trial, a notice of intention to move to vacate a judgment, or to a notice of appeal. *Id.* Query: May one serve a document by Express Mail or overnight delivery service by leaving the document for processing according to one's firm's regular business practice for sending documents by Express Mail or overnight delivery service? *Cf.* CODE CIV. PROC. § 1013a(3) (allowing this alternative for service by mail). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:86.7--:86.8b (1996).

<sup>119</sup> CODE CIV. PROC. § 1013(d). This provision, however, is merely "directory," *id.* § 1013(g), thus implying that a failure to comply does not invalidate service.

<sup>120</sup> CODE CIV. PROC. § 1013(e); RULES OF CT. 2008(b); L.C. Rudd & Son, Inc. v. Superior Court, 52 Cal. App. 4th 742, ??, 60 Cal. Rptr. 2d 703, 705 (1997). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:86.10--:86.24 (1996).

number last given by the recipient on any document he has filed in the case and served on the moving party.<sup>121</sup> Service is complete upon receipt of the entire document by the receiving party's fax machine. Service that occurs after 5:00 p.m. is deemed to occur on the next court day.<sup>122</sup> Any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a certain date after service of the papers is extended by two court days.<sup>123</sup> The serving party must note on the copy of the papers served by fax the date and place of transmission and the fax telephone number to which the papers were transmitted. Alternatively, the serving party may attach an unsigned copy of the declaration or certificate of transmission, which must contain the fax telephone number to which the papers were transmitted.<sup>124</sup>

Documents served by fax should conform to the usual [format for court papers](#).<sup>125</sup> By serving a signed document by fax, a party represents that he has possession of the original.<sup>126</sup> Any other party may serve a demand for production of the

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<sup>121</sup> A party or attorney agreeing to accept service by fax must make his fax machine available for receipt of documents between the hours of 9:00 a.m. and 5:00 p.m. on days that are not [court holidays](#) under CODE CIV. PROC. § 136. The attorney may use the fax machine for sending faxes and may take the fax machine out of service for repair and maintenance. RULES OF CT. 2008(c).

<sup>122</sup> RULES OF CT. 2008(d).

<sup>123</sup> CODE CIV. PROC. § 1013(e); RULES OF CT. 2008(b). The extension does not apply to extend the time for filing a notice of intention to move for a new trial, a notice of intention to move to vacate a judgment, or to a notice of appeal. *Id.*

<sup>124</sup> CODE CIV. PROC. § 1013(f). This provision, however, is merely "director," *id.* § 1013(g), thus implying that a failure to comply does not invalidate service.

<sup>125</sup> RULES OF CT. 2004.



original.<sup>127</sup> The parties must then arrange a meeting at which they can examine the original.<sup>128</sup>

➡ Proof of Service

➡ Form: Proof of Service by FAX

Proof of service by fax is made by any of the methods provided for service by other means, except that

- the time, date, and sending fax telephone number are used in lieu of the date and place of deposit in the mail
- the name and fax machine telephone number of the person served are used in lieu of the name and address of the person served as shown on the envelope
- a statement that the document was transmitted by fax and that the transmission was reported as complete and without error is used in lieu of the statement that the envelope was sealed and deposited in the mail with postage prepaid
- a copy of the transmission report is attached to the proof of service and the proof of service must declare that the transmission report was properly issued by the transmitting fax machine.<sup>129</sup>

**[F] Filing**

Unless the local rules provide otherwise, all motion papers are filed in the clerk's office.<sup>130</sup>

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<sup>126</sup> RULES OF CT. 2007(a). The rules purport to provide that a signature produced by a fax machine is an original, sections 255 and 260 of the Evidence Code notwithstanding. RULES OF CT. 2007(d).

<sup>127</sup> RULES OF CT. 2007(b). The demand is served on all other parties but is not filed with the court. *Id.*

<sup>128</sup> RULES OF CT. 2007(c).

<sup>129</sup> RULES OF CT. 2008(e).

<sup>130</sup> RULES OF CT. 319.

### [1] Filing By Fax

The statutes and rules permit the filing of motion papers by fax, either directly with the court and through a private entity that receives documents by fax for processing and filing with the court.<sup>131</sup> Documents filed by fax should conform to the normal [format for court papers](#), except that any exhibit exceeding 8.5 by 11 inches must be reduced to not more than 8.5 by 11 inches before it is transmitted.<sup>132</sup>

In order to file motion papers through a fax filing agency, one must make advance arrangements for payment of filing fees and service charges.<sup>133</sup> A party may transmit a document by fax to the agency for filing with any trial court. The agency acts as the agent of the filing party and not as an agent of the court.<sup>134</sup> The agency prepares the document for filing, transports the document to court, and files the document with the court, paying any applicable filing fee.<sup>135</sup> Each document filed by an agency must contain the phrase “By fax” immediately below the title of the

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<sup>131</sup> See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:90.2–:90.21 (1996).

<sup>132</sup> RULES OF CT. 2004.

<sup>133</sup> RULES OF CT. 2005(c). If an agency receives documents from a person with whom it does not have prior arrangements, the agency may discard the documents without notice to the sender. *Id.*

<sup>134</sup> RULES OF CT. 2005(a). Weil and Brown contend that any error in the fax transmission or filing is charged to the filing party and cannot be cured by a nunc pro tunc order as in [courts with direct fax filing procedures](#). ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 9:90.13 (1996). However, they cite no authority in support of this proposition. This writer is aware of no impediment to the court’s issuing a nunc pro tunc order when a fax filing agency makes a mistake, at least so long as the opponent would suffer no detriment.

<sup>135</sup> RULES OF CT. 2005(b).

document.<sup>136</sup> By filing a document with the court, an agency certifies that it has complied with these rules and that the document filed is the full and unaltered fax document it received.<sup>137</sup> The agency is required to keep all documents transmitted to it confidential except as provided in the Rules of Court.<sup>138</sup>

A party may file motion papers by fax directly to any court that has provided for direct filing by local rule.<sup>139</sup> One must preface the document to be filed with a Judicial Council [Facsimile Filing Cover Sheet](#). Following the cover sheet, one transmits any special handling instructions needed to ensure that the document complies with the local rules. The cover sheet and special handling instructions are not filed with the court.<sup>140</sup> Each document transmitted for direct filing must contain the phrase “By fax” immediately below the document’s title.<sup>141</sup> Although the rules address the late transmission of documents *served* by fax,<sup>142</sup> they do not address the late transmission of documents *filed* by fax. Presumably, a document faxed to the court when the clerk’s office is closed is deemed filed the next day that the clerk’s office is open.

A party filing a document directly by fax, must set up the fax machine to print a transmission record of each fax filing. If the fax filing is not filed with the court

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<sup>136</sup> RULES OF CT. 2005(f).

<sup>137</sup> RULES OF CT. 2005(e).

<sup>138</sup> RULES OF CT. 2005(d).

<sup>139</sup> RULES OF CT. 2006(a).

<sup>140</sup> RULES OF CT. 2006(b), 2009.

<sup>141</sup> RULES OF CT. 2006(c).

<sup>142</sup> *See* RULES OF CT. 2008(d).

because of an error in the transmission of the document which was unknown to the sender or a failure to process the fax filing when received by the court, the sender may move the court for an order filing the document nunc pro tunc. The moving party must submit the transmission record and a proof of transmission in the following form:

At the time of transmission I was at least 18 years of age and not a party to this legal proceeding. On (date) \_\_\_\_\_ at (time) \_\_\_\_\_, I transmitted to the (court name) \_\_\_\_\_ the following documents (name) \_\_\_\_\_ by facsimile machine, pursuant to California Rules of Court, rule 2006. The court's fax telephone number that I used was (fax telephone number) \_\_\_\_\_. The facsimile machine I used complied with rule 2003 and no error was reported by the machine. Pursuant to rule 2006 I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.<sup>143</sup>

One may use a Visa or Mastercard account to pay for filing fees on fax filings made directly with the court. The amount of the charge is the applicable filing fee plus any fee or discount imposed by the card issuer plus \$1 per page of the document.<sup>144</sup> The fax cover sheet must include

- the Visa or Mastercard account number to which the fees should be charged
- the signature of the cardholder authorizing the charging of the fees
- the expiration date of the credit card.

If the issuing company rejects the charge, the clerk will notify the party filing by fax that he has 20 days from the date of mailing of the notice within which to pay the \_\_\_\_\_

<sup>143</sup> RULES OF CT. 2006(d).

<sup>144</sup> RULES OF CT. 2006(e), (g).

fee, either by cash or by certified check. If the party does not make timely payment, the clerk will void the filing.<sup>145</sup> The court may, by local rule, establish a direct filing program to allow a party or attorney to open an account with the court before filing a paper by fax. The court may require an advance deposit not to exceed \$1,000, or the court may agree to bill the attorney or party.<sup>146</sup>

➡ Service by Fax

The procedures for validating the authenticity of a document served by fax apply as well to a document filed by fax.<sup>147</sup>

### [2] Lodging Copy with Court

Local rules sometimes require that the lodging of motion papers in the department in which the motion will be heard.<sup>148</sup>

### [3] Fees

The fee for filing any notice of motion is \$14,<sup>149</sup> except for motions for summary judgment, which cost \$100.<sup>150</sup> There is no fee for filing an amended notice of

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<sup>145</sup> RULES OF CT. 2006(e), incorporating by reference CODE CIV. PROC. § 411.20.

