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102 Navigating Foreign Waters: A Comparative Analysis of Common and Civil Law Litigation Procedures

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Prior to joining PwC, Mr. Carroll worked for 7 years in private practice, mainly in the areas of corporate and securities law, including cross-border securities litigation.

He is a member of the Advisory Council of the SEC Historical Society and does pro bono work on behalf of retail investors, most recently in relation to the Global Analyst Settlement.

Mr. Carroll received a B.S. in Finance and International Business from the Wharton School of the Univ. of Penn., and is a graduate of Suffolk Law School in Boston. He also earned an LL.M. from the Univ. of Frankfurt and is completing his doctoral work at the Univ. of Münster.

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Christopher Crowder is chief legal counsel – international for The Scotts Miracle-Gro Company, a consumer lawn and garden products company with its European headquarters located in France. His legal and financial training includes positions in the New York headquarters of Skadden, Arps, Slate, Meagher & Flom, LLC, and in the New York and San Francisco offices of Citigroup's Global Investment Bank.

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Jacques-Antoine Robert is a partner in the Paris office and the general commercial lawyer, acting mainly for major industrial groups – notably high tech and pharmaceutical companies – shareholders of such groups or investment funds. He represents his clients in regulatory matters, transactions and disputes involving commercial and/or liability issues.

Mr. Robert works in contract law He has notably participated in recent major operations concerning regulatory and competition law for a high tech manufacturer.

He is featured as a recommended lawyer in the healthcare field by the French edition of the Legal 500 and by the European Counsel's Life Sciences Industry Report; his team was awarded the Trophy of Best specialized Healthcare and Pharmaceutical team 2005.

Mr. Robert is a former student of the University of Paris I Sorbonne and of the Institute of Judicial Studies.

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Katherine Wallen is currently an Assistant General Counsel in Sun Microsystems Inc's Legal Department and is the EMEA Manager for the Legal Department's Global Law Network. Katherine has worked within Sun's Legal Department for over five years, handling work as diverse as strategic alliances, complex licensing deals, manufacturing and operations agreements, sales for the Wall Street Sales financial vertical in the US, and litigation.

Prior to joining Sun, Katherine spent a year in house at the Acer Group Legal Department managing their litigation. Before going in-house, Katherine litigated business, employment, and tried jury cases at several San Francisco, California law firms.

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CHAPTER 3

LITIGATION IN THE CIVIL LAW AND THE COMMON LAW: THE BASICS

GEORGE BERMANN

Any U.S. attorney who is considering the prospect of litigation in a foreign court should expect to encounter certain differences from the litigation models with which he or she is familiar based on domestic practice. But what form are those differences likely to take, and how pronounced are they likely to be? That, broadly put, is the subject of this chapter.

INTRODUCTION

It is customary, and convenient, to compare U.S. litigation with litigation in civil law jurisdictions. The durability of the distinction between procedure in the civil law and common law is remarkable. Even among contemporary writers on comparative civil procedure, the debate is not about whether the distinction is a legitimate one, but rather about how sharp the distinction really is. In my view, subject to two broad caveats (viz. differences among civil law jurisdictions and trends toward convergence between civil law and common law litigation practice), the distinction remains a valid one. Still, with civil procedure figuring among the favorite subjects of nation-by-nation law reform in recent years, it is especially important that persons making judgments of any kind about litigation in foreign country courts have information that is fully current and fully specific to the jurisdiction in question.

THE "ADVERSARIAL" AND THE "INQUISITORIAL"

The demarcation between common law and civil law litigation practice is traditionally summed up in the distinction between so-called "adversarial" and

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"inquisitorial" procedures. Like many labels, these have had certain unfortunate connotations. Thus, describing U.S. procedure as adversarial might lead one to suppose, mistakenly, that civil practice in civil law jurisdictions is not adversarial in the commonsense meaning of that term. That impression would be false, in that in civil law procedure, no less than in common law procedure, the disputing parties frame the dispute and have the fundamental right to challenge and seek to refute one another's representations of fact and of law. So, too, describing procedure in civil law countries as inquisitorial may suggest that its methods are fundamentally coercive and even brutal, which is surely not the case. But the distinction is a useful one if, in using it, we take care to indicate what we mean and do not mean by those terms.

If we understand the distinction as going to the locus of responsibility for the proper conduct of the litigation, once instituted and framed, civil and common law jurisdictions retain distinctive identities. Thus, notwithstanding legislative efforts at various levels in the United States to make civil litigation more efficient and to subject lawyers to greater discipline in their litigation practice, it remains the case that responsibility for the course and pace of litigation rests fundamentally with the attorneys rather than the judge. Even with the advent in U.S. practice of mandatory pretrial conferences, judicial controls on pretrial discovery, and case management techniques for large and complex cases, litigators enjoy prerogatives that enable them to determine not only the claims and defenses (and the arguments in their support) that will be advanced, but also the means by which (and the length with which) they will be advanced or refuted.

By contrast, partly out of the belief that the quality and cost of civil justice is a matter of public as well as private concern, civil law jurisdictions tend to allow the judiciary to identify the issues worthy of examination in the courtroom (albeit within the context of claims and defenses that the parties themselves have defined), to prioritize those issues rather than allow the parties acting strategically to do so, and to determine broadly the resources that are appropriately devoted to resolving each issue. This may lead on occasion to curbing inquiries that counsel might otherwise be disposed to make. But it may also lead the court, firm in the belief that the sound administration of justice (whether fact-finding, law-finding, or legal characterization of fact) so requires, to embark on a line of inquiry that counsel for neither party has suggested be undertaken. Indeed, some of the civil procedure codes in civil law jurisdictions (section 139 of the German Civil Procedure Code being the best-known example) impose on the judge the affirmative responsibility for ensuring that the truth is ascertained.

The notion that the judge is required to pursue certain avenues of inquiry even when the party that will be benefited has made no request to that effect is basically unknown in U.S. practice. While it is not a canon of all civil law jurisdictions, and while it may not be employed in practice as fully as the applicable procedure code might suggest, it remains in some systems very much the prevailing ethos. Indeed, in some systems, trial courts may find their judgments

reversed for their not having energetically enough seen to the exploration of arguments or claims on which one of the parties' case rests. The idea that the judge has an affirmative obligation to get to the truth of the matters asserted is often praised in the literature of the civil law as helping to ensure that parties actually receive fair and adequate representation in court when counsel—even counsel of their own choosing—may have failed them. Judicial activism, in the sense in which I am describing it, is thus seen as serving to some degree to "level the playing field" and as neutralizing the tendency of clients to get only as good representation as they can afford.

IMPLICATIONS OF JUDGE-DRIVEN PROCEDURE

This basic and enduring difference between litigation in civil and common law jurisdictions, poorly captured by the traditional terms employed, goes some distance toward explaining the likely absence from civil law practice of certain features that are customary in U.S. civil procedure. Such features, which are visible throughout the life cycle of civil litigation, include certain "threshold" aspects of litigation in the United States like the notable specificity of pleadings, the prevalence of lawyer-initiated motion practice seeking to reshape the litigation in ways advantageous to one's client, and the tolerance of wide-ranging lawyer-defined discovery of documents and other sources of evidence. In most civil law jurisdictions, by contrast, the pleadings may be drafted more diffusely if counsel believes that that will more effectively impel the court to make the inquiries helpful to the client's cause. Counsel seldom presume to request the court to take the actions that would be the "stuff" of motion practice. Rather, the judge is likely to consider it his or her prerogative to determine what are and are not the essential issues in the case and to determine the priority of the issues that are allowed to remain.

Finally, broad and extensive pretrial discovery is likely to be regarded as uneconomic and potentially oppressive. It generally remains the case that production of documents (or witnesses, for that matter), whether pretrial or during trial, is mandatory only if the court issues an order to that effect and that such an order will tend to identify with specificity the documents or classes of documents to be produced. The system neither permits what we would call "fishing expeditions" nor welcomes efforts to obtain material that would not constitute evidence but merely possibly lead to the discovery of evidence.

The concentration of authority in the court in the civil law may also manifest itself in features of the civil trial as such. Thus, it remains the case that while in common law procedure witnesses are principally called, and prepared, by the parties and are, to that extent, "proprietary," in civil law countries they fully "belong" to the court. In the absence of coaching and direct examination, the need for attorney cross-examination is correspondingly reduced. At the suggestion of counsel, the court will decide which witnesses it would be useful to hear. And, when they are heard, they will be allowed to speak freely and at length in reply to often

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very open-ended questions from the judge, thereby finding themselves at liberty essentially to "tell their story." In most civil law jurisdictions, the judge asks most of the questions and counsel may need the court's permission to pose questions of their own.

The civil law court may be yet more activist when it comes to expert testimony, as to which it will be most uncomfortable leaving the outcome to a "battle of the experts." The judge will ordinarily appoint his or her own expert (often relying on an official "list" maintained by the court), rather than rely on the expert truth to emerge from the confrontation of party-appointed and party-funded witnesses. Counsel for both sides may wish to supplement the testimony of the court-appointed expert with that of experts of their own choosing, but the testimony of the latter is likely to be accorded considerably less weight.

Turning to evidence more broadly, procedural law in civil law jurisdictions is seemingly much less particular about what evidence is or is not permitted to enter the record. Relevance is of course a basic standard, much as it is in the United States. But it is largely unaccompanied by the particularized rules and disciplines that constitute the law of evidence in this country. (Because the law and practice of evidence in the United States cannot be understood apart from the tradition of jury trials in civil cases, I defer further discussion of the distinctive civil law approach until we have identified the absence of civil juries as a feature of litigation in the civil law.)

In so many ways, then, the "record" in civil law litigation is fundamentally one that the judge has seen fit to assemble, rather than the product of calculations by the parties as to what it will serve their purpose to adduce. This is as true of documentary as of testimonial evidence. In all likelihood, both will represent the evidence that the court (again, perhaps at the parties' separate urging) deems relevant and useful.

Even the form of the record is telling. As far as witness testimony is concerned, verbatim transcripts are the invariable norm in the United States, but not necessarily abroad. The verbatim character of the record is both a natural consequence and a further encouragement of the model that I have described. Counsel appreciates having an exact rendition of what "his" or "her" witnesses had to say, as well as an exact rendition, if only for cross-examination or refutation purposes, of the testimony of witnesses that opposing counsel has called. The record is also a corollary of particularized rules of evidence, as it is necessary to preserve evidentiary objections for review on appeal. Despite the evidently available technology, foreign courts are still likely to forgo the advantages of verbatim transcripts in favor of a summary of testimony, in the form of "minutes," that the judge himself or herself will produce while, or immediately after, the testimony is given.

TEMPERING THE DISTINCTION

As I have already suggested, civil law like common law jurisdictions undergo change over time. The changes that have occurred over time have tended to lessen rather than heighten the differences, allowing comparatists to report a

certain measure of convergence. I have already alluded to the "managerial" instincts that are causing judges in the United States to play a more active role than they generally had in the past in regard to narrowing the issues, avoiding duplicative and potentially oppressive procedures (including discovery), holding counsel to standards of good faith practice in various respects, promoting settlement, and even "managing" cases.

There is some evidence of movement from the other side as well. While crowded dockets give judges an incentive to manage litigation closely, they also make it difficult for them to do so in all cases. Scholars of civil procedure in civil law countries recently reported a tendency to accord the parties a somewhat greater degree of party autonomy in the conduct of litigation than the civil law "model" would suggest. Indeed, some civil law systems have never accorded their judges the active role that judges in other civil law systems have enjoyed. When civil law systems reform so as to accord greater party autonomy in the conduct of litigation, they do so less out of a firm belief that greater party autonomy produces greater efficiency, procedural fairness, or substantive justice than as an accommodation to the realities of court congestion and judicial overwork.

THE JURY

Not only has the distinction between so-called adversarial and so-called inquisitorial justice been tempered in recent years, but the distinction has never, in itself, adequately explained the observable differences between litigation in the two families of legal systems. Surely, much that we observe in civil justice in the United States is traceable to other circumstances, notably the fact (or, to put it more accurately, the tradition) of civil jury trials.

The consequences of civil juries may be both narrow (e.g., rules of evidence, requests for instructions on the law) and broad (e.g., the importance of oral advocacy). As noted, absent a jury, civil law systems see little reason to establish specific rules governing the admissibility or weight of evidence; the court is deemed capable of determining relevance and according to any piece of evidence the weight that it inherently deserves. Obviously, we need to distinguish in this respect rules of privilege, since they, unlike most rules of evidence, are based not on reliability doubts but rather on the importance of countervailing societal values that civil and common law jurisdictions are likely to share. Thus, while we should not expect to find particularized rules in civil law systems on the admissibility of evidence, we should expect a broad embrace of testimonial privileges based on the need to protect communications made in the context of certain highly valued relationships.

As to the applicable rules of law, there is no need for "instruction," either of a jury or even of the court. On the contrary, the civil law court is traditionally deemed to "know" the law and to be prepared to ascertain and apply it, irrespective of the help that counsel may offer in those regards. As for an emphasis on written pleadings, at the expense of oral argument, this is consistent not only

with the absence of a jury in the shaping of whose judgment courtroom advocacy can be expected to play a major role, but also with a broader tradition favoring written over oral presentations.

CONTINUITY AND NONCONTINUITY OF TRIALS

Both the so-called inquisitorial model and the absence of a jury bear some relation to another distinction commonly drawn between litigation in civil and common law countries. To the extent that a court is essentially passive (at least as to the production of factual matter), and that a jury of community citizens has been assembled to hear the evidence, it is useful for the trial as such to be concentrated in time. This has led in the United States to a relatively sharp distinction between a litigation's pretrial and trial phases, with an assumption that, while the former may be quite extended, the latter will ordinarily take place, if not in one day, then over a series of consecutive days. The expression, commonly evoked for various purposes in the United States, of "having one's day in court" captures this idea.

The model that prevails in many civil law jurisdictions, coupled with the absence of a jury, accommodates the notion of a more "discontinuous" trial, by which is meant essentially a succession of intermittent hearings over the course of which the facts and issues are progressively defined and the record progressively assembled. Discontinuity may be costly, however, and generate intolerable litigation delay. For this reason, procedural reform in some civil law systems has included measures to increase the likelihood, if not the certainty, that preparatory hearings will be conducted in so serious and efficient a way that all witnesses who are to be heard are in fact heard in a single "main" hearing. Such reforms are reported to be far from fully successful.

Holding a trial that is discontinuous in the sense in which I have used that term may have far-reaching implications. For example, the judge under such a system is likely to acquire over time a progressively firm view of the merits of the case, and even of the parties' relative good faith. As the case comes gradually into focus, the judge will also have opportunities to convey those impressions to counsel. It is plausible, and widely supposed, that this in turn operates to promote settlement and to do so on terms more reflective of the actual merits.

BURDEN OF PROOF

The inquisitorial model and the absence of a jury also have implications for the notion of burden of proof. While substantive rules of the civil law create presumptions of various sorts, the system tends not to allocate in any strict sense the burden of persuasion of the trier of fact. To the extent that the court's responsibility is to correctly find the facts and the law, it will not entirely suffice to allow the litigation outcome to depend on a preestablished and necessarily artificial

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rule as to which party bears the risk of loss when evidence is in equipoise. It is commonly assumed in civil law jurisdictions that the judge, invariably, is capable of ultimately arriving at a personal conviction (the French call it *conviction intime*) as to where the truth really lies. The absence of a jury as trier of fact makes dispensing with clearly defined burdens of proof all the easier.

APPELLATE REVIEW

Neither its "inquisitorial" character, nor the absence of a jury, nor indeed any other identifiable aspect of civil law systems easily explains the prevalence of a further feature that tends to strike common law observers as especially peculiar. I refer to the notion that the court, on first appeal from a court of first instance, has the authority and indeed the duty to decide the case de novo. We need, first of all, to be clear as to what deciding a case de novo means in this context. At a minimum, it means that the appellate court may freely reexamine the facts as well as the law. A party may freely seek to prove what it failed to prove at first instance, to the point of asking that witnesses be reexamined. (A party that attempts to bring new sources of evidence for the first time to the appeals court may, however, need to explain why it failed to do so at the earlier stage.) More important, whether or not the record is significantly amplified on appeal, the appellate court is free to make its own independent assessment of the evidence. The idea that the trial court's findings of fact are to be sustained as long as not clearly erroneous is quite absent. (A fortiori, no deference is owed on issues of law or on questions of the legal characterization of the facts.) Only when the case is further appealed—typically to the civil division of the supreme court—will review be strictly limited to questions of law.

One justification for what may appear to be a wasteful fullness of review on appeal in many civil law jurisdictions is an assumption that an appellate court's reading of the record is more likely to be correct than a trial court's reading of the record. If this is so, it probably reflects less a belief that a "second" view is necessarily better than a "first" than a view that appellate judges are more adept at "getting it right." This in turn may reflect the important fact—not yet mentioned in this chapter—that the judiciary in civil law systems tends to be a lifelong and hierarchically organized career, for which specialized professional training (beyond the basic law degree) may be required and in which promotion to the appellate bench signifies professional success as a judge.

The fact that law-trained persons choose to become judges at the outset of their careers and, once having so chosen, remain there (and that persons seldom become judges after successful careers in the practice of law) may have important consequences both in the courtroom and without. It undoubtedly contributes to the notion that adjudication is a manifestation of the administration of justice and thus in many ways an essentially bureaucratic affair. (Any number of other features will reinforce this impression, not least the tradition of unsigned per curiam opinions, without dissenting or concurring opinions.)

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CHAPTER 3

CIVIL LITIGATION IN CRIMINAL COURT

In a good many civil law systems, what would be called civil litigation in the United States may take place in criminal court. This is due to provisions of law that enable persons allegedly injured by the commission of a criminal act to seek compensation as part of the criminal prosecution. (In some systems, they may even compel criminal prosecution when the case would not otherwise be prosecuted.) Whatever the origins of this institution, its contemporary justification lies in the procedural advantages that it affords the victims of crime, notably sparing the victim from having to shoulder the full burdens of civil litigation. The practice creates risks as well, however, and civil law systems have developed a series of remedies for its abuse. Be that as it may, tort plaintiffs in civil law jurisdictions that have such an institution commonly opt to "join" their damage claims to criminal prosecutions in criminal court, thus submitting the adjudication of their claims to the rules of criminal as opposed to civil procedure, to the extent that they differ. The U.S. practitioner, contemplating litigation abroad, as counsel for plaintiff or defendant, needs to be aware of this option and the differences that its exercise may make.

COSTS

Just about everywhere civil litigation is considered to be too costly, as well as subject to excessive delays. Interestingly, the civil law model we have explored is one that, by its nature, tends to socialize much of litigation's costs. The taxpayers maintain court systems heavily staffed with judges so as to discharge the heavy functional responsibilities placed upon them. Private lawyers, whose trial roles and responsibilities are generally reduced by U.S. standards, generate fewer costs to litigants than the costs to which we in the United States are accustomed.

In most civil law jurisdictions, indeed outside the United States generally, the prevailing party may not only be spared costs but may also recover his or her attorney's fees. It is widely considered unjust that a party who prevails to the point of judgment in his or her claim or defense nevertheless has to bear the cost of his or her representation. While the so-called "American rule" has its rationale—notably that it encourages the prosecution of novel claims—it has never had much resonance outside the United States or in the civil law world more specifically. That the "American rule" is not even characteristic of the common law is shown by the fact that the system to which it is ordinarily contrasted (i.e., a system promising the prevailing party the recovery of attorney's fees) is usually identified as the "British rule." The "British rule" could just as easily and properly be called the "civil law rule."

CONCLUSION

The U.S. lawyer observing civil litigation in a civil law system will readily recognize that he or she is in a court and witnessing an adjudication. As at home, the litigation system is one that visibly pursues ascertainment of the truth under

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preestablished rules of law, while at the same time seeking to ensure both procedural fairness (whether called "due process" or not), on the one hand, and reasonable economy and efficiency, on the other. Still, civil law systems of litigation continue to exhibit features whose only explanation can be certain assumptions about the proper allocation of responsibility between court and counsel for the sound adjudication of civil claims. While labels such as "adversarial" and "inquisitorial" tend to exaggerate and distort the differences, the differences remain. They also remain traceable in large measure to the premises to which I have referred.

In characterizing foreign systems of litigation, whether for professional or academic purposes, one needs always to ensure against the risks of caricature and generalization. Particularly in light of the frequent reform of procedural systems taking place around the world, and the fact that such reform is generally conducted on a strictly national (or subnational) basis, the only means of ensuring against these risks is to obtain current and jurisdiction-specific information about changes that may have occurred in the law and practice of civil litigation in the country in question. Even so, we cannot help but notice that procedural change has a way of being marginal only, more in the nature of fine-tuning and abuse-curtailing than anything else. The basic premises underlying comparative civil procedure's misleading labels tend to be enduring.

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CHAPTER 5

INTRODUCING FOREIGN CLIENTS TO U.S. CIVIL LITIGATION

DONALD FRANCIS DONOVAN

A client surprised is a client unhappy. For the foreign client, the U.S. legal system can be full of surprises. It is therefore essential to provide foreign clients with a basic overview of the U.S. litigation system at the outset of any dispute—not only to minimize unhappy surprises for the client later on, but also to increase client cooperation on critical aspects of the case. For example, a client used to the French system, where the only documents customarily disclosed are those offered to support one's case at trial, will not easily understand the scope of effort required by a U.S. document request. A U.S. lawyer who transmits such a request to a foreign client without prior education may get the sort of paltry response that would warrant rereading the rules on discovery sanctions.

But what to cover in this educational talk with the client? For many lawyers, the U.S. system is so familiar that it is difficult to determine what aspects will be odd to a foreign client. In my experience, there are five features of U.S. litigation that most require translation: (1) the practice of wide-ranging discovery, (2) the prevalence of jury trials, (3) the virtual absence of fee shifting, (4) the predominance of settlement as the primary means to resolve lawsuits, and (5) the availability of class action litigation. In the conversation with the hypothetical client that follows, I address each of these features in turn.

WIDE-RANGING DISCOVERY

The major legal systems of the world all generally provide the parties some opportunity to obtain and review documents and information in the possession

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of opposing parties. The United States, however, stands alone in the world in the breadth and extent of disclosure to which litigants are entitled. While in many legal systems disclosure is largely limited to the evidence submitted to a court at trial, U.S. procedures allow a lawyer to request and review all broadly relevant documents and information from the opposing party. This process, called discovery, often takes months or even years to complete and must conclude before the court assesses the factual merits of the case. Most foreign litigants are amazed at the expense, delay, and potential intrusiveness associated with the U.S. discovery process.

The principal mechanisms of U.S. discovery are document requests, depositions, and interrogatories.

Document Requests

U.S. procedures allow parties to require that their opponents make available for inspection and reproduction a broad range of documents. There is generally no requirement that the party seeking discovery specify individual identified documents, and the only real limit of relevance is the requirement that the documents sought *may* lead to the discovery of admissible evidence.

