CHAPTER 1

INTRODUCTION TO CALIFORNIA CIVIL PROCEDURE

“[U]ndoubtedly, a state may regulate at pleasure the modes of proceeding in its courts ***.”

—Bronson v. Kinzie, 1 How. (42 U.S.) 311, 315, 11 L.Ed. 143 (1843).

Analysis

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A. COURSE PERSPECTIVE

Your federal civil procedure course came early in the law school curriculum for a good reason. From the outset, you gained an understanding of how the cases you studied in your other courses moved through the legal system. You likely began to realize that the strategic use of procedure has the power to derail even substantively solid cases, or to extend the life (at least temporarily) of otherwise weak ones.

The subject of civil procedure in the California state courts merits its own upper-division course for many important reasons. There is little time in the basic federal civil procedure course to explore procedural distinctions between the federal and California court systems. But those distinctions can be critical to the decision of whether to file an action in either federal or state court. Taking an advanced course in state procedure will deepen your understanding of the federal rules as you compare different approaches to the same problems in California. You will quickly see that
California procedure and federal procedure are not identical twins. As evidenced by its statutes, rules and court decisions, California’s civil procedural law has diverged in many respects from its federal counterpart. You will not leave law school with a false assumption that California practice precisely mirrors the federal model.

Another reason to study California civil procedure is the impressive scale of the California court system and its impact on state litigation and litigators. California’s judicial system is significantly larger than the entire federal system. In fact, it is the largest court system in the United States. There are 1,705 authorized judgeships in California’s trial and appellate courts, compared to approximately 880 authorized Article I and Article III judgeships (trial and appellate court) in the federal system as a whole. There were approximately 1,475,000 state superior court non-criminal filings in 2012–2013, compared to about 28,700 non-criminal filings in California’s four federal district courts in the year ending December 31, 2013. (The total of civil filings in all of the U.S. district courts in 2013 was about 293,000.) See 2014 Court Statistics Report, Statewide Caseload Trends, 2003–2004 through 2012–2013, pp. xv–xvii (Judicial Council of California); and United States Courts, Statistical Tables for the Federal Judiciary, Table C–3, December 2013. Given the likelihood that a California litigation attorney will appear with some regularity in a state court, a thorough understanding of state procedure is essential to navigating the strategic and tactical considerations that are peculiar to California litigation.

There are additional practical reasons to study California civil procedure. You will acquire a better sense of how to conduct civil litigation by analyzing the procedural systems in the California courts. You will appreciate the degree to which California has been in the forefront of innovations that drive the processing of civil suits. You will have a stronger foundation for commencing your practice and for influencing future procedural reform. For additional perspectives on the benefits of including state procedure in the law school curriculum, see William R. Slomanson, State Civil Procedure Plea, 54 J.Leg.Ed. 235 (2004).

**B. SOURCES OF PROCEDURAL LAW**

The federal civil procedure course traced the varied “sources” of federal law. These sources—the legislative, judicial and executive branches of the federal government—are all empowered to make binding law. The law produced by these sources is called primary authority. Federal primary authority includes the Constitution of the United States, federal statutes, Federal Rules of Civil Procedure (FRCP), and federal judicial opinions.
California’s Legislature, courts, and executive-branch administrative agencies generate binding state procedural law. The primary authorities upon which California judges, attorneys and litigants rely include:

- Constitutions of California and the United States;
- Statutes enacted by the California Legislature;
- California case law;
- California Rules of Court;
- Local rules of the trial and appellate courts;
- Local court policies and practices; and
- California Code of Regulations.

 Whereas primary authorities are “the law” itself, secondary authorities are not. Instead, secondary authorities provide commentary on, or analysis of, the content or meaning of primary authorities. They also serve as highly useful vehicles for finding primary authorities. A treatise, for example, functions as a secondary authority because it sets forth the author’s summary and interpretation of the rules of law contained in primary authorities (statutes, cases, etc.). Secondary authorities are often well respected and persuasive. Many are regularly quoted in judicial opinions. They do not, however, attain the status and stature of primary authorities. Frequently used secondary authorities include:

- Legislative histories;
- Opinions of the California Attorney General;
- Scholarly publications (including legal treatises and law reviews);
- Practice guides; and
- Jury instructions.

An awareness of the utility of, and difference between, primary and secondary authorities is necessary for several reasons. First, the distinction between primary and secondary authorities is relevant to appreciating the contrast between binding and persuasive authority. See Chapter 9(A)(1). Second, despite the impression fostered by the case method of law study, one cannot fully comprehend California’s complex intertwined procedural foundations by relying only upon cases. Third, California’s primary and secondary authorities are essential resources for conducting research and formulating legal arguments at all stages of the litigation process. Each authority is discussed below.

1. PRIMARY AUTHORITIES

Constitutions. The state and federal constitutions set the parameters for governmental action by allocating power among the various branches of government. They also restrict governmental action in many contexts.
Votes of the people or of their elected representatives create and amend constitutional provisions.

For example, the California Constitution may be amended via the placement of an initiative on the ballot which is then approved by a simple majority of voters. The relative ease of the state amendment process has resulted in more than 500 constitutional amendments since the ratification of California's current Constitution in 1879. In contrast, only 17 federal constitutional amendments have been enacted since ratification of the Bill of Rights in 1791. California's Constitution is said to be the third-longest in the world; it is eight times longer than the U.S. Constitution.

The state and federal constitutions impact California civil procedure in several significant ways. For example, article VI of the state Constitution vests California’s judicial power in a hierarchy of courts. It mandates the establishment of a Superior Court (trial court) in each of California’s 58 counties. Article VI also directs the Legislature to divide the state into six appellate districts containing an intermediate Court of Appeal, with one or more divisions in each district. It also creates the California Supreme Court. (See chart at p. 7.) The state Constitution establishes the general nature of the judges’ powers and guidelines for their conduct of judicial business within the hierarchy of the state’s trial and appellate courts. Specific procedural matters governed by the California Constitution include the standard for appellate reversal of trial court decisions and the rights and requirements related to jury trials.

The federal Constitution can also impact state procedure because California procedural law cannot violate those portions of the United States Constitution that apply to the states. This intersystem relationship is sometimes quite explicit. In matters of personal jurisdiction, for instance, CCP § 410.10 provides that a “court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” A state cannot exercise personal jurisdiction if to do so would violate the federal Constitution’s Due Process Clause. (See Chapter 2(B)(1).) Therefore, California’s trial and appellate court judges must apply United States Supreme Court rulings to such jurisdictional issues as a matter of state law.

Not every federal constitutional provision applies to state procedural law. For example, the right to a civil jury trial contained in the Seventh Amendment of the United States Constitution does not apply to the states. In California, that right stems only from the state Constitution and state statutory law. California is free to reject—and has expressly rejected—many of the right-to-jury-trial cases you may have studied in your federal procedure course. See Chapter 6(A)(1).
SEC. B SOURCES OF PROCEDURAL LAW

Statutes. The California Legislature enacts and revises the statutes that appear in California’s codes. The California Code of Civil Procedure (CCP) is the predominant and most comprehensive compilation of California’s procedural law. It contains the bulk of the state’s procedural requirements, many of which are highlighted throughout this casebook. Unlike the comparatively condensed FRCP, the CCP expansively addresses many more procedural contingencies.

Other California codes contain important procedural requirements. For example, California Government Code §§ 68600–68620 set forth the provisions of the Trial Court Delay Reduction Act (often referred to as “Fast Track”), a special case management statutory scheme for streamlining the disposition of civil cases filed in California’s superior courts. See Chapter 5(B)(1). California Civil Code § 3295 contains requirements for obtaining discovery of a civil defendant’s financial condition for the purpose of seeking punitive damages. See Chapter 4(D)(5). California Evidence Code § 450 et seq. authorizes courts to take judicial notice of particular matters in connection with trial and appellate court proceedings. See, e.g., Chapter 3(B) on demurrers.

Case Law. Like legislation, case law plays a prominent role in both the state and federal legal systems. In your first civil procedure course, you probably learned that the federal courts often must apply state substantive law derived from state case law. You might have been exposed to the interplay of state case law with state and federal legislation.

Scholarly works and practice guides address the judicial integration of case and statutory law, as well as the resulting impact on the evolution of the common law:

American legislatures today pass thousands of laws each year touching on any subject they please, and the myth of a perfect overarching common law has been abandoned for decades. But the holdover of the common law heritage is that American judges can make law when necessary. In fact, although most judicial opinions today interpret statutes or administrative rules, American judges still have great power.

Robert C. Berring & Elizabeth A. Edinger, Finding the Law 10 (12th ed.2005). To elaborate on this concept:

The United States is a “common law” country. Briefly this means that the law of the land is viewed as an evolving body of doctrine determined by judges on the basis of cases which they must decide, rather than a group of principles expressly articulated and codified. The law grows as established principles are tested and adapted to meet new situations. * * *
At the same time there is also a dramatic increase in the activity of both state and federal legislatures in enacting statutes, which have come to govern an ever greater variety of human activity. An essential tension in the nature of legal research arises from the conflict and interplay between common and statutory law. The ruling principles in some areas are determined wholly by case law; other areas are governed partly by statute, or by statutes as construed and interpreted by the courts.