<sup>146</sup> RULES OF CT. 2006(f).

<sup>147</sup> RULES OF CT. 2007.

<sup>148</sup> *See, e.g.*, SAN DIEGO SUPER. CT. R. 4.1(e) (exhibits exceeding ten pages in length must be lodged with the law and motion department); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 16(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 9:24.2c (1996).

<sup>149</sup> GOV. CODE § 26830(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 9:90.1 (1996).

<sup>150</sup> GOV. CODE § 26830(b).

motion.<sup>151</sup> If the motion constitutes the first paper filed in the action on behalf of any defendant, the total filing fee is \$182.<sup>152</sup>

**[G] Proof of Service**

In the preceding sections we have described how to make a proof of service for the various means by which one may serve a motion. The Rules of Court permit one to file the proof of service as late as five calendar days before the time appointed for the hearing.<sup>153</sup> Customarily, however, proofs of service are filed at the same time as the motion papers.

**§ 7.04 Opposing the Motion**

**[A] Grounds**

The grounds upon which one may oppose a motion fall into three categories. First, one may attack the procedures the moving party employed to bring the motion to the court's attention. Second, one may dispute the evidence upon which the moving party relies in support of the motion. Third, one may argue that the law does not entitle the moving party to the relief sought.<sup>154</sup>

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<sup>151</sup> Gov. CODE § 26830(a)(1).

<sup>152</sup> Gov. CODE § 26826(a).

<sup>153</sup> RULES OF CT. 317(b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 9:15.1 (1996).

<sup>154</sup> *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:94.1–:99 (1996).

➔ Notice of Motion

If one objects to the manner by which the moving party noticed the motion, one must take care not to address the merits of the motion. By addressing the merits one forfeits any objection one might have to the manner of notice.<sup>155</sup>

One may challenge the moving party’s evidence either by contending that that evidence is inadmissible or by contending that evidence of greater weight refutes the moving party’s evidence or raises an issue of fact. When objecting to the moving party’s evidence, the better practice is to file a separate document setting forth the evidence objected to and the grounds for the objection.<sup>156</sup> When adducing opposing evidence, the opponent must comply with the same requirements as the moving party in terms of assuring the admissibility of that evidence.

➔ Evidentiary Support for Motion

One may challenge the moving party’s entitlement to the order sought either by challenging the merits of the moving party’s legal argument or by making some other argument showing that the law entitles the opponent to an order denying the moving party the relief sought. Both kinds of arguments appear in a [memorandum of points and authorities](#) filed in opposition to the motion.

If one has no intention to oppose a motion, one should not force one’s adversary to the expense of making the motion.<sup>157</sup>

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<sup>155</sup> Alliance Bank v. Murray, 161 Cal. App. 3d 1, 7, 207 Cal. Rptr. 233, 237 (1984).

<sup>156</sup> See, e.g., RULES OF CT. 345 ([motions for summary judgment](#)); ORANGE SUPER. CT. R. 514(D) (objections must be set forth in a separate document and state the language objected to, the document, page, and line number where the language appears, and the grounds for the objection); SAN DIEGO SUPER. CT. R. 4.1(m) (a party desiring to object to evidence must either submit the objections in writing or arrange for a court reporter to attend the hearing). Written objections to evidence adduced in support of a [motion for summary judgment](#) must be filed and served no later than 4:30 p.m. on the third court day preceding the hearing. RULES OF CT. 345.

**[B] Form of the Papers**

Opposition papers must follow the same requirements as to form as the [moving papers](#).

**[C] Service and Filing**

One must file and serve all papers opposing a motion at least five court days before the time appointed for the hearing.<sup>158</sup> A paper submitted before the close of the clerk's office on the day the paper is due is deemed timely filed.<sup>159</sup> If the party opposing the motion files the opposition papers late, he may forfeit his right to oral

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<sup>157</sup> See, e.g., LOS ANGELES SUPER. CT. R. 7.12(h)(2).

<sup>158</sup> CODE CIV. PROC. § 1005(b); RULES OF CT. 317(a). One must file papers opposing a [{motion for summary judgment}](#) 14 days before the hearing. CODE CIV. PROC. § 437c(b). Some local rules require one to file a statement of nonopposition by the time opposing papers are due if one elects not to oppose a motion. See, e.g., SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 4(h). The extension provisions contained in section 1013 of the Code of Civil Procedure do not affect the deadline for filing opposition papers because the time for filing opposition papers is measured from the hearing date, not from the service of the moving papers. CODE CIV. PROC. § 1005(b). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:104–:105.3 (1996).

<sup>159</sup> RULES OF CT. 317(d).



➔ [Filing](#) argument,<sup>160</sup> and the court may refuse to consider them.<sup>161</sup> One files and lodges opposing papers in the same manner as moving papers.

The Rules of Court do not expressly address the timing for filing a proof of service of opposition papers. Prudence dictates that if one intends to file a proof of service separately from the opposition papers, one should wait no longer than five calendar days before the hearing.<sup>162</sup>

#### [D] Extensions of Time

➔ [\(Fast Track Rules\)](#) The court may order a different time schedule if good cause exists.<sup>163</sup> When the Code of Civil Procedure requires an action relating to the pleadings or to the service of notices (other than notices of appeal and of intention to move for a new trial), the judge of the court in which the action is pending (or the judge who presided at trial) may, for good cause, extend the time allowed for the action, but the extension may not exceed 30 days without the opponent's consent.<sup>164</sup>

➔ [Form: Application for Order Extending Time](#)

<sup>160</sup> See, e.g., SAN DIEGO SUPER. CT. R. 4.2(i).

<sup>161</sup> RULES OF CT. 317(c). If the court refuses to consider late papers, it must so indicate in the minutes or order, *id.*, and must exercise its discretion in accordance with the standards governing the granting of relief from mistake, inadvertence, surprise, or excusable neglect under CODE CIV. PROC. § 473(b). *Mann v. Cracchiolo*, 38 Cal. 3d 18, 30, 694 P.2d 1134, 1139, 210 Cal. Rptr. 762, 767 (1985).

<sup>162</sup> *Cf.* RULES OF CT. 317(b) (“Proof of service of the *moving* papers shall be filed no later than five calendar days before the time appointed for the hearing.”). Local rules sometimes impose additional requirements. See, for example, LOS ANGELES SUPER. CT. R. 9.8(e), which requires that the proof of service be filed at least five court days before the hearing and be attached to the papers if served by mail. (The former requirement conflicts with RULES OF CT. 317(b) and may be invalid.)

<sup>163</sup> RULES OF CT. 317(a).

<sup>164</sup> CODE CIV. PROC. § 1054(a).

**§ 7.05 Replying to the Opposition**

The moving party may submit additional evidence and argument in response to his opponent's opposition papers. All reply papers must be filed and served at least two court days before the hearing.<sup>165</sup> If one files reply papers on the eve of the hearing, then one should deliver the papers to opposing counsel by hand or by fax to avoid the risk of a continuance based on opposing counsel's nonreceipt of the reply papers.<sup>166</sup> The court may disregard reply papers filed late<sup>167</sup> and may order a different time schedule if good cause exists.<sup>168</sup>

If the moving party raises new issues in the reply papers, the opposing party is entitled to a continuance in order to have a fair opportunity to meet those issues.<sup>169</sup>

**§ 7.06 The Hearing****[A] Challenging the Judge**

Section 170.6 of the Code of Civil Procedure provides each side in a lawsuit one peremptory challenge to any judge (or court commissioner or referee<sup>170</sup>) assigned to

<sup>165</sup> CODE CIV. PROC. § 1005(b); RULES OF CT. 317(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:106–:110.1 (1996).

<sup>166</sup> *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.8(c); SAN DIEGO SUPER. CT. R. 4.1(i).

<sup>167</sup> RULES OF CT. 317(c).

<sup>168</sup> CODE CIV. PROC. § 1005(b); RULES OF CT. 317(a).

<sup>169</sup> *Marriage of Hoffmeister*, 161 Cal. App. 3d 1163, 1170, 208 Cal. Rptr. 345, 349 (1984).

<sup>170</sup> *Autoland, Inc. v. Superior Court*, 205 Cal. App. 3d 857, 860, 252 Cal. Rptr. 662, 663 (1988) (section 170.6 applies to discovery referees). Section 170.6 comes into play with respect to commissioners and referees only as to those matters a commissioner or referee may determine without the consent of the parties. *See, e.g.*, CODE CIV. PROC. §§ 259, 639.

try the case or hear a motion involving a contested issue of law or fact.<sup>171</sup> Therefore, before making a motion, a party must consider whether it is wise to spend one's precious peremptory challenge at a pretrial hearing or to save it for trial.

Once a party has effectively challenged a judge, that judge is disqualified from any further role in the action, even if the party who filed the challenge consents to his participation.<sup>172</sup> Furthermore, the dismissal of a party who has challenged a judge does not restore the judge's qualification to participate in the case.<sup>173</sup>

### [1] Declaration of Prejudice

No judge may try a case or hear "any matter therein" that involves a contested issue of law or fact if the judge is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action.<sup>174</sup> A party or an attorney

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<sup>171</sup> CODE CIV. PROC. § 170.6(1). One may not employ section 170.6 to challenge a judge because of his race. To challenge an opponent's misuse of the peremptory challenge one must show that the judge belongs to a cognizable racial group, and one must adduce facts raising an inference that the opponent challenged the judge because of race. The challenging party may rebut the objection by providing an explanation for the challenge. *People v. Superior Court (Williams)*, 8 Cal. App. 4th 688, 713, 10 Cal. Rptr. 2d 873, 888 (1992).