Under U.S. procedure, parties can request their opponents to produce entire categories of documents, rather than specifically identified individual documents. For example, in a lawsuit brought by a minority shareholder accusing a company of financial fraud, the plaintiff would be entitled to review almost all of the corporation's documents that have anything to do with the corporation's finances. These could include the company's internal financial statements and underlying backup materials, business plans and other projections, correspondence (including internal e-mail messages), minutes of board of directors' meetings, and other similar documents. In high-stakes litigation, the parties will commonly exchange or otherwise make available to each other tens or hundreds of thousands of pages. The effort required to locate and produce such documents necessarily involves great expense and substantial personal effort that can sidetrack the parties' employees from their other work duties. Only a small fraction of the documents produced in discovery are typically offered as evidence at trial.

Depositions

In a deposition, a lawyer takes the testimony of a witness before trial and outside the presence of any judge or jury. As a practical matter, the lawyers, not the judge, decide which witnesses will be deposed and have the authority to compel the witness to appear at deposition and answer their questions under penalty of perjury. A lawyer will usually represent the witness at the deposition and can make objections to the form of the questions. A professional stenographer associated with neither party attends the deposition and records the questions and answers verbatim in a transcript. Sometimes, a videotape or audiotape will be used instead to preserve a record.

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Depositions often take place in a conference room of a law firm, the offices of one of the parties, or a hotel. They typically last one or two days per witness. In a complex financial case, the parties may take dozens of depositions. This process often requires a company to temporarily surrender a large number of its managers to spend hours in a tense and often hostile setting answering questions devised and delivered by opposing counsel. For most clients from other legal systems, this process involves a level of intrusion that they have never before imagined.

Interrogatories

U.S. procedure also allows a party to serve an opponent with written questions, called interrogatories. These questions must be answered in writing under penalty of perjury. A party may additionally send questions in the form of "requests for admissions" that require the opponent to admit or deny written allegations. A party may also issue a demand to inspect an opponent's premises or person.

JURY TRIALS IN CIVIL CASES

Unlike almost every other country in the world, the United States employs a jury system for civil trials. This means that a jury of six to twelve persons selected from the local population decides the factual issues in dispute. These jurors are laypersons who typically have no legal education or any particular qualifications that might assist them in understanding the dispute they are asked to resolve. The role of the judge in a jury proceeding is limited to resolving legal questions, deciding what evidence may be considered by the jury, and giving the jury instructions about the law that must govern its deliberations.

The exercise of adjudicative power by laypersons necessarily introduces substantial uncertainty into the civil litigation process. This uncertainty increases in complex litigations involving difficult facts and sophisticated economic or technical concepts that may be more difficult for a jury to grasp than for a trained judge or arbitrator.

As a general matter, foreign litigants are able to participate in U.S. court proceedings on equal footing with their domestic counterparts. However, the jury system does raise the prospect that particular juries in particular communities may exhibit a bias against parties from outside the community, including foreign parties. This problem arises most directly in smaller communities in which one party may be a well-known employer. It is therefore prudent for a foreign litigant to take steps to avoid litigating disputes in a forum that may provide a clear hometown advantage to an opponent.

The jury system also causes added expense and delay by virtue of the complex and highly technical set of evidentiary rules that have developed in the United States. These rules of evidence are intended to protect juries from information that might cause them to become biased or otherwise focus on evidence that is

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unreliable or irrelevant to the legal issues in dispute. It is typical in U.S. litigation for the parties to engage in extended debates concerning the admissibility of particular documentary or oral testimony, and these debates can take up substantial time during trial, providing a source of further expense and delay.

VIRTUAL ABSENCE OF FEE SHIFTING

In the United States, each party generally bears its own legal costs resulting from the litigation. Generally, the parties must contractually agree to award attorneys' fees to the prevailing party before a court will do so. In some limited circumstances a statute may so provide. Otherwise, the losing party is not obligated to pay legal fees to the prevailing party. This policy stands in marked contrast to the rule in other countries where litigation costs such as attorneys' fees are routinely awarded. The U.S. rule assumes added significance when considered in conjunction with those other aspects of the U.S. legal system that make U.S. litigation more costly and time consuming than litigation in other countries.

The strategic impact of the American rule on attorneys' fees can be profound. A party facing litigation must consider not only whether it can afford to lose, but also whether it can afford to *prevail*. The unavailability of fee shifting means that even legal victory by a plaintiff can create an economic loss if the expense of litigation is greater than the available recovery.

At the same time, the lack of fee shifting also removes an important disincentive to the filing of dubious or frivolous claims. A plaintiff seeking to bring such a claim can do so safe in the knowledge that he or she will not be called upon to pay the opposing party's litigation costs.

LITIGATION STRATEGY DRIVEN BY INCENTIVES TO SETTLE

The consequence of the high cost, slow pace, and uncertainties of the jury trial is that parties have a strong incentive to reach an out-of-court settlement rather than face a trial. In fact, about 95 percent of important financial litigation is resolved by settlement or otherwise disposed of before trial. As a result of this strong incentive, U.S. trial strategy is heavily driven by the individual stages of litigation, the outcome of which can largely determine the necessity, prospects, and terms of any eventual settlement.

First, there is great pressure to resolve disputes as quickly as possible through a prediscovery motion to dismiss or a pretrial motion for summary judgment. Second, the parties will take actions designed to maximize the chances of a favorable out-of-court settlement. Third, the parties will strive to devise a winning trial strategy in the event that they fail to achieve an earlier resolution of the dispute.

Motions to Dismiss

A defendant wishing to file a motion to dismiss must do so at the very outset of litigation, frequently before there has been any discovery between the parties.

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Typically, a court may grant this motion only if, accepting all the facts alleged by the plaintiff as true, the plaintiff has nevertheless failed to set forth a claim for which relief may be granted. The standard is difficult to meet, but the reward is great for those who meet it. A successful motion to dismiss will terminate the litigation. The defendant will have achieved victory without the uncertainty, expense, delay, and disruption of discovery and trial. For a defendant who cannot afford the costs of full litigation or deems them too expensive, the motion to dismiss may represent the last opportunity to seek victory through litigation before agreeing to a settlement of the dispute.

Motions for Summary Judgment

Typically, motions for summary judgment occur after the conclusion of discovery and before the trial. A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact and that the moving party is entitled to judgment in its favor as a matter of law. For purposes of making this determination, the court will construe all disputed facts in favor of the nonmoving party.

This standard is applied unevenly in different jurisdictions in the United States, and, like the motion to dismiss standard, it can be difficult to meet. Because the preparation and defense of a summary judgment motion require the parties to evaluate the worth of the case with the benefit of completed discovery, many cases are settled after a summary judgment motion has been submitted but before it is decided.

Trial

As already noted, trial poses a daunting challenge to counsel in complex disputes. They must make their case to lay jurors who likely will not have the background to enable them easily to understand and appreciate the commercial and financial transactions at issue. In the U.S. system, it is the parties themselves who by and large decide what evidence the jury may consider. This choice is subject to the rules of evidence, which the judge will enforce, but generally the judge has no power to request or require the introduction of documents or witnesses that a party does not choose to submit to the jury. It is also the attorneys for the parties, and not the judge, who examine and cross-examine the witnesses who have been called. Counsel will also typically present opening and closing statements.

In most civil trials the law imposes a burden of proof on the plaintiff that requires convincing the jury by "a preponderance of the evidence." This standard requires that the jury be convinced that it is more likely than not that the plaintiff's position is correct. One or two levels of appeal are generally available from a final judgment.

There is nothing that focuses a client's mind on the strengths, weaknesses, and value of the case like a firm trial date. Many cases are settled shortly before a trial begins. After judgment is handed down, settlement is still possible, but the

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terms of the settlement will be heavily influenced by both the judgment and counsel's assessment of the strength or weakness of the grounds of appeal.

CLASS ACTIONS

The United States is also almost unique in that it permits class action lawsuits in which individual plaintiffs may assert claims on behalf of a nonparty class of individuals who are similarly situated. In those situations, the law gives great leverage to plaintiffs and increases the threat to defendants. A company can easily decide, as a matter of principle, to fight to the end a small claim by one individual that it considers baseless. When that claim is combined with claims of a class of thousands of other individuals, however, the total amount at stake can threaten the very existence of a company. If such a claim cannot be defeated by a motion to dismiss or for summary judgment, management must seriously consider whether the company can afford the risk of proceeding to a trial of the case by a jury. This creates even greater incentive for the pretrial resolution of the case.

CONCLUSION

By the time this sort of conversation is finished, the client may or may not be hugely enthused about the U.S. civil litigation system—but he or she will be well prepared for what is to come.

DEMYSTIFYING THE LITIGATION PROCESS IN THE UNITED STATES

ABOUT THE FIRM

Sedgwick, Detert, Moran & Arnold LLP ("Sedgwick") earned its reputation as one of United States' best litigation and trial law firms by winning cases and consistently providing clients with sophisticated, result-oriented strategies. Sedgwick is one of the largest firms focusing on corporate litigation. As the firm enters its eighth decade of practice, its representations span the globe. Today Sedgwick provides clients multi-jurisdictional legal services that parallel the global marketplace. Sedgwick has more than 350 attorneys worldwide. Our clients include nearly 100 Fortune 500 companies among other international businesses. The firm offers legal services in a broad range of practice areas, including antitrust, commercial, employment, complex litigation and class actions, products liability, environmental law, patent litigation, intellectual property, real estate, bankruptcy, commercial transactions, and insurance law. For more information about Sedgwick, please visit the firm's Web site at www.sdma.com or contact Cynthia Plevin, Martin Fleisher, or Sherri McElroy at 415.781.7900. Offices: Chicago Dallas London Los Angeles Newark New York Orange County Paris San Francisco Zurich

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INTRODUCTION AND OVERVIEW

These materials are designed to assist in-house litigation counsel, transactional counsel, and paralegals in understanding the procedural rules applied to civil litigation in the United Sates. Please note that all state code references in these materials are to California. The materials offer insight into how these procedural rules can be used to resolve litigation expeditiously, minimize the company's potential exposure, and shift liability away from the company. They also identify the numerous pitfalls that exist in the litigation processes in the United States and how best to avoid them.

For many corporate defendants, the first notice of a claim comes well before a lawsuit is filed. Often the injured party has retained counsel, who contacts the company with a settlement demand, hoping to resolve the case without the need for litigation. This stage is generally referred to as the "pre-litigation stage," providing an opportunity for a quick resolution of the claim before the time, expense and risk of litigation are incurred. Although the litigation process does not officially begin at this stage, there are

methods available to the claim professional to secure important information during this phase that can reduce the cost of litigation and diminish the company's potential exposure. For example, valuable information that will enhance the company's ability to successfully tender the claim to a vendor or the vendor's insurance carrier can be obtained by securing information on the injury-causing product. This is also a time when the company's product merchant can prevail upon the vendor to resolve the claim. The pre-litigation phase also provides an opportunity for the claim representative to obtain valuable information on the nature and extent of the claim by securing the claimant's medical and employment records along with his or her version of the facts of the accident. Finally, the pre-litigation stage allows the company to marshal the facts, meet with company witnesses, and generally prepare its defense before the claim becomes a lawsuit.

While the pre-litigation process does not always result in a resolution of the claim, these efforts can often improve outside counsel's ability to effectively defend and/or resolve the case once the litigation process begins—because the discovery phase in the United Stated is so significant. At the start of the litigation process the roles of the paralegal and/or in•house litigation attorney changes, with the procedural rules of the litigation process dictating the course of the lawsuit as well as the manner in which the parties interact. A clear understanding of this process is essential to developing and implementing a winning strategy for resolving a lawsuit against the company.

The civil litigation process is designed to provide a method for resolving disputes. The process affords the litigants a structure in which to interact and present their respective positions for resolution. It should not necessarily be viewed as a guarantor of justice, since there is no assurance that the process will produce a complete vindication of the rights of one side over the other. The process is best viewed as a vehicle for peacefully resolving disputes, with each side being offered a fair opportunity to present their respective position.

In the United States, the litigation process can generally be separated into six basic phases (excluding appeals). These phases include pleadings, case management, law and motion and discovery, pre-trial, trial, and post-trial. There is also an appellate phase, however, these materials will only address the six stages of litigation before an appeal is filed.

The pleading stage presents numerous strategic considerations for the litigants. The scope of the action, including the causes of action and affirmative defenses asserted, the parties to the litigation, and the venue in which the case will be litigated are all raised during the pleading stage. Attempts to limit or expand the scope of the lawsuit, change the venue in which the case is litigated, and/or preclude the litigation from proceeding are strategic issues that are addressed during the pleading stage.

The case management phase allows the court to control the course of the litigation to insure that the case proceeds toward resolution. The court will set dates for the parties to complete law and motion and discovery. It will compel the parties to engage in the ADR process to make certain that alternative means of resolving the case are fully explored. The court will use the case management process to pare down the issues and parties in the case as it proceeds to trial. The case management phase is also used to set all the pre-trial dates as well as the trial date. Orders issued by the court on case management issues often dictate the pace, scope and direction of the litigation.

The discovery phase provides for the regulated exchange of information between the parties. This phase is distinguished from the investigative efforts undertaken by private investigators and/or counsel meeting with company representatives or independent witnesses. Civil discovery is regulated by the

Code of Civil Procedure. The scope and timing of discovery as well as the rights and obligations of the parties are prescribed by statute. The law and motion phase often involves one or more parties attempting to enforce the rights or obligations set forth under the Code of Civil Procedure to either obtain discovery or to prevent its disclosure.

The resources invested in obtaining discovery or in preventing the opposing party from gaining access to discovery can have a direct bearing on the resolution of a lawsuit. Obtaining discovery from the plaintiff generally enhances the ability of the defendant to accurately evaluate a case and to decide whether to move for summary judgment, proceed to trial or settle. Strategic decisions on whether to use the law and motion process to obtain requested information from the opposing party depends in large measure on the value of the case and the potential exposure to the company. Likewise, decisions concerning whether to use the law and motion process to resist the opposing party's efforts to obtain information from the company will depend on the business interests of the company and the relative importance of protecting the information from disclosure.

Aside from being a device to obtain or bar access to discovery, the law and motion phase can be used to narrow the issues in the case. Motions for summary judgment or summary adjudication of issues can be used to defeat all or portions of the lawsuit against the company. A motion to dismiss can be used where the opposing party has failed to follow the procedural rules for prosecuting their case. As with decisions concerning whether to move to compel or preclude discovery, decisions concerning whether to file these kind of motions are often based on the economics of the lawsuit as well as the business interests of the company.

The pre-trial, trial and post trial phases of the litigation process are generally the most costly since they often involve the use of experts, service providers, the subpoena of witnesses, the posting of jury fees, court reporter fees and the expense of defense counsel preparing for and ultimately trying the lawsuit. Of course, there is also the risk the opposing party will prevail. This risk and the costs related to trying a case along with the cost of challenging the verdict, or opposing the plaintiff's attack on a defense verdict, make it vital that an accurate evaluation of the case is made well before the pre-trial phase of the case. In some instances, it is difficult to accurately assess the potential exposure to the company until expert discovery is completed, however, it should be clear that the litigation process in California is progressively more expensive to the parties as the case proceeds through each stage of the process.

These materials provide a walk through the litigation process to make the process more understandable. They also present the various options available to the litigants, including suggestions on how to use the process to maximize the defendant's position vis-à-vis the plaintiff, intervenor, and/or cross-complainant. These materials are also designed to offer ways to regulate the cost of litigation, improve communication with outside counsel and achieve the best result for the company.

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1. PLEADINGS
I. Overview
A. Documents Considered to be Pleadings
1.
Only complaints (including complaints-in-intervention), demurrers, answers, and cross-complaints are considered pleadings.

2.
No other document, even though it is printed on pleading paper, is a pleading

B. Function of Pleadings
1.
The pleadings set forth the facts and formulate the issues in the case. This allows the parties to determine what will need to be established to prove their respective claims and defenses.

2.
The pleadings should define the issues to be tried. As a general rule, evidence offered at trial must be relevant to a material issue raised by the pleadings.

3.
Practice Pointer: Discovery is framed around the facts and issues raised in the complaint. The plaintiff has a right to amend her complaint one time without leave of court. Thereafter, the plaintiff must seek leave of court. Although courts are reluctant to grant leave to amend the complaint after discovery has started, a plaintiff may move to amend her complaint up to the day of trial, adding causes of action that did not appear in the case before. [Code of Civil Procedure, sections 473(a)(1) and 576.] Do not assume that the scope of the litigation will not change after you answer the complaint. Theories of liability can be added and the potential exposure to the company can change as the litigation progresses.

C. California: A Code (Fact) Pleading State

1. The Code of Civil Procedure requires that the complaint and cross-complaint contain a statement of facts constituting the cause of action "in ordinary and concise language."

a.

A pleading should contain only allegations of ultimate facts constituting a cause of action, rather than evidentiary facts.

b.

A pleading should not contain opinions, hypothetical statements, or conclusions of law.

c.

When reviewing the plaintiff's complaint, remember that this is only one version of the facts, which may bear very little resemblance to the truth as revealed by investigation and discovery.

d.

Practice Pointer: The allegations in the complaint are often used by a vendor to make an initial assessment whether a tender of defense should be accepted. Since the complaint does not always provide the factual allegations necessary to make a proper assessment whether the injury-causing event

was caused by the vendor's product, tendering a claim with nothing more than a broadly framed complaint may be counter•productive. The better practice in tendering the claim is often to supplement the information in the complaint with facts developed during the pre-litigation stage of the claim.

2. Code Pleading versus Notice Pleading

a.

The requirement to plead facts is unique to code pleading jurisdictions.

b.

Federal courts follow notice pleading rules, which require less precision and factual detail than code pleadings.

c.

Notice pleading requires only that the defendant be generally advised of the incident and loss involved.

d.

Practice Pointer: This distinction is particularly significant when trying to decide whether to remove a case to federal court. If the complaint contains a punitive damages prayer, it is far easier to strike the prayer in state court than federal court. The state courts in California require greater specificity in

pleading facts to support a claim for punitive damages than the federal court.

D. Forms of Pleadings
1. Judicial Council Forms
a.
To further simplify the pleadings stage, the Judicial Council, at the direction of the California legislature, drafted official forms for use in most common civil actions, including personal injury, property damage, wrongful death, breach of contract, fraud, and unlawful detainer.

b.
Forms were developed by the Judicial Council for the complaint, answer, and cross-complaint. Little information about the plaintiff's claim is provided by these forms.

c.
The Judicial Council Forms are not mandatory. The more traditional forms of pleadings can be used.

d.
Practice Pointer: It is easy to assume that Judicial Council Form Complaints involve relatively smaller claims or that the plaintiff's attorney is less talented than his peers. After all, many reason that if the attorney was truly talented, he would have his own form complaints and would not have to rely on the short cut offered by the Judicial Council. Rather than make this assumption, it should be recognized that there are advantages to using the Judicial Council Form Complaint rather than the traditionally drafted complaint, including simplifying the pleadings, keeping the plaintiff's costs down and revealing only the essential facts in the complaint.

II. The Complaint
A. Purpose and Effect
The plaintiff initiates litigation by filing and serving a complaint. The date of filing is the date of the commencement of the action. The date of the commencement and the date of service are used to determine the subsequent court imposed deadlines.
B. Format and Content
1.
In General

a.
The Code of Civil Procedure outlines the elements that must be set forth in the complaint and prescribes the manner in which they are to be stated.

b.
The Code of Civil Procedure requires that a complaint contain the following:

(i)
The name, bar number, office address, and telephone number of the attorney filing the complaint.

(ii)
A statement of facts constituting the cause of action.

(iii) A demand (prayer) for relief.

2.
The complaint must also be drafted according to requirements prescribed by the rules applicable to pleadings with respect to type size, paper size, and pagination.

3.
Practice Pointer: Having the attorney's name and bar number improves your ability to research the plaintiff's attorney's background, including his trial record and whether he has a disciplinary record with the State Bar. The Bar number also reveals how long the attorney has practiced in California. Do not assume a high Bar number indicates the attorney is new to the practice. It is possible to attorney recently came to California after practicing in another state.

C. Designation of Parties
The full name of each plaintiff and each defendant must to shown on the first page of the complaint. For parties other than natural persons, the status or capacity should be alleged in the body of the complaint. For example:
1. Corporations
a.
Caption: XYZ, Inc., a corporation

b.
Allegations of status in the body of the complaint:

"Plaintiff XYZ, Inc. is a corporation organized and existing under the laws of the State of California, and is and was at all relevant times mentioned herein qualified to do business in California.

c. Practice Pointer: A suspended corporation lacks the capacity to sue in California courts. In fact, a suspended corporation lacks the capacity to defend itself in a lawsuit in California. Color-Vue, Inc. v Abrams (1996) 44 Cal. App. 4th 1599. More importantly, a suspended corporation may be sued. If the corporation does not resolve its status with the Secretary of State before its deadline to respond to the

complaint, the plaintiff may enter default judgment against it.

2. Minor Plaintiffs

a.

Causes of action belonging to a minor (or incompetent) are prosecuted through a guardian ad litem. Without a guardian ad litem, the minor cannot maintain her lawsuit and is unable to respond to discovery. In fact, a minor defendant in a civil action cannot respond to either the complaint or discovery without a guardian ad litem being appointed. The only exception to this rule is where the minor has been deemed an emancipated minor. Jolicoeur v Milhaly (1971) 5 Cal. 3d 565, 582.

b.

Caption: Jaime Martinez, a minor, by and through his guardian ad litem, Mariel Martinez.

c.

The guardian ad litem is not a party to the action with a separate claim. The guardian ad litem merely acts as the minor's representative.

d.

A non-attorney who has been appointed as guardian ad litem cannot act in pro per on behalf of the minor, except to dismiss the action.

e.

Practice Pointer: Settlement agreements with a minor, through the guardian ad litem, that are less than $5,000 do not have to be approved by the court. Settlement agreements with minors in excess of $5,000 must be approved by the court.

3. Doe Defendants

If the plaintiff is unaware of the defendant's true name at the time the complaint is filed (or is unaware of the basis of liability against a known entity), the plaintiff may include these parties in the complaint as fictitiously named defendants. As a general rule, the plaintiff will include Doe Defendants in the caption, which he can designate at a later time.

a.

Caption: "Does 1 through 10, Inclusive."

b.

Allegations: "Plaintiff is ignorant of the true names or capacities of the defendants sued herein under the fictitious names Doe One through Ten, inclusive."

