



# ICLG

The International Comparative Legal Guide to:

## Litigation & Dispute Resolution 2017

**10th Edition**

A practical cross-border insight into litigation and dispute resolution work

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**General Chapter:**

1	<b>Cybersecurity</b> – Greg Lascelles & Salah Mattoo, Covington & Burling LLP	1
---	---	---

**Country Question and Answer Chapters:**

2	<b>Australia</b>	Clayton Utz: Colin Loveday & Scott Grahame	6
3	<b>Austria</b>	Oblin Melichar: Dr. Klaus Oblin	15
4	<b>Belarus</b>	Sysouev, Bondar, Khrapoutski SBH Law Office: Timour Sysouev & Alexandre Khrapoutski	22
5	<b>Brazil</b>	Souto, Correa, Cesa, Lummertz & Amaral Advogados: Jorge Cesa & Ronaldo Kochem	33
6	<b>British Virgin Islands</b>	Lennox Paton: Scott Cruickshank & Matthew Freeman	40
7	<b>Canada</b>	Blake, Cassels & Graydon LLP: Ryder Gilliland & Daniel Styler	54
8	<b>Costa Rica</b>	Axioma Estudio Legal: Andre Vargas Siverio	62
9	<b>Czech Republic</b>	Gürlich & Co.: Richard Gürlich & Kamila Janoušková	69
10	<b>Denmark</b>	Kammeradvokaten, Law Firm Poul Schmith: Kasper Mortensen & Henrik Nedergaard Thomsen	76
11	<b>Ecuador</b>	Quevedo & Ponce: Alejandro Ponce Martínez	84
12	<b>England &amp; Wales</b>	Covington & Burling LLP: Greg Lascelles & Salah Mattoo	90
13	<b>Finland</b>	Waselius & Wist: Tanja Jussila	102
14	<b>Germany</b>	ARNECKE SIBETH Rechtsanwälte Steuerberater Partnerschaftsgesellschaft mbB: Dr. Robert Safran & Ulrich Stepler	110
15	<b>Ghana</b>	Sam Okudzeto & Associates: Esine Okudzeto & Rosemary Owusu	119
16	<b>Indonesia</b>	Makarim & Taira S.: Alexandra Gerungan & Raditya Anugerah Titus	126
17	<b>Ireland</b>	McCann FitzGerald: Seán Barton & Megan Hooper	133
18	<b>Japan</b>	Nagashima Ohno & Tsunematsu: Koki Yanagisawa	142
19	<b>Korea</b>	Bae, Kim & Lee LLC: Kap-You (Kevin) Kim & John P. Bang	150
20	<b>Luxembourg</b>	Loyens & Loeff Luxembourg S.à.r.l.: Véronique Hoffeld	157
21	<b>Macedonia</b>	Polenak Law Firm: Tatjana Popovski Buloski & Aleksandar Dimic	164
22	<b>Nigeria</b>	Kentuadei Adefe, Legal Practitioners, Mediators & Arbitrators: Kentuadei Adefe & Ottah Nelson	174
23	<b>Poland</b>	Kubas Kos Galkowski: Paweł Sikora & Wojciech Wandzel	183
24	<b>Portugal</b>	Rogério Alves & Associados – Sociedade de Advogados, R.L.: Rogério Alves	191
25	<b>Romania</b>	Zamfirescu Racoți & Partners Attorneys at Law: Cosmin Vasile & Alina Tugearu	199
26	<b>South Africa</b>	Cliffe Dekker Hofmeyr Inc: Pieter Conradie & Anja Hofmeyr	207
27	<b>Spain</b>	BROSETA: Patricia Gualde & Alfonso Carrillo	215
28	<b>Sweden</b>	Norburg & Scherp Advokatbyrå AB: Fredrik Norburg & Erika Finn	225
29	<b>Switzerland</b>	Bär & Karrer Ltd.: Matthew Reiter & Simone Burlet-Fuchs	232
30	<b>Turkey</b>	Gün + Partners: Pelin Baysal & Beril Yayla Sapan	240
31	<b>Turks &amp; Caicos Islands</b>	Kobre & Kim: Tim Prudhoe & Alexander Heylin	248
32	<b>United Arab Emirates</b>	Hamdan AlShamsi Lawyers & Legal Consultants: Hamdan Alshamsi	255
33	<b>USA – California</b>	Skadden, Arps, Slate, Meagher & Flom LLP: Jason D. Russell & Hillary A. Hamilton	262
34	<b>USA – Delaware</b>	Potter Anderson & Corroon LLP: Jonathan A. Choa & John A. Sensing	270
35	<b>USA – Florida</b>	Richman Greer, P.A.: Leora B. Freire & Leslie Arsenault Metz	278
36	<b>USA – Georgia</b>	Holland & Knight LLP: Laurie Webb Daniel & Harold T. Daniel, Jr.	285
37	<b>USA – Illinois</b>	Drinker Biddle & Reath LLP: Justin O. Kay	294