The common law of California is defined as “[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State.” Cal.Civ. Code § 22.2. As a California practitioner, you will need to recognize when a court is merely interpreting the law or arguably writing it on a clean slate. Judges routinely interpret what the Legislature intended when it drafted a statutory provision, or what a higher court intended when its opinion did not clearly answer the issue raised in a subsequent case. In certain instances, however, judges can make the law where there is no existing authority, or they can fill legislative gaps. See Vaughn R. Walker, Moving the Strike Zone: How Judges Sometimes Make Law, 2012 U.Ill.L.Rev. 1207 (2012) (former federal judge discussing “how judges not only make law but cannot avoid doing so”). Examples of judicially-created procedural law include the collateral order doctrine in the context of appeals (see Chapter 8(B)(1)), and the principles of claim and issue preclusion (see Chapter 9(B)).

California’s case law is generated by three levels of state courts. You should now examine the chart of California’s court system below, illustrating the hierarchy of decisional law. (For additional information about the California court system, consult the California courts’ website at http://www.courts.ca.gov/.)
CALIFORNIA COURT SYSTEM

CALIFORNIA SUPREME COURT
1 Chief Justice and 6 Associate Justices

Jurisdiction

May hear appeals from decisions of Courts of Appeal
Must hear appeals directly from Superior Courts on death penalty matters
Original jurisdiction in mandamus, certiorari, prohibition, and habeas corpus proceedings
Hears appeals directly from decisions of Public Utilities Commission, from recommendations of State Bar on attorney admission and disciplinary proceedings, and from recommendations of Commission on Judicial Performance on discipline of judges

CALIFORNIA COURT OF APPEAL
105 Justices in 6 Districts (19 Divisions), sitting in panels of 3 Justices

Courthouses:
First District: San Francisco
Second District: Los Angeles, Ventura
Third District: Sacramento
Fourth District: San Diego, Riverside, Santa Ana
Fifth District: Fresno
Sixth District: San Jose

Jurisdiction

Hears appeals and writ petitions from decisions of Superior Courts within District
Original jurisdiction in mandamus, certiorari, prohibition, and habeas corpus proceedings
Hears appeals and writ proceedings from decisions of Workers’ Compensation Appeals Board, Agricultural Labor Relations Board, and Public Employment Relations Board

CALIFORNIA SUPERIOR COURT
1,705 authorized Judges, 342 authorized Commissioners and Referees
58 Counties, 400+ court locations

Jurisdiction

Trial Department: Conducts pretrial and trial proceedings in civil (unlimited and limited) and criminal (felony and misdemeanor) cases
Small Claims Division: Conducts civil proceedings within jurisdictional limit
Appellate Division: Hears appeals from limited civil cases and criminal misdemeanor cases
Case law is integral to presenting procedural legal arguments before the court, but only if practitioners can properly rely on it as binding or persuasive authority. Not every opinion rendered by a California court is published and available for citation. For example, unlike the federal system, where selected district court opinions are published, California trial court decisions are not published. They are available primarily only upon request from the superior court that issued them. While all California Supreme Court decisions are published, California Rules of Court (CRC) 8.1100–8.1125 contain restrictive criteria governing the publication of opinions from the courts of appeal and the appellate divisions of the superior courts.

Only about eight percent of California Court of Appeal opinions are certified for publication. The impact of this statistic is striking, since an unpublished court of appeal opinion (or portion of an opinion) cannot be cited or relied upon by California litigants or courts, except in very limited circumstances usually involving the immediate parties (such as claim and issue preclusion). See CRC 8.1115; K.G. v. Meredith, 204 Cal.App.4th 164, 172 n.9, 138 Cal.Rptr.3d 645, 653 n.9 (2012) (citation of unpublished court of appeal opinion permitted to explain factual background of case, not to provide legal authority); and Note, Judge Nullification: A Perception of Unpublished Opinions, 62 Hastings L.J. 1397 (2011) (analyzing California’s peculiar publication and citation rules). Notwithstanding California’s no-citation rule, unpublished court of appeal decisions are regarded as an “underground body of law” that “may influence the strategy of counsel and the decisions of trial and perhaps even appellate courts.” People v. Moret, 180 Cal.App.4th 839, 884 n.10, 104 Cal.Rptr.3d 1, 38 n.10 (2009) (Klein, P.J., dissenting).

Federal Rule of Appellate Procedure (FRAP) 32.1 permits citation in all federal circuits of federal opinions, orders, judgments and other written dispositions issued after January 1, 2007, even if they have been designated as unpublished or nonprecedential. FRAP 32.1 has been the source of controversy among some judges and practitioners (including several within the Ninth Circuit) who believe that unpublished opinions have less value than those decisions selected for publication and therefore should not be citable. Ninth Circuit Rule 36–3 has been revised to achieve consistency with FRAP 32.1 while continuing (with limited exceptions) to prohibit citation of pre-2007 unpublished Ninth Circuit opinions. Several commentators have grappled with the impact of FRAP 32.1 on the federal courts. See, e.g., Caleb E. Mason, An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure, 55 UCLA L.Rev. 643 (2008) (noting that short, nonprecedential opinions comprise more than 80 percent of dispositions of circuit courts of appeals); Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette

The following case against the California Supreme Court challenged the enforcement of the California Rules of Court governing publication and citation of appellate opinions:

**SCHMIER V. SUPREME COURT OF CALIFORNIA**


**HANING, ASSOCIATE JUSTICE.**

Michael Schmier (appellant) appeals the dismissal of his complaint for injunctive relief and writ of mandate after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks to enjoin respondents from enforcing the rules governing publication of opinions (California Rules of Court, rules 8.1100–8.1125), contending they are unconstitutional and conflict with statutory law.

**BACKGROUND**

Rule 8.1105(c) provides that no opinion of the Court of Appeal may be published in the Official Reports unless it “(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; [¶] (2) resolves or creates an apparent conflict in the law; [¶] (3) involves a legal issue of continuing public interest; or [¶] (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.” Rule 8.1105(b) provides that a Court of Appeal opinion shall not be published unless a majority of the court rendering the opinion certifies that it meets one of the standards of rule 8.1105(c).

An opinion that is not certified for publication cannot subsequently be cited as legal authority or precedent, except as relevant to the doctrines of

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* An April 2007 amendment made substantive changes to CRC 8.1105(c). See Note 3 at p. 13.
law of the case, res judicata, or collateral estoppel, or as relevant to a criminal or disciplinary action because the opinion states reasons for a decision that affects the same defendant or respondent in another action. (Rule 8.1115.)

Rule 8.1120 sets forth the procedure for requesting publication of a Court of Appeal opinion not certified for publication by that court. If the Court of Appeal does not honor the request, rule 8.1120 obligates the Supreme Court to then rule on the request. Rule 8.1125 sets forth a similar scheme pertinent to depublication.

Appellant, individually and purportedly on behalf of all persons similarly situated, filed an action for injunctive relief and writ of mandate to compel respondents to publish all Court of Appeal opinions and to permanently enjoin them from enforcing the rules governing publication. He contends the rules violate the federal and state constitutional doctrine of separation of powers and the constitutional rights to petition the government for redress of grievances, freedom of speech, due process and equal protection. He further contends that the rules violate Civil Code section 22.2, which states that the common law of England is the rule of decision of all California state courts unless inconsistent with the federal constitution or the state constitution or statutes and the doctrine of stare decisis.

Respondents demurred primarily on the ground the trial court lacked subject matter jurisdiction because the Supreme Court alone is vested with the responsibility to regulate the publication of Court of Appeal opinions.

The trial court sustained the demurrer without leave to amend and ordered the case dismissed.

DISCUSSION

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II

The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. The consistency of a rule is tested against the statutory scheme the rule was intended to implement.

California Constitution, article VI, section 14 requires the Legislature to provide for the prompt publication of such opinions of the Courts of Appeal “as the Supreme Court deems appropriate.” Government Code section 68902 states: “Such opinions . . . of the courts of appeal . . . as the Supreme Court may deem expedient shall be published in the official reports [which] shall be published under the general supervision of the Supreme Court.” The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a
policy that California’s highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) “the expense, unfairness to many litigants, and chaos in precedent research,” if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions. By providing the mechanism for realizing this policy, the rules are consistent with the statutory scheme they were intended to implement.

Contrary to appellant’s assertion, the rules do not conflict with Civil Code section 22.2 ***. As used in this statute, “common law of England” refers to “the whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted.” Common law is now largely codified in California, and statutes are presumed to codify common law rules, absent clear language disclosing an intent to depart therefrom.