-or-

"Defendants Doe One through Ten inclusive, are sued herein pursuant to Code of Civil Procedure, section 474."

c. The purpose of the Doe allegations is to allow the plaintiff to later amend the complaint to name the defendant when its identity is discovered.
d. The complaint must also allege that the Doe defendants were responsible for the acts enumerated in the complaint. This is usually accomplished by alleging that the wrongful acts were committed by "defendants and each of them."
e. Once the Doe defendant's true identity is known, the plaintiff will amend the complaint and then serve the newly identified defendant with copies of the summons and complaint. However, the plaintiff cannot bring someone in as a Doe defendant if the identity of the person was known when the suit was filed.

f. Practice Pointer: Under the Trial Delay Reduction Act rules, the court is allowed to dismissed Doe defendants if they are not designated by a date set by the court. In practice, many judges dismiss all parties that have not been served and Doe defendants if they have not been brought into the case by the date of the Case Management Conference.

D. Alleging Causes of Action

1. Format Rules

a.
Each cause of action must be separately stated and numbered.

b.
Each cause of action should be titled so as to identify the nature of the claim asserted and the specific parties affected.

c.
The phrase "cause of action" refers to the violation of a person's primary right – for instance, injury to person or property.

d.
Fact Pleading is Required

(i)
The complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language."

(ii)
In practice, what are contained in the complaint are the elements that the plaintiff must prove at trial to recover on each cause of action. That is, the elements to be pleaded to state a cause of action are determined by the substantive law.

(iii) The plaintiff must plead ultimate, not evidentiary, facts and must not state conclusions of law.

E. Consequences of Improper Fact Pleading

1.

The failure to plead ultimate facts subject the complaint to demurrer for "failure to state facts constituting a cause of action." Code of Civil Procedure, section 430.10.

2.

If, in addition to pleading ultimate facts, the plaintiff alleges additional "evidentiary" facts or "legal conclusions," these can be ignored or may be subject to a motion to strike.

3.

California courts have become increasingly liberal in their attitude toward pleading. In some cases, the courts will apply the notice pleading standard of the federal court.

4.

Practice Pointer: The courts require greater specificity when pleading a fraud cause of action. (Committee on Children's Television, Inc. v General Foods Corp. (1983) 35 Cal. 3d 197, 216.) Specificity is also required when pleading a claim for punitive damages. (Brousseau v Jarrett (1977) 73 Cal. App. 3d 864, 872; Clauson v Sup. Ct. (1998) 67 Cal. App. 4th 1253, 1255.) It is not uncommon for a responding party to demur to a fraud claim or move to strike punitive damages on the ground the plaintiff failed to provide sufficient specificity to support their claim.

5.

Practice Pointer: In cases where the corporation is sued for fraud the plaintiff must allege the following:

a.

The names of the persons who made the misrepresentations;

b.

Their authority to speak for the corporation;

c.

To whom they spoke;

d.

What they said or wrote, and when it was said or written. (Lazar v Sup. Ct. (1996) 12 Cal. 4th 631, 645.)

Since the plaintiff often fails to provide the required level of specificity, there may be an opportunity to attack the pleadings and defeat this cause of action before the plaintiff has an opportunity to conduct discovery on this issue. Since the cause of action is directed to the acts of corporate management, there is a risk if the cause of action is not defeated during the pleading stage that plaintiff's counsel will try to depose management level personnel.

6. Practice Pointer: To recover punitive damages against a corporation, the plaintiff must plead and prove that the corporation's officer, director or managing agent authorized, ratified, and/or had advance knowledge of the wrongful act and acted with malice. As with a fraud claim, it makes sense to attack the punitive damages allegations during the initial pleading stage to eliminate the claim and to avoid the discovery that would likely be sought from the management level personnel of the corporation.

F. Cross-Complaints

1.

A cross-complaint is the same as the complaint except that it is filed and served by the defendant against the plaintiff, another defendant and/or a person or entity that was not previously a party to the litigation. As with the complaint, a cross-defendant can attack the pleadings with a demurrer and/or motion to strike, motion for judgment on the pleadings, or answer.

2.

A cross-complaint asserts claims for affirmative relief against the plaintiff, the co-defendant, or a person or entity that is not yet in the lawsuit.

3.

If the defendant's action against the plaintiff arises from the same operative facts, it must be raised by cross-complaint or the defendant will be barred from asserting it in any later lawsuit. (Weil & Brown, Civil Procedure Before Trial, 6:511.) A defendant may only file a cross-complaint against a co-defendant or third party if the claim arises from the same operative facts. Code of Civil Procedure, section 428.10(b).

4.

Practice Pointer: The decision to file and serve a cross-complaint is an extremely important one. Depending on the area of law, it may be the practice for co-defendants to enter into a stipulation to defer cross-complaining against each other until after the plaintiff's case, or to sever the cross-complaint to enhance their ability to present a united front in defending the plaintiff's action. In other cases, it may be essential to file and serve the cross-complaint and litigate the issues from the cross-complaint in the plaintiff's case. The course of discovery as well as the presentation of the case to the jury are significantly effected by having a cross-complaint in the case. It is vital that you fully explore the company's options with defense counsel before making the decision to proceed with a cross-complaint.

In the case where the company's liability arises from the acts or omissions of a vendor, or the vendor's

G. Complaints-in-Intervention

1.

In cases involving a retail establishment, a complaint-in-intervention is typically filed and served by the worker's compensation carrier to recover benefits paid to a customer who was injured while obtaining merchandise for his employer. The defendant served with the complaint-in-intervention must respond to it with a demurrer, motion to strike, motion for judgment on the pleadings or an answer.

2.

It is important to keep in mind that the intervenor's claim is not dependent on whether the plaintiff proceeds with her action. If the defendant settles with the plaintiff, the intervenor's action remains active. The defendant will have to defend or otherwise resolve the complaint-in-intervention.

3.

Practice Pointer: The unique relationship between the plaintiff and the intervenor seeking to recover workers compensation benefits paid to the plaintiff often offer opportunities to resolve the intervenor's claim for a significant discount while also driving down the value of the plaintiff's claim. This is because the intervenor's recovery "comes off the top of the plaintiff's recovery." In other words, if the intervenor is seeking to recover $100,000 paid in workers compensation benefits and is willing to "sell the lien" for $10,000, the defendant can proceed to trial knowing that the plaintiff will have to recover more than $100,000 before he can recover against the defendant.

One might ask why an intervenor would be willing to sell its claim for such a low amount. First, the intervenor generally prefers to "piggyback on the plaintiff's case." If the plaintiff is not retaining experts and adequately preparing its case, the intervenor may decide to recover what it can before trial. Second, the intervenor may have aggressively challenged the legitimacy of the claim in the workers compensation action. Where this has occurred, the workers compensation retained physicians may undermine the intervenor's claim by offering their opinions in the civil action on the dubious nature of the plaintiff's claim. Rather than face a jury that will question the merits of the plaintiff's and the intervenor's claim, the intervenor may be willing to sell its claim for a marked discount.

4. Reminder: It is crucial that you remember the intervenor's claim survives even after the defendant settles with the plaintiff. Settling with the plaintiff alone does not resolve the intervenor's claim. Settling with the intervenor can help you to drive down the value of the plaintiff's claim, but settling with the plaintiff does not automatically resolve the intervenor's claim. Although the intervenor may be less interested in proceeding to trial once the plaintiff is out of the case, you will still need to resolve the intervenor's claim before you can close your file on the case.

H. Verified Pleadings

1.

The Code of Civil Procedure requires that the complaint in certain cases be verified. These cases include venue allegations in unlawful detainer actions, actions to quiet title, dissolution of marriage, involuntary dissolution of corporations, venue obligations in actions to enforce consumer obligations, and petitions for writ of mandate.

2.
Other than the specific cases referred above, the plaintiff is not required to verify the complaint.

3.
Where the complaint is verified the responding party is required to file and serve a verified answer.

4.
Practice Pointer: The verified complaint is often used as a discovery device in that it requires the responding defendant to admit or deny the factual allegations under penalty of perjury. It is important that the company representative who signs the verification work closely with defense counsel to make certain the verified answer is true and accurate.

There are advantages to the defense in having a verified complaint. It sets forth the plaintiff's version of the facts before discovery is initiated, giving the defendant valuable information on the plaintiff's case before responding to the complaint. A verified complaint is also generally admissible at trial and may be used to impeach the plaintiff. In addition, it is an effective device to use in deposing the plaintiff, since it operates as prior testimony by the plaintiff on the facts of the case.

I. Venue and Jurisdictional Facts

Venue refers to the geographic location for the lawsuit as among several places where jurisdiction could be established.
1. Venue:Geographic Considerations
a.
The complaint does not need to contain facts showing proper venue.

b.
If the plaintiff has filed the complaint in the wrong county or judicial district, the defendant's remedy is to move to change venue. The court can also transfer venue on its own motion. For example, in the Los Angeles Superior Court, tort actions, other than asbestos cases, must be filed in the jurisdictional district where the accident occurred. The court can transfer the case to the proper district on its own motion. The court can also sanction the plaintiff's counsel for filing the action in the wrong jurisdictional district.

c.
It is important to note that improper venue cannot be raised by demurrer.

d.
Jurisdiction: Monetary Considerations

Jurisdiction refers to the authority of a court to hear and decide cases. Prior to the consolidation of the

municipal and superior courts, the jurisdictional amount in controversy would determine whether the matter was placed in the municipal or superior court. For example, a complaint alleging damages less than $25,000 would be assigned to the municipal court. Since the unification of these courts the jurisdictional amount serves only to determine if the case is a “limited jurisdiction” case or “unlimited.” The major distinction in these two courts is discovery in limited jurisdiction cases is limited to one deposition and any combination of 35 interrogatories, demand for production of documents, or request for admissions. Recovery is also capped at $25,000.

e.

Practice Pointer: In certain cases you may want to remove the case to federal court. Removal can be based on subject matter jurisdiction or diversity jurisdiction. Where it is based on diversity jurisdiction, you will need to refer to the jurisdictional allegations in the complaint to determine whether there is complete diversity. You will also need to establish the amount in controversy is $75,000 or greater. Although the plaintiff is not allowed to set forth in the complaint the amount he is seeking in his lawsuit (other than to allege the amount exceeds the jurisdictional limit of the limited jurisdiction court), there are plaintiff’s attorneys who serve a Statement of Damages along with the complaint, setting forth the amount being sought for general and special damages.

f.

Practice Pointer: The time limits for removal are strict. The removal papers must be filed with the court 30 days after

service of the complaint. This puts pressure to provide defense counsel with the file quickly.

There are several techniques that can be employed to enhance your ability to remove a case. First, if there is no Statement of Damages, defense counsel may be able to satisfy the $75,000 requirement by contacting plaintiff’s counsel and asking about the nature and extent of the plaintiff’s claim. This discussion should occur in either case so defense counsel can explore the possibility of quickly resolving the case. For purposes of removal, however, this discussion can provide vital information that can be used in the successful removal of a case.

III. Service of Summons and Complaint

A. The Summons

1.

The function of the summons is to notify defendants that a lawsuit has been filed against them and that they have only a limited time in which to respond.

2.

Service of the summons, in addition to giving a defendant notice of the pending litigation, serves to establish the personal jurisdiction of the court over the defendant being served with the summons within the state.

3.

If a defendant is outside the state, service of the summons only functions to give notice of the action and

does not automatically insure personal jurisdiction of the court over the defendant.

4.
A summons must provide notice and an opportunity to be heard in compliance with the 14th Amendment's Due Process Clause. This requires that the plaintiff make a reasonable effort to notify the defendant. One of the following methods is generally utilized:

a.
Service within California may be by personal delivery to the defendant, delivery to someone else at the defendant's usual residence or place of business, service by mail coupled with acknowledgment of receipt, or service by publication.

b.
Service elsewhere in the United States may be by the four above-listed methods or by registered or certified mail with return receipt requested, or by any other method allowed by the law of the state where the person is served.

c.
A defendant may waive its constitutional and statutory rights by either making a general appearance in the action before service of the summons and complaint (also known as voluntarily submitting to the court's jurisdiction), or appointing an agent for service of process, thereby waiving the right to be personally served.

d.
The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after filing the complaint. When the complaint is amended to add a defendant, the added defendant

must be served and the proof of service must be filed within 30 days after the filing of the amended complaint. (CRC, Rule, 201.7(b).) This rule, enacted on July 1, 2002, has accelerated the progress of civil litigation by requiring the plaintiff to have the case "at issue" with respect to the named defendants, within 60 days after filing the complaint.

B. Filing of Responsive Pleadings by Defendant

1. State Court

If service of process is not contested, the defendant must file a responsive pleading (either a demurrer or answer) within 30 days of service. Under the Trial Delay Reduction Act, plaintiff's counsel can only grant a 15 day extension to respond to the complaint. Thereafter, the responding party must seek relief

from the court to respond to the complaint.
a.
Practice Pointer: Where the complaint is verified and the company is faced with a deadline to file a verified answer you should not assume you will be able to enter into an agreement with plaintiff's counsel to allow more than 15 additional days to respond to the complaint. The plaintiff's counsel's refusal to grant a longer extension is not a reflection of the attorney's attitude toward you or the company, but rather, a reflection of the limitations imposed by the Trial Delay Reduction Act rules.

b.
Dismissal Statute

A motion to quash can be used to challenge defects in the manner of service and, in the case of an out-of-state corporation, to challenge the plaintiff's claim of personal jurisdiction. With a national retailer operating in California, there is little chance of establishing that the company does not have sufficient contacts with the state to challenge personal jurisdiction. However, there may be a basis to challenge late service. The court has the discretion to dismiss the lawsuit if the summons is not served within two years under Code of Civil Procedure, section 583.420(a)(1). Dismissal is mandatory under Code of Civil Procedure, section 583.210 where the plaintiff fails to serve the summons within three years after the complaint is filed.
2. Fast Track Rules
California Rules of Court, Rule 201.7(b) has virtually eliminated motions to dismiss on the ground the summons was not served within two or three years. Under Rule 201.7(b) of the Rules of Court the plaintiff is required to serve all named defendants within 60 days of filing the complaint. The judge assigned to the case will conduct a Case Management Conference and address whether all of the parties have been named and served. Where service of the summons and complaint has not been accomplished, the court will set an OSC re: Dismissal to decide whether to dismiss the named defendant that has not been served within the statutory time limit. It is important to note that the Case Management rules give the court the power to extend the amount of time required to serve the named defendants with the summons and complaint.

a.
Practice Pointer: Even though the court will generally address the plaintiff's failure to serve the summons in a timely manner at the Case Management Conference, a motion to quash should be considered where it appears the attempted service was not accomplished within the statutory time limit.

b.
Practice Pointer: There are cases where the plaintiff attempts to serve the retailer by having a process server drop the summons and complaint at the store where the incident occurred. Dill v Berquist Const. Co., Inc. 24 Cal. App. 4th 1426, 1438-1439, holds that it is not substantial compliance to deliver the summons on a corporate employee where there is no evidence he was an officer or authorized to receive service of the summons on the corporation's behalf. Although service by this method can be challenged, it often does not make sense to move to quash to challenge the manner in which the summons was

served. It is likely the plaintiff will eventually effect service properly and time would be wasted in preparing a defense by forcing the plaintiff to serve the summons and complaint properly.

A caveat to this point is with the new requirement set forth under Rule 201.7(b) of the Rules of Court, requiring plaintiff to file a proof of service on all named defendants in 60 days of filing the complaint, a challenge to the manner of service may be an effective strategy. Of course, since the all-purpose judge retains the discretion to excuse plaintiff's delay in filing the proof of service, a challenge to the manner of service may fail to achieve the ultimate goal of defeating the plaintiff's lawsuit. On the other hand, if plaintiff is coming close to running passed the two or three-year dismissal statute, challenging the manner of service may be the best strategy.

c. Practice Pointer: The plaintiff is required to serve the "ADR information package" along with the summons and complaint. (CRC 201.9). These materials are extremely informative and should be reviewed to make early strategic decisions on how to proceed in the case. They indicate whether the case is "complex" under CRC 1800. They also reveal the location of the court and, perhaps most importantly, the identity of the assigned judge. This information allows defense counsel to determine whether to file a peremptory challenge to the judge.

3. Federal Rules

The federal rules require prompt service of the complaint. The action is subject to dismissal without prejudice if it is not served within 120 days after filing of the complaint, unless good cause for the delay is shown.

The defendant generally must file responsive pleadings within 20 days of being served.

C. Result of Failure to Respond to Summons and Complaint in a Timely Manner

1.

A defendant is in default if it does not appear within the allotted time to respond to the complaint.

2.

However, even if the time to respond has expired, the defendant can file a pleading or motion if the default judgment has not been entered.

3.

The plaintiff must request the clerk to enter the default. The request for entry of default must be filed within 10 days after the expiration of the time for service of a responsive pleading unless an extension of time was granted. (CRC 201.7(g).) Once the default is entered by the clerk, the defendant's time to enter an appearance has been cut off.

4.

The plaintiff is then required to prove up her damages in a court hearing in order to obtain a judgment.

5.

Practice Pointer: As stated previously, a complaint may not include allegations of the amount of damages in a personal injury or wrongful death action. However, the plaintiff may serve a Statement of

Damages along with the summons and complaint and the ADR information package. One of the more important reasons for serving a Statement of Damages is it must be filed before a default judgment can be entered. Some plaintiff's attorneys routinely file and serve a Statement of Damages with the summons and complaint hoping the defendant fails to file a timely response to the lawsuit. Once default is entered, the plaintiff can then proceed to enter default judgment without having to give further notice of the damages being sought. In other words, if you have a Statement of Damages included with the summons and complaint there is even greater pressure to provide the file to defense counsel in less than 30 days. Otherwise, the plaintiff will seek to enter default for the full amount stated in the Statement of Damages 10 days after the 30 day period has elapsed.

Where the plaintiff has not served a Statement of Damages with the summons and complaint, she must serve it on the defendant before default may be entered.
As mentioned, the risk to plaintiff in filing and serving a Statement of Damages is it may assist the defendant's efforts to remove the case to federal court on diversity grounds; where complete diversity and $75,000 in controversy must be established to support the removal to federal court.
6. No Requirement to Warn of Impending Default
It is important to note that the plaintiff's counsel is not required to warn the defendant or it's counsel of an impending default. (Bellm v Bellia (1984) 150 Cal. App. 3d 1036, 1038.) However, without a prior warning, courts tend to be more receptive to granting relieve from the default on a Code of Civil Procedure, section 473(b) motion. (Pearson v Continental Airlines) (1970) 11 Cal. App. 3d 613, 619. The better practice, however, is not to expect plaintiff's counsel will provide a warning of an impending default or that the failure to provide one will protect against the entry of default.

D. Relief from Default
1.
The trial court has broad discretion to vacate a default judgment and/or the clerk's judgment, provided the moving party establishes the proper ground for relief and does so within the time limits provided under statute.

2.
Practice Pointer: Surprisingly, it is not uncommon for the plaintiff's counsel to attempt to serve a national retailer by having a process server place the summons and complaint at the front counter of the store where the accident occurred. This is improper service and could provide a basis to move to quash, however, this procedure is obviously only available if the company receives notice that its store has been served. There are numerous instances where the store manager has neglected to forward the improperly served summons and complaint to the corporate office, leaving the in-house legal department unaware that a lawsuit is pending. Should the plaintiff attempt to enter default under these circumstances, defense counsel should be able to successfully set aside the default on the ground that service was improper and the company never received notice.

3.
Time Limits

a. Within Six Months After Entry of Default

A defendant may seek discretionary relief from default under Code of Civil Procedure, section 473(b) on grounds of inadvertence, surprise, or excusable neglect. The motion must be filed within 6 months after the clerk's entry of default. The motion is not effective after that time, even if the motion is filed within 6 months after the entry of default judgment. However, a motion for mandatory relief from default based on an attorney affidavit of fault is timely if filed within 6 months after entry of judgment.

b. Within Two Years of Default Judgment

After the six-month period you may still be able to set aside the default judgment if you show the lack of notice of the proceedings. Relief must be sought within 2 years of the default judgment or 180 days after service of the written notice that the default judgment had been entered, whichever is earlier.

IV. The Demurrer

A. The Purpose of the Demurrer

A demurrer is a pleading used to test the legal sufficiency of the other party's complaint, cross-complaint, or answer. It is not used to challenge the accuracy of the facts pled in the lawsuit. As such, it is improper to attach declarations or other "evidence," beyond matters the court may take judicial notice.

B. May Be the Initial Pleading

The demurrer may be the defendant's initial pleading, and if the defendant has not otherwise appeared, the demurrer constitutes a general appearance, subjecting the defendant to the court's personal jurisdiction. This means you cannot demur to the complaint and then later move to quash based on lack of personal jurisdiction.

C. Function of the Demurrer

The demurrer is designed to challenge defects on the face of the pleadings or matters outside the pleadings for which the court can take judicial notice, such as the complaint was filed beyond the applicable statute of limitations. A Judicial Council Form Complaint is not immune from being attacked on demurrer.

D. Time to File a Demurrer

1.

The defendant can demur within the same time that it has to answer the complaint – 30 days from the date of service, unless additional time is provided by stipulation or order of the court.

2.

Practice Pointer: When you request an extension to respond to the complaint you should make it clear that the request is to respond as opposed to simply answer. Some plaintiff's counsel will agree to stipulate to an extension, provided it is only to answer. Such a stipulation will not help you if you are considering a demurrer to the complaint. Your letter confirming the extension from plaintiff's counsel should make it clear that you are being provided an extension to respond to the complaint.

3.

Excessive Notice

A demurrer must be noticed for hearing not more than 35 days after filing the demurrer or the first available court date thereafter (CRC 325(b)).

4.
A demurrer may be filed along with the answer. Although this approach is not generally followed, it may be used where there are some causes of action that are subject to attack and others that are properly pled.

E. Grounds for a Demurrer

1. The grounds for a demurrer are enumerated in the Code of Civil Procedure. They include:

a.
The court's lack of subject matter jurisdiction;

b.
The plaintiff's lack of capacity to sue;

c.
Nonjoinder or misjoinder of the parties;

d.
A pending action between the same parties for the same causes of action;

e.
Failure to state facts sufficient to constitute a cause of action; and

f.
Uncertainty.

2. General Demurrers and Special Demurrers

a.
A demurrer for failure to state a cause of action is commonly referred to as a "general demurrer," as is a demurrer on the ground of lack of subject matter jurisdiction.

b.
All other grounds for demurrer are special demurrers.

c.
Only general demurrers are allowed in limited jurisdiction cases. In these cases, the grounds for special

d.
Although it is rare, a plaintiff may demur to a defendant's answer on the grounds (1) failure to state facts sufficient to constitute a defense, (2) uncertainty, and (3) failure to state whether a contract alleged in the answer was oral or written.

e.
Practice Pointers:

(i)
The decision to demur to the complaint is an important one. Often, it makes little sense to demur where it is evident the defects in the complaint could be easily corrected. It is better practice to ask opposing counsel to amend the complaint to correct the defects or to proceed with the action in its current form. Where the defects operate to the advantage of the company, it is often better to leave the matter as is rather than alert the plaintiff's attorney to his error. Demurring will only give counsel the opportunity to become better educated on the law by reading the legal authority cited in the demurrer and improve the complaint by removing the cited errors.