Continued Overleaf →

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## Country Question and Answer Chapters:

38	<b>USA – New Jersey</b>	Drinker Biddle & Reath LLP: Andrew B. Joseph & William A. Wright	303
39	<b>USA – New York</b>	Drinker Biddle & Reath LLP: Clay J. Pierce & Marsha J. Indych	310
40	<b>USA – Pennsylvania</b>	Drinker Biddle & Reath LLP: Michael W. McTigue Jr. & Jennifer B. Dempsey	319
41	<b>USA – Texas</b>	Jackson Walker LLP: Retta A. Miller & Devanshi M. Somaya	326
42	<b>USA – Washington, D.C.</b>	Miller & Chevalier Chartered: Brian A. Hill & John C. Eustice	333

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## EDITORIAL

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Welcome to the tenth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Cybersecurity, particularly from a UK perspective.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 41 jurisdictions, with the USA being sub-divided into 10 separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of Covington & Burling LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# USA – California

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## I. LITIGATION

### 1 Preliminaries

#### 1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

California has two parallel court systems, state and federal. California state court is a common law system governed by case law developed by appellate and California Supreme Court decisions, the U.S. Constitution, California Constitution, numerous state and federal statutes, and federal, state and municipal regulations. The rules of civil procedure in California state courts are governed by the California Code of Civil Procedure (“CCP”), the California Rules of Court (“CRC”), and each Superior Court’s local rules. The federal courts are governed by the Federal Rules of Civil Procedure (“FRCP”); further, each U.S. District Court and each federal judge has his or her own local rules of procedure and practice as well.

#### 1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Each of California’s 58 counties has its own Superior Court that handles all general civil matters and, separately, family law, probate, juvenile, small claims, and criminal matters. Superior Court decisions are appealed to one of six California Courts of Appeal, depending on location, and ultimately the Supreme Court of California. The federal system in California consists of U.S. District Courts for the Northern, Eastern, Central and Southern Districts, with appeals to the Ninth Circuit Court of Appeals, and ultimately the U.S. Supreme Court. Each district court has an adjunct Bankruptcy court, and appeals may be made to the district court or the Bankruptcy Appellate Panel for the Ninth Circuit. Other courts in the federal court system include a Tax Court for federal taxation matters, a Court of Federal Claims for claims for money damages against the U.S. government, and the Patent Trial and Appeal Board decides certain issues of patentability in an administrative trial and appeal process.

#### 1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The stages of civil proceedings in California state and federal courts are:

- **Pleading.** Generally, a plaintiff commences an action by filing and serving a written complaint on the defendants. In response, the defendants may file and serve either a motion challenging the sufficiency of the complaint or the plaintiff’s claims, or an answer setting forth defences and potential counterclaims against the plaintiff or a third party.
- **Discovery.** The discovery process in both California state and federal courts involves parties requesting information from the opposing parties in the form of documents and/or testimony sought through depositions of party witnesses. The opposing parties must provide such information so long as it is relevant and not privileged or otherwise protected from disclosure.
- **Dispositive motions.** Both state and federal courts permit summary disposition of claims and defences if a party can demonstrate there are no disputes of material fact and that only legal issues are in dispute. FRCP 56; CCP 437c (a).
- **Trial.** Due to the cost and uncertainty of trial, the vast majority of civil cases are resolved by dispositive motion or settlement before trial. If a case proceeds to trial, factual disputes are resolved by a jury unless the parties waive their right to a jury in favour of a trial by the judge alone (a “bench trial”). To prove their cases, the parties introduce oral and documentary evidence through live witness examination by the parties’ attorneys. In a jury trial, the parties and/or the court develop written jury instructions that explain to the jury how to apply the law to the facts. The jury then provides a verdict. In California state court, the Expedited Jury Trials Act (CCP 630.01), allows the parties to voluntarily expedite a trial by entering into agreements about trial procedure, such as how evidence is presented and high/low agreements on damages. The matter is heard by a smaller jury, ideally in one day. The decision of the jury is binding on the parties, and appeals and post-trial motions are strictly limited.
- **Judgment.** The jury’s verdict or the court’s decision is set forth in a formal written judgment entered into the court records as the final resolution of the case. The prevailing party can enforce a monetary judgment immediately upon entry, unless enforcement is stayed pending an appeal.
- **Appeal.** After entry of judgment, parties may file a notice of appeal to contest the result. If an appeal is taken, a record of the trial court proceedings is prepared to provide all necessary information to the appellate court. The parties submit written briefs to the appellate court, but no further evidence or testimony is taken. Both federal and state courts have their own specific rules of appellate procedure.