However, neither the Legislature nor the courts are precluded from modifying or departing from the common law, and frequently do. ***

Appellant has not cited and we are unaware, of any common law rule governing the publication or citation of opinions. To the extent appellant suggests that the common law of England requires that all appellate decisions will be published and may be cited as authority, such a rule is inconsistent with the constitution and laws of this state, including the rules of court, which have the force of positive law. “As a rule of conduct, [common law] may be changed at the will of the [L]egislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.” By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state’s decisional law.

Nor do the rules contravene the doctrine of stare decisis, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. Although the doctrine embodies an important social policy by representing an element of continuity in law and serving the psychological need to satisfy expectations, it is a principle of judicial policy, not a rule of constitutional or statutory dimension. Therefore, the Supreme Court—California’s highest court—is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the stare decisis doctrine.
Relying principally on James B. Beam Distilling Co. v. Georgia (1991) 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481, appellant claims the rules violate the constitutional guarantees of due process and equal protection by creating a system of selective prospectivity that allows courts to create a new rule of law applicable to a single case. As articulated in Beam, selective prospectivity occurs when a court expressly overrules a decisional precedent, but applies the new rule only to the case in which the new rule is announced, returning to the old rule with respect to all other cases arising on facts predating the pronouncement of the new rule. Beam held that in civil as well as criminal cases, when the court applies a new rule of law to litigants in one case, “it must do so with respect to all others not barred by procedural requirements or res judicata.” As Beam also observed, opinions that overrule precedent are rare. “In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.”

The rules protect against selective prospectivity by providing a uniform and reasonable procedure to assure that actual changes to existing precedential decisions are applicable to all litigants. They require that all opinions of the state’s highest court be published. (Rule 8.1105(a).) They establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published. (Rule 8.1105(c).) They permit any member of the public to request the Court of Appeal to publish an opinion and, if the request is denied, require the Supreme Court to rule thereon. (Rule 8.1120.) In short, the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in Beam that most opinions do not change the law. If appellant’s view prevailed, the Supreme Court would be unable to decertify opinions for publication, which would seriously compromise its ability to control the direction of appellate precedent.

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Finally, in closing, we address appellant’s erroneous notion that nonpublication equates with secrecy. It hardly needs mentioning that opinions, rulings and orders of the Court of Appeal are public records, open to all. Indeed, the nonpublished opinions are not only available to the public, but frequently become the subject of media broadcasts and publications. One can now track the progress of cases in the First District through the internet, and the other appellate districts will soon be online as well. The fact that opinions are not published in the Official Reports means nothing more than that they cannot be cited as precedent by other
litigants who are not parties thereto. But they are certainly available to any interested party.

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DISPOSITION

The judgment of dismissal is affirmed.

NOTES AND QUESTIONS

1. The court of appeal rejected Schmier’s arguments and upheld the validity of the CRC publication rules. Do you think the court’s opinion effectively responded to Schmier’s concern that enforcement of the state’s publication and citation rules removes valuable appellate authority from the public’s reach?


3. CRC 8.1105 has been amended since Schmier to clarify and expand the criteria used by the courts of appeal in deciding whether to certify an opinion for publication. The current version of the rule replaced the former presumption against publication with a presumption in favor of publication if the opinion meets one or more of the criteria specified in CRC 8.1105(c). Besides the criteria mentioned in Schmier, the revised rule permits a court of appeal opinion to be certified for publication on several additional grounds, such as when the opinion “[i]nvokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision”; or when it “[a]dvances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule.” CRC 8.1105(c). The certifying court may not consider factors such as workload of the court or potential embarrassment in determining whether to order publication. CRC 8.1105(d). What impact do you think the current version of the rule might have on the percentage of court of appeal decisions certified for publication?
4. Does (or should) CRC 8.1115—California’s “no-citation” rule—
prohibit citation to unpublished federal opinions? See Glaski v. Bank of
(2013) (citation permitted). What about citations to unpublished decisions from

5. As mentioned in Schmier, the California Supreme Court may order
that a published court of appeal opinion be “depublished.” See CRC 8.1125(c).
Thirty-one such opinions were ordered depublished in the 2013–2014 fiscal
year. See Press Release, Judicial Council of California, Supreme Court Issues
www.courts.ca.gov/27369.htm. Since the 1995 fiscal year, the number of
opinions ordered depublished has ranged from a high of 69 to a low of four.
(The Supreme Court ordered over 100 opinions depublished per year during
the late 1980s and early 1990s.) See 2014 Court Statistics Report, Statewide
of California). Unlike CRC 8.1105, which lists criteria for certifying an opinion
for publication, CRC 8.1125 does not contain comparable guidelines for
depublication. An order of depublication “does not necessarily signal
disapproval” of the court of appeal opinion. However, “[b]ecause depublication
renders the opinion non-citeable and removes its precedential value, it nullifies
the opinion and renders it nonexistent.” Farmers Insurance Exchange v.
Superior Court, 218 Cal.App.4th 96, 109–110, 159 Cal.Rptr.3d 580, 591–592
(2013). See generally Joseph R. Grodin, The Depublication Practice of the
California Supreme Court, 72 Cal.L.Rev. 514 (1984) (authored by former
California Supreme Court justice). Since depublication has such a drastic effect
on a previously published opinion, what factors should guide the Supreme
Court’s decision to depublish?

Rules of Court. While the FRCP and FRAP have nationwide
application, each state is free to adopt its own set of court rules. See Glenn
S. Koppel, Reflections on the “Chimera” of a Uniform Code of State Civil
971 (2009). The CRC are California’s statewide rules of court. They work
in tandem with the CCP in addressing procedural matters.

CCP § 575 provides statutory authority for the CRC, stating that the
“Judicial Council may promulgate rules governing pretrial conferences,
and the time, manner and nature thereof, in civil cases at issue ** in the
superior courts.” At the appellate level, CCP § 901 provides that the
“Judicial Council shall prescribe rules for the practice and procedure on
appeal.”

Article VI, section 6 of the California Constitution creates and spells
out the authority of the Judicial Council of California. To satisfy its
constitutional mandate “[t]o improve the administration of justice,” the
Judicial Council is empowered to “adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.” In addition, the rules of court must be consistent with constitutional provisions. See In re Kler, 188 Cal.App.4th 1399, 115 Cal.Rptr.3d 889 (2010) (CRC 8.385, requiring certain habeas corpus writ petitions to be filed first in superior court, is inconsistent with state Constitution, which grants appellate courts original jurisdiction in writ proceedings).

The Judicial Council, chaired by the Chief Justice of the California Supreme Court, includes 14 trial and appellate judges appointed by the Chief Justice, two legislators, four attorneys appointed by the State Bar, and 12 nonvoting advisory members. The work of the Judicial Council is described in CRC 10.1–10.101.

The role of the Judicial Council is similar to that of the various federal rules committees and the Judicial Conference of the United States. These institutions help make new procedural rules and amend the existing ones, after an opportunity for public comment. As you may have studied in your federal civil procedure course, the Standing Committee on Rules of Practice and Procedure proposes amendments to the FRCP and the other federal rules to the Judicial Conference. These proposals are published for comment from practitioners, judges and professors. The final version of a new federal rule is ultimately submitted to the United States Supreme Court for its approval. Amendments to the FRCP become valid several months after the Court forwards the proposed rules to the Congress for legislative acquiescence or rejection. See FRCP 86; 28 USC § 2074. The process of amending the FRCP is discussed in Richard L. Marcus, Modes of Procedural Reform, 31 Hastings Int’l & Comp.L.Rev. 157 (2008); and Mark R. Kravitz, To Revise, or Not to Revise: That Is the Question, 87 Denv.L.Rev. 213 (2010).

California’s statewide court rules are divided into ten titles: (1) Rules Applicable to All Courts; (2) Trial Court Rules; (3) Civil Rules; (4) Criminal Rules; (5) Family and Juvenile Rules; (6) Reserved (for future use); (7) Probate Rules; (8) Appellate Rules; (9) Rules on Law Practice, Attorneys, and Judges; and (10) Judicial Administration Rules. Additional provisions are contained in several addenda and appendices, such as Standards of Judicial Administration and Ethics Standards for Neutral Arbitrators in Contractual Arbitration (see Chapter 5(A)(1)). The statewide rules may be accessed at http://www.courts.ca.gov/rules.htm.

The CRC clarify and augment the more general provisions of the Code of Civil Procedure and other California codes. For example, CCP § 284 authorizes a court to order that the attorney of record in an action or special proceeding be changed at any time. Attorneys rely on this rule to terminate the attorney-client relationship for a variety of reasons, including conflicts.
of interest. The Code of Civil Procedure is silent, however, about the specific procedural requirements. CRC 3.1362 provides important details, such as to whom to direct the motion, upon whom to serve notice, and how to state the attorney’s reasons for seeking a substitution.

The following case illustrates the sometimes elaborate interplay among statewide rules of court, local court rules, and statutory provisions:

**VIDRIO V. HERNANDEZ**

California Court of Appeal, Second District, 2009.