(ii)
Where you believe a cause of action can be defeated and discovery avoided on the matter, a demurrer can be the best approach. Perhaps not surprisingly, however, even where defense counsel is certain the demurrer would be sustained without leave to amend, it is common for a judge to overrule the demurrer and allow the parties to conduct discovery on the issue. Such judges are often concerned about having their ruling overturned on appeal and reason that the safer course of action is to have the issue addressed in a summary judgment motion.

(iii) You can quickly run up the cost of defending a case by making a series of attacks on the pleadings. Where the court has sustained the demurrer with leave to amend and defense counsel recommends another demurrer, you have to question whether the goal of defeating the cause of action is worth the time, effort and expense in

demurring to the complaint. If you think the issue through, you may find that answering the complaint and proceeding with discovery is the most cost-effective approach. After all, you can still move for judgment on the pleadings up to the time of trial if you believe the cause of action was improperly pled.
(iv) On the rare occasion when the plaintiff demurs to the answer you will generally find the demurrer is filed to test the applicability of the statute of limitations defense. Some defense counsel routinely assert a statute of limitations defense, citing various statutory provisions supporting the defense. Plaintiff's counsel may have concerns whether her client's case is barred by one or more of the cited statutes and may file a demurrer to have the issue resolved at the outset of the litigation. This approach allows plaintiff's counsel to have the matter resolved by the court before the parties incur significant

. The Answer

A. Purpose

The answer is a responsive pleading that sets forth the defendant's denials and/or defenses to the complaint.

B. Time for Filing

The answer is due within 30 days of the date of service of the complaint, unless the time to respond is extended by stipulation or court order.

C. Petition to Compel Arbitration

If the complaint is based on a contract between the plaintiff and the defendant which provides for the arbitration of their disputes, the defendant may file a petition to compel arbitration rather than answer. Caution: The petition to compel arbitration applies to cross-complaints as well as complaints. Where you have decided to cross-complain against a vendor for contractual indemnity, make certain defense counsel has advised you on whether the agreement has a binding arbitration clause and/or a choice of law provision. Otherwise, you may find that your cross-complaint is removed from the underlying action and placed in binding arbitration.

D. Format

1. General Denial

a.

A general denial is a blanket denial of the entire complaint.

b.

It is important to note that a general denial is not allowed if the complaint is verified.

2. Special Denial

a.

It is customary to start with a denial of the material allegations of each cause of action in the complaint, followed by the applicable defenses to the various causes of action.

b.

The denials should reference a description of the cause of action and the number assigned to that cause of action in the complaint.

E. The Answer Must Be a Fact Pleading

The answer must contain ultimate facts, not evidentiary facts or conclusions of law.

F. Affirmative Defenses

1.

Affirmative defenses must be raised in the answer. If they are not raised, they may be waived. A party may amend its answer once, without seeking leave of court. Thereafter, defense counsel may seek leave to amend the answer to include additional affirmative defenses. Seeking leave of court to amend the answer to include additional defenses after discovery is concluded will almost invariably lead to

plaintiff's claim that he was prejudiced in preparing his case since he did not have the opportunity to conduct discovery on the newly introduced affirmative defense. Obviously, it is better practice to make certain to include the proper defenses in the initial responsive pleading.

2.
Defense counsel will often include a laundry list of affirmative defenses, knowing that many will not apply when the case eventually proceeds to trial. To avoid the need to amend the answer, defense counsel often insert every conceivable affirmative defense. The problem with this approach is it invites discovery on the defenses raised in the answer. The cost of litigating the case can increase exponentially when inapplicable defenses are asserted and discovery requests are served to determine the basis for each affirmative defense.

VI. The Cross-Complaint
A. Purpose
A cross-complaint is a pleading that allows the defendant to assert claims for affirmative relief against the plaintiff, a co-defendant, and/or another person or entity not yet a party to the litigation. It prevents a multiplicity of lawsuits, however, it is an independent action that survives if the complaint is dismissed.
B. Permissive and Compulsory Cross-Complaints
1. Permissive
a. The defendant has the choice of asserting any cause of action it has against the plaintiff. The subject matter did not have to be raised in the complaint.

b.
The reason for this rule is to allow the plaintiff and defendant to settle all of their differences in the same lawsuit.

c.
If too many unrelated claims are joined by the cross-complaint, the court has the discretion to sever the actions.

2. Compulsory
a. The defendant's cross-complaint is compulsory if the cause of action against the plaintiff arises from the same operative facts as the complaint.
C. Service of the Cross-Complaint
1.
A cross-complaint must be served on all parties to the litigation.

2.
Existing parties may be served by mail, but new parties must be served with a summons and cross-complaint and all prior pleadings.

3.
A responsive pleading, such as an answer or demurrer, is required.

VII. Motions Attacking the Pleadings
A. Motions to Strike
1.
Motions to strike are used to attack defects or objections to pleadings that cannot be challenged by demurrer.

2.
Complaint, complaints-in-intervention, cross-complaints, and answers are all subject to motions to strike.

3.
A motion to strike must be filed within the time allowed to respond to the pleading, e.g., 30 days after the filing of the complaint, complaint-in-intervention, cross-complaint, or answer, unless extended by stipulation or court order.

4.
Grounds for motion to strike

a.
Motions to strike can be filed to strike irrelevant, false, or improper matters inserted in any pleading or pleadings not drafted or filed in conformity with the statutes, a court rule, or order of the court.

b.
The grounds for the motion must appear on the face of the pleading or from a matter the court can take judicial notice.

5. Practice Pointer: A motion to strike offers the first opportunity to attack a prayer for punitive damages or attorneys fees. Failing to attack punitive damages through a motion to strike can often lead to plaintiff's counsel seeking leave to conduct discovery on this issue. On the other hand, where punitive damages are properly pled, a motion to strike may not be the best course of action. Where the plaintiff identifies thousands of prior incidents involving falling merchandise where customers have been seriously injured, for example, along with details showing a similarity between the facts of these other incidents and the present case, a motion to strike will probably fail. It probably

is also a poor way to make an initial impression on the court, which will likely view any future arguments offered in the company's defense with a measure of skepticism.

6. Practice Pointer: Where a motion to strike is accompanied by a demurrer and the demurrer is sustained with leave to amend, the motion to strike is rendered moot and the court will not issue a ruling on it. In other words, even though the motion may have been well supported by legal authority, the court will not address the merits of the motion because it no longer has an operative complaint before it to rule on the motion. However, if you are interested in having the court focus on your motion to strike and if you do not believe your chances of prevailing on a demurrer are good, filing an answer and a motion to strike may be the best approach.

B. Motion for Judgment on the Pleadings

1.

A motion for judgment on the pleadings is essentially the same thing as a demurrer. It can be filed at any time during the lawsuit, since the grounds for a general demurrer are never waived. Therefore, the rules that apply to general demurrers apply to motions for judgment on the pleadings.

2.

In fact, the pleadings can be attacked up to the time of trial and at the trial itself. (Stoops v Abbassi (2002) 100 Cal. App. 4th 64, 650.)

3.

Practice Pointer: It is important to note that a judgment on the pleadings does not lie on grounds that were previously raised by demurrer unless there has been a material change in the law since the demurrer was overruled. (Yancey v Sup. Ct. (1994) 28 Cal. App. 4th 558, 562.) This may factor into your decision on whether to demur to the complaint. If defense counsel just received the complaint and there is little time to craft a strong demurrer, the better course of action may be to answer the complaint and move for judgment on the pleadings when there is sufficient time to adequately address the legal issues. In fact, the court may be more favorably disposed to grant the motion knowing that it was filed after the parties conducted some discovery and evaluated the issues in greater depth.

VIII. Questions for Defense Counsel

A. Service of the Complaint

1. Was service proper?

a.

If not, is it appropriate to challenge the manner of service with a motion to quash?

b.

Is there a tactical advantage to filing a motion to quash rather than allowing the plaintiff to re-serve the complaint properly?

c.

Is the tactical benefit obtained worth the expense of filing a motion to quash?

.
Is there a benefit to be obtained from plaintiff's counsel in exchange for accepting service even though it was improper?

2. Has a company employee (or former employee) been served with the summons and complaint?
a.
If so, is there a potential conflict of interest for defense counsel to represent both the company and the employee?

b.
Should waivers be obtained from the company and the employee after appropriate discussions about the potential conflict?

c.
Has the employee (former employee) been properly served? If not, does the employee want to challenge the manner of service (or challenge personal jurisdiction)?

d.
Does the company wish to waive conflicts and the course and scope defense to have defense counsel represent the company and the employee or does the company want to assert the course and scope defense and/or cross-complain against the employee for indemnity?

B. Parties to the Lawsuit
1. Are all of the parties necessary to the prosecution of the lawsuit included in the complaint?
a. If not, what consideration should be given to filing a cross-complaint?
b. Is the cross-complaint permissive or compulsory?
c. Is it better to file the cross-complaint in the plaintiff's case or proceed after the plaintiff's case is resolved?
C. Venue

1. Is the complaint filed in the correct court?
a.
Removal to Federal Court

(i)
Should the case be removed to federal court? If there are punitive damages alleged in the complaint, do you and defense counsel prefer to stay in state court to defeat the claim or is federal court still the best

venue?

(ii)
If you prefer to litigate the case in federal court, has the 30 days for removal passed?

(iii) Can you establish diversity of citizenship and the $75,000 amount in controversy? Is there a Statement of Damages from which to determine the amount in controversy? If not, have you or defense counsel contacted plaintiff's attorney to secure information that will allow you to meet the $75,000 amount in controversy requirement?

b.
Transfer

(i)
If venue is improper, have you discussed with plaintiff's counsel and has she agreed to transfer the case to the correct venue?

(ii)
If there is no agreement to transfer, should a motion to transfer be filed? Is such a motion cost efficient?

c. Peremptory Challenge
(i)
Do you and defense counsel like the judge assigned to your case? If not, is there enough time to file a peremptory challenge?

(ii)
Do you and defense counsel want to use your single peremptory challenge to the assigned judge? Do you believe the challenge will provide you a better judge for your case?

D. Attacking the Complaint
1.
Is the complaint subject to demurrer or a motion to strike?

2.
If so, is it strategically wise to attack the complaint by demurrer or should the issues be raised in the answer or a later motion for judgment on the pleadings?

If a demurrer is filed, what is the chance of success and what is the cost involved?

4.
Could the defects in the complaint be resolved through stipulation with opposing counsel and allowing her to file an amended complaint? Is it better to leave the defects in the complaint?

5.
Should you offer to stipulate to liability in exchange for plaintiff dropping the punitive damages allegations?

6.
Do you and defense counsel believe you can defeat the punitive damages allegations in a motion to strike?

7.
Have you discussed with defense counsel the discovery implications of leaving the punitive damages allegations in the complaint?

E. Where a Default Has Been Taken

1.
Is there a default judgment or has time to respond simply expired?

2.
If judgment has been entered, what is the chance of prevailing on a motion to set aside the default and what is the cost?

F. Considerations Regarding Cross-Complaints

1.
Should a cross-complaint be filed against the plaintiff?

2.
Should a cross-complaint be filed against a co-defendant or an unnamed person or entity?

3.
What effect will a cross-complaint have on tender issues?

4.
Is there an arbitration clause in the vendor agreement that precludes the company from proceeding with a cross-complaint?

G. Shifting Liability Issues

1.
Have you and defense counsel identified all applicable insurance? If so, has the claim been tendered to the insurance carrier?

2.
Have you and defense counsel contacted plaintiff's counsel before responding to the complaint to explore settlement or to obtain information on the value of the case that would be needed for removal purposes?

3.
Where it appears the injury-causing event was caused by a vendor's product or from the vendor's acts and/or omissions, has the claim been tendered to the vendor?

4.
Do you have sufficient information to tender the claim or just enough to put the vendor on notice?

5.
Have you and defense counsel notified the company product merchant to explore resolving the tender issue directly with the vendor?

H. Early Resolution Issues

1.
Have you discussed with plaintiff's counsel the possibility of settling the case before responding to the complaint? Has defense counsel?

2.
Have you attempted to secure information from plaintiff's counsel before defense counsel has filed a responsive pleading?

a.
Has an investigation been conducted before defense counsel had to respond to the complaint to make certain an initial liability assessment was made?

b.
Has defense counsel provided you with an evaluation of the liability and damages issues before filing a responsive pleading? Is the case worth litigating or should it be settled?

c.
Do we have any evidentiary issues or business related concerns that will effect the handling (and outcome) of the case? Do we know of any disgruntled former employees or unfavorable witnesses? Are

there any negative reports that would support a decision to resolve the case before discovery is initiated? Have these matters been discussed with defense counsel before responding to the complaint and the initiation of discovery?

3. Has defense counsel provided you information on the background of plaintiff's counsel? Are there any concerns about the manner in which plaintiff's counsel conducts himself in litigation/trial? Does this case have the potential to impact other cases involving the company? Does defense counsel believe these factors will effect the potential exposure in the case? Does defense counsel believe these factors will effect the potential exposure to the company in other cases.

2. "FAST TRACK" AND TRIAL COURT MANAGEMENT RULES

I. General Background

The management of civil litigation begins when the plaintiff files a lawsuit. Once the action is filed, it is assigned to a judge, triggering a series of deadlines under the Trial Court Delay Reduction Act and the Civil Trial Court Management Rules. The course, scope and pace of the litigation are dictated by the court's application of these rules. Therefore, it is essential that you have a clear understanding of how these rules are applied.

A. Fast Track

The Trial Court Delay Reduction Act ("Fast Track") rules apply to all actions in the superior court in each county in California, except juvenile, probate and domestic relations cases. (Government Code, sections 68605.5 and 68608.) This means that you can expect your cases will be subject to the Fast Track rules.

Under the Fast Track scheme, the judge is required to actively monitor, supervise and control the movement of all cases from the time the action is filed through final disposition. The goal of the Fast Track is to provide for the timely disposition of lawsuits, allowing only the reasonable time necessary for pleadings, discovery, preparation, and court events. (Government Code, section 68603.) The judge has the power under the Fast Track rules to impose sanctions, including the power to dismiss actions or strike pleadings, if it appears lesser sanctions would not be effective to advance the goals and objectives of the Fast Track. In fact, "judges are encouraged to impose sanctions to achieve the purposes of" the Fast Track. (Government Code, section 68608.)

The Fast Track Rules provide for specific time deadlines that are enforced by the all-purpose judge. These deadlines are as follows:

4.

Service of the Complaint. The complaint must be served within 60 days after filing. The court may grant an extension on plaintiff's showing that service could not be achieved within the time required with the exercise of due diligence consistent with the amount in controversy. (New legislation to take effect on January 1, 2004 changes this provision to require the court to grant additional time to the plaintiff if she demonstrates due diligence. This is the only change in the language of the statute that will take effect in January 2004.)

5.
Service of Responsive Pleadings. Responsive pleadings must be served within 30 days after service of the complaint. The parties may stipulate to an additional 15 days.

6.
The time to serve motions as set forth under Code of Civil Procedure, sections 1005 and 1013 shall not be shortened except as provided under those sections.

7.
Within 30 days of service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days.

8.
No case may be referred to arbitration before 210 days after filing the complaint, exclusive of a stipulated continuance.

9.
A peremptory challenge in a Fast Track case shall be exercised in 15 days of the party's first appearance. It should be noted that a case cannot be removed from the Fast Track because of a peremptory challenge. The case will remain in the Fast Track and will be assigned to a new all-purpose judge. (Government Code, section 68607.5.)

I. Civil Trial Court Management Rules
1. Differentiation of Cases
California Rules of Court, Rule 208(b) makes it the responsibility of the trial judge to "achieve a just and effective resolution of each general civil case through an active management and supervision of the pace of litigation from the date of filing to disposition." Rule 209 requires the trial judge to assign cases into one of three categories for the purpose of assigning a trial date for the action:
Plan 1:12 months from date of filing to disposition
Plan 2:18 months from date of filing to disposition
Plan 3:24 months from date of filing to disposition
The court may presume a case is a plan 1 type case at the time it is filed. The court is allowed to change the designation of a case to plan 2 or 3 at any time for good cause. The court also has the authority to deem a case "exceptional," exempting it from the goals and deadlines imposed by the trial court management rules.
2. Factors to Determine the Pace of the Case
The court considers the following factors when deciding the pace of litigation and the trial date:
a.
Type and subject matter of the action;

b.
Number of causes of action or affirmative defenses;

c.
Number of parties with separate interests;

d.
Number of cross-complaints and the subject matter;

e.
Complexity of issues, including issues of first impression;

f.
Difficulty in identifying, locating, and serving parties;

g.
Nature and extent of discovery anticipated;

h.
Number and location of percipient and expert witnesses;

i.
Estimated length of trial;

j.
Whether some or all issues can be arbitrated;

k. Statutory priority for the issues;
l. Likelihood of review by writ or appeal;
m. Amount in controversy and the type of remedy sought, including measures of damages;
n. Pendency of other actions or proceedings which may affect the case;
o. Nature and extent of law and motion proceedings anticipated;
p. Nature and extent of the injuries and damages;
q. Pendency of underinsured claims; and
r. Any other factor that would affect the time for disposition of the case.

3. Case Management Conference

The court is required to review the case no later than 180 days after the filing of the complaint.
The parties are given notice of the case management conference 45 days before the conference.
The parties are required to meet and confer 30 days before the Case Management Conference to discuss the following issues:
a.
Resolving discovery disputes and setting a discovery schedule;

b.
Identifying and, if possible, informally resolving any anticipated motions;

c.
Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;

d.
Identifying the facts and issues in the case that are in dispute;

e.
Determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of a motion or otherwise;

f.
Possible settlement; and

g.
Other relevant matter.

The Case Management Conference is designed to result in the issuance of an order on the following matters:
a.
Referral of the case to ADR;

b.
Date for completion of ADR process:

c.
A trial date, if the case is ready for a trial date to be set;

d.
Whether the case will be tried by jury or non-jury;

e.
The identity of each party demanding a jury trial;

f.
The estimated length of trial;

g.
Whether all parties necessary to the disposition of the case have been served or have appeared;

h.
The dismissal or severance of unserved or not appearing defendants from the action;

i.
The names and addresses of the attorneys who will try the case;

j.
The date, time, and place for a mandatory settlement conference;

k.
The date, time, and place for the final status conference;

l.
The date, time, and place of any further case management conferences or review; and

m.
Any additional orders that may be appropriate.

J. Practice Pointers:

The modified Fast Track Rules and the Civil Trial Court Management Rules have accelerated the pace of litigation and placed a premium on the defense attorney who can evaluate liability and damages quickly and accurately. With the shortened time limitations placed on the case, defense counsel will have to develop a discovery plan and implement it early in the case. Defense counsel will also have to work within a tighter time frame when scheduling motions and preparing for trial.

The notice requirement for motions has been extended from 14 days to 21 days. With Plan 1 cases being set for trial within 12 months, counsel will have less time to consider whether to file a motion.

The notice requirement for motions for summary judgments has been extended from 28 days to 75 days. The court is precluded from shortening the time for hearing a summary judgment motion and such motions cannot be heard less than 30 days before trial. Given that discovery is generally required before a party can determine whether a summary judgment motion is appropriate, there is little time to prepare a summary judgment motion and have the matter presented for hearing.

3. DISCOVERY

1. Introduction

K. What Is It?

Discovery is the stage of litigation that provides the parties with the opportunity to thoroughly analyze the merits of their case. Discovery is a powerful tool if utilized properly. It is also one of the most expensive and abused areas of litigation. One means of keeping the cost of discovery down is for counsel to have a discovery plan, which will act as a guide in determining what needs to be done. The key here is knowing what you have to prove for your side to prevail.

L. What Are the Purposes of Civil Discovery?

1.

Discovery methods are used to obtain the full disclosure of information before trial. This in turn increases the chances that trial will be a truth-finding endeavor.

2.

Pretrial disclosure maximizes the opportunity for effective organization and presentation of evidence while it minimizes surprise.

3.

Through discovery, weaknesses in the plaintiffs case may be uncovered (such as evidence of the plaintiffs own negligence, the production of documents helpful to the company's case, or contradictions in the plaintiffs version of the facts).

M. The Positive Effects of Discovery

1.

Promoting Settlement: Pretrial discovery often encourages settlement by forcing both sides to evaluate the strengths and weaknesses of their own and their opponent's cases.

2.

Narrowing Issues for Trial: Facts gleaned from discovery permit counsel to concentrate efforts on those issues in dispute and to stipulate to or abandon those as to which the result is clear.

3.

Preserving Evidence for Trial: Because the actual trial of a case frequently takes place many years after the events that gave rise to the lawsuit, pretrial discovery will often aid in preserving testimony and evidence.

4.

Evaluating the Individuals Involved: Pretrial discovery allows counsel to assess the demeanor and style of witnesses, parties, and counsel before trial. This information is usually helpful in determining how to present a particular witness in the most positive light, and, conversely, how best to challenge an adverse witness's testimony.

N. The Five Major Drawbacks of Discovery

1.

Discovery can be expensive, often requiring the expenditure of more time and money than a routine case can justify.

2.

Attorneys, in an effort to protect their clients, sometimes become embroiled in relatively meaningless disputes over the sufficiency of

discovery responses, to the extent that they lose sight of the central focus of the case.

3.

Discovery is sometimes used by attorneys to overwhelm the opposition. While this tactic can occasionally foster settlement, it gives an unfair advantage to the party inclined to use discovery like a blunt object. It is also fraught with danger because it can cause the opposing party to "dig their heals in," making settlement virtually impossible.

4.

An attorney pursuing discovery information may end up revealing her case strategy to an opponent.

5.

Discovery produced in a case can find its way into other lawsuits against the company, thereby increasing the cost of managing the litigation in other jurisdictions and potentially increasing the company's exposure in other lawsuits.

SCOPE OF DISCOVERY

O. In General

1.

The rules of discovery are codified in California Code of Civil Procedure sections 2016-2036, also known as the California Civil Discovery Act. These sections define the scope of permissible discovery, the methods for obtaining discovery, and the procedures for handling discovery disputes. Judicial decisions interpreting these sections also must be considered when determining the meaning and intent of the specifci code section.

2.

As stated, discovery in limited jurisdiciton cases is limited to one deposition and any combination of 35 interrogatories, demand for production of documents or request for admissions. The rationale for limiting discovery in these cases is they involve claims with less than $25,000 in controversy.

Obviously, it would not make sense to allow extensive discovery on cases with such limited value. This perspective is a healthy one to adopt when deciding the nature and scope of discovery that is truly needed in an unlimited jurisdiction case.