The making of a peremptory challenge under section 170.6 against one judge does not affect one's right to disqualify a second judge for cause. *See, e.g.*, CODE CIV. PROC. § 170.1.

*See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:121--145 (1996); 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 112-127 (3d ed. 1985).

<sup>172</sup> *Brown v. Superior Court*, 124 Cal. App. 3d 1059, 1061-62, 177 Cal. Rptr. 756, 758 (1981).

<sup>173</sup> *Louisiana-Pacific Corp. v. Philo Lumber Co.*, 163 Cal. App. 3d 1212, 1219, 210 Cal. Rptr. 368, 372 (1985).

may establish this prejudice by means of an oral or written motion without notice supported by a [declaration](#) under penalty of perjury that the judge to whom the case is assigned is prejudiced against that party or attorney so that the party or attorney cannot, or believes that he cannot, have a fair and impartial trial or hearing before that judge. The declaration must include substantially the same contents as the following statutorily prescribed affidavit:

\_\_\_\_\_ being duly sworn, deposes and says: That he or she is a party (or attorney for a party) to the within action (or special proceeding). That \_\_\_\_\_ the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his or her attorney) or the interest of the party (or his or her attorney) so that affiant cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee.<sup>175</sup>

## [2] Timing Issues

If a side fails to challenge a judge hearing a pretrial motion involving a determination of “contested fact issues relating to the merits,” that side forfeits its right to exercise its peremptory challenge against the same judge.<sup>176</sup> Most pretrial

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<sup>174</sup> CODE CIV. PROC. § 170.6(1).

<sup>175</sup> CODE CIV. PROC. § 170.6(5), (6).

<sup>176</sup> CODE CIV. PROC. § 170.6(2); *cf.* *Bambula v. Superior Court*, 174 Cal. App. 3d 653, 656–57, 220 Cal. Rptr. 223, 224 (1985). *But cf.* *Farmers Ins. Exch. v. Superior Court*, 10 Cal. App. 4th 1509, 13 Cal. Rptr. 2d 449 (1992) (if the Chairman of the Judicial Council [coordinates](#) similar actions pending in different counties, a party may submit a peremptory challenge within 20 days after service of the coordination order, even if the assigned judge has decided a contested fact issue relating to the merits before coordination).

motions do not involve contested fact issues relating to the merits,<sup>177</sup> though motions for preliminary injunctions may.<sup>178</sup>

If the judge (other than a judge assigned to the case for all purposes) who is scheduled to hear the matter is known at least ten days before the date set for the hearing, the objecting party must make the motion at least five days before the hearing. In no event may one make the motion later than the commencement of the hearing.<sup>179</sup> If the notice of motion simply designates the “Law and Motion Department” or some other department as the place of hearing, the fact that the judge regularly assigned to that department is “scheduled to hear the matter” is

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<sup>177</sup> *Landmark Holding Group v. Superior Court*, 193 Cal. App. 3d 525, 529, 238 Cal. Rptr. 475, 477 (1987) (application for a {temporary restraining order}); *Bambula v. Superior Court*, 174 Cal. App. 3d 653, 224–25, 220 Cal. Rptr. 223, 224 (1985) ({motion for summary judgment}); *Los Angeles County Dept. of Pub. Social Servs. v. Superior Court*, 69 Cal. App. 3d 407, 417, 138 Cal. Rptr. 43, 49 (1977) (motion to transfer and {motion for continuance}); *Zdonek v. Superior Court*, 38 Cal. App. 3d 849, 852–53, 113 Cal. Rptr. 669, 671–72 (1974) (demurrer to complaint), *overruled on other grounds*, *Woodman v. Superior Court*, 196 Cal. App. 3d 407, 241 Cal. Rptr. 818 (1987); *Hospital Council v. Superior Court*, 30 Cal. App. 3d 331, 337–38, 106 Cal. Rptr. 247, 252 (1973) ({motion for judgment on the pleadings}). *But see California Fed. Sav. & Loan Ass’n v. Superior Court*, 189 Cal. App. 3d 267, 271, 234 Cal. Rptr. 413, 415–16 (1987) ({motion for summary adjudication} on correct interpretation of a contract involved contested fact issues relating to the merits). *See also Fight for the Rams v. Superior Court*, 41 Cal. App. 4th 953, 958–59, 48 Cal. Rptr. 2d 851, 853–54 (1996) (holding that ruling on demurrer did not involve contested fact issues but criticizing *California Fed. Sav. & Loan Ass’n v. Superior Court*, *supra*).

<sup>178</sup> *Cf. Kohn v. Superior Court*, 239 Cal. App. 2d 428, 430, 48 Cal. Rptr. 832, 834 (1966).

<sup>179</sup> CODE CIV. PROC. § 170.6(2). The fact that the tentative ruling identifies the assigned judge does not extinguish the parties’ right to challenge at the commencement of the hearing. *Kaiser Foundation Hosps. v. Superior Court*, 190 Cal. App. 3d 721, 725, 235 Cal. Rptr. 630, 632 (1987).

“known” as soon as the opposing party receives the notice, provided that there is reasonable assurance that the judge will in fact hear the case.<sup>180</sup>

If the action is assigned to a judge “for all purposes,”<sup>181</sup> one has only ten days after notice of the assignment or, if the party has not yet appeared in the action, after making an appearance in which to challenge the assigned judge.<sup>182</sup> Regardless of the court’s internal designation, an assignment is for all purposes if the assignment instantly identifies the judge likely to try the case and if the judge is expected to process the whole case.<sup>183</sup> If, pursuant to the {fast track rules}, the court uses a “direct calendar” system for assigning cases to individual judges when the case is filed, the challenging party must make his challenge with 15 days of his appearance.<sup>184</sup> When a direct calendar assignment is made more than 15 days after a complaint is filed, the “first appearance” by a plaintiff or defendant who has already

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<sup>180</sup> *People v. Superior Court (Lavi)*, 4 Cal. 4th 1164, 1180, 847 P.2d 1031, 1040, 17 Cal. Rptr. 2d 815, 824 (1993).

<sup>181</sup> See RULES OF CT. 213; STANDARDS OF JUDICIAL ADMINISTRATION § 19; SAN FRANCISCO SUPER. CT. R. 2.5.

<sup>182</sup> CODE CIV. PROC. § 170.6(2); *Fight for the Rams v. Superior Court*, 41 Cal. App. 4th 953, 957, 48 Cal. Rptr. 2d 851, 853 (1996). The time within which to file a peremptory challenge to the “all-purpose” assignment of a trial court judge is extended when “notice” of the assignment is served by mail. *California Business Council for Equal Opportunity v. Superior Court*, 52 Cal. App. 4th 1100, ??, 62 Cal. Rptr. 2d 7, 10 (1997).

<sup>183</sup> *People v. Superior Court (Lavi)*, 4 Cal. 4th 1164, 1180, 847 P.2d 1031, 1039–40, 17 Cal. Rptr. 2d 815, 823–24 (1993).

<sup>184</sup> GOV. CODE § 68616(i); *Fight for the Rams v. Superior Court*, 41 Cal. App. 4th 953, 957, 48 Cal. Rptr. 2d 851, 853 (1996).

responded to the complaint in a direct calendar court coincides with the direct calendar assignment.<sup>185</sup> If the all purpose judge presides at or acts in connection with a hearing, proceeding, or motion before trial and not involving a determination of contested fact issues relating to the merits, that fact does not preclude a post-hearing or post-ruling assertion of the challenge, provided it is otherwise timely.<sup>186</sup>

### [3] Multiple Challenges and Multiple Parties

A party or attorney may not invoke section 170.6 more than once in any one action. If there are multiple plaintiffs or multiple defendants, each *side* may make only one motion.<sup>187</sup> If one defendant's interests are adverse to the other defendant's interest, there are two defense "sides."<sup>188</sup>

**Example:** Defendants *A* and *Z* are charged with negligently driving their cars and injuring plaintiff *P*. *A* contends that *Z* alone was responsible for the accident. The case is assigned to Judge *L*, whom *Z* challenges. The case is then assigned to Judge *M*, whom *A* challenges. The court grants the motion.

The court ruled correctly. *A*'s and *Z*'s interests are adverse, and *Z*'s challenge to Judge *L* did not preclude *A* from challenging Judge *M*.<sup>189</sup>

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<sup>185</sup> *Fight for the Rams v. Superior Court*, 41 Cal. App. 4th 953, 958, 48 Cal. Rptr. 2d 851, 853 (1996).

<sup>186</sup> *Fight for the Rams v. Superior Court*, 41 Cal. App. 4th 953, 958, 48 Cal. Rptr. 2d 851, 853 (1996).

<sup>187</sup> CODE CIV. PROC. § 170.6(3).

<sup>188</sup> *Johnson v. Superior Court*, 50 Cal. 2d 693, 700, 329 P.2d 5, 10 (1958).