*172 Cal.App.4th 1443, 92 Cal.Rptr.3d 178.*

**PERLUSS, PRESIDING JUSTICE.**

Mercury Insurance Company (Mercury) appeals from the trial court’s order imposing $1,857.50 in monetary sanctions after the court determined Mercury’s claims adjuster and the lawyer it had provided to defend its policyholder in this personal injury action had failed to negotiate in good faith at a mandatory settlement conference. Because neither Code of Civil Procedure section 177.5 nor California Rules of Court, rule 2.30 nor any other statute or court rule authorizes the imposition of sanctions on a nonparty insurer in this circumstance, we reverse.

**FACTUAL AND PROCEDURAL BACKGROUND**

1. *The Underlying Litigation*

Miguel Vidrio, Jr. and Patricia Salinas filed a lawsuit in December 2006 alleging they had been injured a year earlier when, as a result of Maria Hernandez’s negligence, the car Hernandez was driving collided with the car being driven by Vidrio. Hernandez was insured by Mercury, which provided her with a defense.

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2. *The Mandatory Settlement Conference*

A mandatory settlement conference was scheduled for December 7, 2007. ***

Hernandez was represented at the mandatory settlement conference by [her counsel] Chalamidas. Mercury’s adjuster Ambriz, who had full authority to settle the case, was also present. Plaintiffs were * * * * represented by a specially appearing contract attorney (James M. McKanna) * * * *. Vidrio and Salinas made settlement demands of $15,000 each (demands that had previously been served on counsel for Hernandez

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1 Statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 References to rule or rules are to the California Rules of Court. References to Local Rule or Local Rules are to the Local Rules of the Superior Court of Los Angeles County.
pursuant to section 998(a). Hernandez repeated [a] prior settlement offer of $1,000 for each plaintiff. Neither side made a counter-proposal, and the case did not settle.

Following the settlement conference the court held a proceeding on the record at which it observed the rules of court, the Local Rules and the litigation guidelines published by the Los Angeles County Bar Association “all mandate good faith representation by counsel as well as the authorized representative of the company, in this case Mercury Insurance.” The court then stated, “* * * Counsel and the adjuster came to court today unprepared to discuss damages, unprepared to discuss costs of defense, unprepared to have an intelligent conversation about how they derive a thousand dollars in total to be paid to the plaintiffs. * * * I have every intention of imposing a monetary sanction. I find there was bad faith conduct by counsel.”

* * * The court then issued an order to show cause why sanctions should not be imposed, naming Chalamidas, Ambriz and Mercury as respondents, and set a hearing for December 21, 2007.

3. The Hearing on the Order to Show Cause Regarding Sanctions

* * *

At the hearing, * * * the court stated it was relying on rule 3.1380 * * * in conducting the proceeding. As described by the court, that rule requires a good faith offer of settlement by a defendant as part of its mandatory settlement conference statement and also requires the parties participating in the conference to comply with any additional requirements imposed by the court’s local rules. * * * With respect to sanctions the court said it could rely on either section 177.5 or rule 2.30, with rule 2.30 being “more specific to imposing sanctions relative to settlement conferences.”

Following the recitation of its authority for proceeding with the sanctions hearing, the court * * * was harshly critical of the conduct of Hernandez’s representatives at the settlement conference itself and, in particular, the refusal to offer more money than the section 998 offer of $1,000 for each plaintiff: “* * * That is the reason why [sanctions are being imposed].”

* * *

After hearing argument from counsel, the court ordered sanctions in the sum of $1,500 payable directly to the court and $357.50 payable to

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* CCP § 998 permits a party to make an offer of judgment or compromise during the pendency of a lawsuit. If the offer is accepted, judgment is entered in accordance with its terms. If the offer is not accepted, the party who did not accept the offer will be subject to various cost consequences if he fails to obtain a more favorable judgment at trial or arbitration. See Chapter 5(E)(3).
plaintiffs' counsel—the attorney fees incurred in connection with the sanctions hearing, not the mandatory settlement conference itself. The monetary sanctions were imposed against Mercury only, not Chalamidas or Ambriz. * * *

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DISCUSSION

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2. Governing Statutes and Rules of Court

a. Settlement conference procedure

Rule 3.1380 *** governs mandatory settlement conferences. *** Rule 3.1380(b) requires the personal attendance of “[t]rial counsel, parties, and persons with full authority to settle the case” at such conferences unless excused by the court for good cause. Rule 3.1380(c) requires each party to submit to the court a mandatory settlement conference statement[:] the plaintiff's statement must include a good faith settlement demand (rule 3.1380(c)(1)); the defendant’s statement a good faith offer of settlement (rule 3.3180(c)(3)). * * *

Local Rule 7.9(d) * * * provides, unless expressly excused for good cause by the judge, “all persons whose consent is required to effect a binding settlement shall be personally present at a scheduled settlement conference. Included among such persons are: the litigants * * *, [and] an authorized representative of any insurance company which has coverage involved in the case ***.” Local Rule 7.9(d)(3) further specifies, “Attorneys for all parties appearing in the action shall attend the conference and be intimately familiar with the pertinent available evidence involving both liability and damages. Such attorney shall be prepared to discuss the case in depth and, except for good cause shown, shall be the attorney who will try the case.”

Local Rule 7.9(e) requires the parties to submit a written settlement conference statement * * *. Unlike rule 3.1380 the Local Rule does not expressly require a settlement demand or offer.

b. The authority to impose sanctions

Section 177.5 authorizes a judicial officer to impose reasonable monetary sanctions, not to exceed $1,500, payable to the court, “for any violation of a lawful court order by a person, done without good cause or substantial justification.” The section defines “person” to include “a witness, a party, a party’s attorney, or both.” Section 575.2 provides a court’s local rules may authorize sanctions against “any counsel, a party
represented by counsel, or a party if in pro se,” for the failure to comply with any of the requirements of local rules.\textsuperscript{5}

Rule 2.30(b) authorizes, “in addition to any other sanctions permitted by law,” imposition of reasonable monetary sanctions, payable to the court or an aggrieved person or both, for the failure without good cause to comply with any rule of court relating to general civil cases. For purposes of rule 2.30, “person” means “a party, a party’s attorney, a witness, and an insurer or any other individual or entity whose consent is necessary for the disposition of the case.”

Local Rule 7.13, one of a series of rules adopted as part of the Los Angeles Superior Court’s delay reduction program, provides the court may impose appropriate sanctions “for the failure or refusal (1) to comply with the Rules, (2) to comply with any order made hereunder or (3) to meet the time standards and/or deadlines established herein.” Local Rule 7.13 provides, “Such sanctions may be imposed on a party and/or, if appropriate, on counsel for such party.”

Like Local Rule 7.13, Local Rule 8.0 authorizes sanctions, including monetary sanctions, for the failure or refusal to comply with the court’s Local Rules. Monetary sanctions “may be imposed for such violation against any party, party’s attorney or witness payable to the County of Los Angeles.”

3. The Sanctions Award Against Mercury was not Authorized by Statute or Court Rule

California courts have inherent power to “take appropriate action to secure compliance with its orders, to punish contempt, and to control its proceedings.” (Bauguess v. Paine (1978) 22 Cal.3d 626, 637, 150 Cal.Rptr. 461, 586 P.2d 942.) However, our trial courts have no inherent power to impose monetary sanctions. (Bauguess; Trans-Action Commercial Investors v. Firmaterr (1997) 60 Cal.App.4th 352, 366–367, 70 Cal.Rptr.2d 449.)

a. No statute authorizes the imposition of sanctions against Mercury

Mercury correctly asserts no statute authorizes the imposition of sanctions against a nonparty insurer for its purported failure to participate

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\textsuperscript{5} The imposition of sanctions by the trial court is authorized by a number of other statutes. For example, section 128.7, subdivision (c), permits the award of monetary sanctions for violations of the requirement that court papers be signed, certifying that a pleading, petition, written notice of motion or other similar paper has not been presented for an improper purpose and all claims, defenses or other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension of existing law or establishment of new law. (See also Gov.Code, § 68608, subd. (b) [“Judges shall have all the powers to impose sanctions authorized by law. . . . Judges are encouraged to impose sanctions to achieve the purposes” of the Trial Court Delay Reduction Act].) However, the only statute cited by the trial court was section 177.5; and we are, in any event, not aware of any other possible statutory authority for the award of sanctions against a nonparty insurer for failure to participate in good faith in a mandatory settlement conference.
in good faith in a mandatory settlement conference. Section 177.5, the only statute cited by the trial court, is inapplicable *. * *. First, it empowers a court to impose monetary sanctions for violation, without good cause, of a lawful court order. Even if Mercury did direct its adjuster and the counsel it retained for Hernandez not to negotiate in good faith, that conduct did not violate any court order. Second, section 177.5 provides sanctions may be awarded against a “person,” defined to include “a witness, a party, a party’s attorney, or both.” Mercury does not fall within any of those categories *. * *. 