P. The Test Applied to Any Particular Challenged Discovery Request

Discovery must be relevant to the subject matter, however, the term “relevancy” has limited value in the court’s determination of whether a discovery request is permissible. The more helpful inquiry is whether the discovery is reasonably calculated to lead to the discovery of admissible evidence. Discovery is proper if it reasonably might lead to other evidence that would be admissible at trial.

It does not matter if the evidence being sought would be admissible at trial. If the evidence being sought would lead to the discovery of admissible evidence, it is within the scope of discovery permitted under the Code of Civil Procedure.

The court’s liberally apply the reasonably calculated to lead to admissible evidence standard to permit discovery on non-pivileged matters. (TBG Ins. Services Corp. v Sup. Ct. (2002) 96 Ca. App. 4th 443, 448.) In fact, the

objection from some defense counsel that plaintiff is conducting a “fishing expedition” is not a proper objection. The mere fact that the plaintiff is “fishing for information” does not, on its own, make the discovery improper. The court will prevent or limit a party’s fishing expedition if the nature or method of the effort is improper.

Q. Disclosure

Disclosure of otherwise legitimate information that passes this test may nonetheless be refused if it is privileged or if the request is improper in some other respect (e.g., ambiguous, unintelligible, or overbroad)

Types of privileges often asserted in the discovery context include:

1.
The attorney-client privilege

2.
The physician-patient privilege

3.
The trade-secret privilege

4.
The privilege against self-incrimination.

R. Practice Pointers:

The initial set of written discovery typically served by the parties include the Judicial Approved Form Interrogatories. The Form Interrogatories include a series of questions asking for the identity of all witnesses and whether they have prepared witness statements. There is a basis to withhold information

on such statements on the ground they are protected under the attorney-client privilege as well as the attorney work product protection. Recent case law has re-affirmed the principle that where the corporate employer requires its employees to make a report, the privilege of the report is determined by the employer's purpose in requiring the report. Scripps Health v Sup. Ct. (2003) 109 Cal. App. 4th 529. If the "dominant purpose" of the reports was for transmittal to the attorney in the course of the attorney-client relationship where it expected confidentiality, the privilege will apply.
In determining whether the dominant purpose of a requested document was for transmittal to the attorney, the court will consider whether the defendant required completion of the reports for the purpose of attorney's review and if the documents were intended to be confidential. Certainly, where the document states that it should be kept confidential and/or routed to defense counsel, the argument for protecting it from disclosure is stronger. The argument becomes more attenuated where confidentiality is not required and/or its purpose is less clearly related to the defense counsel's preparation of the company's defense.

S. The Attorney Work-Product Doctrine

The attorney work-product doctrine may protect otherwise relevant matter from discovery.

1.

This doctrine will in some instances provide a basis for withholding information developed or created by an attorney in preparing his own case for trial.

2.

A writing that contains an attorney's impressions, conclusions, opinions, legal research, or theories is absolutely privileged.

3.

Other work product (e.g., verbatim transcriptions of or written witness statements procured by counsel) can sometimes be discovered if it is otherwise unavailable to the opposition, and if prohibiting its discovery would "unfairly prejudice" that party.

4.

Practice Pointer: A corollary to the attorney-client privilege objection in response to plaintiff's request in his set of interrogatories asking for the identity of all witnesses and information concerning whether they provided written statements to the defendant, is the attorney work product protection. The objection is based on the contention that statements obtained from employees at the time of the incident were secured in anticipation of litigation and are protected work product. (Nacht & Lewis Architects v Sup. Ct. (1996) 47 Cal. App. 4th 214.) Since the plaintiff's counsel can depose the employee, he will often have difficulty demonstrating to the court that the work product protection should yield to his client's need for the information. Even in the case where the statement was obtained from a former employee, if defense counsel is able to provide the last known address for the former employee, she should be able to protect the written statement from being produced.

Defense counsel's ability to prevent the production of written statements obtained in anticipation of

litigation is impaired if one or more statements are produced voluntarily. The selective production of certain witness statements and not others will generally be viewed by the court as gamesmanship and, in addition to a strong waiver argument, will usually lead the court to order the statements produced by the objecting party.

T. Other Basis to Deny Discovery

Despite objections to the form of discovery, discovery is disallowed when it will cause annoyance, embarrassment, or oppression disproportionate to the value of the information sought or when it constitutes an invasion of privacy, and no compelling state interest justifies disclosure.

U. K. Time for Discovery

The formal discovery process begins 10 days (20 days for depositions) after the defendant has been served with a summons or appeared in the action. Discovery then continues to remain open, assuming the case has not been taken to a private judge, until 30 days prior to trial (15 days for expert discovery).

IX. Discovery Tools

A. Depositions (Code of Civil Procedure sections 2016-2025)

1.

A deposition is a proceeding in which attorneys question a witness under oath before an officer authorized to administer oaths. Deposition proceedings are reported verbatim and transcribed.

2.

The deposition of any individual may be taken whether that individual is a party to the lawsuit or not.

a.

Nonparties may be compelled to attend by means of a subpoena.

b.

When a nonparty witness is deposed, the document request is accomplished by a subpoena duces tecum.

b. c Parties and those affiliated with parties are required to submit to deposition simply on the basis of a notice.

d.

A deposition notice can also include a request that the individual bring to the deposition specified papers and objects in his possession or under his control.

3. The major advantage of depositions over other discovery devices:

a.

It provides an opportunity for face-to-face questioning and immediate follow-up.

b.
It provides a means of obtaining invaluable leads and information, particularly when a witness is talkative.

c.
It provides an effective means of sizing up the strengths and weaknesses of the witness for trial.

d.
It can be accomplished much more quickly than interrogatories, since notice can be given within 10 days (hand service) or 15 days (regular mail service) of the deposition, rather than having to wait 30 days for a response.

e.
It presents the possibility of spontaneous responses from opposing parties, without attorney influence. In addition, unlike with interrogatories, an adjustment to the deponent's response can be made immediately, and the deponent can be pinned down on the spot, without having to wait for an opponent's written response.

f.
It provides an opportunity to authenticate documents.

g.
It provides the ability to lock in testimony or expert opinions and assumptions.

h.
There is no limit to the number of questions that can be asked.

i.
It can be used on nonparties.

j.
Computer software, such as LiveNote, has made it possible to simultaneously obtain the deponent's testimony. Defense counsel can transmit the live testimony to the company or provide summaries that directly reference the testimony within a short space of time, saving the time that was usually spent waiting for the deposition transcript to come to defense counsel.

a.
The cost of the court reporting service ($5 to $6 a page of transcript, resulting in a deposition cost from a minimum of $500 up to an all-day cost of $1,500) and any additional costs (video, LiveNote, etc.) associated with arranging for the deposition.

b.

The cost for counsel to prepare for the deposition, i.e., to review documents; review medical records; discuss matters with clients and witnesses, etc.

c.
Attendance at the deposition. This is an area where costs can escalate. If plaintiff's counsel is not efficient in questioning witnesses and the deposition extends longer than anticipated, the cost of the deposition can soar. In cases where counsel is

k. Deposition testimony is often admissible at trial for the purpose of contradicting testimony or when, for one reason or another, the deponent is unavailable to testify at the time of trial.
l.. Practice Pointer: Depositions can be videotaped. This offers a excellent opportunity to catch the deponent early in the case when she may not be fully prepared to testify about the facts of the case. The videotape can be used at trial and, on many occasions, shows the witness dressed more casually and perhaps less attentive to the details of the process than demonstrated by the witness at trial. Despite the growing use of videotaped depositions, many attorneys fail to properly prepare their clients to testify on camera.
Another advantage for the defendant in videotaping the deposition is the plaintiff cannot use the tape in place of their live testimony. In other words, if the tape does not offer much in terms of its dramatic effect at trial, defense counsel is not required to use it and plaintiff cannot use it in lieu of his live testimony. Having said that, you should be aware the videotape is often used by plaintiff's counsel to preserve the testimony of a client who is dying. The videotaped deposition can then be used by the plaintiff's counsel as "preservation testimony." Certainly, if you suspect the plaintiff may have a terminal condition that would prevent him from making it to trial, it would not make sense to videotape his deposition.
m. Practice Pointer: A recent amendment to Section 2026 of the Code of Civil Procedure provides that "any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify at trial if the deposition notice reserved the right to use the deposition at trial." This provision offers an important tool for securing expert testimony while keeping costs down. This procedure also increases the

mportance of expert discovery. The attorney who fails to properly prepare for an expert deposition may now find that he is limited at trial to the cross-examination questions he posed in deposition.
4. Costs

needlessly dragging out the process, a motion to suspend the deposition or to appoint a referee may be necessary, thereby increasing the costs further.
d.
Expert hourly rate. If your defense counsel is deposing an expert, the expert's hourly fee (usually $350 to $500) will have to be paid up front. The total amount of the check presented at the deposition is based on the attorney's estimate of how much time he expects to take. If he goes over the time estimate, the balance of the fee is due within five days of receipt of an itemized statement from the expert.

e.
The disadvantage of discovery via deposition: Less control. Other counsel can attend the deposition and ask questions, and the counsel having noticed the deposition will be required to pay for the transcript costs regardless of how long other counsel drag out the deposition with their questioning.

f.
Practice Pointer: The cost of defending depositions of company witnesses can be fairly substantial. In addition to the attorney time and expense in preparing, the company witness is taken from work to meet with defense counsel to prepare to testify at deposition. In a case where the potential exposure to the company is modest and there are several notices to depose company witnesses, there should be an analysis of whether the time and expense and interruption to business warrants proceeding with litigating the case. This is not to suggest that settlement offers should be made on all smaller cases where the plaintiff's attorney notices multiple depositions of company witnesses. Following such an approach would send the wrong message to the plaintiff's bar. However, there should be an analysis in each case whether the cost of defending numerous depositions makes sense in light of the overall exposure in the case.

5. Procedures for Challenging Deposition Subpoenas
a. Any party to the action, including the subpoenaed nonparty witness, may challenge the deposition subpoena.
The grounds on which a deposition subpoena may be attached include:
(i)
Defects in the subpoena's form or content (e.g., inaccurate document descriptions, e.g., "records only" subpoena);

(ii)
Defects in subpoena service (including attaching fees);

(iii) Unjustly burdensome or oppressive demands;
(iv)
The “consumer’s right of privacy in personal records” (Code of Civil Procedure section 1985.3(e)); or

(v)
That the records sought are privileged, irrelevant, or otherwise not within the permissible scope of discovery.

b. Specific procedures for challenging deposition subpoenas will depend upon who is raising the challenge.
(i) Motion to Quash or Limit Subpoena: This motion may be filed by the subpoenaed witness, any party, or any “consumer” whose personal records have been subpoenaed.
The motion must be filed before the deposition. In response, the court may either quash (void) the subpoena or modify it. If the court modifies the subpoena, it will direct the subpoenaed party to comply with the court’s new terms.
The court may also award reasonable expenses and attorneys’ fees to the successful party if it finds that the losing party acted in “bad faith” in either making or opposing the motion.
(ii) Protective Orders: Any party or witness may instead opt for a protective order against the subpoena or deposition proceedings.
The court may make whatever orders are appropriate to protect any party, witness, or “‘consumer”‘ from unreasonable or oppressive demands, including unreasonable violations of a witness’s or consumer s right of privacy.
(iii) Enforcing the Subpoena: Because a properly subpoenaed witness must appear, testify, and produce whatever documents are specified in the subpoena under California statutes, the subpoena is enforceable either by:
- A motion to compel compliance;
- Contempt proceedings; and/or
- A civil damages action.

B. Interrogatories to Parties (Code of Civil Procedure section 2030)
1.
Interrogatories consist of a series of written questions directed to a party that must be answered under oath.

2.
Parties are limited to asking 35 special interrogatories and any number of the approximately 87 interrogatories identified on the Judicial Council form unless accompanied by an attorney declaration justifying service of more than 35 special interrogatories.

3.
Advantages

a.
Interrogatories are useful in that they are inexpensive and they require that the answering party make reasonable efforts to provide the information sought.

b.
Interrogatories are most helpful in obtaining background information and uncontroverted facts. They may be used to request a statement of an opponent's contentions and the facts underlying those contentions. This is particularly important since contention questions cannot be posed in deposition. Other than through expert depositions, special interrogatories are the only discovery device that can secure the opposing party's legal contentions in the case.

4. Disadvantages
a.
Interrogatory responses are usually carefully drafted by the answering party's attorney, so that they often provide only a minimal amount of useful information.

b.
Obtaining insufficient or inadequate answers is expensive and time-consuming.

5.
Practice Pointer: The verified responses to interrogatories can offer an opportunity to impeach the plaintiff at trial. Since the attorney for the plaintiff often drafts the responses for her client and fails to actually ask the client to review the questions and answers to make sure they are correct, the plaintiff tends to have difficulty answering questions about the responses at a later time. When questioned during trial about signing a verification under penalty of perjury where they never actually confirmed the accuracy of the information contained in the response, many plaintiff's lose a measure of composure and find their credibility may be tarnished.

6.
Warning: Failing to provide timely responses to plaintiff's interrogatories can result in a waiver of all objections to the interrogatories, including the attorney-client privilege! It is absolutely vital that timely verified responses are provided, or an extension confirmed in writing is obtained, to protect the company from waiving its objections. Otherwise, the court can order the company to answer, without objection, all of the interrogatories. This can be devastating in a case where there are questions directed to matters encroaching on the company's attorney-client privilege and/or involve national discovery issues. Maintaining a proper calendar of all dates is absolutely essential.

C. Identification and Production of Documents and Things for Inspection (Code of Civil Procedure section 2031)

1.

A request for production of documents allows a litigant to review and copy items in the possession or control of a witness or party.

2.

A party may also inspect the possessions and property of an adversary, or other tangible evidence within a party's control.

3.

This method of discovery is often invaluable in that it is relatively inexpensive (it is usually sent by regular mail) and it allows a party access to documents and things that are often the most reliable evidence of the facts underlying the lawsuit.

However, keep in mind the expense of attorney time to inspect the records or the site.

If not carefully written, a request can create a document-review nightmare where the opposing party overwhelms you with records.

4. Benefits

a.

There is no limit on the number of demands you can make.

b.

This method provides you access to the property or objects if it is applicable to the litigation.

c.

Access to documents prior to a deposition can assist the attorney in taking a more meaningful deposition. However, information obtained at a deposition can also assist the attorney in writing very specific requests for inspection of documents that the opposing party will be unable to avoid (e.g., "'letter dated 1/2/92 from Mr. X for Mr. Y regarding Mr. Z").

5. Warning: Spoliation of evidence is no longer a viable cause of action in California, however, there are evidentiary rulings that the court can frame to address the destruction of evidence that can have a significant impact on your case. Cedars-Sinai Medical Center v Sup. Ct. (1998) 18 Cal. 4th 1, 12. There are four non-tort remedies that the court can impose for the spolitation of evidence. These include:

a.

An evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party;

b.
The imposition of sanctions for conduct that amounts to “misuse of the discovery process. Sanctions under Section 2023(b) of the Code of Civil Procedure can include issue, contempt, evidentiary, and even terminating sanctions for the spoliation of evidence;

c.
State Bar of California disciplinary sanctions under Business & Professions Code, section 6106, and;

d. Criminal penalties for spoliation under Penal Code, section 135.
The issue of spoliation arises when the plaintiff’s attorney requests in writing that the injury-causing merchandise be preserved for purposes of litigation. If the merchandise is then discarded, plaintiff’s counsel may seek one or more of the above remedies. In short, you should not assume that simply because the cause of action for spoliation of evidence has been eliminated in California that there is no recourse if evidence is lost or destroyed.
Requests for Admissions (Code of Civil Procedure section 2033)
5.
1. Requests for admissions (RFAs) require a party to stipulate that a certain fact is true or that a document is genuine.

6.
2. Practically, this device is rarely useful in obtaining a stipulation as to underlying facts because

counsel usually find some basis upon which to justify denial of even the most carefully drafted request. Unwarranted refusals to admit facts that are later proved at trial, however, may result in an order requiring the answering party to bear the costs incurred in proving the existence of such facts.
Warning: Defense counsel should be aware that Section 2033(o) provides “if a party fails to admit the genuineness of any document or the truth of any matter when requested to do so and if the requesting party thereafter proves the matter, the party requesting the admission may move the court for an order requiring the party to pay reasonable expenses incurred in making that proof, including reasonable attorneys fees!
7.
A party is limited to 35 RFAs.

8.
Benefits

a.
The use of RFAs can lead to an early adjudication on a particular cause of action if an affirmative defense results from a party’s admissions or if an element of the party’s cause of action is conclusively eliminated.

b.
RFAs are inexpensive.

c.
REAs can provide an opportunity for the opposing party to evaluate the strength of their case.

d.
If the answering party fails to obey an order compelling responses, the court can deem the request for admissions admitted, again creating the opportunity to prevail on a motion for summary judgment. In fact, if the plaintiff's attorney fails to provide verified responses by the time of the hearing on a motion to deem the request for admissions admitted, the court is required to deem the request for admissions admitted.

e.
Practice Pointer: In cases where the plaintiff's counsel is disorganized, unprepared, or otherwise incompetent, serving request for admissions in the regular course of serving initial discovery can offer an opportunity to eventually move to deem the request for admissions admitted. If counsel continues to ignore his obligations and fails to provide the verified responses by the time of the hearing, defense counsel may be in a position to have the request for admissions deemed admitted.

D. Independent Medical Examinations (Code of Civil Procedure section 2032)
1. This discovery method provides the defendant the opportunity to have one physical examination of the injured party by a doctor of the defense counsel's own choosing. If the plaintiff has multiple injuries, some of an orthopedic nature and others neurological, the defendant may only request an examination in one area, unless he can establish good cause for multiple examinations (Shapira v Sup. Ct. (1990) 224 Cal. App. 3d 1249, 1255.). In the absence of a stipulation of counsel or a court order, defense counsel will have to choose which area to

conduct the examination. Generally, plaintiff's counsel will stipulate to the second examination since it often assists in resolving the case and the court tends to allow the second examination if a clear and distinct injury in a second area is in issue.
2.
Mental examinations are not available under Section 2032 unless ordered by the court or agreed to by stipulation of counsel. Where the plaintiff is claiming great mental pain and suffering from the physical injury, the court may order a mental examination. Mental examinations are generally not ordered simply because the plaintiff is claiming general damages (e.g., pain and suffering.)

3.
The defendant's medical examiner is not entitled to conduct painful, protracted or intrusive tests. In

f

many cases, plaintiff's counsel will use this provision as a basis to object to x-rays being taken by defendant's medical expert (Code of Civil Procedure, section 2032(g)(1).) However, unless there is a showing of a special risk posed by the x-rays, plaintiff's general fear of x-rays will not justify his refusal to submit to x-rays. (Ghanooni v Super Shuttle of Los Angeles (1993) 20 Cal. App. 4th 256, 259.) Where the medical expert reports to defense counsel that a recent x-ray is required to properly assess the plaintiff's condition, he may be forced to move for an order allowing x-rays to be taken. The law and motion activity generated on this and other issues related to the examination can significantly increase the cost of medical examinations.

4.
The plaintiff's counsel and a court reporter may attend the medical examination. The plaintiff's attorney is permitted to observe every phase of the examination. In fact, the attorney has a right to audio•tape the examination. She may not videotape the examination. In the case of a mental examination, the attorney for the plaintiff does not have a right to attend the examination. However, the examiner and the plaintiff have a right to audio-tape the mental examination.

5.
Caution: The plaintiff's attorney will typically demand a copy of the IME (independent medical examination) report. The defendant is then required to provide the report and all other reports on the plaintiff within 30 days after being served with the demand and in no event later than 15 days before trial. In other words, the plaintiff's demand for the examiner's report includes the IME report, record review and all other reports in the examiner's possession. The plaintiff's right to the examiner's report is not affected by whether the defense attorney designates the examiner as an expert. The plaintiff is still entitled to the examiner's report and other reports in his possession. (Kennedy v Lucky Stores, Inc. (1998) 64 Cal. App. 4th 674, 678.)

6. The risk of conducting an IME is readily apparent when you realize that your medical expert will have to provide her report and the other reports that she relied in evaluating the plaintiff. For this reason, many defense attorneys ask their experts not to prepare a report until they provide a verbal report of their findings. If the findings are helpful, defense counsel may request a report. If the findings are not helpful, defense counsel may choose to ask the examiner to refrain from

preparing a report. The obvious danger to this approach is plaintiff's counsel is apt to call the expert to testify at trial, knowing the absence of a IME report signals the defense is concerned about the expert offering an adverse opinion.

7. Costs

a. The exam, in addition to the review of the medical records and the preparation of the doctor's findings, can cost as little as $700 and as much as several thousand dollars, depending upon the doctor selected to perform the exam and the amount of time required to complete the exam.

b. Subpoenaing of medical records and doctor's findings can be

costly. The medical expert will want to review the past medical records and films before the medical examination. Obtaining all of these records and having your medical expert review them along with the cost of the medical examination can quickly increase the cost of defending the case.

c. The plaintiff is not required to seek a protective order if she does not wish to submit to an IME. She simply has to state her objections to the IME demand and refuse to appear on the scheduled date. The defendant then must file a motion to compel if he wants to force plaintiff to comply with the demand. The court is required to award sanctions in favor of the prevailing party to the motion, unless substantial justification is demonstrated by the losing party. Given the cost of the motion and the supporting declarations and the possible need for a declaration from the expert, the law and motion process can result in a large increase the cost of the IME process.

7. Benefits:

a.

This method gives you an unbiased opinion of the opposing party's damages. Rather than having to rely on the opinions of plaintiff's treating physicians, who may be biased because of a lien relationship with the plaintiff or a past relationship with plaintiff's counsel, you can consider the relatively objective view of the medical expert selected by defense counsel.

b.

This discovery device is probably the only one that allows you to have medical evidence that you can fully evaluate on whether the plaintiff will require additional care and treatment. Without an IME, you will probably be forced to accept the recommendations of plaintiff's medical experts or treating physicians on the need for future care and treatment. If this is a significant issue in your case, you will probably want to make certain an IME is performed.

c.

Practice Pointer: You need to make certain your defense counsel is not recommending a medical expert who makes a living selling his opinions to support the defense side. It is far better to have a qualified, well-respected expert who will present herself well to a jury than to retain someone who is

nothing more than an advocate. A medical expert's loss of credibility to the judge or jury can be devastating to the defense of a case. It is almost always better to have a well-respected physician who will provide and honest, objective view of the facts. After all, you would probably prefer to know the bad news before the case goes to trial so you can resolve it before it goes to verdict.