State and federal courts both establish deadlines for various stages of proceedings but the pace and scope of litigation is principally driven by the parties. In 2015, Superior Courts disposed of 64% of civil cases within 12 months of filing and 83% of all civil cases

within 24 months of filing. In California district courts, the average time from filing to disposition of civil cases was five to nine months in 2016.

#### 1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

State and federal courts in California generally enforce contractual exclusive jurisdiction clauses, known as “forum selection clauses”. In California, mandatory forum selection clauses, which restrict litigation to a specific forum, will be enforced as long as not unfair or unreasonable, while permissive forum selection clauses, which provide for jurisdiction in a specific forum without prohibiting litigation in another forum, are examined under a traditional *forum non conveniens* analysis. Federal courts will enforce a valid forum selection clause unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavour a transfer.

#### 1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The cost of civil litigation in California varies widely, depending on the length and complexity of the litigation. The initial cost to file a civil case is 435–450 USD in California Superior Court and 400 USD in U.S. District Court. Typically other costs, such as attorneys' fees and discovery costs, are exponentially larger than administrative costs. United States and California state courts follow the “American Rule” under which each party bears its own attorneys' fees. However, California courts will usually enforce contractual provisions which shift attorneys' fees and costs to the losing party. Additionally, some federal and state statutes provide for recovery of attorneys' fees and/or certain costs by the prevailing party.

#### 1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

An attorney may advance reasonable expenses of litigation or preparation for litigation or providing any legal services to the client, and repayment may be contingent on the outcome of the litigation. Contingency and conditional fee arrangements are frequently utilised and generally permitted, including reverse contingency fees, in which the attorney can earn a percentage of predicted damages that were avoided.

#### 1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims are generally assignable in California, and once assigned, the assignee need not join the assignor in the litigation. Certain claims, such as personal tort claims, are not assignable. Third party litigation funding is permitted in California. However, there are numerous ethical concerns associated with third party litigation funding, such as the attorney's duties of confidentiality, loyalty, and independence in all decision-making; furthermore, attorneys cannot split fees with non-lawyers. The Northern District of California requires the disclosure of non-party, third-party litigation funding entities and individuals in class actions.

#### 1.8 Can a party obtain security for/a guarantee over its legal costs?

As a general rule, a party cannot obtain security for or a guarantee of its legal costs and fees because in California each party bears its own legal costs and attorneys' fees unless a contract or statute provides otherwise. In limited circumstances involving contracts and real property, parties may seek to attach an interest in real property prior to obtaining a judgment. Prejudgment attachment is narrower when it involves an individual as opposed to a legal entity.

## 2 Before Commencing Proceedings

#### 2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Generally, there are no specific formalities a plaintiff must comply with before filing a lawsuit. Exceptions include litigation against certain government entities, where a party is required to exhaust the administrative remedies provided by that entity before filing suit.

#### 2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Both state and federal courts apply the statutes of limitations, laid out in the California Code of Civil Procedure, to determine how long a plaintiff has to bring a claim for various common law causes of action. The statute of limitations varies depending on the claim. For example, claims for breach of written contract must be filed within four years of the date of breach (two years for oral contracts), and personal injury claims must be brought within two years of the injury. CCP 335.1, 337, 339. Statutory causes of action typically include a statute of limitation provision. Courts strictly adhere to statutes of limitation except in circumstances where an equitable basis exists to “toll” the time period, such as delayed discovery of an injury.

## 3 Commencing Proceedings

#### 3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Generally, a plaintiff commences civil proceedings by filing a complaint with either the Superior Court or the federal District Court in the county or district where one of the defendants resides or does business, or where a substantial part of the events giving rise to the claim occurred. *See* 28 U.S.C. 1391(b); CCP 392-403.