<sup>189</sup> *Johnson v. Superior Court*, 50 Cal. 2d 693, 700, 329 P.2d 5, 10 (1958).

If cases are {consolidated} for trial, an earlier peremptory challenge in one of the cases precludes a later peremptory challenge by other parties belonging to the same side.<sup>190</sup> If the chairperson of the Judicial Council “{coordinates}” for trial cases pending in different counties,<sup>191</sup> a party may submit a peremptory challenge after service of the coordination order, even if the assigned judge has decided a contested fact issue relating to the merits before coordination.<sup>192</sup> One must submit the peremptory challenge to the assigned judge within 20 days after service of the order assigning that judge to the coordination proceeding. For purposes of section 170.6, all the plaintiffs in the coordinated actions constitute a side, and all the defendants constitute a side.<sup>193</sup>

### [B] Continuances

Although the court has discretion to deny a requested continuance of a hearing,<sup>194</sup> if the attorneys agree to continue a hearing or to take it off calendar, the court will usually acquiesce. Some courts require a written stipulation or an *ex parte*

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<sup>190</sup> *Cf.* *Le Louis v. Superior Court*, 209 Cal. App. 3d 669, 682–83, 257 Cal. Rptr. 458, 466 (1989).

<sup>191</sup> *See* CODE CIV. PROC. §§ 404 *et seq.*

<sup>192</sup> *Farmers Ins. Exch. v. Superior Court*, 10 Cal. App. 4th 1509, 13 Cal. Rptr. 2d 449 (1992).

<sup>193</sup> RULES OF CT. 1515. CODE CIV. PROC. § 1013 extends the time limit five days for service of the coordination order by mail. *Citicorp N. Am., Inc. v. Superior Court*, 213 Cal. App. 3d 563, 261 Cal. Rptr. 668 (1989).

<sup>194</sup> *Mahoney v. Southland Mental Health Assocs. Medical Group*, 223 Cal. App. 3d 167, 170–72, 272 Cal. Rptr. 602, 603–05 (1990) (applications for continuances are not favored); LOS ANGELES SUPER. CT. R. 9.12(b); SAN DIEGO SUPER. CT. R. 4.2(e) (no continuances unless all parties appear *ex parte* and obtain an order); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 12(a).



application plus a declaration showing good cause for rescheduling the hearing.<sup>195</sup> The moving party has a duty to notify the court if the motion will not be heard as scheduled.<sup>196</sup> Some courts refuse to grant a third continuance of a hearing absent a court appearance and a showing of good cause.<sup>197</sup>

### [C] Tentative Rulings

Some courts make tentative rulings on motions indicating the order the court intends to enter unless persuaded otherwise at oral argument. These tentative rulings are made available by telephone by 3:30 p.m. the day before the hearing.<sup>198</sup> If the loser elects not to challenge the tentative ruling by notifying the court and opposing counsel or if both parties accept the tentative ruling, the court normally hears no oral argument, and the tentative ruling becomes the court's order.<sup>199</sup>

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<sup>195</sup> LOS ANGELES SUPER. CT. R. 9:12(b) (stipulation or ex parte application must be filed by 4:30 p.m. of the third court day preceding the hearing); SAN DIEGO SUPER. CT. R. 4.2(e). Compare SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 12(a), (b) (court will grant a continuance on counsel's oral representation that opposing counsel has agreed to the continuance).

<sup>196</sup> RULES OF CT. 321(b). See also SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 12(a) (attorney seeking continuance must inform the clerk not later than 3:00 p.m. of the second court day preceding the hearing). One may incur [sanctions] for failing to inform the clerk that a hearing will not proceed as scheduled. LOS ANGELES SUPER. CT. R. 9.12(c); SAN DIEGO SUPER. CT. R. 4.2(f), 4.3(g).

<sup>197</sup> See, e.g., SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 12(a).

<sup>198</sup> RULES OF CT. 324(a). But see SAN DIEGO SUPER. CT. R. 4.4(a) (telephonic ruling is not a tentative ruling). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:111–114.1 (1996).

**[D] The Call of the Calendar**

Judges follow different procedures in determining the order of cases in which to hear oral argument. Courts with short calendars often simply hear the cases in the order in which they appear on the calendar. Other courts attempt to expedite the proceedings by asking counsel to give time estimates for oral argument; then the court hears uncontested and short matters first, moving more complex matters to the end of the calendars.

Unless the court orders otherwise, a party may give notice that he will not appear at the hearing and will submit the matter without an appearance, in which case the court will rule on the merits of the motion.<sup>200</sup> If a nonappearing party fails to give notice of his nonappearance, the court may also rule on the merits,<sup>201</sup> or it may enter its tentative ruling as its order<sup>202</sup> or deny the motion.<sup>203</sup> In addition, the court may impose {sanctions} on the offending party for inconveniencing the court and opposing counsel.<sup>204</sup> If both parties fail to appear at the hearing and to give notice of

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<sup>199</sup> *E.g.*, SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 14(b); *see* M&R Properties v. Thompson, 11 Cal. App. 4th 899, 901, 14 Cal. Rptr. 2d 579, 580 (1992).

<sup>200</sup> RULES OF CT. 321(c). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:150–:156 (1996).

<sup>201</sup> RULES OF CT. 321(d).

<sup>202</sup> *See, e.g.*, SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 14(e).

<sup>203</sup> *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.15 (moving party's failure to appear "creates an inference that the motion . . . was not well taken"); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 14(f).

<sup>204</sup> Marriage of Gumabao, 150 Cal. App. 3d 572, 577, 198 Cal. Rptr. 90, 94 (1984).

their nonappearance, the court may drop the matter from the calendar, to be reset only upon motion.<sup>205</sup> A court that “drops” a motion is deleting a hearing on that motion from the court’s calendar, and is not declaring the motion to be forever abandoned by the moving party or denying the motion with prejudice.<sup>206</sup>

### [E] Oral Argument

Whether the court will hear oral argument of a motion lies within the court’s discretion.<sup>207</sup> If the opponent of a motion fails to file opposition papers, it is unlikely that the court will grant his request for oral argument.

If the motion is significant, one should take steps to assure that the hearing is reported, so that an appellate court will have a basis to review the trial court’s order. Without a transcript, the appellate court would have no way of knowing what grounds were advanced, what arguments were made, and what facts may have been

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<sup>205</sup> RULES OF CT. 321(d). The court has discretion in the control and regulation of its calendar or docket and may for good cause delay a hearing to a later date or drop or strike a case from the calendar, to be restored on motion of one or more of the parties or on the court’s own motion. “Off Calendar” is not synonymous with denial of the motion. *See R&A Vending Servs. v. City of Los Angeles*, 172 Cal. App. 3d 1188, 1193, 218 Cal. Rptr. 667, 670 (1985).

<sup>206</sup> *Bank of America Nat’l Trust & Sav. Ass’n v. Yurosek*, 52 Cal. App. 4th 365, 378, 60 Cal. Rptr. 2d 631, 640 (1997).

<sup>207</sup> *Sweat v. Hollister*, 37 Cal. App. 4th 603, 613, 43 Cal. Rptr. 2d 399, 405 (1995); *Wilburn v. Oakland Hosp.*, 213 Cal. App. 3d 1107, 1111, 262 Cal. Rptr. 155, 158 (1989). Courts, however, are admonished to allow oral argument in “those complex law and motion cases where the decision has an immediate and dramatic impact upon the parties.” *Cal-American Income Property Fund VII v. Brown Dev. Corp.*, 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703, 705 n.3 (1982). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:165–:178 (1996).

admitted, mutually assumed, or judicially noticed at the hearing. In such a case, no abuse of discretion can be found except on the basis of speculation.<sup>208</sup> To assure that the argument is reported, one should consult the local rules or the clerk's office to determine whether the court regularly provides for reporting or recording of hearings. If the court does not do so, its local rules will specify the procedure by which a party may obtain a reporter or a recording of the proceedings in order to provide an official verbatim transcript.<sup>209</sup> If the services of an official court reporter are not available for a hearing or trial in a civil case, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter. The party who hired the reporter bears the responsibility to pay the reporter's fee, but the expense may be recovered as part of the costs.<sup>210</sup>

➡ Evidentiary Support for Motion

If one intends to take the unusual step of introducing **oral testimony** at the hearing, one must file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to be

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<sup>208</sup> *Lemelle v. Superior Court*, 77 Cal. App. 3d 148, 156–57, 143 Cal. Rptr. 450, 455 (1978); *cf. In re Christina P.*, 175 Cal. App. 3d 115, 129, 220 Cal. Rptr. 525, 532 (1985) (when counsel has reason to anticipate that what is said at a hearing may be pertinent to a subsequent appeal, he has a duty to insure that a court reporter is present).

<sup>209</sup> *See* RULES OF CT. 324.5; *cf. ORANGE SUPER. CT. R.524* (request for a court reporter should appear on the face of the moving or opposing papers or be made at least two days before the hearing).