E. Expert Disclosure (Code of Civil Procedure section 2034)

The purpose of expert disclosure is to require each side to provide the names of their experts and the nature of each expert's testimony so that the other parties can notice their depositions. A party can hire a "consultant" during the investigative stages of the litigation knowing that if the "consultant" formulates opinions that may be adverse to the party's position, the attorney does not have to disclose him as an expert. The consultant's opinions are protected from scrutiny since he will not be used as an expert and so cannot be questioned by any party.

F. Motion to Compel Discovery

Counsel for the requesting party may file this motion when the responding party either fails to respond or makes unsatisfactory responses to interrogatories or inspection/production demands.

2. If a party fails to respond, the moving papers (consisting of a Notice of Motion, Memorandum of Points and Authorities, and supporting declarations, if any) can be filed any time after the deadline for a response has passed.

a.

No attempt to resolve the problem informally is required.

b.

The court may also impose monetary sanctions against the non-responding party and/or its attorney, depending upon the facts of the noncompliance.

3. If, on the other hand, the responding party has merely given unsatisfactory answers to interrogatories or inspection /production demands, different rules apply:

a.

A notice of motion to compel must be served within 45 days after the responses in question were served, unless the court extends the time.

b.

If this 45-day time limit is missed, the requesting party waives the right to compel a further response.

c.

Note that, as to interrogatories, a party missing the 45-day limit cannot get around this waiver by asking the same question again in a later set of interrogatories.

d.

A motion to compel further answers must be accompanied by a declaration stating facts showing that a reasonable and good faith attempt was made to resolve informally the issues presented by the motion before filing the motion. This is called

the "'meet and confer" requirement, although no actual "'meeting" is required.

e.

California law allows informal resolution conferring in person, by telephone, or by letter with an

opposing party or attorney.

f.
Be aware that efforts to meet this “informal resolution” requirement do not extend the 45-day limit within which the attorney who wishes to compel further answers must file his or her motion.

X. Deciding On A Discovery Plan
A. General Factors to Consider
With the advent of the Fast Track and the Civil Trial Case Management Rules, the parties to litigation no longer have the luxury to assume a low profile in discovery as they may have in the past. Prior to the current system, a discovery plan might have included an assessment of whether to wait to see if the plaintiff was serious about litigating her case. With Plan 1 cases being given trials dates in 12 months of being filed, very few plaintiffs have the latitude to decide to assume a passive attitude toward prosecuting their case. It is far more common now for the plaintiff’s attorney to serve the summons, complaint, ADR package and a demand package with written discovery soon to follow. Under this new, aggressive system of pushing cases through the civil litigation system, it is more important for defense counsel to develop an efficient, well-conceived discovery plan.
Although the new civil litigation system in California has condensed the procedural steps of a case into a shorter time frame and pressure on completing discovery has increased, defense counsel still needs to consider the economic realities of the case. The monetary value of the case, the financial impact of the litigation on the company, the likelihood of an early resolution, and the effect the case may have on other cases being litigated against the company are all factors that need to be evaluated and factored into any discovery plan. Simply serving massive written discovery on the plaintiff in every case without first considering all of these factors does not advance the company’s interest. The discovery plan needs to be crafted early in the litigation and be tailored in a way that meets the needs of the company while advancing the company’s legal position in the lawsuit.
B. Evaluation of Legal and Factual Issues
After meeting with the witnesses and reviewing the documents in the file, defense counsel should determine the facts necessary to prove each claim or defense and the probable source of proof for those facts. These will form the basis for the discovery plan.
XI. Checklist Of Questions To Ask Your Counsel During The Discovery Stage Of Litigation
A. Generally
1.
Have you sent out deposition notices to the opposing party and his/her/its witnesses?

2.
If documents have not yet been produced by opposing counsel, would a subpoena duces tecum be useful to make the witness bring those documents?

3.
If the opposing party is claiming privilege or attorney work-product to avoid producing one or more documents, is the battle of a motion to compel production worth the contents of that/those document(s)?

4.
Will asking additional form interrogatories obtain enough important information from the opposing party to justify their expense?

5.
Are requests for admissions going to provide us with sufficient worthwhile information to justify their expense? (Is the authenticity of any documents at issue?)

6.
If many discovery requests are being sent out, ask: Are you requesting so much information that the opposing party will object to the requests as unduly burdensome, oppressive, or harassing? What is your justification?

7.
If an insured or witness on "your side" is going to be deposed, make sure counsel has adequately prepared him or her.

B. Questions to Ask Counsel About Depositions
1.
Is this deposition in the discovery plan?

2.
If not, why not?

3.
Why do you think we need this deposition?

4.
What discovery methods can we forego if we take this deposition?

5.
Have you done a production of documents yet?

6.
How would the deposition be affected by your review of the document production?

7.
What will this deposition cost?

8.
What is it about this witness's testimony that we know will hurt our case?

9.
Have you asked any of the other counsel to split the cost of the deposition?

10 If the deposition will require traveling a long distance to the deponent's location, you will want to ask counsel if he or she has attempted to arrange for all parties interested in attending the deposition to share in the cost of bringing the deponent to them. (Out-of-state deponents can be flown to the state of the litigation for far less than it would cost for all counsel to fly to the deponent's state.) This option may be unworkable, however, if counsel wants the deponent's records available.
C. Questions to Ask Counsel About Interrogatories
See the questions in the deposition section above. However, as with depositions, interrogatories should be designed in accordance with a well thought out discovery plan.

D. Questions to Ask Counsel About Requests for Production of Documents or

Inspections:
A. As with the other methods of discovery, you will want to know how this fits into the discovery plan.
E. Questions to Ask Counsel About Medical Examinations and Experts
Why do we need a medical examination? Is the plaintiff claiming future care and treatment? Is there an issue concerning the apportionment of the plaintiff's alleged injuries? Do we expect the examination will reveal the plaintiff over-treated, had a pre-existing condition, or is a malingerer?
What is the background of the recommended expert? Has he testified at trial before? Have you used the expert before?
What other experts do we need? Why do we need them? Can we cover the issues with an in-house expert? How much will the expert cost?
Should we serve the plaintiff with a statutory offer to settle (Code of Civil Procedure, section 998) to recover the expert's fees in the event we prevail at trial? If so, how much should we offer? What are the chances we will recover these fees from the plaintiff?

4. MOTIONS
I. INTRODUCTION
The parties to a civil action file motions to obtain an order from the court during the course of the litigation.
II. STRUCTURE OF THE MOVING PARTY'S MOTION

A. Notice of Motion

Typically, the moving party must give notice that it is going to seek relief from the court via a motion. The Notice of Motion is typically a two-page pleading that notifies all parties of the time, place, date, and grounds of the said motion.

B. Memorandum of Points and Authorities

The moving party must provide a memorandum of points and authorities with its moving papers. This section of the motion is used to provide the court with the legal authority supporting the moving party's position.

C. Declaration in Support of Motion

Most motions will require a supporting declaration (typically of the moving party's counsel) informing the court that they have attempted to resolve this matter informally with opposing counsel (meet and confer) but to no avail. Declarations are also used to certify that exhibits to the motion, if any, are true and correct copies of those exhibits.

III. OPPOSITION

A. Time for Filing

Once the moving papers are filed and served, opposing counsel have a fixed amount of time in which to file their response to those arguments presented in the moving party's points and authorities.

B. Content

The opposition is typically composed of a memorandum of points and authorities and a supporting declaration.

IV.

REPLY Once the opposition is filed, the moving party has the option of filing a reply.

V.

JOINDERS

Joinders are valuable when the joining party wishes to receive precisely the same relief as is requested by the party that originally brought the motion. This allows the joining party to receive the benefit of the motion without the expense of preparing the motion.

VI. ORAL ARGUMENT

On the day of the hearing, when the judge calls the matter on the calendar, counsel may present any oral argument they wish to add to the papers already submitted. Oral argument typically takes less than 10 minutes, but the majority of the time spent attending a hearing is spent traveling to the courthouse and waiting for the matter to be called on the calendar.

VII. GENERAL QUESTIONS TO ASK COUNSEL ABOUT ANY MOTION

A. Under what statutory authority is the motion being brought?

B. You may want to ask counsel to provide you with this information when time is spent on any motion. Some motions are brought by counsel seeking relief from their own mistakes, or may not

C. Code of Civil Procedure section 473 is a motion that may be used by an attorney seeking relief from any proceeding taken against him or her through the attorney's or the client's mistake, inadvertence, surprise, or excusable neglect. If your attorney files one of these motions, you may want to ask for a copy of the attorney's declaration that accompanied the motion. The declaration should lay out very clearly the reasons the attorney is seeking relief. If it is through the mistake, inadvertence, surprise, or excusable neglect of the attorney, you should question whether you should be paying for the cost of that motion or for any attendant costs associated with preparing the motion or attending the hearing.

B. What are our chances of prevailing?

C. Have you ever filed this type of motion before?

D. What do you expect the cost of preparation and of attendance at the hearing to be?

E. Will you be using any of your previous work to create this motion?

F. Have you attempted to work this out with counsel informally? (This will not, of course, always be advisable, especially where it could tip off the opposing party and give them the chance to plan to defeat the motion.)

G. Did you send a confirming letter on that attempt? Did I get a copy of it?

H. What was counsel's response?

I. Are you familiar with the practice of the judge who will be hearing this motion? Have you asked anyone in your firm about this judge's tendency to grant or deny these types of motions?

J. What other, or hidden, costs or benefits might result from the motion or opposition?

VIII. TYPES OF MOTIONS

A. Motion to Dismiss

1. Purpose

This is a motion whereby the moving party seeks to have the entire case dismissed as to their client. Under the Fast Track and the Civil Trial Case Management Rules, it is rare to have a defendant file a motion to dismiss. Technically, motions to dismiss on the following

grounds are still available, however, it is far more likely these days for the court to dismiss a matter on its own motion.

a. Failure to bring the cause of action to trial within five years of filing the lawsuit. Code of Civil Procedure section 583.3 10

b. Failure to bring the cause of action to trial within three years of a court order declaring mistrial. Code of Civil Procedure section 583.320 (a)(1)

c. Failure to bring the cause of action to trial within three years of a court order declaring new trial. Code of Civil Procedure section 583.320(a)(2)

d. Failure to serve the summons and complaint upon a defendant within three years after the action is commenced against the defendant. Code of Civil Procedure section 583.250

e. Delay of prosecution. Code of Civil Procedure section 583.410

2. Complexity
In the unlikely event that a motion to dismiss is required and the court has not taken it upon itself to dismiss the action, the motion should not be particularly difficult to prepare. Where the plaintiff has failed to meet a statutory deadline set forth above, the authority is fairly clear and a previous motion to dismiss can be utilized to reduce the amount of time needed to prepare this motion.
If defense counsel spent more than three hours preparing this motion, you may want to ask why it took so long and whether the attorney used portions of a previous motion's memorandum of points and authorities to prepare the motion. If such materials were used, the attorney should explain to you why the motion took more than three hours to prepare.
3. Research Required
Typically on these types of motions the work has been done before, since they are basic and do not involve complex issues. Although there may be some unique issue in a particular case that requires research, most attorneys will get their information from a practice guide.
Motion for Summary Judgment/Motion for Summary Adjudication of Issues
4. Purpose
This motion is filed pursuant to Code of Civil Procedure section 437c and is designed to defeat the plaintiff's entire action (summary judgment) or one or more causes of action (summary adjudication of issues.). These motions are essentially "a trial on the papers." The moving party is required to present evidence to show there is no triable issue of fact for a jury to decide and that the court can decide the matter on the evidence presented in the motion. The burden of

proof on a motion for summary judgment or summary adjudication of issues is much greater than in a trial. At trial, the burden of proof is generally the "preponderance of the evidence standard." With a summary judgment/summary adjudication of issues motion, the moving party must show that there is no triable issue of fact for the jury to decide. All that the plaintiff need do to defeat the motion is to present a triable issue of a material fact in opposition to the motion.
5. Complexity
These motions are usually the most time-consuming motions for defense counsel to prepare. Unless the issue is fairly simple, such as whether the statute of limitations has lapsed, these motions generally require integrating discovery responses and testimony into a presentation of the law that will make it clear to the court that the moving party should prevail.
Since there is often reference to deposition testimony, the preparation of the motion involves having to review extensive testimony to determine whether any factual dispute exists that might undermine the motion. The testimony must then be cross-referenced with the documentary evidence and the written discovery to further insure that the motion is still viable. Some motions may also require the input of one or more experts, who will offer declarations in support of the motion. In addition to the substantive issues and the intergration of the supporting evidence into the motion, defense counsel will have to comply with the procedural rules to make certain the motion can be addressed by the court before trial. All of these factors make these motions far more time consuming and costly than the other motions defense counsel may be required to prepare.
6. Timing
Section 437c was recently amended to require 75 days notice of the motion. Previously, the moving party was only required to provide 28 days notice on a motion for summary judgment. Despite the broad

powers granted the court under the Fast Track and Civil Trial Management Rules, the court cannot shorten the 75 day notice period to accommodate the calendar of the parties or an impending trial date. In addition, the motion must be set for hearing at least 30 days before trial.

a.

Practice Pointer: If your case is like most and is categorized as a Plan 1 case, trial will be set 12 months after the date the complaint is filed. Since a summary judgment motion must be heard at least thirty days before trial and 75 days notice must be provided to the opposing party, you will have much less time to prepare your case for summary judgment than you may have been accustomed.

b.

Warning: The amended summary judgment statute allows the plaintiff to request the court to defer deciding the motion to allow the plaintiff to conduct discovery necessary to oppose the summary judgment motion. Moreover, if the court determines the party that

moved for summary judgment unreasonably failed to allow the discovery to be conducted, the court is required to either grant a further continuance to permit the discovery or deny the motion.

This amendment to the summary judgment rules creates a significant risk for the defendant that moves for summary adjudication of issues on the plaintiff's punitive damages claim. It should be anticipated that the plaintiff will request the motion be continued to allow discovery on this issue, including the depositions of company representatives. In other words, by moving for summary judgment on punitive damages, you may be opening the door to the deposition of corporate representatives in the home office. In developing your litigation plan with defense counsel, you may want to emphasize the importance of moving to strike the punitive damages during the initial pleading stage to avoid the risk of court ordered discovery on the punitive damages issue.

7. Research

The level of research required on these motions can vary, depending on the number of issues raised in the motion and the complexity of the legal and factual issues in the case. It is rare that a motion for summary judgment is a simple matter. Most judges are reluctant to take away plaintiff's right to have their day in court by deciding the matter on a motion for summary judgment. To convince the judge to grant the motion generally requires the presentation of well supported legal authority and a compelling presentation of the facts. To present such an argument generally requires a substantial investment of time and effort by defense counsel.

1. 8. Practice Pointers:

2.

a. Summary judgment motions are sometimes used by defense counsel as a discovery device. By filing the motion defense counsel can force the plaintiff to put his "cards on the table." In fact, it can be an effective tool for obtaining the opinions of plaintiff's expert before expert discovery begins. In a case where liability is questionable and it appears plaintiff's counsel may have difficulty locating an expert to support his theory of liability, a motion for summary judgment can be an effective strategy.

b. The counter argument to employing the strategy of using summary judgment motions as a discovery device is they often show the defendant's theory of the case. Plaintiff's counsel can use the motion as a road map of the defendants case as the plaintiff's attorney prepares his case for trial. The motion is usually well organized and cites the relevant portions of

testimony and written discovery in a way that makes it easy for plaintiff's counsel to use it in focusing his trial preparation.
4.
c. A summary judgment motion can be a useful tool for educating the court on the issues in the case before it proceeds to trial. It gives the defense a chance to offer the court the defendant's view of the case. If the motion is well prepared, the court may come to rely upon it for identifying the relevant issues for trial. It also directs the court to the evidence that the defendant believes is relevant.

5.
d. Trial preparation is easier and less costly if the defense attorney has already moved for summary judgment. The legal issues have already been researched and analyzed and the evidence presented in a form that connects the facts to the legal issues. Although you may pay more for proceeding with a summary judgment motion, you may ultimately pay less in the end if the motion aids defense counsel in preparing for trial

6. Specific Questions for Counsel
a.
If we prevail on this motion, will it resolve all causes of action against the company?

b.
Have you discussed the motion with plaintiffs counsel to explore whether the plaintiff will voluntarily dismiss one or more of the causes of action?

c.
Are we going to argue a statute of limitations issue?

d.
If so, what are the potential arguments the plaintiff might raise regarding the tolling of that statute?

e.
Does the motion open the company to discovery that it would prefer to avoid?

f.
Is the motion being used as a discovery device? Why is that approach better than just conducting discovery?

g.
Have we completed the discovery necessary to prevail on the motion? If not, do we have time to complete our discovery or should we proceed with the motion anyway?

h.
Can we share the cost of the motion with a co-defendant? Can we join in the motion of a co-defendant?

B. Ex Parte Applications
1. Purpose

Ex parte applications allow a party to bring an issue before the court without having to provide formal notice as mentioned above (formal notice must be served at least 21 days before the hearing; longer for a motion to dismiss or a summary judgment motion). The term “ex parte” [“from one side only”] means that unless someone shows up to oppose the application, the court is going to hear only one side of the story. (This is why ex parte communications with the judge, arbitrator, or special master are forbidden, since the other parties are not privy to the conversation and have no opportunity to respond.)
Ex parte applications usually deal with issues of timing and procedure, and rarely with any issues of substance.
You still have to give notice of an ex parte motion, but it is only 24 hours and you can do it by telephone or fax.
2. Complexity
Typically these matters are not complex, since they are brought on short notice. A common ex parte motion is an Ex Parte Applicationo For An Order Shortening Time On Service Of Notice on some other motion.
What the attorney is doing here is asking the court to let him or her file a Notice of Motion or a Memorandum of Points and Authorities, or the like, without having to give the opposing party the typical 21 days’ notice. Usually the other party stipulates to relinquish its right to the 21-day notice.
3.
Research

If you are billed for research on an ex parte motion, you most certainly should ask why and what it was for.

4.
Comment

An ex parte motion will usually be granted if there is no opposition. If your attorney files an opposition, you might ask why. The same question should be asked if your attorney attends. Unless there is a good reason to oppose what counsel is seeking ex parte, there is usually no need to attend. However, some courts prefer that all parties appear.

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C. Motion for Reference
1.
Purpose

This motion is usually filed at the agreement of all parties to take the case to a private judge, known as a "referee," or to a "special master." This motion allows the court to assign the referee or special master.

2.
Complexity

Unless there is some complex issue that your attorney should explain to you, the wording in this motion can be standard. If counsel's firm has done this before, it is likely that they will just pull the prior motion

up on the word processor and plug in the new case name and new special master.
3. Research
It is unlikely that there will need to be any research regarding this motion, as it is usually filed pursuant to stipulation by all counsel.
D. Motion to Consolidate/Sever Actions
1. Purpose
a.
Motions to consolidate require other actions related to the existing action to be brought together and resolved at the same time.

b.
Motions to sever ask the court to remove a particular action (typically a cross-complaint where the party was brought in late) from the case at issue because that action involves a collateral issue and it would delay the litigation proceeding to keep it in.

2.
Complexity

It is difficult to predict the complexity of these motions. However, the case law underlying when these motions can be brought is fairly straightforward and should not result in a motion exceeding five or six hours.

3.
Research

As noted above, this is difficult to predict, but any such motion that requires several hours of research should be explained. If there was a complicated issue, then there is no problem. If the law was clear

regarding the severance or consolidation of the action, then an explanation is in order.

E. Motion to Continue or Advance Trial Date

1.

Purpose

The purpose of this motion is self-explanatory.

2.

Complexity

This is not a complex motion and many times can be done pursuant to stipulation.

3.

Research

Depending on the issues there may be research involved. If so, ask what it was for.

F. Motion Opposing a Good Faith Application

1. Purpose

This motion is pursuant to Code of Civil Procedure section 877.6 and is filed by the party challenging the good faith application of the settling defendant. In a case with more than one defendant, or cross-defendant, the defendants typically will cross-complain against each other, asserting that if they are held liable, the amount each pays should not exceed the percentage of the defendant's responsibility for the plaintiffs damages. This theory is referred to as "'comparative indemnity" or "contribution." If one of the defendants enters into a separate settlement with the plaintiff, it can file an "877.6" motion to have the court rule that the settling defendant has paid approximately its fair share, and that the other defendants' cross-complaints for equitable contribution or comparative indemnity should be dismissed. The motion challenging the settling defendant's application for good faith determination faces the difficult task of establishing the settlement is not in good faith. The moving party must also present evidence that the settlement is insufficient, involves collusion or suffers from some other defect.

2. Complexity

These motions have become more challenging since the procedure changed requiring the opposing party to file the motion and present evidence to defeat the settlement. On the other hand, the legal authority supporting the motion is fairly straightforward.

The cost of the motion depends in large part on the facts related to the settling party's proportionate fault and its available assets. In short, the motion, although worthwhile can be relatively expensive.

G. Motion for Judgment on the Pleadings

1.

Purpose

This motion requests the court to rule that it is required by law to rule in a certain fashion as to some defense or cause of action. The motion is basically a "demurrer" that is filed subsequent to the time

allowed for a demurrer.

2.
Complexity

These motions are generally simple, as they are based solely on the law and the pleadings and do not require the presentation of evidence. However, substantial legal research may sometimes be required to support or oppose unusual arguments.

H. Motion for Reconsideration

1.
Purpose

This motion requests the judge to reconsider its ruling on a previous motion, based on some new facts occurring after the original motion was decided, or on some change in the law subsequent to the decision.

2.
Complexity

This motion may be simple or difficult, depending on the nature of the new information or law. Because judges are usually reluctant to change their earlier decisions, a motion for reconsideration must be very persuasive to be successful.

I. Other Motions

The motions described above are those most commonly seen. However, there can be as many types of motions as there are creative attorneys. As with any motion or opposition, if counsel suggests opposing or bringing some unfamiliar motion, be aware that motion work can be costly and can have hidden consequences or benefits beyond the actual granting or denying of the motion. You may wish to ask counsel to discuss with you the costs and expected benefits of any motion work, including an estimate of the time involved, to allow you to make an informed decision about motion strategy and its impact on the case.

IX. SANCTIONS

Motions that are the result of bad-faith actions or tactics, that are frivolous, intended solely to harass, or that are intended solely to cause unnecessary delay may result in sanctions against the offending party or its attorneys. Sanctions can include payment to the other parties to reimburse their attorneys fees' and other costs, or to the court to reimburse its costs. Sanctions may also include other penalties, such as denial of a motion, striking of an entire pleading or a portion of one, and possibly the entering of a default or the dismissal of the entire action.

The possibility of sanctions should be kept in mind when bringing motions or evaluating oppositions to motions. Be certain that you have a basis for making or opposing motions, and that you are not doing it just to be contentious or to harass the opponent and make their litigation more expensive. Filing

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nappropriate motions or oppositions not only increases costs for little or no real benefit to the case, but may result in your paying the other side's bills as well.