Federal subject matter jurisdiction exists only when a claim arises under federal law or the parties are “diverse”, meaning plaintiffs and defendants reside in different states within the United States (or when one party is a citizen of a U.S. state and the other party is a foreign state or foreign citizen). 28 U.S.C. 1332. For diversity jurisdiction, the action must be at least valued at 75,000 USD. *Id.*

The plaintiff is responsible for properly serving the complaint and court-issued summons on each defendant within the specified time limit (60 days in state court, 90 days in federal court). CRC 3.110(b); FRCP 4(m).

Generally, service may be made in one of four ways:

1. Personal service, effective upon delivery. CCP 415.10; FRCP 4(e)(2)(A).
2. Substitute service on a competent individual at the defendant's residence or place of business and mailing the summons and complaint to that location; service is considered complete on the 10th day after the mailing. CCP 415.20; FRCP 4(e)(2)(B), 4(e)(1).
3. The defendant may agree in writing to accept service by mail, which gives the defendant additional time to respond to the complaint. CCP 415.30; FRCP 4(d).
4. Service by publication is allowed only by court order, and is effective 28 days after publication. CCP 415.50; FRCP 4(e)(1).

Generally, out-of-state and foreign defendants may be served by any of the four methods listed above or by certified mail. CCP 413.10, 415.40. The United States is a signatory to the Hague Convention, and thus litigants in California federal and state courts are generally required to comply with its provisions when serving a defendant outside of the United States.

### 3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

After filing a complaint but before effecting service, a plaintiff may move for a temporary restraining order (“TRO”) and/or a preliminary injunction (“PI”) to preserve the *status quo* pending trial. Ordinarily, a defendant must be given notice of a request for a TRO or PI. A plaintiff may be able to obtain a TRO without serving prior notice on the defendant in some circumstances. These remedies are extraordinary, so the plaintiff must show it is likely to succeed on the merits of its claim and that it will suffer irreparable harm without a TRO or PI.

### 3.3 What are the main elements of the claimant's pleadings?

In federal court, the plaintiff need only include a demand for relief, a “short and plain statement of the claim”, and such claim must be “plausible” as pled. FRCP 8(a)(2). California courts require a statement of the claim in “ordinary and concise language” and a demand for judgment. CCP 425.10(a). The plaintiff must plead facts showing it satisfies each element of each of its claims. Some claims, like fraud, must be pled with greater factual detail. The plaintiff must state that it complied with all applicable pre-filing requirements (like exhaustion of administrative remedies).

### 3.4 Can the pleadings be amended? If so, are there any restrictions?

In state court, a pleading may be amended once, without court permission, at any time before a responsive pleading is filed, or, if a party files a demurrer, before the hearing on such demurrer if the pleading is amended before any opposition to the demurrer is due. CCP 472. At any other time, a party may seek court permission to amend, which is liberally granted when “in the furtherance of justice”. CCP 473(a)(1), 576.

The federal rules allow a party to amend any pleading once, without permission, within 21 days of serving it, or within 21 days of the opponent's service of a responsive pleading or motion, whichever

is earlier. FRCP 15(a)(1). Otherwise, the parties must receive the court's permission or the opposing party's written consent to amend, and federal courts freely permit amendments “when justice so requires”. FRCP 15(a)(2).

### 3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

In both California and federal courts, a party can withdraw its pleading by voluntarily dismissing its complaint. Under California law, a plaintiff generally has the absolute right to voluntarily dismiss its complaint (without prejudice to later refile the same claims) before the “actual commencement of trial”, CCP 581(c), or before a dispositive ruling on a demurrer or other pretrial motion. *Lee v. Kwong*, 193 Cal. App. 4th 1275, 1281 (2011). After a trial begins or a dispositive ruling is made, a plaintiff may generally voluntarily dismiss its complaint only *with* prejudice – that is, the plaintiff cannot sue later on the same claim in the same court – unless all affected parties consent to dismissal without prejudice. CCP 581(e). Under federal law, a plaintiff generally may voluntarily dismiss an action without a court order before the opposing party serves an answer or moves for summary judgment. FRCP 41(a)(1)(i). An action may also be dismissed without prejudice at any time without court approval by “filing a . . . stipulation of dismissal signed by all parties who have appeared”, or with court approval if the plaintiff so requests. FRCP 41(a)(1)(ii), (a)(2). A plaintiff who voluntarily dismisses its action may be liable for the defendant's costs and attorneys' fees. FRCP 41(a)(2), 54(d); CCP 1032.