*. * * [L]ike section 177.5, neither section 575.2 nor Local Rules 7.13 and 8.0 include the authority to sanction a nonparty insurer. *. * *

Moreover, although Local Rule 7.9(d) provides for the mandatory attendance at a settlement conference of *. * * “an authorized representative of any insurance company which has coverage involved in the case,” nothing in Local Rules 7.9(d) or 7.9(e) *. * * purports to require the participants, once present, to negotiate with each other. Thus, neither section 575.2 nor the Local Rules justified the award of sanctions against Mercury.

b. The sanctions award was not properly based on rule 2.30

*. * * [R]ule 2.30, identified by the trial court as being “more specific to imposing sanctions relative to settlement conferences,” is the only possible source of authority for the sanctions imposed against [Mercury]. Unlike the statutes and local rules discussed above, rule 2.30 expressly authorizes the court to order payment of reasonable monetary sanctions to the court, an aggrieved person or both not only by a party or the party’s attorney but also by “an insurer or any other individual or entity whose consent is necessary for the disposition of the case” for any failure without good cause to comply with applicable provisions of the California Rules of Court. Nonetheless, Mercury argues rule 2.30’s authorization for an award of sanctions against a nonparty insurer is invalid because it is not grounded in statute and, in any event, its conduct at the mandatory settlement conference did not violate any rule of court and is not sanctionable. *. * *

Prior to July 1, 2001, former rule 227 (now rule 2.30) provided, “The failure of any person to comply with these rules, local rules, or order of the court, unless good cause is shown, or failure to participate in good faith in any conference those rules or an order of the court require, is an unlawful interference with the proceedings of the court. The court may order the person at fault to pay the opposing party’s reasonable expenses and counsel fees and to reimburse or make payment to the county, may order an appropriate change in the calendar status of the action, and for failure to comply with local rules may impose sanctions authorized under section 575.2 of the Code of Civil Procedure and under section 68608(b) of the Government Code, in addition to any other sanction permitted by law.”
The rule was substantially revised, effective July 1, 2001, in response to the Court of Appeal’s decision in *Trans-Action Commercial* **.* After thoroughly reviewing the statutory authority governing sanctions, and particularly attorney fees as sanctions, the *Trans-Action Commercial* court held former rule 227 was invalid “to the extent the rule purports to allow sanctions inconsistent with the limits and conditions provided in an applicable statute.” The court suggested the defect in the rule could be cured by amending it to incorporate the statutory terms and conditions for sanctions awards.

**[T]**he revised rule, as proposed and then adopted by the Judicial Council, provided, in addition to any other sanctions permitted by law, “the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure to comply with **[the rules of court governing civil pretrial and trial procedure], unless good cause is shown.” (The amended rule also provided for the same procedural safeguards contained in section 177.5, authorizing monetary sanctions for violations of court orders.)

In proposing the rule expressly authorizing monetary sanctions for failure to comply with the civil pretrial and trial rules of the California Rules of Court, the [Judicial Council’s] civil and small claims advisory committee’s report explained, “The Judicial Council is constitutionally empowered to ‘adopt rules for court administration practice, and procedure, not inconsistent with statute.’ Unless they transcend legislative enactments, the rules and procedures adopted by the Judicial Council have the force of law. [¶] There is presently no statute that specifically provides for the award of sanctions specifically for failure to comply with the California Rules of Court. Because of the absence of any direct statute, it is entirely appropriate for the Judicial Council to exercise its rule-making authority to establish a clear sanctions rule in this area. **[ ]**

If Mercury contends the Judicial Council exceeded its authority by adopting a rule providing for monetary sanctions for violations of the rules of court—a provision that, concededly, is not expressly authorized by statute, but also does not conflict with any statute **[ or readily determinable statutory intent **—we disagree. The Judicial Council’s constitutional authority to adopt rules for court administration, practice and procedure “[t]o improve the administration of justice” (Cal. Const., art. VI, § 6, subd. (d)), we believe, necessarily includes the concomitant authority to create the means to enforce those rules, provided only that “[t]he rules adopted shall not be inconsistent with statute.” **[ ]**

Former rule 227 was further amended, effective January 1, 2004 **.* These amendments ** modified the definition of a “person” subject to sanctions for violating a rule of court to specifically include “an insurer or
any other individual or entity whose consent is necessary for the
disposition of the case.” This revised definition ** is now included in rule
2.30(b) **. 

To the extent Mercury’s contention rule 2.30 is invalid focuses on this
expanded definition of “person” to include a nonparty insurer—an
argument premised on the absence of any statutory provision expressly
authorizing imposition of monetary sanctions against a nonparty who is
not a witness ** —for the reason articulated above we are inclined to
disagree. The Judicial Council’s constitutional rulemaking power plainly
extends to the adoption of a rule requiring individuals or entities with
authority to consent to the settlement of a case participate in a mandatory
settlement conference, as does rule 3.1380(b). Certainly such a rule of
court, an essential component to the effective and timely resolution of civil
cases, is not in any way inconsistent with any statute or statutory intent.
*** Ensuring compliance with this rule, like other rules of court, depends
at least in part on the trial court’s ability, in an appropriate situation, to
impose sanctions for its violation. ***

We ** agree with Mercury nothing in rule 2.30, rule 3.1380 or any
other rule of court pertinent to the conduct of a mandatory settlement
conference justified the award of monetary sanctions in this case. Prior to
the amendments following the decision in Trans-Action Commercial,
effective January 1, 2001, former rule 227 provided the “failure to
participate in good faith in any conference” required by court rule or court
order was sanctionable conduct. That language was eliminated by the
January 1, 2001 amendments, and neither current rule 2.30 nor any other
rule of court purports to require good faith negotiation by participants in
settlement conferences. Yet that is precisely the reason the trial court gave
for imposing sanctions in this case **.

In sum, even were we to agree with the trial court’s assessment of the
conduct of counsel and the adjuster, the failure to increase a settlement
offer or to otherwise participate meaningfully in settlement negotiations
violates no rule of court and is not a proper basis for an award of sanctions.
*** Hernandez filed an appropriate settlement conference statement; her
lawyer and Mercury attended the conference and participated in it. While
the trial court’s frustration at the parties’ lack of movement is
understandable, no more was required.

DISPOSITION

The order imposing sanctions is reversed. ***

NOTES AND QUESTIONS

1. As explained in Vidrio, the trial court relied on CRC 2.30 as the basis
of its sanctions award against the defendant’s insurer. Despite several
revisions of CRC 2.30 since 2001, the Judicial Council did not remove the
language authorizing a court to impose sanctions under the rule, “[i]n addition to any other sanctions permitted by law.” Does this quoted language improperly permit a trial court to order sanctions that might violate the constitutional requirement that statewide rules of court not be inconsistent with statute? According to Vidrio, what does “not inconsistent with statute” mean?

2. The California Supreme Court addressed the power of the Judicial Council to adopt rules pursuant to statutory authority in Jevne v. Superior Court, 35 Cal.4th 935, 28 Cal.Rptr.3d 685, 111 P.3d 954 (2005). The Court upheld the validity of rules governing ethics standards for neutral arbitrators in contractual arbitration proceedings because they “effectuate the enacting body’s intent.” See Chapter 5(A)(1). Although the rules were somewhat broader than the literal terms of the statute, they did not run afoul of the statutory authority because they reasonably implemented the statutory purpose. Do you think that Vidrio was particularly concerned about remaining true to statutory intent in its analysis of CRC 2.30’s sanctioning authorization? What criteria might a court use to determine whether a rule has strayed from the original statutory authority?

3. Per Vidrio, the court may issue “reasonable monetary sanctions” under CRC 2.30 against a party that violates a statewide rule of court. An important limitation on the court’s power to impose monetary sanctions, however, is found in CRC 2.30(d), regarding the award of attorney’s fees as a sanction. “Rule 2.30(d) authorizes the court to award reasonable attorney fees incurred in connection with the [CRC 2.30] motion for sanctions, not attorney fees incurred as a result of the rule violation.” Sino Century Development Ltd. v. Farley, 211 Cal.App.4th 688, 698, 149 Cal.Rptr.3d 866, 873 (2012). Why do you suppose the Judicial Council placed this limitation on the award of attorney’s fees as a sanction?

Local Rules. California’s Constitution, Code of Civil Procedure, Rules of Court, and case law generally apply statewide. While these are the most comprehensive sources of California’s procedural laws, they do not cover every conceivable situation. In a state as vast and diverse as California, some procedural matters may pose persistent problems in the superior courts of certain counties, but not in others. Issues may occur with enough frequency to warrant development of a local rule.

Local rules provide written guidance to court officers and litigants in a particular court. The rules can have the same force of law as statutes and statewide rules of court. The foundation for California’s local court rules is Cal.Gov’t Code § 68070(a), which states: “Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council.” CCP § 575.1(a) and CRC 10.613 set out the process by which a superior court may adopt local rules to facilitate its operation.
All enacted local rules are sent to the Judicial Council, which in turn forwards copies to every county court and law library in the state. Each California court has a website that contains information about that court’s local rules and policies. Those sites can be accessed at: http://www.courts.ca.gov/3027.htm. Attorneys should always review the special procedural requirements of any court in which they will appear.