5. PRETRIAL AND TRIAL PROCEDURE

I. Pretrial Procedure

The pre-trial phase actually begins after the Mediation Return Date. At that point the court is informed that the case did not resolve and the parties will need to prepare the case for trial. Defense counsel will need to meet the court's requirements for filing the various trial documents, including exhibit and witness lists, proposed jury instructions, statement of the case, exhibits, motions in limine and trial briefs. Defense counsel will also have to organize and prepare the evidence that she will present to the court, prepare strategy and tactics related to attacking the evidence presented by the opposing parties, prepare the opening statement and closing argument, prepare jury selection strategy and tactics (referred to as the "voir dire"' process), and make a final evaluation of the likelihood of success and potential exposure.

Cost-Benefit Analysis: The pretrial preparation phase and the trial phase is typically the phase where the cost-benefit analysis gives way to the drive to secure a defense verdict or minimize the company's exposure. Counsel is under pressure to present the best possible case at trial, and a lack of preparation may be later interpreted as malpractice. Unless you remain involved during this phase by regularly consulting with defense counsel to control costs and confirm in writing that counsel is to limit preparation in some manner, pretrial preparation costs can increase the cost of defending the case well beyond the costs incurred up to that point. Pretrial preparation may take place in less time than the period between bills previously submitted by counsel, and you may not be aware that large bills are being generated until a large bill for pretrial preparation comes to you. It is wise to discuss a plan for pretrial preparation with counsel and confirm the plan in writing, so that counsel can follow the plan without the fear of being second-guessed later and charged with malpractice.

Final Evaluation: The pretrial phase can be extremely expensive and labor intensive for counsel. Therefore, before this phase starts in earnest, all of the settlement options should be fully explored. Hopefully, the discovery phase has been successfully completed and counsel has the necessary information available to properly prepare an evaluation of the liability and damages issues and prepare the case for trial. Realistically, the discovery phase will probably wind up just as you enter the pretrial phase.

Practice Pointer: Since expert discovery is conducted 30 days before trial, it tends to over lap with defense counsel's work in preparing the case for trial. In addition, given that expert discovery can be expensive, with the cost of retained experts, deposing the opposing party's experts and evaluating the experts' testimony, it makes sense to try to evaluate the case well before experts are retained and deposed. On the other hand, in some cases the liability and damages issues are unclear in the absence of expert discovery. In these kind of cases, defense counsel is asked to conduct the expert discovery, quickly evaluate the testimony and provide an assessment of the company's potential exposure and prepare the case for trial. In addition to the mushrooming costs that are incurred by the company during this phase of the litigation process, you will find that your defense counsel is being stretched in several directions. It is crucial to have a defense attorney who is good at handling multiple tasks, experienced in handling the expert deposition phase of litigation and is familiar enough with trial preparation to handle all of these tasks without missing an assignment. Otherwise, you may find your defense attorney heading

to trial with less confidence and command of the facts and law as he should have to defend the case.

A. The Court's Requirements for the Documentation Necessary for Trial
1. Voir Dire Questions/Jury Selection
The process of choosing an unbiased and impartial jury for trial involves the acquisition of a panel of potential jurors and the selection of the actual jury from the panel of potential jurors-The actual jury is chosen by asking potential jurors questions designed to determine if the jurors would be biased, or would be unable to fairly weigh the questions presented to them to decide. For example, jurors are often asked if they know of the parties involved, or have previously determined how they would decide the issues involved. Counsel typically must present written questions to the court designed to -'
disclose any bias that the potential jurors may have against the client.
2.
Jury Instructions

Jury instructions are written instructions to the jury about the law applicable to the case. Many jury instructions are standardized in a form known as "BAJI," or the "Book o f Approved jury Instructions." BAJI instructions are statements of typically required law. "'Special" jury instructions are prepared by the parties to address a specific area of law not covered by the BAJI instructions. All parties are typically required to submit a full set of proposed jury instructions, from which the court will compile the full set of instructions for the jury.

3.
Verdict Form

The court usually requires the parties to provide a form for the jury to use in announcing its verdict to the court. The preparation of the verdict form is extremely important. The language used in a special verdict form can often determine how the jury deliberates on the issues in the case. After all, the jury will use the special verdict form to render its decision. You will want your defense counsel to pay special attention to the content and form of the special verdict from to make certain it is prepared in a manner that advances the company's position. It is extremely rare that you will want to use a general verdict form. Although it will cost more in terms of trial preparation to have defense counsel press the court for a particular special verdict form, it is generally well worth the expense.

4.
Trial Exhibits

Sometimes the court requires the parties to present the exhibits they will use at trial. With the rapid advances in technology, trial exhibits and the use of technology in the courtroom can increase the cost of presenting a case at trial. You should closely review with defense counsel the nature and cost of the trial exhibits and whether any of the demonstrative matters can be generated in-house by defense counsel.

5. Trial Brief

Courts typically request that the attorney prepare a trial brief that presents to the court a summary of the legal issues involved and how the evidence relates to those legal issues, to keep the court informed as to what the attorney's theory of the case will be. This enables the court to follow the trial from the lawyer's perspective and to be prepared to rule on questions of evidence, motions during trial, and any other matters that may come up-The trial brief is a very important document and may take counsel quite some time to prepare.

B. Preparation of Evidence and Strategy

Counsel will prepare the information needed to present to the jury to prove the case. The attorney will develop the "'theme" of the case (e.g., the client did not cause the injuries of the plaintiff, or the plaintiff was not damaged in any way) and, with the theme in mind, gather and prepare the evidence to be presented.

1. Preparation of Strategy

Trial strategy is the plan for organizing the case. It involves planning the argument to be presented to the jury, planning the evidence necessary to convince the jury of the desired result and presenting it in an understandable way, planning what type of person would be the •
most desirable to have selected as a juror, and planning the motions that will be made to the judge to control the presentation of evidence and to have the judge decide issues in the case on a legal basis, without the jury. Counsel must both attack the evidence being presented by the opposing parties and present evidence necessary to prove his or her own case. Preparation of strategy also requires that the attorney plan the opening statement and the closing argument.

2. Preparation of Trial Evidence

The evidence, as mentioned above, commonly takes two forms: documentary evidence or physical evidence, and witness testimony.

a.

Physical Evidence: Physical objects, such as documents, can be evidence. Counsel must prepare the physical evidence, which will commonly take the form of exhibits, and plan how it is to be presented to the jury. Typically, a witness must testify what the physical object is before it can be presented to the jury as evidence. In the case of a document, counsel must typically have the witness testify about the document to have it allowed into evidence.

b.

Testimony or "Witness" Evidence: People who have direct knowledge of the facts of the case (through having experienced some event, such as having heard, smelled, seen, or otherwise directly sensed some occurrence) are allowed to testify about what they can remember. For example, an eye witness to a car crash is allowed to testify about what he or she remembers having seen and/or heard.

Expert witnesses are those persons who have special knowledge about a certain area so that the court allows them to tell the jury about that subject matter. For example, a surgeon is typically an expert on the subject of surgery.

c.
Preparation of Materials Received During Discovery: During the discovery process, counsel received information from the parties about evidence related to the case. Evidence gathered through the discovery process can be used at trial if a person or item is unable to be produced at trial, or if the testimony changes from what was produced during discovery. If the evidence has changed, the attorney can attack the trial testimony or evidence presented as being unreliable. While preparing for trial, the attorney will review the matters produced during discovery and organize them so that counsel can be ready when the evidence is presented at trial to attack it with the evidence received during discovery. Many attorneys prepare “witness notebooks” or “trial notebooks” to have this evidence at hand when needed.

d.
Preparing Witnesses to Testify: Defense counsel will generally meet with each witness that will be presented on behalf of the client to prepare that person for testimony at trial. This is to ensure that the witness understands the questions chat will be asked, that the person remembers what his or her deposition testimony was, and that the person is able to anticipate what will happen during his or her testimony so that the presentation of that person’s testimony can be as smooth and convincing as possible. Counsel should not tell the witness what to say, as that strategy will likely be uncovered during cross-examination by the opposing party and damage the credibility of the witness. The attorney may also attempt to simulate cross-examination, playing the role of opposing counsel in attacking the witness’s testimony. Many attorneys will practice cross-examination with the witness. Preparing the witness will allow the witness to be able to anticipate what will happen during testimony and to be more prepared to answer intelligently and convincingly.

3. Preparation of a Trial Notebook
Counsel may prepare a trial notebook that contains strategies for presentation of evidence and cross-examination of witnesses, important information received during discovery, and the attorney’s overall strategy and notes. The attorney will prepare materials with an eye toward the opposing party’s potential strategy to be in a position to quickly react to the opposing party’s presentation of. Evidence. Significant time may be spent preparing the trial notebook.
C. Final Evaluation
Having received most if not all of the evidence during the discovery process, and having fully researched the legal issues involved, counsel should be in a position to provide you with a final evaluation of its exposure, or an evaluation of the case’s worth for the claimant. This final evaluation should provide you with a basis for making informed decisions during settlement

discussions, and should help the client and counsel plan what approach should be taken during pretrial preparation and trial.
D. Occurrences Immediately Before Trial
1.
Settlement Conference

Immediately before trial the court usually requires the parties to make one last attempt at settling the

case. Most courts vigorously promote settlement to avoid wasting judicial resources on disputes that could be worked out between the parties. Settlement conferences immediately before trial are usually the most productive because all parties have, hopefully, become very familiar with the facts and the law relevant to the case during pretrial preparation and should be able to make a proper evaluation of the case. Immediately before trial, or "on the courthouse steps," is the last opportunity for the parties to resolve their dispute before spending large sums in a trial, and then hoping that a group of 12 strangers will see things their way. Most parties become extremely realistic at this time.

2.
Assignment to a Courtroom and "Trailing"

If the settlement discussions have been abandoned, on the date set for trial the parties begin trial or, in some cases, will be sent to another courtroom to immediately commence trial. If a courtroom is not available, the parties will begin "trailing" or waiting, usually on telephone standby, for a courtroom to become available. In most courts, the amount of time that a case can "trail" is limited. If a courtroom does not become available in that limited time, then the case is given a new trial date, potentially several months into the future. In many of the busier courts, where limited court space is available, it is not uncommon for a case to be rescheduled for trial several times before finally going to trial, or for the parties to be sent to another courtroom in another courthouse several miles from where the case was originally venued.

II. Trial Procedure

Trial is the presentation of evidence and arguments to the jury (or to a judge if the right to a jury has been waived by the parties), which decides the dispute. The following are the phases of a normal, simple trial.

A. Pretrial Motions

At the beginning of trial, the parties may bring motions to affect the conduct of the trial:

1.
Motion to Continue Trial

If counsel is unprepared to begin trial for some reason such as the unavailability of important witnesses, or some other reason than a plain-old failure to prepare, counsel is required to bring this motion at the beginning of trial to have the trial postponed.

2.
Disqualification of a Judge

If counsel has a basis to believe that the judge would be biased, or that the judge has some prejudice against one of the clients, counsel may attempt to withdraw the judge as the trial judge. However, if the judge was previously assigned to the case for all purposes, the time to challenge the judge will have lapsed.

3. In Limine Motions

As discussed above in pretrial preparation, parties may bring “in limine” motions to control the presentation of. evidence. For example, an in limine motion may request the exclusion of a certain type of evidence because ~it is unreliable, such as the testimony of a person who is not an expert about a subject matter that requires expert knowledge.

B. Jury Selection

As described in the pretrial section above, the voir dire process is undertaken to question prospective jurors for bias, allowing counsel to excuse any witness who shows bias. Also, parties are typically provided several “peremptory” challenges to excuse jurors who are not shown to have any bias. This allows a party to excuse someone from being on the jury who the party feels would not be a good person to have on the jury.

The pool of potential jurors comes from within the court’s geographical area. They are typically chosen on the basis of some public record that establishes their residence, for example, voter registration records, DMV records, oz tax records. How the pool of potential jurors is chosen nay be important to the strategy of jury selection, as it may reveal what type of persons will be on the jury. For example, pools of potential jurors chosen from voter registration records may tend to be more educated, more economically stable, and more civic-minded than the general population because They believe it is important to spend the time necessary to vote.

The jury is typically made up of 12 persons with a couple of alternates to take the place of any juror who may not be able to complete the trial. The jury selection process o~ questioning potential jurors and eliminating biased, or peremptorily challenged, jurors continues until all of. the spots on the jury arc filled.

Once a jury is selected, the jurors are not allowed to discuss the case with anyone other than other jurors, although they are typically allowed to go home at night, unless a motion is made by one of the parties to “‘sequester” the jury and shield them from any unsupervised outside contact.

C. Opening Statements

During “opening statements,” counsel for each party will describe to the jury the evidence that they will present and what they intend to prove to the jury.

D. Order of Presentation of Evidence

Once opening statements have been made, each party will present its evidence. Usually, the plaintiff or initial claimant will proceed first. The plaintiff will typically produce a witness and ask the witness questions soliciting evidence the plaintiff wishes to show to the jury. The other parties

will then have an opportunity to “cross-examine” the witness, questioning the witness about the subject of the witness’s previous testimony to test the truth of the testimony or to further develop it. The cross-examination may only be allowed to deal with matters that are within the scope of the questions originally asked of the witness. Once the plaintiff has presented all the witnesses and evidence it needs for its case in chief, the plaintiff will rest.

E. Motion for Nonsuit

This motion is made by the defense to the judge, at the conclusion of the plaintiffs case, saying in effect that the plaintiff has not presented sufficient evidence to prove its case, and that a reasonable jury could not find in the plaintiffs favor. If the defense wins a motion for nonsuit, the plaintiff loses.

F. The Defendant’s Case

Once the plaintiff has finished its case and any motions fox nonsuit have been heard, the defense presents its case ~in the same manner as the plaintiff, presenting witnesses, asking them questions, and then having the opposing parties cross-examine the witnesses. Once the defense has completed its case, either the plaintiff or the defendant can move for a directed verdict.

Directed Verdict

At the end of the presentation of evidence, any party can move for a directed verdict requesting the judge to tell the jury that given the evidence presented, no reasonable jury could come to any other possible conclusion. For example, after a vehicle accident case has been presented by both the plaintiff and the defendant, one of the parties may request the court to make a directed verdict that one of the drivers was not careless or negligent in the operation of his or her vehicle.

G. Jury Instructions

The judge reads the jurors the instructions that were prepared by counsel during pretrial preparation and compiled by the judge into one set of instructions. The jury is then presented with all the evidence, possibly the record of the trial, and the jury can begin deliberations.

H. Closing Arguments

Once all of the evidence has been presented to the jury, and the judge has read the jury instructions to the jury, the attorneys for each party make their “closing arguments.” Closing arguments allow the attorney for a party to attempt to persuade the jury to rule in that party’s favor. The attorney can tell the jury how to decide the case, who to believe, how to apply the law, and what conclusions to draw from the evidence. It is the attorney’s only chance to tell the jury what to do. The closing arguments are the last thing that the jury hears before starting the process of deciding the outcome of the lawsuit.

I. Deliberations

The jury, presented with all the evidence during the trial and presented with
the law during the jury instruction, applies the evidence to the jury
instructions and attempts to come to a decision as to which party should
prevail. The jurors are placed in a jury room in which they review the © 2006 Sedgwick, Detert, Moran & Arnold LLP Confidential and Proprietary evidence presented at trial, review the jury instructions, review any verdict that the judge may leave given them, and then vote to determine whether or not the plaintiff has carried the burden of proof and proven its case. Different jurisdictions have different requirements for how many jurors must agree on one side to allow a particular party to win-Typically, more than a simple majority of the jurors is required. In California nine or more jurors must agree in order for a decision to be reached. If nine or more jurors cannot agree, then the case has resulted in a “hung jury” and the case must be retried.

J. Verdict

Once the jury has reached its decision, with nine or more jurors voting in favor of one of the sides, the jury will inform the court, all the parties will be hauled back to the courtroom, and the jury will present the verdict to the court who will have it read.

K. Post-Verdict Motions

Once the verdict has been read, several motions can be brought by the parties. These motions are an attempt to convince the court that the jury’s verdict must be disregarded.

1.

Judgment Notwithstanding the Verdict

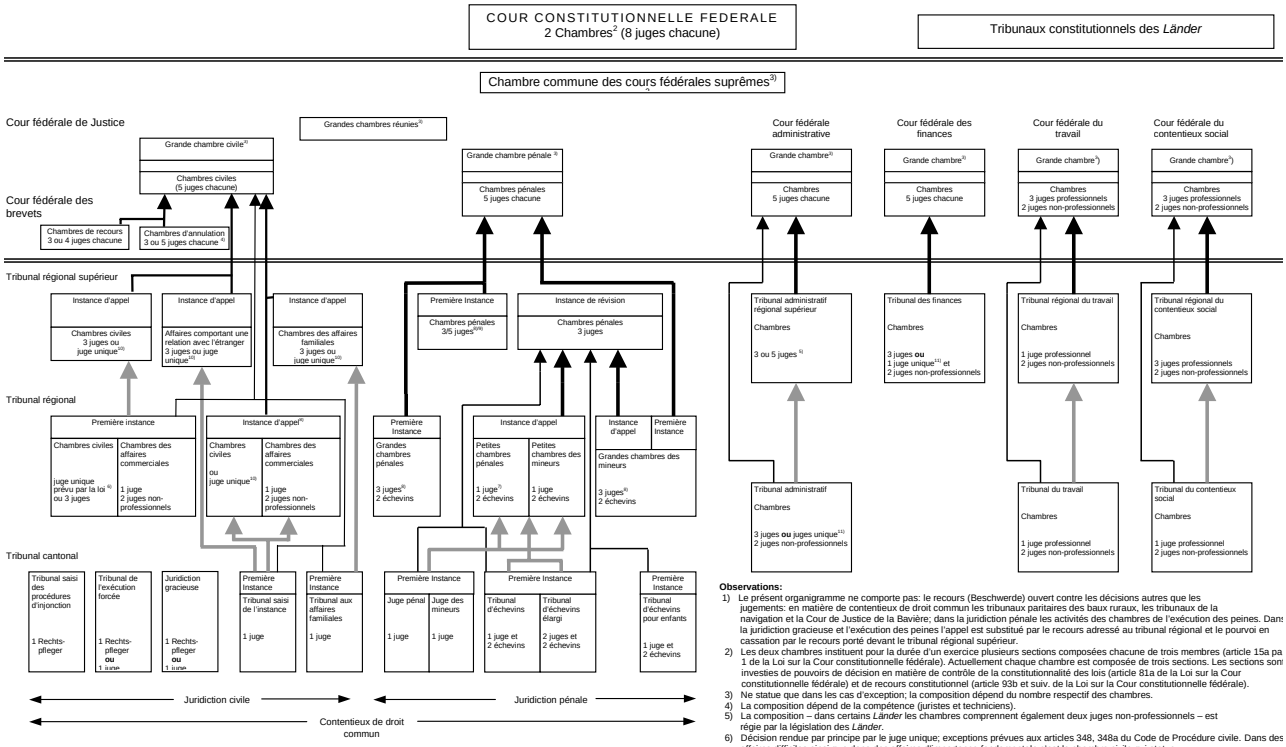
The Losing side can bring a motion to request that the judge in effect overrule the decision of the jury and conclude that no reasonable jury could have come to the decision that this jury did come to, and that the court, in fairness, should replace the jury's verdict with its own.

2.
Motion for Mistrial

If one of the parties believes that decisions trade by the judge during the trial were improper, that there was misconduct by the jury, or that some other event occurred which kept the party from receiving a fair trial, the party may move for a mistrial, asking the judge to throw out the verdict reached by the jury and have the entire case retried.
Once all of the post-verdict motions have been heard, the trial is over. Once the trial is over, the verdict is entered by the court as a judgment. Either the parties accept the judgment and enforcement of the judgment begins, or a party appeals the judgment to a higher court. If the judgment is in the plaintiffs favor, and no appeal is granted, then the defendant can be forced, through a variety of means, to pay the judgment.

Situation: avril 2005

Organigramme sur l'Organisation judiciaire en République fédérale d'Allemagne[1])



Légende:
Les flèches indiquent les voies de recours comme suit:

appel — pourvoi en cassation ou recours sur le fond — pourvoi direct en cassation

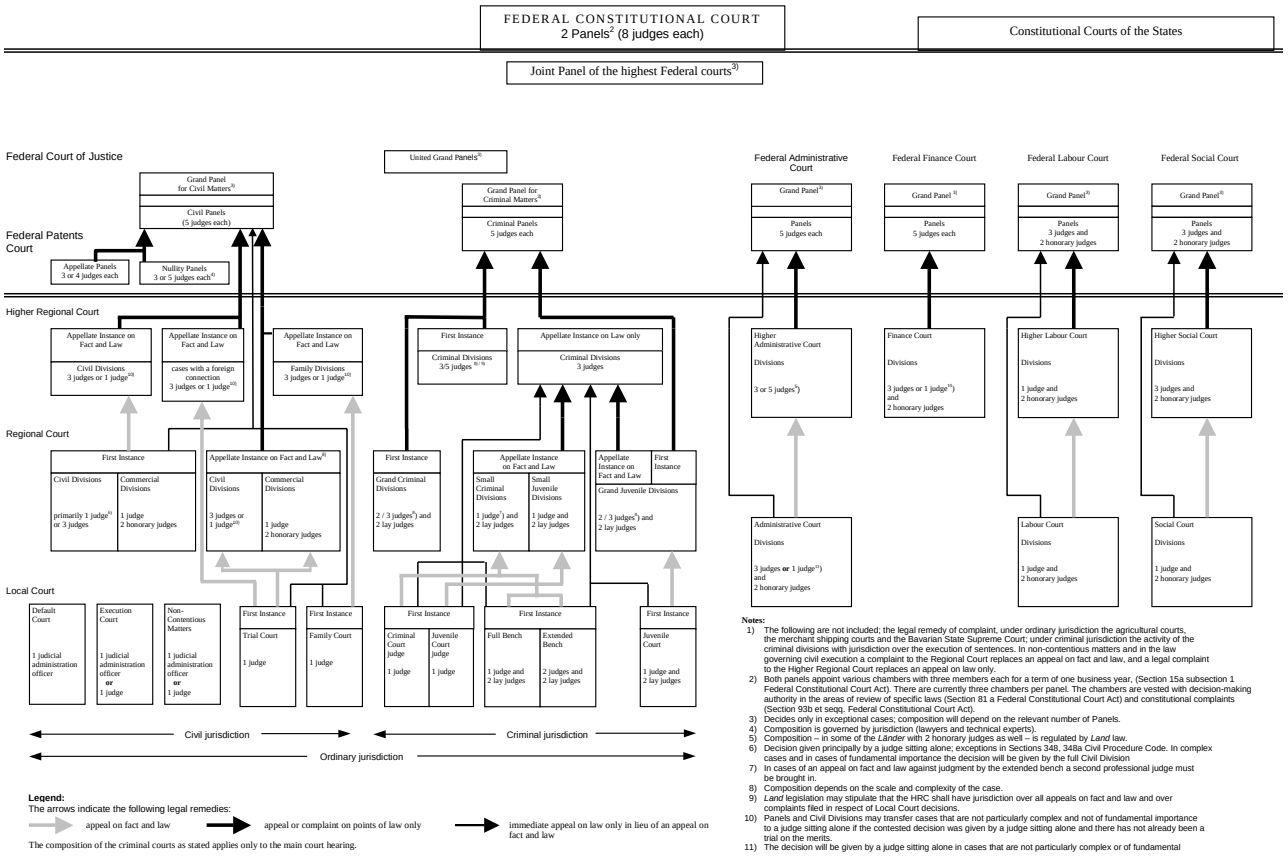
La composition indiquée des formations de jugement en matière pénale vaut uniqu4ement pour les débats.