## 4 Defending A Claim

### 4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

After service of a summons and complaint, the defendant may respond by either filing an answer, or answer and cross-complaint (called a “counterclaim” in federal court). The answer must contain the defendant's general or specific denials of the material allegations of the complaint and assert all affirmative defences. CCP 431.20, 431.30(b); FRCP 8(b). The defendant can also file a motion challenging the sufficiency of one or more of the plaintiff's claims or the court's jurisdiction over the claims (called a “demurrer” in California courts and a “motion to dismiss” in federal courts). CCP 430.10; FRCP 12(b).

A defendant is required to assert any claims it may have against the plaintiff relating to the subject matter of the complaint at the same time it answers the complaint. CCP 426.30; FRCP 13. In federal court, the defendant must raise these “compulsory counterclaims” when responding to the opposing party in a pleading (unless doing so would cause jurisdictional problems); failure to raise compulsory counterclaims bars the defendant from raising the claims in subsequent actions. FRCP 13(a)(1)(A)-(B). A permissive counterclaim, which does not arise out of the same transaction or occurrence, may be raised in the present action or a subsequent action. FRCP 13(b).

### 4.2 What is the time limit within which the statement of defence has to be served?

Generally, a defendant must file and serve its response to the complaint within 30 days after service of the complaint. CCP

412.20(a)(3), 430.40(a). A defendant in federal court has 21 days to respond unless it waived service of process, in which case it has 60 days to respond. FRCP 12(a)(1)(A).

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### **4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?**

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A defendant may file a cross-complaint in California courts against third parties if the claims arise out of the same transaction or occurrence or involve the same “claim, right, or interest in the property or controversy” at issue. CCP 428.10(b). Necessary or indispensable third parties may be joined if feasible under FRCP 19, or a defendant can bring in a third party believed to be liable for the plaintiff’s damages by bringing an impleader action under FRCP 14.

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### **4.4 What happens if the defendant does not defend the claim?**

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A plaintiff may obtain a default judgment against a defendant who fails to respond to the complaint. CCP 585; FRCP 55. The defendant may serve and file a notice of motion to set aside the default judgment and for leave to defend the action in the proper court if it can show good cause for not responding to the complaint, such as improper service or lack of personal jurisdiction. CCP 585.5(b); FRCP 60(b).

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### **4.5 Can the defendant dispute the court’s jurisdiction?**

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A defendant may challenge the court’s jurisdiction over the defendant (personal jurisdiction) or the claims (subject matter jurisdiction), although the latter challenge is more common in federal courts because of their more limited jurisdiction. CCP 418.10; FRCP 12(b) (1), (2).

## **5 Joinder & Consolidation**

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### **5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?**

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A third party must be joined when the court determines that complete relief cannot be granted without that party. CCP 389(a); FRCP 19(a)(1). A court may permit a third party to join, even if that party is not essential to resolving the action, when the third party’s claim or defences arises from the transaction or occurrence subject to dispute. CCP 378, 379; FRCP 20.

A court must allow a third party to “intervene” in an ongoing litigation to protect its interest in the subject of the action, and may allow an intervention when the third party’s claim or defence shares a common question of law or fact with the action. CCP 387; FRCP 24.

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### **5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?**

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Consolidation of multiple proceedings is permitted when they involve common issues of law or fact to help avoid unnecessary cost or delay. CCP 1048; FRCP 42(a).

There is also a “class action” procedure that allows a plaintiff to represent a group of individuals not before the court, if the representative plaintiff can show the class members are too numerous to be joined in the action, the representative’s claims are typical of each member’s claims, the representative is capable of representing the members, and there are issues of law or fact common to the class. CCP 382; FRCP 23.

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### **5.3 Do you have split trials/bifurcation of proceedings?**

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Courts may exercise their discretion to separate one trial into two or more proceedings, and to bifurcate any proceedings on particular issues to prevent prejudice, promote convenience, or for judicial efficiency. CCP 1048(b); FRCP 42(b).

## **6 Duties & Powers Of The Courts**

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### **6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?**

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Assignment of California Superior Court cases varies by county, with some using a “direct calendar” system, under which one judge is assigned at random to oversee the case from complaint to judgment, and other counties using a “master calendar” system that assigns cases for trial to a trial court, while all pre-trial matters are handled in other departments. In federal courts, cases are assigned upon filing to a particular judge, who oversees all aspects of the litigation through judgment. The determination of the specific assignment of cases to particular judges, in both state and federal court, is done randomly.