The statutory authority given to courts under CCP § 575.1 to adopt local rules is severely limited by CRC 3.20. Rule 3.20(a) precludes courts from enacting local rules purporting to govern a wide range of pretrial procedures:

The Judicial Council has preempted all local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers. No trial court * * * may enact or enforce any local rule concerning these fields. All local rules concerning these fields are null and void unless otherwise permitted or required by a statute or a rule in the California Rules of Court.

As a result of the preemptive effect of CRC 3.20, numerous pretrial procedures that formerly would have appeared in a county’s set of local rules are now contained only in the CRC. For example, statewide rules govern motions for change of venue (CRC 3.1326), discovery motions (CRC 3.1020), and motions for summary judgment (CRC 3.1350).

While CRC 3.20(a) broadly impacts civil pretrial matters, CRC 3.20(b) contains several exceptions. These include trial and post-trial proceedings, as well as local case management rules adopted under the Trial Court Delay Reduction Act. Under the case management program described in Chapter 5(B), for example, a court’s local rules, rather than the CRC, ordinarily determine several key litigation time limits, such as those governing service of the complaint.

CRC 3.20 has been blamed for the “gradual but steady erosion in the rule-making authority of the trial courts in California.” Arnold H. Gold, California Rules!: Important Local Rules of the Los Angeles Superior Court Have Been Trumped by California’s New Rule of Court 981.1 [now CRC 3.20] and Court Unification, 23 L.A.Law. 36, 38 (Sept.2000). One might wonder whether, in the interest of statewide uniformity, the Judicial Council has overstepped its authority in diminishing the broader local rulemaking power given to courts by the Legislature, as evidenced in CCP § 575.1 and Cal.Gov’t Code § 68070(a).

The court or presiding judge promulgating a local rule must avoid any conflict with other primary sources of California procedural law. As stated by the California Supreme Court:
Reviewing courts have not hesitated to strike down local court rules or policies on the ground they are inconsistent with statute, with California Rules of Court promulgated by the Judicial Council, or with case law or constitutional law. Appellate decisions have invalidated local rules or restricted their application in many areas of affected litigation, including dissolution actions, litigation under the Trial Court Delay Reduction Act ***, complex litigation, and general civil litigation. We also have disapproved rules and procedures adopted by the Courts of Appeal, as well as rules adopted by the Judicial Council.

Elkins v. Superior Court, 41 Cal.4th 1337, 1351–1352, 63 Cal.Rptr.3d 483, 490–491, 163 P.3d 160 (2007) (holding family court local rule requiring parties in dissolution matters to present their case by declarations invalid because inconsistent with statute); see also Ghaffarpour v. Superior Court, 202 Cal.App.4th 1463, 136 Cal.Rptr.3d 544 (2012) (local rule governing timing of filing of motion to disqualify judge was void because it conflicted with less restrictive statutory time limits).

Local Policies and Practices. In the absence of an express local court rule, individual superior courts or judges within them may resort to their inherent power to control judicial proceedings. “[A]ll courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority.” Litmon v. Superior Court, 123 Cal.App.4th 1156, 1174, 21 Cal.Rptr.3d 21, 33 (2004). Several statutes confer this authority as well. CCP § 128(3) permits a court to “provide for the orderly conduct of proceedings before it.” CCP § 187 gives a court “all the means necessary to carry it[s jurisdiction] into effect.” Cal.Gov’t Code § 68070(a) also permits a court to make rules for its own governance, as long as these rules are not inconsistent with statutes or the statewide CRC. “[R]egardless of their source of authority, ‘trial judges have no authority to issue courtroom local rules which conflict with any statute’ or are ‘inconsistent with law.’ ” Litmon, 123 Cal.App.4th at 1175, 21 Cal.Rptr.3d at 34.

The authority to control judicial proceedings may be exercised in a variety of ways. The presiding superior court judge, for example, may require adherence to certain procedures as a condition for lawyers to litigate matters in that county’s superior court or one of its branches. In addition to county- or branch-wide policies, an individual judge may adopt a policy that requires a particular procedure or practice in his or her courtroom. Local policies and practices exist on the appellate level as well. E.g., Internal Operating Practices and Procedures of the [Court of Appeal]
Fourth Appellate District, Division One (2012) (containing general information about the court and samples of forms).

A local policy will be invalid, however, unless it is adopted in accordance with the publication, comment and filing requirements specified by statute and the CRC. Those requirements apply to “every rule, regulation, order, policy, form, or standard of general application adopted by a court to govern practice or procedure in that court or by a judge of the court to govern practice or procedure in that judge’s courtroom.” CRC 10.613(a). For example, a rule contained only in a memorandum of the supervising judge of a court branch does not satisfy the adoption requirement. See Hall v. Superior Court, 133 Cal.App.4th 908, 35 Cal.Rptr.3d 206 (2005). Neither does the publication of local practices on a court’s website. In re Gray, 179 Cal.App.4th 1189, 102 Cal.Rptr.3d 551 (2009).

A local policy or practice may take one of several forms. One type is a General Order regulating the procedures for particular matters in a superior court. The order, however, will be invalid if it conflicts with statutory law. In the San Francisco County Superior Court, for example, a General Order permitting expedited summary judgment motions in asbestos litigation to be heard on 60–day notice improperly conflicted with the 75–day notice required under the statute governing summary judgment motions. See Boyle v. CertainTeed Corp., 137 Cal.App.4th 645, 40 Cal.Rptr.3d 501 (2006).

Procedural manuals are another means of locally regulating court procedure. These relatively informal manuals are typically written and promulgated by judges in one court to provide guidance to practitioners in a comparatively narrow area. They also must be consistent with statute. For example, the Los Angeles County Superior Court adopted a Judicial Arbitration Handbook, which permitted a procedure for filing an arbitration award that differed from the procedure required by a California Government Code section. The court of appeal invalidated the procedure set forth in the Handbook, stating that “[a] local court rule or practice which is inconsistent with a statute enacted by the Legislature is invalid.” Mentzer v. Hardoin, 28 Cal.App.4th 1365, 1372, 34 Cal.Rptr.2d 214, 218 (1994).

California Code of Regulations. Administrative regulations comprise an important component of California primary authority. The California Code of Regulations, formerly known as the California Administrative Code, is a compilation of regulations enacted by administrative agencies, which are part of the executive branch of the state’s government. The Office of Administrative Law oversees the adoption of regulations. Some of these
regulations govern procedural matters, such as those concerning judicial review of administrative decisions.

Administrative regulations are either quasi-legislative or interpretive. Quasi-legislative regulations are those resulting from the Legislature’s express statutory delegation of rule-making power to the administrative agency. These regulations are entitled to substantial judicial deference. **Kawamura v. Organic Pastures Dairy Co., 160 Cal.App.4th 1374, 73 Cal.Rptr.3d 500 (2008).** An administrative regulation or action that amends, enlarges, or impairs the scope of the statute, however, will be found void. **San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653, 42 Cal.Rptr.3d 868, 133 P.3d 1028 (2006).** Interpretive regulations, on the other hand, are those that represent the agency’s interpretation of statutory language. The degree of judicial deference accorded to interpretive regulations depends on several factors, including whether the agency’s interpretation is longstanding. **Kawamura, 160 Cal.App.4th 1374, 73 Cal.Rptr.3d 500.**

2. SECONDARY AUTHORITIES

*Legislative Histories.* The written records of various state legislative sessions can be a useful resource for judicial interpretation of statutory changes. Cases of first impression are often decided with the aid of the legislative history accompanying the statute in question.

A trial or appellate court may take judicial notice of “cognizable” legislative history when the associated statutory language is ambiguous. Cognizable history “shed[s] light on the collegial view of the Legislature *as a whole*” and includes such items as committee reports, transcripts of committee hearings, and reports of the Legislative Analyst. Items that only reflect the statements of individual legislators, such as letters to particular members or the governor, are not considered cognizable legislative history. **Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal.App.4th 26, 30–31, 34 Cal.Rptr.3d 520, 523 (2005).** See also **Bonanno v. Central Contra Costa Transit Authority, 30 Cal.4th 139, 132 Cal.Rptr.2d 341, 65 P.3d 807 (2003) (comments of California Law Revision Commission are persuasive evidence of Legislature’s intent).**

Opinions of the California Attorney General. The Attorney General of California provides legal opinions when requested by state, county or city agencies. These opinions assist agencies in resolving practical issues for which primary authorities do not provide adequate guidance. Many of these opinions are published. “Opinions of the Attorney General, while not binding, are entitled to great weight. In the absence of controlling authority, these opinions are persuasive since the Legislature is presumed to be cognizant of that construction of the statute . . . and that if it were a
misstatement of the legislative intent, some corrective measure would have been adopted.” City of Woodlake v. Tulare County Grand Jury, 197 Cal.App.4th 1293, 1302 n.4, 129 Cal.Rptr.3d 241, 246 n.4 (2011); see also Ennabe v. Manosa, 58 Cal.4th 697, 168 Cal.Rptr.3d 440, 319 P.3d 201 (2014) (approving reliance on Attorney General opinion to interpret statute governing sale of alcoholic beverages). Moreover, Attorney General opinions merit “extra weight * * * in areas of special expertise.” Lexin v. Superior Court, 47 Cal.4th 1050, 1087 n.17, 103 Cal.Rptr.3d 767, 796 n.17, 222 P.3d 214 (2010).