Observations:

1) Le présent organigramme ne comporte pas: le recours (Beschwerde) ouvert contre les décisions autres que les jugements: en matière de contentieux de droit commun les tribunaux paritaires des baux ruraux, les tribunaux de la navigation et la Cour de Justice de la Bavière; dans la juridiction pénale les activités des chambres de l'exécution des peines. Dans la juridiction gracieuse et l'exécution des peines l'appel est substitué par le recours adressé au tribunal régional et le pourvoi en cassation par le recours porté devant le tribunal régional supérieur.
2) Les deux chambres instituent pour la durée d'un exercice plusieurs sections composées chacune de trois membres (article 15a pa 1 de la Loi sur la Cour constitutionnelle fédérale). Actuellement chaque chambre est composée de trois sections. Les sections sont investies de pouvoirs de décision en matière de contrôle de la constitutionnalité des lois (article 81a de la Loi sur la Cour constitutionnelle fédérale) et de recours constitutionnel (article 93b et suiv. de la Loi sur la Cour constitutionnelle fédérale).
3) Ne statue que dans les cas d'exception; la composition dépend du nombre respectif des chambres.
4) La composition dépend de la compétence (juristes et techniciens).
5) La composition – dans certains *Länder* les chambres comprennent également deux juges non-professionnels – est régie par la législation des *Länder*.
6) Décision rendue par principe par le juge unique; exceptions prévues aux articles 348, 348a du Code de Procédure civile. Dans des affaires difficiles ainsi que dans des affaires d'importance fondamentale c'est la chambre civile qui statue.
7) Un deuxième juge professionnel doit faire partie de la juridiction dans les procédures statuant sur des appels formés contre les décisions du tribunal d'échevins élargi.
8) La composition dépend de l'importance et des difficultés de l'affaire.
9) Une loi du *Land* peut prévoir que la compétence pour les appels et recours formés à l'encontre d'une décision rendue par le tribuna cantonal revient aux Tribunaux régionaux supérieurs
10) Les chambres peuvent charger le juge unique de statuer dans des affaires dépourvues de difficultés particulières et d'importance fondamentale), si la décision attaquée a été rendue par un juge unique et si une audience principale n'a pas déjà eu lieu au fond
11) Le juge unique statue dans les affaires dépourvues de difficultés particulières ou d'importance fondamentale

The Courts of Law in the Federal Republic of Germany[1)]

Information correct as of April 2005

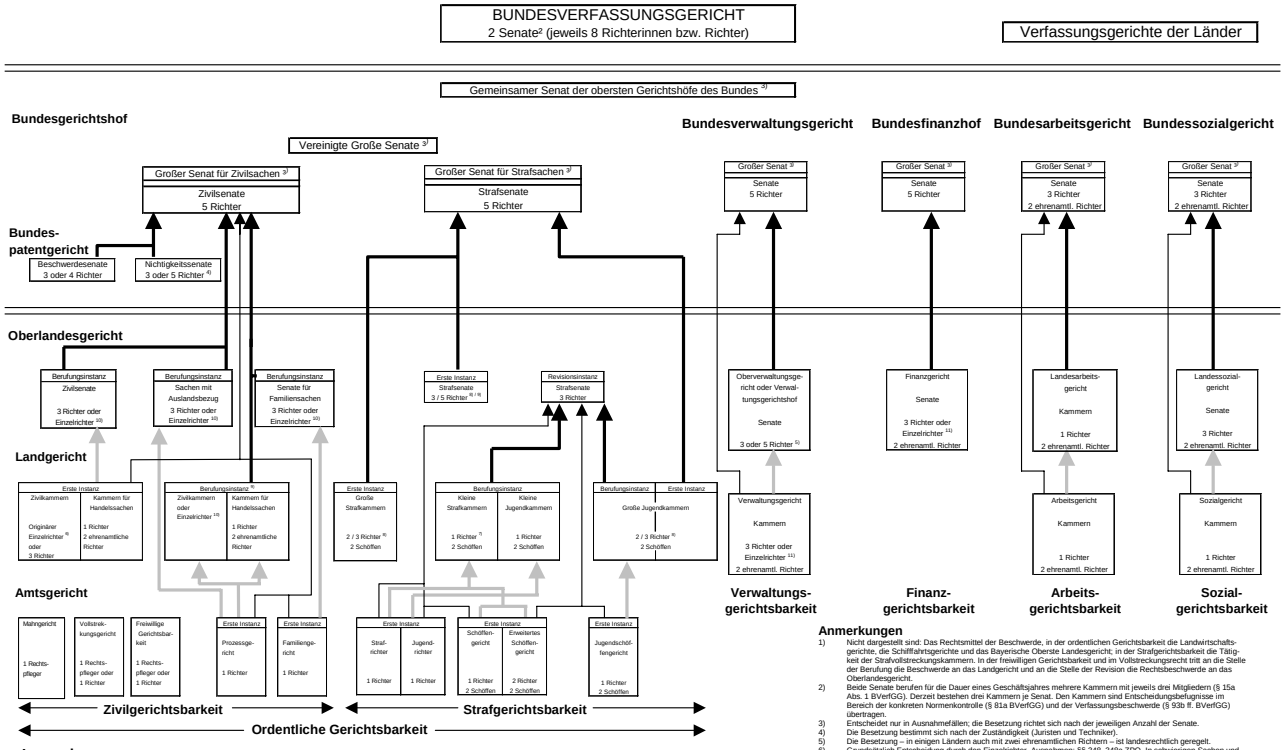


Notes:

1) The following are not included; the legal remedy of complaint, under ordinary jurisdiction the agricultural courts, the merchant shipping courts and the Bavarian State Supreme Court; under criminal jurisdiction the activity of the criminal divisions with jurisdiction over the execution of sentences. In non-contentious matters and in the law governing civil execution a complaint to the Regional Court replaces an appeal on fact and law, and a legal complaint to the Higher Regional Court replaces an appeal on law only.
2) Both panels appoint various chambers with three members each for a term of one business year, (Section 15a subsection 1 Federal Constitutional Court Act). There are currently three chambers per panel. The chambers are vested with decision-making authority in the areas of review of specific laws (Section 81 a Federal Constitutional Court Act) and constitutional complaints (Section 93b et seqq. Federal Constitutional Court Act).
3) Decides only in exceptional cases; composition will depend on the relevant number of Panels.
4) Composition is governed by jurisdiction (lawyers and technical experts).
5) Composition – in some of the *Länder* with 2 honorary judges as well – is regulated by *Land* law.
6) Decision given principally by a judge sitting alone; exceptions in Sections 348, 348a Civil Procedure Code. In complex cases and in cases of fundamental importance the decision will be given by the full Civil Division
7) In cases of an appeal on fact and law against judgment by the extended bench a second professional judge must be brought in.
8) Composition depends on the scale and complexity of the case.
9) *Land* legislation may stipulate that the HRC shall have jurisdiction over all appeals on fact and law and over complaints filed in respect of Local Court decisions.
10) Panels and Civil Divisions may transfer cases that are not particularly complex and not of fundamental importance to a judge sitting alone if the contested decision was given by a judge sitting alone and there has not already been a trial on the merits.
11) The decision will be given by a judge sitting alone in cases that are not particularly complex or of fundamental

Stand: April 2005

Übersicht über den Gerichtsaufbau in der Bundesrepublik Deutschland [1)]



Anmerkungen

1) Nicht dargestellt sind: Das Rechtsmittel der Beschwerde, in der ordentlichen Gerichtsbarkeit die Landwirtschaftsgerichte, die Schifffahrtsgerichte und das Bayerische Oberste Landesgericht; in der Strafgerichtsbarkeit die Tätigkeit der Strafvollstreckungskammern. In der freiwilligen Gerichtsbarkeit und im Vollstreckungsrecht tritt an die Stelle der Berufung die Beschwerde an das Landgericht und an die Stelle der Revision die Rechtsbeschwerde an das Oberlandesgericht.
2) Beide Senate berufen für die Dauer eines Geschäftsjahres mehrere Kammern mit jeweils drei Mitgliedern (§ 15a Abs. 1 BVerfGG). Derzeit bestehen drei Kammern je Senat. Den Kammern sind Entscheidungsbefugnisse im Bereich der konkreten Normenkontrolle (§ 81a BVerfGG) und der Verfassungsbeschwerde (§ 93b ff. BVerfGG) übertragen.
3) Entscheidet nur in Ausnahmefällen; die Besetzung richtet sich nach der jeweiligen Anzahl der Senate.
4) Die Besetzung bestimmt sich nach der Zuständigkeit (Juristen und Techniker).
5) Die Besetzung – in einigen Ländern auch mit zwei ehrenamtlichen Richtern – ist landesrechtlich geregelt.
6) Grundsätzlich Entscheidung durch den Einzelrichter, Ausnahmen: §§ 348, 348a ZPO. In schwierigen Sachen und in Sachen von grundsätzlicher Bedeutung entscheidet die Zivilkammer.
7) In Verfahren über Berufungen gegen ein Urteil des erweiterten Schöffengerichts ist ein zweiter Berufsrichter hinzuzuziehen.
8) Besetzung abhängig von Umfang und Schwierigkeit der Sache.
9) Durch Landesgesetz kann bestimmt werden, dass die Oberlandesgerichte für alle Berufungen und Beschwerden gegen amtsgerichtliche Entscheidungen zuständig sind.
10) Senate und Zivilkammern können Sachen ohne besondere Schwierigkeiten und ohne grundsätzliche Bedeutung dem Einzelrichter übertragen, wenn die angefochtene Entscheidung von einem Einzelrichter erlassen wurde und nicht bereits im Haupttermin zur Hauptsache verhandelt worden ist.
11) In Sachen ohne besondere Schwierigkeiten oder grundsätzliche Bedeutung entscheidet der Einzelrichter.

102 - Comparative Litigation Processes

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ACC-Europe's 2006 Annual Meeting **May 15-16, 2006 - Athens, Greece**

COUNTRY KEYS - GERMANY

1. **Costs: Set by statute**
   - **Court and Lawyer's costs, unless agreed otherwise**
2. **Cost-shifting: 'loser pays' rule**
   - **Some exceptions**
3. **Pleadings- information-'front loaded'**
4. **No Discovery**
   - **Pre-trial disclosure extremely limited**
5. **Litigation Process**
   - **Specialized and consistent**

COUNTRY KEYS - UK

1. **Pre-trial dominated by Process of Discovery**
   - **Scope reduced by specific pleading requirements**
2. **Adversarial Procedure**
   - **Judge is neutral arbiter**
3. **Strict Rules for Admission of Evidence**
   - **e.g., Authenticity, Hearsay, Best Evidence Rule**
4. **Extensive Case Management Powers**
   - **Limits delay and progress cases quickly and efficiently**
5. **Costs Front-Loaded**
   - **Loser pays but practical limits of 60%**

COUNTRY KEYS - FRANCE

Inquisitorial Procedure

- Judge plays active role in the proceedings

Wide Powers of Injunctive Relief

- e.g., seizure, forced sale, prohibition on continuing

Principle of Contradictory Debates

- Oral argument forms the supporting evidence

No Discovery

- Pre-trial disclosure extremely limited

Litigation Costs

- Each party bears its own costs (with exceptions)

COUNTRY KEYS - US

1. **Adversarial Procedure in front of Jury**
   - **Judge is neutral arbiter ruling on motions and advising jury**
2. **Discovery Dominates Pre-trial Activities**
   - **Broad search for admissible evidence (subject to limits)**
3. **Law and Motion Practice**
   - **May limit discovery or actually eliminate case**
4. **Strict Rules for Admission of Evidence**
   - **e.g., Authenticity, Hearsay, Best Evidence Rule**
5. **Litigation Costs Not Recoverable**
   - Each party bears its own costs (with exceptions by law or contract)

Simmons & Simmons

ACC Europe

Comparative Analysis of Common Law and Civil Law Litigation Procedure

15 May 2006
Athens

Litigation procedures

Issuing proceedings

Standing

Civil law	Common law
For both systems, the claimant has to justify that he or she has an interest in the case and the right to sue. Moreover, the claimant's interest must be personal, existing, real and legitimate.	

Class actions and collective claims

Civil law	Common law
There are no class actions in most civil law countries. However, courts and several statutes allowed actions by associations, either for the defence of individual interests, or for the defence of a collective interest (eg. Consumers' Association). In France, we can note the rise of collective cases, more specifically in product liability litigations such as tobacco or drugs. More recently, a collective case has been brought before courts against DVD manufacturers. A bill is being examined allowing collective actions in statement of responsibility for "mass tort" (eg. ecological damage) and an action inspired by the American class action (admissibility of claim and the class action, recognition of the defendant's liability, indemnification of the class action's members). Numerous questions are still to be researched further, notably the class action's membership, the determination of competent jurisdictions, the determination of damage, questions of proof and other mechanisms of collective compensation.	Under the ordinary procedural rules of court, it is possible to bring a representative action when more than one party has the "same interest" in a claim or more commonly a group action when there are multiple claimants and common issues of law or related facts under a Group Litigation Order. Representative bodies may also bring actions on behalf of individual consumers if appointed by Order, eg. Consumers' Association.

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	Civil law	Common law
Emergency relief	There are emergency procedures under which the plaintiff may request interim measures, such as an injunction or interim payment.	It is generally possible to apply for a "speedy trial" order which can significantly reduce the lead-time to trial. Emergency relief is understandably expensive both in terms of time management and legal costs.
Interim measures	Most of civil law countries provide a wide range of interim measures in order to ensure the recovery of a claim or to stop an obvious violation of law. Under French law for exemple, *saisie conservatoire* permits any of the debtor's property to be seized and detained by the court pending judgment. The judgment in favor of the claimant can be enforced against the attached property.	Parties can seek the assistance of the court on a whole variety of issues before any trial. The most representative interim measures are Injunctions. Injunctions can be obtained by requiring a party to do, or refrain from doing, some act either before proceedings are commenced, or during the litigation. The most important types of injunction concern the freezing of assets and the seizure and preservation of evidences. In appropriate cases, the application can be made without notice to the defendant.

As a general rule, an injunction will not be granted if there is a suitable alternative measure such as damages.

Usually, under both systems, the party applying for the injunction will be required to undertake compensating the other party for the losses it may suffer if it appears that the injunction has been incorrectly granted. The court may also require the applicant to put up security as a condition for making the order.

Litigation procedures

Rules of evidence

Burden of proof

Civil law

In an action for damages, the plaintiff, who must prove fault, damage and a causal link between the two, bears the burden of proof.

The standard for evidence is, in most of civil law countries, the intimate conviction of the judge which means that the judge must be convinced on looking upon the submited documents.

Common law

The burden of proof for civil claims is the "balance of probabilities" (in contrast to criminal actions where it is "beyond reasonable doubt".

The burden of proof rests on the plaintiff.

Discovery

In civil law countries, there is no Discovery.

Although in common law, the pleading rule requiring specific allegations of fact actually reduces the potential scope of Discovery, because it frames claims and defenses from the very beginning of the proceeding, the parties are obliged to produce for inspection by the other party, and without the intervention of the court, all documents which are relevant to the matters in dispute and which are in their possession, whether or not the documents favor their claim or that of the defense. Thus, Discovery enables the parties to obtain facts and information about the case from the other party, which assists them in preparing for trial.

The Discovery covers any document that relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may (and not must) either directly or indirectly, enable the party either to advance his own case or to damage the case of his adversary.

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Privilege

Civil law

Communications between parties which come into existence in the course of trying to settle a dispute are privileged and may not be put in evidence without both parties' consent. Therefore, offers or compromises suggested by a party in a failed settlement attempt will not later be shown to the court.

Common law

Legal professional privilege is an important exception to Discovery rule.

Similarly to the legal professional privilege of common law countries, documents related to lawyer/client communications (whether litigation is contemplated or not) are privileged. Therefore, a party cannot be required by his opponent to disclose privileged documents, even if they are relevant to the case.

Litigation procedures

Evidence

Witness statements / Cross-examination / Preparation of witness

Civil law

Common law

A witness statement is a written statement signed by a person containing evidence that the latter would be allowed to give orally.

There is no cross-examination of witnesses in civil law countries proceedings. However, parties may ask the judge to question the witness. Witnesses are convened by the judge.

Furthermore, the adversary principle must be ensured at all times during the procedure.

Moreover, the preparation of witnesses is strictly forbidden.

The attorneys are not normally allowed to discuss the issues related to trial with witnesses out of court and may face disciplinary sanctions if they breach this rule.

If the judge is informed that a witness was questioned by the attorney before trial, the witness' testimony may not be given full credibility.

Where a witness is called to give oral evidence, his or her witness statement shall stand as evidence in chief unless the court orders otherwise.

The general rule is that evidence at hearings other than the trial is to be by witness statement unless the court, a practice direction or any other enactment, requires otherwise.

Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence.

If the court gives permission to cross-examine the witness but the latter does not show up as required by the order, his evidence may not be used unless the court gives permission.

Where a witness is called to give evidence at trial, he or she may be cross-examined on his or her witness statement whether or not the statement or any part of it was referred to during the witness's evidence in chief.

Simmons & Simmons

	Civil law	Common law
Evidence restriction	While there are some restrictions in some civil law countries, there are no rules corresponding to the common law rules on admissibility such as Hearsay and Best evidence rules. In principle, any evidence is admissible, but the court will evaluate how much weight is to be accorded to an evidence. Evidence admitted is subject to appeals for factual error. In most civil law countries, a distinction is drawn between the proof of legal facts (no limitation on the admissible forms of evidence) and legal acts (where such a limitation exists in civil matters). Therefore, under French Law, the parties to a contract (legal act) can only prove it by documentary evidence, but this rule does not apply to commercial matters and to contracts valued less that 800 EUR. Evidence regularly obtained abroad is admissible.	Common law contains several rules which restrict admission of evidence. The main barriers to the production of documentary evidence are: Authenticity, the Hearsay rule, and the Best evidence rule. The requirement of authenticity as a condition precedent to admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The authenticity of a document may be proven in any way, such as handwriting verification, or oral testimony of a person who saw the document executed. Under the Hearsay rule, a witness may not testify about fact with which he or she has no direct knowledge, eg. conversation of other people a witness overheard. Under the Best evidence rule, the evidence must constitute the best available evidence. In the case of written documents, the original document must be presented.
Experts	Expert evidence is admissible before most of civil law countries' courts. Firstly, litigants may have their own expert to help them prove fault, damage or causation. Secondly, an expert may be appointed by the judge to assist him on particular issues of fact.	Experts are appointed and paid by the parties. Therefore, the experts are usually partial and their task is to support the position of the party who appointed them. Like other witnesses, they are examined and cross-examined by attorneys. But, similarly to civil law, courts can invite experts in certain fields to give testimony on the facts which require high technical knowledge. They are considered as witnesses whose task is to provide the court with information related to a specialized area.

Litigation procedures

Case management

Civil law

The case management powers of courts in civil law countries are quite limited but, pratically, courts have the ability to ensure that there are only restricted opportunities for parties to delay an action. In order to do so, in France, the judge and the lawyers can agree on a "calendar of proceedings" in which the lawyers are subject to strict deadlines to provide their writs and to communicate their documents.

If the lawyers fail to respect this calendar of proceedings, sanctions may be applied such as the closing of the proceedings or fines for late communication.

Common law

Common law countries courts have extensive case management powers in order to progress cases quickly and efficiently. The opportunities for a party to delay a case by ignoring the rules or making tactical applications are, therefore, also relatively limited.

When deciding to which track to allocate the case, the court will for example have regard to the following:

(a) the financial value, if any, of the claim;

(b) the nature of the remedy sought;

(c) the likely complexity of the facts, law or evidence;

(d) the number of parties or likely parties;

(e) the importance of the claim to persons who are not parties to the proceedings;

Court have general case management powers to:

(a) extend or shorten the time for compliance with any rule;

(b) require a party or a party's legal representative to attend the court;

(c) dismiss or give judgment on a claim after a decision on a preliminary issue.

Litigation procedures

Enforcement

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Civil law

The judgment becomes enforceable and the period to file an appeal commences to run, only once the prevailing party has officially "notified" the losing party of the judgment, even though the losing party has a copy of the judgment.

Most of civil law courts' judgments, especially those of the European countries, can be registered and enforced within the European Union. In addition, there exist reciprocal agreements between the countries and other jurisdictions around the world, which permit the registration and enforcement of a judgment in those jurisdictions.

If there are no reciprocal arrangements, enforcement of judgments in most of civil law countries may be obtained by an order under which the defaulting party is compelled to perform its obligations under the award.

Common law

An English court judgment can be registered and enforced within the European Union. Equally, judgments from those countries can be registered and enforced with relative ease in the United Kingdom. In addition, there are reciprocal arrangements between the United Kingdom and many Commonwealth countries and other jurisdictions which allow for the mutual recognition and enforcement of judgments.

The 2004 European enforcement order lays down minimum standards to ensure that judgments, court settlements and authentic instruments can circulate freely within the European Union.

Litigation procedures

Legal costs

Civil law

In civil law countries, by principle, the unsuccessful litigant is ordered to pay the taxable charges incidental to proceedings.

In addition, the judge has a discretionary power to order the unsuccessful party to pay the costs incurred by the two parties, and not comprised in the taxable charges incidental to proceedings.

The costs mainly include lawyers fees (that are not included in taxable charges).

Common law

Under common law provisions, courts have a wide discretion on the question of costs and will take into account such matters as the parties' conduct before, as well as during the proceedings.

The general rule is that a successful party will be able to recover its reasonable costs from the unsuccessful party although, in practice, such costs are often limited to approximately 60%.

Finally, in certain circumstances, the courts can order that a party bringing a claim (or a defendant bringing a counter claim) gives "security for costs", to guarantee that the claimant will be able to meet any costs order which may eventually be made against it if the claim is unsuccessful.

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