<sup>210</sup> GOV. CODE § 68086(a)(5); RULES OF CT. 891(c).

introduced and a reasonable time estimate for the hearing.<sup>211</sup> Whether to expend the time to hear oral testimony lies within the court's discretion.<sup>212</sup>

### [F] Telephonic Hearings

California lawyers have the option of appearing by telephone in any nonevidentiary hearing, and the superior courts are required to provide for court appearances by telephone.<sup>213</sup> A party who wishes to appear by telephone in a proceeding permitted by these rules must give notice of that intention by placing the phrase "Telephone Appearance" below the title of the first filed moving or opposing papers or by filing and serving a separate notice at least two days before the hearing. If a party subsequently chooses to appear in person, he must notify the court and the other parties by telephone at least 24 hours before the hearing. A court may, by local rule, require further information concerning the telephone appearance.<sup>214</sup>

➡ Form: Notice of Telephone Appearance

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<sup>211</sup> RULES OF CT. 323(a). When the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing. *Id.*

<sup>212</sup> *John Siebel Assocs. v. Keele*, 188 Cal. App. 3d 560, 567, 233 Cal. Rptr. 231, 235 (1986). The court must exercise its discretion if requested to hear oral testimony at a hearing. *Reifler v. Superior Court*, 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356, 359 (1974).

<sup>213</sup> GOV. CODE § 68070.1(a). *See also* CODE CIV. PROC. § 575.5 (court must advise the Judicial Council whether it will adopt or reject the Judicial Council standard governing the appearance of counsel by telephone at pretrial and arbitration determination conferences in its local rules); *id.* § 575.6 (each superior court must adopt a rule enabling the appearance of counsel by telephone at trial setting conferences). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:157–164 (1996).

## § 7.07 The Ruling

## [A] The Order

➡ [Form: Order](#)

Unless the parties waive notice or the court orders otherwise, the winner mails or delivers a proposed order to the loser within five days of the ruling for approval as to form.<sup>215</sup> Within five days after the mailing or delivery, the loser must notify the prevailing party whether he approves the proposed order.<sup>216</sup> If he disapproves, he must say why. Failure to notify the winner within the time required constitutes approval of the form of the order.<sup>217</sup> The winner then transmits the proposed order to the court with a summary of any responses from other parties.<sup>218</sup> If the winner fails to prepare and submit a proposed order, any other party may do so.<sup>219</sup> Some local rules require the moving party to lodge and serve a proposed order with the moving papers.<sup>220</sup>

<sup>214</sup> RULES OF CT. 827; *see* ORANGE SUPER. CT. R. 327(B); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 11(c), app. B.

<sup>215</sup> RULES OF CT. 391(a); *see* *Beatrice Cos. v. Superior Court*, 182 Cal. App. 3d 525, 527–28, 227 Cal. Rptr. 316, 318 (1986) (court abused its discretion in ordering loser to prepare the order). Unlike other motion papers, a proposed order should not include the author's name and address in the upper left corner. *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.17. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:81.2–.4, :294–:320.9 (1996).

<sup>216</sup> RULES OF CT. 391(a). CODE CIV. PROC. § 1013, relating to service of papers by mail, does not apply to this rule. *Id.*

<sup>217</sup> RULES OF CT. 391(a).

<sup>218</sup> RULES OF CT. 391(b). Some local rules require inclusion of copies of all written responses. *See, e.g.*, SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 17(b).

<sup>219</sup> RULES OF CT. 391(c).

➡ Demurrers: Statement of Grounds for Decision

In general, the order need not include detailed findings of fact or an elaborate explanation of the reasons for the court's decision.<sup>221</sup> In certain circumstances, however, a more elaborate statement is required. Whenever a **demurrer** is sustained, the order must include a statement of the specific grounds upon which the decision is based.<sup>222</sup> Upon the denial of a {**motion for summary judgment**} on the ground that there is a triable issue as to one or more material facts, the court, by written or oral order, must specify the material facts raised by the motion as to which the court has determined that there exists a triable controversy. Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court must specify the reasons for its determination.<sup>223</sup>

### [B] The Notice of Ruling

➡ Form: Notice of Ruling

When the motion is granted or denied, the winner must give notice of the court's order to all other parties or their attorneys unless the court orders otherwise.<sup>224</sup> The notice is essential to the "finality" of the court's order because it starts the running of the period in which the loser may seek **reconsideration**.<sup>225</sup> Also, when the court

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<sup>220</sup> See, e.g., LOS ANGELES SUPER. CT. R. 9.17 (proposed order should not be attached to the other moving papers); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 74 (proposed orders must be submitted with the opposition and reply papers in cases of motions for summary judgment and summary adjudication of issues).

<sup>221</sup> *Beckett v. Kaynar Mfg. Co.*, 49 Cal. 2d 695, 698, 321 P.2d 749, 751 (1958).

<sup>222</sup> CODE CIV. PROC. § 472d. The order may refer to the appropriate pages and paragraphs of the demurrer. The loser may waive these requirements. *Id.*

<sup>223</sup> CODE CIV. PROC. § 437c(g). The court must specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion indicating that triable issues do or do not exist. The court may record its determination by court reporter or written order. *Id.*

rules on a demurrer and states a time to {amend} or to answer, the time runs from the service of the notice of the decision.<sup>226</sup> The parties may waive notice provided that waiver occurs in open court and is entered in the minutes.<sup>227</sup>

### § 7.08 Motions for Reconsideration and Renewed Motions

Code of Civil Procedure section 1008 provides that any party affected by an order may, within ten days after service of the notice of ruling,<sup>228</sup> apply to the same judge or court<sup>229</sup> that made the order to reconsider the matter and modify, amend, or

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<sup>224</sup> CODE CIV. PROC. § 1019.5(a). An endorsed copy of the order will suffice as notice. *Parris v. Cave*, 174 Cal. App. 3d 292, 294, 219 Cal. Rptr. 871, 873–84 (1985). If the court grants or denies a motion on the court's own motion, the court must give notice of its ruling unless notice is waived by all parties in open court and is entered in the minutes. *Id.* § 1019.5(b).

If the loser is represented by a law firm, the address on the envelope containing the notice must include the firm's name. *Triumph Precision Prods., Inc. v. Insurance Co. of N. Am.*, 91 Cal. App. 3d 362, 365, 154 Cal. Rptr. 120, 122 (1979).

<sup>225</sup> CODE CIV. PROC. § 1008(a).

<sup>226</sup> CODE CIV. PROC. § 472b.

<sup>227</sup> CODE CIV. PROC. §§ 472b, 1019.5(a). The rules of the San Diego Superior Court purport to preclude the filing of any additional papers after a telephonic ruling. *SAN DIEGO SUPER. CT. R.* 4.4(f).

<sup>228</sup> *Advanced Bldg. Maintenance v. State Compensation Ins. Fund*, 49 Cal. App. 4th 1388, 1392, 57 Cal. Rptr. 2d 310, 312 (1996) (court properly denied a motion for reconsideration filed more than ten days after service of an amended notice of ruling on a demurrer).

Query: When must the motion for reconsideration be filed if the parties have waived notice?

<sup>229</sup> If the judge who made the order is available, the motion for reconsideration must be addressed to him; otherwise, the motion may be addressed to another judge of the same court. *Curtin v. Koskey*, 231 Cal. App. 3d 873, 877, 282 Cal. Rptr. 706, 709 (1991).



revoke the order based on new or different facts, circumstances, or law. One must state by **declaration** what applications one has made before, when and to which judge, what order or decisions were made, and what new or different facts, circumstances, or law are shown.<sup>230</sup> The same rule applies to a moving party who does not obtain the order he sought and renews his motion, except that the moving party is not subject to a ten-day time limit and may make the motion to a different judge.<sup>231</sup>

**Example:** The court denies defendant *D*'s motion for summary judgment. A year later *D* renews the motion, submits the required **declaration**, and discloses plaintiff *P*'s recent {**deposition**} admissions. The court grants *P* summary judgment.

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<sup>230</sup> CODE CIV. PROC. § 1008(a); *Wilson v. Science Applications Int'l. Corp.*, 52 Cal. App. 4th 1025, ??, 60 Cal. Rptr. 2d 883, 887 (1997).

An alleged new or different law does not include a later enacted statute unless the statute provides for retroactive application. *Id.* § 1008(f). Unless a statute provides otherwise, it is presumed to apply prospectively only. *Marriage of Bouquet*, 16 Cal. 3d 583, 587, 546 P.2d 1371, 1372–73, 128 Cal. Rptr. 427, 428–29 (1976).

A motion for reconsideration filed after entry of a judgment following a motion will not extend the time to appeal from the judgment. *Passavanti v. Williams*, 225 Cal. App. 3d 1602, 1607–08, 275 Cal. Rptr. 887, 890–91 (1990).

*See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:322–:344.20 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 34–40 (3d ed. 1985).

<sup>231</sup> CODE CIV. PROC. § 1008(b).

The admissions were “new facts,” providing the court the jurisdictional basis to consider *D*’s renewed motion.<sup>232</sup>

If a court at any time determines that there has been a change of law that warrants reconsideration of a prior order it entered, it may do so on its own motion and enter a different order.<sup>233</sup> Until entry of judgment, the court retains complete power to change its decision as the court may determine.<sup>234</sup>

**Example:** *P* sues *Insurance Co.* for breach of its duty to defend. *Insurance Co.* moves for summary judgment. The court denies the motion by a minute order. *Insurance Co.* objects to *P*’s proposed order and seeks clarification of the minute order. The court concludes that its original decision was wrong and grants summary judgment to *Insurance Co.*

The court had the authority to correct its erroneous ruling on its own motion.<sup>235</sup>

Beyond these limits a court lacks jurisdiction to reconsider a prior order or a renewed motion.<sup>236</sup> After entry of judgment, a court has no further power to rule on a motion for reconsideration. A court may reconsider its order granting or denying a

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<sup>232</sup> *Graham v. Hansen*, 128 Cal. App. 3d 965, 971, 180 Cal. Rptr. 604, 608 (1982). *Accord*, *Film Packages v. Brandywine Film Productions, Ltd.*, 193 Cal. App. 3d 824, 827 n.3, 238 Cal. Rptr. 623, 624 n.3 (1987) (subsequent {depositions} presenting no new facts but providing “many subtle nuances and subjective impressions” supported the court’s jurisdiction to grant a renewed application for an attachment order).