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Scholarly Publications. Various scholarly treatises, encyclopedias, and legal periodicals are extremely valuable resources for information on California procedural law. They are considered “secondary” authorities because they contain an expert’s perspective on what the law is or should be, as opposed to being the law itself.

The ancillary nature of treatises and other secondary authorities does not at all mean that they are of limited persuasive value. Lawyers and judges routinely draw upon these authorities in their research and formulation of legal analysis. The preeminent example of a highly regarded analysis of California law is the body of work of Bernard E. Witkin, whose vast writings on California procedure, evidence, criminal law, and civil law have been cited in countless judicial opinions. His treatises have been described as “typically sage, accurate, and thoroughly succinct.” People v. Funches, 67 Cal.App.4th 240, 243, 78 Cal.Rptr.2d 882, 883 (1998). They have “captured and controlled the state law of California.” Ann Bartow, The Hegemony of the Copyright Treatise, 73 U.Cin.L.Rev. 581, 642 (2004).

In a tribute to Witkin following his death in 1995, a former California law school dean described Witkin’s extraordinary impact as follows:

Bernie’s monumental 33-volume Summary of California Law was quintessentially practical—summarizing, condensing and codifying virtually all of the state’s rules of law for the profession’s lawyers and judges. His genius, as described by Justice Norman Epstein, was his ability to synthesize, analyze and state the law in clear, concise terms. (Still, it should not be thought that Bernie simply reported the law. In fact, he periodically made it as well. A prominent California litigator once told me that no matter how clear the judicial opinions themselves may have been on a particular point, Witkin’s pronouncement as to what the courts had held—and what the rule was—represented the higher authority.)

The ubiquity and utility of scholarly works on California law, however, is not necessarily synonymous with precise descriptions of the law’s actual content. As stated by some prominent legal research experts:

The narrative simplicity of some secondary sources may, however, carry disadvantages. Secondary sources which seek to provide clear and concise statements of law often oversimplify complicated concepts and describe as settled and fixed a body of law which is in fact unsettled and changing. Many text writers are more comfortable with order and certainty, while the law is in reality often disordered and uncertain. The researcher is cautioned to use secondary sources for what they can provide, but to be aware of these dangers.


Practice Guides. Practice guides serve as yet another resource for practitioners, judges, law professors, and students. They provide busy lawyers and judges with convenient and current summaries of the procedural requirements of state and federal law. Comprehensive and well-organized practice guides for California procedural law are The Rutter Group’s annually updated publications: Civil Procedure Before Trial; Civil Trials and Evidence; and Civil Appeals and Writs. For a one-volume practitioner’s guide, see David I. Levine, Michol O’Connor & William R. Slomanson, O’Connor’s California Practice: Civil Pretrial (2014 ed.).

Jury Instructions. The Judicial Council of California has produced “form” or “pattern” civil jury instructions called California Civil Instructions (CACI). These standardized jury instructions provide valuable guidance for attorneys researching substantive and procedural areas of law. “Pattern jury instructions . . . while designed to accurately reflect the law, are not the law itself.” Christian Research Institute v. Alnor, 148 Cal.App.4th 71, 82, 55 Cal.Rptr.3d 600, 610 (2007). See also Bowman v. Wyatt, 186 Cal.App.4th 286, 298 n.6, 111 Cal.Rptr.3d 787, 795 n.6 (2010) (pattern jury instructions not entitled to presumption of correctness). In addition to the text of the instructions themselves, CACI includes references to relevant primary and secondary authorities. Additional resource information about CACI is contained on the website for the
California courts: http://www.courts.ca.gov/partners/317.htm. See also Chapter 6(B)(1).

C. ADDITIONAL RESEARCH RESOURCES

There are several additional resources for answering procedural questions beyond those included in this casebook. Citations in the book’s text and notes are useful starting points. Other helpful bibliographic resources for researching the varied aspects of California procedural law are: John K. Hanft, Legal Research in California (7th ed.2011); Heather C. Macfarlane & Suzanne E. Rowe, California Legal Research (2d ed.2013); and Larry D. Dershem, California Legal Research Handbook (2d ed.2008). In addition, the State Bar of California publishes two practical resources discussing recent developments and topics of interest in California civil procedure. They are: California Litigation (published three times a year); and California Litigation Review (published annually).

D. THE CHOICE BETWEEN STATE AND FEDERAL COURT

The casebooks used in federal civil procedure courses occasionally address some of the differences between state and federal procedure. Unfortunately, there is a very limited body of literature on a question often asked in practice:

If I have a choice between pursuing an action in state court or in federal court, why should I choose one forum over the other?

Two of the most important considerations in deciding whether you even have a choice are standing and subject matter jurisdiction.

(a) Standing. Both the federal and state courts require a party bringing an action or an appeal to have standing. In your federal civil procedure course, you likely studied Article III of the U.S. Constitution, which requires that federal courts decide only actual “cases or controversies.” To possess Article III standing, federal courts must “satisfy themselves that ‘the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction.’” Summers v. Earth Island Institute, 555 U.S. 488, 493, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009). “The plaintiff must have suffered or be imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.” Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. ___, ___, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014). In addition to applying this fundamental “injury in fact” requirement, the federal courts evaluate “prudential considerations,” which include whether the plaintiff’s claims
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fall within the “zone of interests” sought to be protected, and whether the
injury is reasonably confined to an individual or small group as opposed to
constituting a “generalized grievance.” Id.

Under California law, “[e]very action must be prosecuted in the name
of the real party in interest.” CCP § 367. The real party in interest is the
party with standing to bring an action in California courts. If standing is
not granted by a specific statutory provision, the real party in interest is
usually deemed to be the person to whom the substantive law grants the
right to sue for relief. The policy underlying California’s standing doctrine
is “to ensure that the courts will decide only actual controversies between
the parties with a sufficient interest in the subject matter of the dispute to
press their case with vigor.” Common Cause v. Board of Supervisors, 49

While a party might have standing under California law, it does not
necessarily follow that the party will have standing under federal law. For
discussion of this point in the context of the extensive litigation challenging
California’s Proposition 8 (which mandated that marriage be defined as
one occurring only between a man and a woman), see casebook p. 307, Note 5.

(b) Concurrent v. Exclusive Subject Matter Jurisdiction. The basic civil
procedure course covered the key features of federal subject matter
jurisdiction. Unlike the general jurisdiction exercised by the state courts
(see Chapter 2(A)), federal courts have restricted subject matter
jurisdiction.

Federal subject matter jurisdiction may be either concurrent or
exclusive. There is concurrent jurisdiction between the state and federal
courts if:

(1) the action arises under federal law, or is a diversity case where the
amount in controversy exceeds $75,000; and

(2) the particular case does not fall within the exclusive jurisdiction of
either judicial system.

As an example of concurrent jurisdiction between the federal and
California courts, imagine a claim alleging a violation of a federal civil
rights statute. Even though this claim arises under federal law, it is usually
presumed that the state and federal courts have concurrent jurisdiction
where Congress is silent about which court system may enforce the
833 (1876).

Sometimes a litigant will not be presented with a choice between state
and federal court because subject matter jurisdiction may lie exclusively
within the federal courts. Exclusive federal jurisdiction exists only when
there is: (a) an express congressional divestment of concurrent jurisdiction;
(b) an unmistakable implication from the legislative history of the federal statute; or (c) a clear incompatibility between the relevant federal interests and state court jurisdiction. See e.g., Mims v. Arrow Financial Services, LLC, 565 U.S. ___, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012) (concurrent jurisdiction for actions arising under federal Telephone Consumer Protection Act); and Tafflin v. Levitt, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) (concurrent federal and state court jurisdiction over RICO claims).


The U.S. Supreme Court has shed light on the narrow circumstances in which the strong presumption of concurrency [between federal and state courts] will be defeated: first, when Congress expressly ousts state courts of jurisdiction; and second, “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.” Focusing on the latter circumstance, we have emphasized that only a neutral jurisdictional rule will be deemed a “valid excuse” for departing from the default assumption that “state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”


Assuming the existence of standing and concurrent subject matter jurisdiction over a case that would permit it to be heard in either judicial system, there are a number of tactical reasons to forum-shop. One of the best examples of such maneuvering can be deduced from the facts of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). As you may recall from your federal procedure course, the plaintiffs purchased an Audi automobile in New York, ultimately intending to drive it to a new home in Arizona. Unfortunately, their trip
was interrupted by the now-famous accident on an interstate highway in Oklahoma. The Supreme Court decision dealt only with the preliminary personal jurisdiction issue of whether the suit was sustainable in an Oklahoma state court.