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### **6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?**

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Judges in federal and California courts are given broad case management powers to promote efficiency and economical use of resources for the parties and the courts. California courts must comply with the Trial Court Delay Reduction Act (Cal. Gov’t Code 68600), which requires California courts to dispose of cases as promptly as possible. Active case management may include: designation of cases as “complex”, subject to different procedures; setting firm trial dates; and requiring parties to engage in mediation and settlement discussions.

Parties can apply to the court for interim relief as needed. Most common applications pertain to proposed schedules and deadlines or discovery disputes. Motions to compel compliance with discovery requests may be assigned for hearing in federal court to a magistrate judge or, in California court, to a discovery referee. Litigation of these issues can consume significant attorney time and commensurate fees.

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### **6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court’s orders or directions?**

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Both state and federal courts in California have authority to impose sanctions on parties or their attorneys for a variety of misconduct. For example, California judges may impose sanctions on parties and/or their attorneys for filing papers that lack evidentiary support

or are solely intended to harass. CCP 128.7(b). Federal courts require a party's attorney to certify that each filed paper is not for an improper purpose. FRCP 11. Sanctions imposed by the court are limited to "what is sufficient to deter" further conduct of the same manner in the future, and may include payment of a monetary penalty to the court or payment of the opposing party's legal fees incurred as a result of the violation. CCP 128.7(d); FRCP (11)(c).

Sanctions also may be imposed in both California and federal courts for other improper behaviour, such as violations of discovery orders. Courts may use monetary sanctions to compel compliance with discovery as well as adverse jury instructions or, in extreme cases, terminating sanctions (dismissal or default). CCP 2023.030; FRCP 37.

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**6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?**

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A California court may – either on its own motion or the motion of a party – strike all or part of a complaint that is (1) irrelevant, false, or improper, or (2) not written or filed according to the rules of the court. CCP 436. A federal court may similarly strike an insufficient defence or any redundant, immaterial, impertinent, or scandalous matter. FRCP 12(f). Such motions are rarely granted.

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**6.5 Can the civil courts in your jurisdiction enter summary judgment?**

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State and federal courts in California permit summary disposition of claims or defences, or an entire complaint, by written submission to the court. CCP 437c; FRCP 56. A court may grant such a motion if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law on the issue in question.

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**6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?**

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Courts may stay proceedings under certain circumstances, such as to permit other litigation or arbitration to resolve issues which impact the outcome of the case. California courts consider whether a stay will "promote the ends of justice" and take into account the effect a stay would have on any related proceedings. CRC 3.515(f). Federal courts weigh the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice.

## 7 Disclosure

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**7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?**

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While a party contemplating suit can seek informal discovery from a potential defendant before filing, a plaintiff in state court can serve formal discovery requests without court permission ten days after serving the summons and complaint, and a defendant can begin discovery once it has been served. CCP 2025.210, 2030.020. In federal court, formal discovery cannot begin without leave of court

until after the mandatory conference of parties' counsel to discuss their claims, defences, potential settlement, a discovery plan, and required initial disclosures. FRCP 26(d)(1). A party generally must provide non-privileged information sought by the requesting party so long as it is relevant and proportional to the needs of the case. CCP 2017.010; FRCP 26(b).

During discovery, parties may request production of electronically stored information ("ESI") and may specify the manner in which the information is produced. If the manner for production of ESI is not specified, the producing party may produce the information in the manner in which it is maintained, or in a reasonably usable form. CCP 2031.030, 2031.280; FRCP 34. Courts may limit discovery of ESI in certain circumstances, such as when the information is duplicative, it is not reasonably accessible, or the burden of producing the information outweighs the likely benefit. CCP 2031.060(f), (g); FRCP 26(b)(2).

California courts have not been hostile to the use of technology-assisted review or predictive coding in conducting discovery, leaving the determination to the parties, although there have not been many decisions addressing the issue.

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**7.2 What are the rules on privilege in civil proceedings in your jurisdiction?**

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A party may withhold certain information if it is protected by a valid privilege or immunity. Privileges in California include attorney-client communication (including protection of the attorney's work-product), physician-patient communication, and trade secrets. CCE 940-1063. The California Constitution also explicitly guarantees a right to privacy which must be balanced against the right of litigants to discover relevant facts. Cal. Const. Art. 1 §1. Common privileges asserted in federal courts are the privilege for attorney-client communications, attorney work product, and the Fifth Amendment right against self-incrimination. Failure to assert a privilege may result in a waiver. FRE 502; CCE 912.

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**7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?**

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Parties may issue subpoenas to a third party to compel testimony or the production of documents. CCP 2020.010 *et seq.*; FRCP 45.