<sup>233</sup> CODE CIV. PROC. § 1008(c).

<sup>234</sup> *Bernstein v. Consolidated Am. Ins. Co.*, 37 Cal. App. 4th 763, 774, 43 Cal. Rptr. 2d 817, 823 (1995).

<sup>235</sup> *Bernstein v. Consolidated Am. Ins. Co.*, 37 Cal. App. 4th 763, 774, 43 Cal. Rptr. 2d 817, 823 (1995).

motion and may even reconsider or alter its judgment so long as judgment has not yet been entered. Once judgment has been entered, however, the court may not reconsider it and loses its unrestricted power to change the judgment.<sup>237</sup>

**Example:** Judge *O* grants defendant *D*'s motion for an order staying a declaratory relief action pending disposition of the underlying tort case. The case is later assigned to Judge *K*, who holds a status conference and sets the case for trial.

Judge *K* lacked jurisdiction to vacate the stay because *D* did not file a motion for reconsideration within ten days of the stay order and there had been no change of circumstances.<sup>238</sup>

Regardless of the name attached to a later motion, the motion is a motion for reconsideration if it addresses a subject the court has already ruled upon.

**Example:** *P* files an {at-issue memorandum} and moves the court to waive the prearbitration and trial setting conference on the ground that the {five-year mandatory dismissal statute} is about to expire. Judge *K* grants

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<sup>236</sup> CODE CIV. PROC. § 1008(e); *Gilberd v. AC Transit*, 32 Cal. App. 4th 1494, 1499–1500, 38 Cal. Rptr. 2d 626, 629 (1995); *Morite v. Superior Court*, 19 Cal. App. 4th 485, 492–93, 23 Cal. Rptr. 2d 666, 669–70 (1993). Query: If the court denies a motion “without prejudice,” does CODE CIV. PROC. § 1008(e) limit the court’s authority to address the same matter later? CODE CIV. PROC. § 1008(e) limits the court’s jurisdiction “whether the order deciding the previous matter or motion is interim or final.”

<sup>237</sup> *Ramon v. Aerospace Corp.*, 50 Cal. App. 4th 1233, 1236, 58 Cal. Rptr. 2d 217, 219 (1996). Following entry of judgment, the losing party may attack the judgment in one of three ways: by a {motion for a new trial}, by a {motion to vacate}, or by filing a timely {notice of appeal}. *Ramon v. Aerospace Corp.*, 50 Cal. App. 4th 1233, 1238, 58 Cal. Rptr. 2d 217, 220 (1996).

<sup>238</sup> *Morite v. Superior Court*, 19 Cal. App. 4th 485, 492–93, 23 Cal. Rptr. 2d 666, 669–70 (1993).

plaintiffs' motion and sets a trial date. On the same day, defendant *D* files a motion to dismiss for failure to prosecute. Judge *S* grants the motion to dismiss and vacates the trial date.

If Judge *K* found that *S* had acted with diligence, then *D*'s motion to dismiss was a request to Judge *S* to reconsider the order by Judge *K* and should have been addressed to him.<sup>239</sup>

It is unclear how far this principle extends. In *Community Memorial Hospital v. County of Ventura*<sup>240</sup> the court held that a party could relitigate through a motion for summary adjudication of issues a proposition of law on which his opponent prevailed in connection with an earlier demurrer. Declining to follow *Gilbert v. AC Transit*,<sup>241</sup> the court reasoned that it would be a waste of judicial resources to prevent a trial court in a motion for summary judgment or adjudication from revisiting issues of law raised on demurrer.<sup>242</sup>

A party who seeks reconsideration of an order or renews a prior motion in violation of these rules is subject to punishment for contempt and to **{sanctions}**.<sup>243</sup>

<sup>239</sup> *Curtin v. Koskey*, 231 Cal. App. 3d 873, 878, 282 Cal. Rptr. 706, 709 (1991).

<sup>240</sup> 49 Cal. App. 4th 527, 532, 50 Cal. App. 4th 199, 56 Cal. Rptr. 2d 732, 735 (1996).

<sup>241</sup> 32 Cal. App. 4th 1494, 38 Cal. Rptr. 2d 626 (1995).

<sup>242</sup> *Community Memorial Hosp. v. County of Ventura*, 49 Cal. App. 4th 527, 532, 50 Cal. App. 4th 199, 56 Cal. Rptr. 2d 732, 735 (1996).

<sup>243</sup> CODE CIV. PROC. §§ 128.5, 1008(d); *Appl v. Lee Swett Livestock Co.*, 192 Cal. App. 3d 466, 476, 237 Cal. Rptr. 433, 439 (1987); *Fegles v. Kraft*, 168 Cal. App. 3d 812, 815, 214 Cal. Rptr. 380, 381 (1985). If the order that one attacked in violation of CODE CIV. PROC. § 1008 was, in fact, erroneous, one cannot be sanctioned for attacking it. *Tutor-Saliba-Perini Joint Venture v. Superior Court*, 233 Cal. App. 3d 736, 745, 285 Cal. Rptr. 1, 5 (1991).

A judge (or commissioner) may revoke an order made in violation of the rules. The judge of the court in which the action is pending has the same power.<sup>244</sup>

### § 7.09 Referees

When a motion raises a question of fact or when the court determines that it is necessary to appoint a referee to determine any and all discovery motions and disputes, the court may, upon the application of any party or on its own motion, appoint a referee to report findings and make a recommendation to the court.<sup>245</sup> The parties may also obtain the appointment of a referee by agreement.<sup>246</sup> A referee or commissioner may not, however, decide the “law” portion of law and motion matters.<sup>247</sup> A discovery referee does not have the authority to issue court orders. Instead, the discovery referee’s power is limited to reporting his findings and making a recommendation to the superior court with a proposed order and any

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<sup>244</sup> CODE CIV. PROC. § 1008(d).

<sup>245</sup> CODE CIV. PROC. § 639(c), (d); *San Bernardino Community Hosp. v. Office of Statewide Health Planning & Dev.*, 187 Cal. App. 3d 457, 472–73, 231 Cal. Rptr. 673, 682 (1987); *see* CODE CIV. PROC. § 585(b) (reference permitted to assess damages in case of a default); *id.* § 636 (reference permitted to facilitate completion of judgment after a trial to the court); WATER CODE § 2000 (reference to State Water Resources Control Board permitted in water cases). A court commissioner may also make findings of fact as to any matter upon which the court requires information. CODE CIV. PROC. § 259(b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 9:183–:188 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 45–52 (3d ed. 1985).

<sup>246</sup> CODE CIV. PROC. § 638.

<sup>247</sup> *International Jet Ski Boating Ass’n v. Superior Court*, 232 Cal. App. 3d 112, 115–16, 283 Cal. Rptr. 33, 34–35 (1991).

recommendation for the imposition of sanctions.<sup>248</sup> After the referee has submitted his report to the court, the parties may object to the referee's findings, recommendations and proposed orders and request a hearing on these objections. A referee can only propose or recommend orders. The superior court must decide whether to accept or reject the referee's recommendations.<sup>249</sup>

Any resident of the county who is competent to serve as a juror and does not have a conflict of interest may serve as a referee.<sup>250</sup> A party may object to the appointment of any person as referee on any of the following grounds:

- lack of statutory qualifications to act as a juror
- consanguinity or affinity, within the third degree, to either party or to an officer of a corporate party or to any judge of the court in which the appointment is to be made
- standing in the relation of guardian and ward, conservator and conservatee, employer and employee, or principal and agent to either party
- being a member of either party's family
- being a partner in business with either party
- providing security on any bond or obligation for either party

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<sup>248</sup> CODE CIV. PROC. § 639(e); RULES OF CT. 244.2(e)(2); *Doyle v. Superior Court*, 50 Cal. App. 4th 1878, 1884 n.1, 58 Cal. Rptr. 2d 476, 482 n.1 (1996).

<sup>249</sup> *Doyle v. Superior Court*, 50 Cal. App. 4th 1878, 1884 n.1, 58 Cal. Rptr. 2d 476, 482 n.1 (1996).

<sup>250</sup> CODE CIV. PROC. § 640; *see, e.g., Martino v. Denevi*, 182 Cal. App. 3d 553, 227 Cal. Rptr. 354 (1986) (accountant). In choosing a referee the court must take into account the parties' financial resources. *McDonald v. Superior Court*, 22 Cal. App. 4th 364, 370, 27 Cal. Rptr. 2d 310, 314 (1986).