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**7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?**

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Conducting and managing discovery is generally the parties' responsibility, although a party may seek court intervention to compel a party to comply with its discovery obligations. FRCP 37; CCP 2023.030, 2025.450. Federal courts in California also have mandatory initial disclosure requirements that require parties to disclose the identities of witnesses they intend to rely on and also to disclose the type and location of documents they intend to rely on to prosecute or defend an action.

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**7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?**

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A party may seek a protective order to restrict access to or use of certain kinds of information. The court may grant such a motion "for good cause", such as to avoid undue embarrassment, oppression, expense, or disclosure of highly confidential information, such as trade secrets. CCP 2017.020; 2031.060; FRCP 26(c)(1).



## 8 Evidence

### 8.1 What are the basic rules of evidence in your jurisdiction?

The rules of evidence for California courts are contained in the California Evidence Code; federal courts are governed by the largely similar, but not identical, Federal Rules of Evidence.

### 8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence (whether testimonial or documentary) is admissible if it is relevant – likely to prove or disprove any fact at issue in the proceeding – and satisfies certain requirements of reliability established by statute and case law. CCE 351; FRE 401-02. For example, hearsay evidence (out-of-court statements used to prove the truth of the matter asserted) is often excluded because it is not reliable, but it can be admitted under a number of established exceptions if satisfactory indicia of reliability exist (such as a party's admission against its own interest, or a record made and kept in the ordinary course of business). CCE 1200-01; FRE 801, 803. Evidence can also be excluded if its probative value is substantially outweighed by the probability that its admission will unduly waste time, create unfair prejudice, confuse the issues or mislead the jury. CCE 352; FRE 403.

In California courts, expert witness testimony is admissible when the witness is qualified to testify as an expert, the opinion will assist the trier of fact, and the testimony is on a subject sufficiently beyond common experience and is based on matters in the expert's personal knowledge, using methods which experts reasonably rely on in forming an opinion on the topic. CCE 800-02. In federal court, expert witnesses may testify if the expert's specialised knowledge will help the trier of fact understand the evidence or determine a fact in issue, the testimony is based on sufficient facts or data and reliable principles and methods, and the expert has reliably applied those principles and methods to the facts of the case. FRE 702.

### 8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Witness testimony may be admitted if the witness is competent (e.g., not mentally impaired), understands his duty to tell the truth, can communicate (interpreters are permitted), and has personal knowledge of the facts. CCE 701-02; FRE 601-04. In depositions, witnesses are generally required to answer all questions, unless they seek privileged information.

### 8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Expert testimony is considered "opinion testimony" and must be based on sufficient data using reliable principles and methods. Although retained by a party, experts are obligated to provide truthful testimony and most experts take pains to preserve their credibility through independence and objectivity. Experts typically

prepare a written report, often with the assistance of counsel, which is provided to the other parties. The expert witness is then deposed by opposing counsel about his qualifications and opinions. The opposing party usually seeks to discredit the expert's opinions by challenging the expert's qualifications or methodology or factual basis for the opinions.

## 9 Judgments & Orders

### 9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Courts may issue a variety of orders and judgments, ranging from case management orders relating to discovery or sanctions for misconduct, to dispositive judgments dismissing a complaint. Courts may award money damages, order equitable relief compelling or prohibiting certain conduct, and/or issue declaratory judgments resolving parties' rights and duties.

### 9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts can award money damages (compensatory, lost profits, punitive, etc.), which vary depending on the circumstances of the case. The U.S. Constitution limits punitive damages to generally less than 10 times the amount of compensatory damages.

Courts may also generally award pre- and post-judgment interest on the award amount. CCC 3287; 28 USC 1961. Attorneys' fees are generally recoverable only if a statute or contract so provides, but court costs are generally awarded to the prevailing party.

### 9.3 How can a domestic/foreign judgment be recognised and enforced?

California's Enforcement of Judgments Law governs the manner in which a judgment is enforced in California, providing detailed procedures for enforcing a judgment against assets, and providing for post-judgment discovery regarding the identity and location of the judgment debtor's assets. CCP 680.010 *et seq.*; FRCP 69. The U.S. Constitution Art. IV § 1 provides that a final judgment from any state is entitled to the same "full faith and credit" in every other state. California's Sister State Money Judgment Act governs the procedure to enforce a judgment from another state in California. CCP 1710.10 *et seq.* California's Uniform Foreign-Country Money Judgments Recognition Act provides standards and procedures to enforce a foreign country judgment. CCP 1713 *et seq.*

### 9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

A state judgment in an unlimited civil case may be appealed to the California Court of Appeal, and a federal judgment may be appealed to the Ninth Circuit Court of Appeals. A party generally must file a Notice of Appeal within 60 days of receiving notice of entry of judgment in state court, and within 30 days in federal court. CRC 8.104; FRAP 4(a)(1). California Rules of Court Title 8 and the Federal Rules of Appellate Procedure and the Ninth Circuit's local rules govern the respective appellate procedures.