- having served as a witness or juror in any trial between the same parties for the same cause of action
- having an interest in the action
- having formed or expressed an unqualified opinion or belief as to the merits of the action
- having a state of mind evincing enmity against or bias in favor of either party.<sup>251</sup>

A referee must report his statement of decision in writing to the court within 20 days after the testimony, if any, is closed.<sup>252</sup> The referee's decision may be excepted to and reviewed in the same manner as if made by the court. When a matter is referred to a referee to make findings of facts, the referee's decision has the effect of a special verdict.<sup>253</sup> The court may order the parties to pay the fees of referees who are not employees or officers of the court in such reasonable amount as the court may fix for the time spent in any manner the court determines to be fair and reasonable, including apportionment of the fees among the parties.<sup>254</sup>

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<sup>251</sup> CODE CIV. PROC. § 641. A party may also use its one [peremptory challenge](#) to disqualify the referee. *Id.* § 170.6.

<sup>252</sup> CODE CIV. PROC. § 643.

<sup>253</sup> CODE CIV. PROC. § 645; *Aetna Life Ins. Co. v. Superior Court*, 182 Cal. App. 3d 431, 436, 227 Cal. Rptr. 460, 464 (1986).

<sup>254</sup> CODE CIV. PROC. §§ 645.1, 1023. The parties may agree in writing to a specific rate of compensation. *Id.* § 1023. Sections 645.1 and 1023 authorize the court to order "the parties," not an attorney for one of the parties, to pay a discovery referee's fees, and these statutes require the court, not the referee, to determine the reasonableness of the referee's fees.





1 John Hobart  
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2 441 Bauchet Street  
Los Angeles, California 90012  
3 (213) 680-9600  
State Bar No. 70032  
4  
Attorney for Plaintiff  
5 \_\_\_\_\_ [name]

6  
7

8 Superior Court of the State of California  
9 County of \_\_\_\_\_

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11 \_\_\_\_\_ [name], )  
 ) Case No. \_\_\_\_\_  
12 Plaintiff, )  
 ) Plaintiff \_\_\_\_\_'s Application  
13 v. ) for an Order Shortening Time  
 )  
14 \_\_\_\_\_ [name], ) (Cal. R. of Ct. 305)  
 )  
15 Defendant. )  
 )  
16 \_\_\_\_\_ )

17 I, John Hobart, declare as follows:

18 1. I am counsel for \_\_\_\_\_, the plaintiff in this action. I have per-  
19 sonal knowledge of the matters set forth in this application and would be compe-  
20 tent to testify as to those matters if called and sworn as a witness.

21 2. I have attached to this application a copy of a motion for \_\_\_\_\_,  
22 which I intend to file on behalf of plaintiff \_\_\_\_\_.

23 3. If plaintiff \_\_\_\_\_ were to arrange for service of the attached  
24 motion by personal delivery on \_\_\_\_\_, defendant \_\_\_\_\_'s attorney,  
25 today, then the earliest date on which this motion could be heard in the ordi-  
26 nary course of events would be \_\_\_\_\_.

27 4. Plaintiff \_\_\_\_\_ will suffer substantial hardship if the Court  
28

1 does not hear this motion by \_\_\_\_\_, for the following reasons:

2 [state facts showing good cause to shorten time]

3 5. On \_\_\_\_\_, I telephoned attorney \_\_\_\_\_ [defendant's attorney],  
4 explained the necessity of an earlier hearing, and requested that defendant  
5 \_\_\_\_\_ stipulate that plaintiff's motion be heard on \_\_\_\_\_. Counsel  
6 refused to stipulate to an earlier hearing.

7 6. During my telephone conversation with counsel, I advised counsel that  
8 I intended to appear in this department on \_\_\_\_\_ [date] at \_\_\_\_\_ [time] to  
9 apply for an order shortening the time for the hearing on the attached motion.

10 I declare under penalty of perjury under the laws of the State of Califor-  
11 nia that the foregoing is true and correct.

12 Dated: \_\_\_\_\_

\_\_\_\_\_  
John Hobart  
Attorney for Plaintiff  
[name]

14

15 Order Shortening Time

16 The Court finds that good cause exists to shorten the time for hearing on  
17 plaintiff \_\_\_\_\_'s motion for \_\_\_\_\_ and therefore orders as follows:

18 1. Hearing on plaintiff's motion is hereby set for \_\_\_\_\_.

19 2. Plaintiff shall serve the moving papers on defendant's counsel by per-  
20 sonal delivery no later than \_\_\_\_\_.

21 3. Defendant shall serve by personal delivery and file the opposition  
22 papers no later than \_\_\_\_\_.

23 Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge

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1 John Hobart  
Hobart, Colfax & Wheeler  
2 441 Bauchet Street  
Los Angeles, California 90012  
3 (213) 680-9600  
State Bar No. 70032  
4  
Attorney for Plaintiff  
5 \_\_\_\_\_ [name]

6  
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8 Superior Court of the State of California  
9 County of \_\_\_\_\_

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11 \_\_\_\_\_ [name] \_\_\_\_\_, ) Case No.: \_\_\_\_\_  
 )  
12 Plaintiff, ) Notice of Defendant \_\_\_\_\_'s  
 ) Motion to Quash Service of Summons;  
13 v. ) Declaration of \_\_\_\_\_; Memorandum of Points and Authorities  
 )  
14 \_\_\_\_\_ [name] \_\_\_\_\_, )  
 ) Date: \_\_\_\_\_  
15 Defendant. ) Time: \_\_\_\_\_  
 ) Dept: \_\_\_\_\_  
16 \_\_\_\_\_ ) Trial Date: none

17 Please take notice that on \_\_\_\_\_ at \_\_\_\_\_ in Department No. \_\_\_\_  
18 of the \_\_\_\_\_ County Superior Court, located at \_\_\_\_\_ [insert address] \_\_\_\_\_, defen-  
19 dant \_\_\_\_\_ will move the court to quash service of plaintiff's summons.  
20 Defendant \_\_\_\_\_ makes this motion on the ground that the Court lacks juris-  
21 diction over him in that:

22 [specify grounds upon which motion is based]  
23 Defendant bases this motion on this Notice, the accompanying Declaration of  
24 \_\_\_\_\_ and Memorandum of Points and Authorities, and the documents on file  
25 in this action.

26 Dated: \_\_\_\_\_  
27 \_\_\_\_\_  
John Hobart  
Attorney for Defendant  
[name]

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Proof of Service by Personal Delivery

I, \_\_\_\_\_, declare as follows:

1. I have personal knowledge of the matters described in this proof of service, and I would be competent to testify as to those matters if called and sworn as a witness.

2. On \_\_\_\_\_, I personally delivered to \_\_\_\_\_ the following document:

[set forth exact title of document]

[or]

2. On \_\_\_\_\_, I left the following document

[set forth exact title of document]

in an envelope clearly labeled to identify attorney \_\_\_\_\_, with a receptionist or a person having charge of the attorney's office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_  
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Proof of Service by Mail

I, \_\_\_\_\_, declare as follows:

1. I have personal knowledge of the matters described in this proof of service, and I would be competent to testify as to those matters if called and sworn as a witness.

2. I am over the age of 18 and am not a party to the cause. I am employed in the County of \_\_\_\_\_, the county where the mailing described in this proof of service occurred. My business address is: \_\_\_\_\_ [insert address].

3. On \_\_\_\_\_, I deposited in the mail at \_\_\_\_\_ [insert address] a copy of \_\_\_\_\_ [insert exact title of document] in a sealed envelope, with postage fully pre-paid, addressed to:

[insert name and address as shown on the envelope]

[or]

3. I am readily familiar with the practice of \_\_\_\_\_ [insert firm] for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, \_\_\_\_\_'s correspondence is deposited with the United States Postal Service the day it is collected and processed. On \_\_\_\_\_ at \_\_\_\_\_ [insert address], I placed for collection and mailing following \_\_\_\_\_'s ordinary business practices a copy of \_\_\_\_\_ [insert exact title of document] in a sealed envelope addressed to:

[insert name and address as shown on the envelope]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_ [name]

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Proof of Service by Express Mail

I, \_\_\_\_\_, declare as follows:

1. I have personal knowledge of the matters described in this proof of service, and I would be competent to testify as to those matters if called and sworn as a witness.

2. I am over the age of 18 and am not a party to the cause. I am employed in the County of \_\_\_\_\_, the county where the mailing described in this proof of service occurred. My business address is: \_\_\_\_\_ [insert address] \_\_\_\_\_.

3. On \_\_\_\_\_, I deposited in a facility regularly maintained by the United States Postal Service for receipt of Express Mail located at \_\_\_\_\_ [insert address] \_\_\_\_\_ a copy of \_\_\_\_\_ [insert exact title of document] \_\_\_\_\_, including an unsigned copy of this proof of service, in a sealed envelope, with Express Mail postage fully pre-paid, addressed to:

[insert name and address as shown on the envelope]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_ [name]

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Proof of Service by Overnight Delivery Service

I, \_\_\_\_\_, declare as follows:

1. I have personal knowledge of the matters described in this proof of service, and I would be competent to testify as to those matters if called and sworn as a witness.

2. I am over the age of 18 and am not a party to the cause. I am employed in the County of \_\_\_\_\_, the county where the mailing described in this proof of service occurred. My business address is: \_\_\_\_\_ [insert address].

3. On \_\_\_\_\_, I [deposited in a facility regularly maintained by \_\_\_\_\_ [insert name of delivery service], an express service carrier, located at \_\_\_\_\_ [insert address] [or] [delivered to an authorized courier or driver authorized by \_\_\_\_\_ [insert name of delivery service], an express service carrier, to receive documents] a copy of \_\_\_\_\_ [insert exact title of document], including an unsigned copy of this proof of service, in an envelope designated by the express service carrier, with delivery fees paid or provided for, addressed to:

[insert name and address as shown on the envelope]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_ [name]

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Proof of Service by FAX

I, \_\_\_\_\_, declare as follows:

1. I have personal knowledge of the matters described in this proof of service, and I would be competent to testify as to those matters if called and sworn as a witness.

2. I am over the age of 18 and am not a party to the cause. I am employed in the County of \_\_\_\_\_, the county where the FAX transmission described in this proof of service occurred. My business address is: \_\_\_\_\_ [insert address] \_\_\_\_\_.

3. On \_\_\_\_\_, at \_\_\_\_\_, I transmitted \_\_\_\_\_ [inset exact title of document] \_\_\_\_\_, including an unsigned copy of this proof of service, from a FAX machine at \_\_\_\_\_ [insert telephone number] \_\_\_\_\_, to a FAX machine maintained by \_\_\_\_\_ [insert name] \_\_\_\_\_ at \_\_\_\_\_ [insert telephone number] \_\_\_\_\_.

4. The transmission was reported as complete and without error, and the transmission report was properly issued by the transmitting FAX machine. A copy of the transmission report is attached to this proof of service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_ [name]



ATTORNEY OR PARTY WITHOUT ATTORNEY ( <i>Name and Address</i> ):	TELEPHONE NO.:	<b>FOR COURT USE ONLY</b>
ATTORNEY FOR ( <i>Name</i> ):	FAX:	
<b>COURT NAME:</b>		
PETITIONER/PLAINTIFF:  RESPONDENT/DEFENDANT:		
<b>FACSIMILE TRANSMISSION COVER SHEET</b>		CASE NUMBER:

**TO THE COURT:**

1. **Please file** the following transmitted documents in the order listed below:

<u>Document name</u>	<u>No. of page</u>
----------------------	--------------------

2.  **Processing instructions** consisting of: \_\_\_\_\_ pages are also transmitted.

3.  **Fee required**  Filing fee  Fax fee (rule 2007(e))

a.  **Credit card payment** (Nevada County Municipal, Oakland-Piedmont Municipal, San Bernardino Superior, Santa Clara Superior, South Bay Municipal, and Ventura Superior Courts – rule 2007(b)). I authorize the above fees and any amount imposed by the card issuer or draft purchaser to be charged to the following account:

VISA  MASTERCARD Account No.: \_\_\_\_\_ Expiration date: \_\_\_\_\_

..... (TYPE OR PRINT NAME OF CARDHOLDER)	▶	_____ (SIGNATURE OF CARDHOLDER)
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b.  **Attorney account** (Modoc Superior and Visalia Municipal Courts – rule 2007(c)).  
Please charge my account No.:

c.  **Fee to be mailed** (Crest Forest Justice, Monterey County Municipal, and Ventura Superior Courts – rule 2007(d)).

4.  If the filing is in the Crest Forest Justice, Modoc Superior, or Monterey County Municipal Court, the filing party must insert in the box below the name and address to which the copy of this cover sheet shall be mailed.

--	--

1 John Hobart  
Hobart, Colfax & Wheeler  
2 441 Bauchet Street  
Los Angeles, California 90012  
3 (213) 680-9600  
State Bar No. 70032  
4  
Attorney for Defendant  
5 \_\_\_\_\_ [name] \_\_\_\_\_

6  
7

8 Superior Court of the State of California  
9 County of \_\_\_\_\_

10

11 \_\_\_\_\_ [name] \_\_\_\_\_, )  
 )  
12 Plaintiff, ) Case No. \_\_\_\_\_  
 )  
13 v. ) Defendant \_\_\_\_\_'s Application  
 ) for an Order Extending Time  
14 \_\_\_\_\_ [name] \_\_\_\_\_, )  
 )  
15 Defendant. )  
\_\_\_\_\_ )

16

17 I, John Hobart, declare as follows:

18 1. I am counsel for \_\_\_\_\_, the defendant in this action. I have per-  
19 sonal knowledge of the matters set forth in this application and would be compe-  
20 tent to testify as to those matters if called and sworn as a witness.

21 2. Defendant \_\_\_\_\_ was served with the summons and complaint in this  
22 action on \_\_\_\_\_ by \_\_\_\_\_ [insert manner of service] \_\_\_\_\_, and his time to respond  
23 will expire on \_\_\_\_\_.

24 3. In order to prepare an appropriate response, I will need an extra \_\_\_\_  
25 days, for the following reasons:

26 [insert facts showing good cause to extend defendant's time to plead]

27 4. On \_\_\_\_\_, I telephoned \_\_\_\_\_, attorney for plaintiff  
28 \_\_\_\_\_, explained the need for extra time to respond to the complaint, and

1 requested that plaintiff grant the needed extension. Attorney \_\_\_\_\_  
2 refused the requested extension.

3 5. During my telephone conversation with counsel, I advised counsel that  
4 I intended to appear in this department on \_\_\_\_\_[date]\_\_\_\_\_ at \_\_\_\_\_[time]\_\_\_\_\_ to  
5 apply for an order extending defendant's time to respond to plaintiff's com-  
6 plaint.

7 6. Neither the plaintiff nor the Court has granted defendant any previous  
8 extensions.

9 I declare under penalty of perjury under the laws of the State of Califor-  
10 nia that the foregoing is true and correct.

11 Dated: \_\_\_\_\_

\_\_\_\_\_  
John Hobart  
Attorney for Defendant  
[name]

12  
13  
14 Order Extending Time

15 The Court finds that good cause exists to extend the time for defendant  
16 \_\_\_\_\_ to respond to plaintiff's complaint and therefore orders that defen-  
17 dant shall have until \_\_\_\_\_ to respond to plaintiff's complaint.

18 Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge

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1 John Hobart  
Hobart, Colfax & Wheeler  
2 441 Bauchet Street  
Los Angeles, California 90012  
3 (213) 680-9600  
State Bar No. 70032

4 Attorney for Defendant  
5 \_\_\_\_\_ [name] \_\_\_\_\_

6

7

8 Superior Court of the State of California

9 County of \_\_\_\_\_

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11 \_\_\_\_\_ [name] \_\_\_\_\_, )  
 ) Case No.: \_\_\_\_\_  
12 Plaintiff, )  
 ) Notice of Telephone Appearance  
13 v. )  
 ) Date: \_\_\_\_\_  
14 \_\_\_\_\_ [name] \_\_\_\_\_, )  
 ) Time: \_\_\_\_\_  
 ) Dept: \_\_\_\_\_  
15 Defendant. )  
 ) Trial Date: none  
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16 \_\_\_\_\_ )

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17 Please take notice that John Hobart, counsel for defendant \_\_\_\_\_,  
18 intends to appear by telephone at the hearing on plaintiff \_\_\_\_\_'s motion  
19 for \_\_\_\_\_, scheduled for hearing on \_\_\_\_\_ at \_\_\_\_\_ in  
20 Department No. \_\_\_ of the \_\_\_\_\_ Superior court.

21 Dated: \_\_\_\_\_

\_\_\_\_\_  
John Hobart  
Attorney for Defendant  
[name]

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Superior Court of the State of California

County of \_\_\_\_\_

_____ [name] _____,	)	
	)	Case No.: _____
Plaintiff,	)	
	)	Order Granting _____'s Motion
v.	)	for _____
	)	
_____ [name] _____,	)	
	)	
Defendant.	)	
_____	)	

\_\_\_\_\_’s Motion for \_\_\_\_\_ came on regularly for hearing on \_\_\_\_\_ before the Honorable \_\_\_\_\_, Judge, in Department \_\_\_ of the \_\_\_\_\_ County Superior Court. After considering the papers submitted and the argument of counsel, the Court determines that good cause exists to grant \_\_\_\_\_’s motion for \_\_\_\_\_ based on the following findings:

[insert facts supporting the ruling]

Therefore, the Court hereby orders that \_\_\_\_\_’s motion for \_\_\_\_\_ is granted.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge

1 John Hobart  
Hobart, Colfax & Wheeler  
2 441 Bauchet Street  
Los Angeles, California 90012  
3 (213) 680-9600  
State Bar No. 70032

4 Attorney for Plaintiff  
5 \_\_\_\_\_ [name]

6

7

8 Superior Court of the State of California

9 County of \_\_\_\_\_

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11 \_\_\_\_\_ [name], )  
 ) Case No.: \_\_\_\_\_  
12 Plaintiff, )  
 ) Notice of Ruling  
13 v. )  
 )  
14 \_\_\_\_\_ [name], )  
 )  
15 Defendant. )  
\_\_\_\_\_ )

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17 Please take notice that on \_\_\_\_\_ the \_\_\_\_\_ Superior Court  
18 granted plaintiff \_\_\_\_\_'s motion for \_\_\_\_\_ and issued the order  
19 attached to this Notice of Ruling.

20 Dated: \_\_\_\_\_

\_\_\_\_\_  
John Hobart  
Attorney for Plaintiff  
[name]

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