## 10 Settlement

### 10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Courts in California may order parties to engage in settlement conferences, often overseen by another judge. Courts cannot force the parties to settle, but can encourage discussions and require the parties to negotiate in good faith. A court can sanction parties for not attending a mandatory settlement conference or negotiating in good faith.

California courts also offer various voluntary alternative dispute resolution programmes to facilitate settlement, such as Early Neutral Evaluation (“ENE”), where parties meet with an evaluator to attempt to resolve the case in its initial stages before incurring extensive costs. After hearing from each side, the evaluator provides a non-binding opinion concerning the strengths and weaknesses of the claims and defences. ENE and mediation proceedings are confidential and no prejudice or liability attaches based upon the evaluator’s assessment of the case or statements made in the proceedings.

## II. ALTERNATIVE DISPUTE RESOLUTION

### 1 General

#### 1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Contractual arbitration is very common in California, particularly in business, employment and consumer disputes. Courts routinely enforce pre-dispute arbitration agreements. Another method of alternative dispute resolution (“ADR”) is consensual mediation. California courts may also order parties to non-binding arbitration or settlement conferences mediated by a judge.

#### 1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Federal Arbitration Act and California Arbitration Act govern contractual arbitration in California. 9 U.S.C. 1 *et seq.*; CCP 1280 *et seq.* The FAA governs arbitration concerning contracts that deal with interstate, foreign, or maritime commerce. The CAA governs arbitration in California that falls outside federal jurisdiction, although the precise division is unsettled (*see* question I.3.2).

The United States is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which allows foreign arbitral awards to be confirmed by a U.S. District Court. Unless a ground for refusing recognition or enforcement exists, the court must enter judgment. That judgment can be enforced against the California assets of the losing party. *See* question I.9.3.

Contracts containing arbitration clauses commonly require the parties to mediate before commencing arbitration. Voluntary and non-binding, mediation is not governed by a statutory scheme. Mediations are confidential; both state and federal courts prohibit the introduction of evidence of statements made during mediation. CCE 1119; FRE 408.

#### 1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration and mediation are available for use in most civil proceedings in California. Arbitration is not available in criminal proceedings or in certain civil rights proceedings.

#### 1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Courts have – and frequently exercise – their authority to stay court proceedings in favour of arbitration if the parties’ contractual arbitration provision is enforceable. If a party resists arbitration, the other party may bring a motion to compel that party to arbitration. If a party refuses to arbitrate even after being compelled to do so, a default award can be entered against that party, after evidence of liability is presented.

California has developed several rules regarding ADR in civil cases filed in state courts, including requiring the plaintiff to serve information on ADR with the summons and complaint, and the parties to “meet and confer” at least 30 days before trial. Several California statutes mandate that certain types of civil cases be submitted to ADR before a lawsuit commences. As discussed in question I.10.1, courts may also order a settlement conference or an ENE.

#### 1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

After the issuance of an arbitration award, a party may file a motion to confirm the award. If no basis to vacate exists, the court is required to enter judgment on the award, making it binding and enforceable. Arbitration awards may not be “appealed” as a court judgment may be judicially reviewed. The FAA and CAA provide very limited bases for a party to ask a court to vacate an arbitration award. *See* CCP 1286.2; 9 U.S.C. 10.

The court, not an arbitrator, determines whether the parties agreed to arbitrate, and whether a party can be bound by an arbitration agreement under principles of agency, *alter ego* or third party beneficiary status. The law governing the contract determines the validity of the original agreement. If mediation results in a settlement agreement executed by the parties during ongoing litigation, the court may enter judgment on the settlement agreement and retain jurisdiction to enforce the settlement terms.

## 2 Alternative Dispute Resolution Institutions

### 2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The American Arbitration Association and JAMS are the most prominent and frequently used ADR institutions in California.

AAA has well-developed Commercial Rules of Arbitration, and its International Centre for Commercial Dispute Resolution has rules aimed at, and experience with, international arbitration matters.

JAMS utilises former judges, experienced trial attorneys, and other experienced business people to engage parties in mediation.



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