The inter-system tactical skirmish was rather subtle. It is obvious why the New York retail dealer, Seaway Volkswagen, Inc. (Seaway), and the New York regional distributor, World-Wide Volkswagen Corporation (WWVW), moved for a dismissal of their cases in the Oklahoma state trial court. Neither arguably had any forum-affiliated contacts with Oklahoma. But why did the German manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi), and the American importer, Volkswagen of America, Inc. (Volkswagen), concede personal jurisdiction? They, too, could have joined in the motion to have the action dismissed on the grounds of lack of personal jurisdiction. And why did the plaintiffs relentlessly pursue the comparatively small retailer and distributor all the way to the Supreme Court, when the other defendants—who were solvent and responsible for any design or manufacturing defect—were parties to the Oklahoma action?

Some answers are suggested by the procedural developments after the United States Supreme Court reversed the Oklahoma state court’s assertion of personal jurisdiction. Seaway and WWVW were dismissed from the case for lack of personal jurisdiction. Removal had been impossible prior to the successful personal jurisdiction motion of the New York defendants because the plaintiffs remained domiciled in New York, given that they did not reach their intended Arizona domicile. The initial departure of WWVW and Seaway from this suit facilitated the exercise of federal subject matter jurisdiction because complete diversity now existed among the plaintiffs and defendants. Audi and Volkswagen had the option of remaining in the Oklahoma state court or removing this case to a federal court in Oklahoma. They decided to remove the case.

One factor affecting this procedural smorgasbord could have been the traditional concern with jury bias favoring individual plaintiffs over nonresident defendant corporations. Another factor might have been the potential size of jury awards. It appears that jury verdicts were then smaller in the Oklahoma federal courts than in the particular county court. That may explain why the plaintiffs pursued the smaller (nondiverse) defendants all the way to the U.S. Supreme Court. Those defendants tried equally hard to get themselves dismissed during the personal jurisdiction segment of this litigation.

As the facts unfolded, the role that these tactical factors could have played was supported by the verdict. After removal, an Oklahoma federal jury rendered a verdict in favor of Audi and Volkswagen. See Robinson v. Audi NSU Auto Union Aktiengesellschaft, 739 F.2d 1481 (10th Cir. 1984). You can sense the tactical maneuvering regarding: (a) which defendants...
the plaintiffs should name in their suit; (b) whether to seek or try to prevent removal to federal court; and (c) the comparative size of jury awards in state and federal courts.

The saga of this case is detailed in Charles W. Adams, World-Wide Volkswagen v. Woodson—The Rest of the Story, 72 Neb.L.Rev. 1122 (1993). The article ends by mentioning a then-unresolved separate lawsuit filed by the plaintiffs against Audi in the district court in Oklahoma to vacate the underlying judgment for defendants on the ground of fraud upon the court. The district court, finding the evidence insufficient to support the claim of fraud, dismissed the action. Plaintiffs appealed. The Tenth Circuit affirmed the judgment. See Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259 (10th Cir.1995), cert. denied, 516 U.S. 1045, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996). In a companion case plaintiffs brought against Volkswagenwerk AG alleging fraud, product liability and other claims, the Tenth Circuit also upheld the district court’s judgment dismissing plaintiffs’ action. See Robinson v. Volkswagenwerk AG, 56 F.3d 1268 (10th Cir.1995), cert. denied, 516 U.S. 1045, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996). Plaintiffs emerged from years of litigation focused primarily on procedural issues with no relief.

As you can see, analyzing the choices between the state and federal systems at the early stages of a lawsuit can help you develop a better sense of the tactical considerations that underscore the selection of a forum for your client in California. For a deeper look at the significance of the differences between state and federal civil procedure, see William R. Slomanson, Practice and Pleading: Choosing State or Federal Procedure, 27 Cal.Law. 37 (Jan.2007).

E. THE EDIBLE WIDGETS HYPOTHETICAL

The following hypothetical highlights some of the important distinctions between state and federal procedure in California. There is a twofold purpose for considering this hypothetical at the outset of the course. The first is to expose you to the fact that many important state procedural rules were not addressed in your federal procedure course. The second is to provide a summary of some of the content of this state-oriented course. This hypothetical is designed to raise questions now and to serve as a springboard for others addressed later in various sections of this casebook:

The Edible Widgets and the Law Students

Pam and Paul are law students in California. One day, they decide to take a break from their studies. They go to Dan’s Deli, an entirely fictional fast-food delicatessen near campus. The menu includes “Edible Widgets,” an entrée that Pam and Paul cannot resist. After consuming their Edible Widgets, they return to the law library to read the next assignment for
their state civil procedure course, and they soon become sick from food poisoning. Pam's illness is short-lived and she recovers by the next day. Paul, however, is hospitalized for several days. He suffers residual pain and discomfort, which causes him to miss all of his classes for several weeks.

Pam and Paul consult Lee—the lawyer who is your boss. They want your law firm to determine whether they can recover damages for their illnesses. Lee assigns you to this case. After some preliminary investigation, you learn that Edible Widgets are served by several California restaurants and are made by an Oregon-based food processor named Widgecorp, Inc. You also learn that Dan’s Deli is incorporated and located in California, and that Dan’s domicile is California. Pam and Paul are also domiciled in California.

1. One preliminary concern will be whether and how to sue Dan’s Deli, Dan, and Widgecorp in the same suit. Since this case does not arise under federal law, and there is no diversity of citizenship between the plaintiffs on the one hand and Dan and the Deli on the other, you will probably not recommend a federal forum. Lee might consider suing the defendants separately in order to gain access to a federal court on the basis of diversity between your clients and Widgecorp, the Oregon defendant. You will likely advise Lee, however, that your clients should sue Dan’s Deli, Dan and Widgecorp in the same action. It would be too cumbersome and expensive to simultaneously sue Dan’s Deli and Dan in a California state court and Widgecorp in a federal court in California or Oregon.

2. After making the initial recommendation that the case should be filed in one California state court action if possible, your next decisions will require evaluation of subject matter jurisdiction, personal jurisdiction, venue, and forum non conveniens. How will Pam and Paul’s action be classified for subject matter jurisdiction purposes? Will a California court have personal jurisdiction over the out-of-state defendant, Widgecorp? Among the 58 counties in California, which county or counties will be proper for venue purposes? And how should Lee respond if Widgecorp files a motion contending that the action should be heard in Oregon because California is an inconvenient forum?

(a) In your initial procedure course, you probably concentrated on the restricted subject matter jurisdiction of the federal district courts. California’s superior courts, by contrast, are courts of general subject matter jurisdiction, empowered to hear all matters not subject to the exclusive jurisdiction of another court or tribunal. Superior court cases are classified as either limited civil cases or unlimited civil cases. You will first examine the CCP to determine the significance of and requirements for these jurisdictional classifications. You will then evaluate the amount in
controversy of Pam’s and Paul’s cases and ascertain whether the court will aggregate Pam’s and Paul’s claims.

(b) Since you decided to recommend joining the Oregon defendant in the California suit, you will have to assess the application of personal jurisdiction law to Widgecorp. The manner in which process is served on all defendants must meet California statutory and federal due process requirements. You must also be prepared to respond if Widgecorp files a motion to quash service of summons or uses another procedural device to challenge personal jurisdiction or service of process.

(c) You will examine the California venue statutes to determine the counties in the state in which Lee can file the suit against Dan, Dan’s Deli, and Widgecorp.

(d) You will advise Lee of the factors the court considers on a state forum non conveniens motion and the impact of Pam and Paul’s California residency on the likelihood of the court granting Widgecorp’s motion to stay or dismiss the action.

3. There are a number of pleading considerations that will affect the drafting of the complaint for Pam and Paul and the progress of this California case. In your federal procedure course, you probably studied the difference between state “fact” or “code” pleading and federal “notice” pleading. Now you will have to apply a host of additional California pleading rules. For example:

(a) You must determine whether Pam and Paul are required to plead, or are prohibited from pleading, the amount of their damages in their California personal injury action.

(b) It may amount to malpractice to omit fictitious “Doe” defendants as potential codefendants of Dan’s Deli, Dan and Widgecorp. Such fictitious parties are generally absent from federal pleadings, but they are a routine feature of California pleading practice. You will need to understand the mechanics of California’s Doe practice and the circumstances under which this device permits “new” defendants to be named after the statute of limitations has expired.

(c) The defendants may wish to expand the case with cross-complaints that raise issues or bring in parties beyond those included in Pam and Paul’s original complaint. California practice has adopted the single term “cross-complaint” to refer to each of the three types of cross-pleadings—counterclaims, cross-claims, and third-party complaints—used to widen the scope of litigation in federal court.

(d) You should be prepared for pleadings or motions attacking the allegations of your complaint. They may contain different terminology than that used in your federal civil procedure course. Under California practice, for example, the functional equivalent of the FRCP 12(b)(6) motion to
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dismiss is a pleading known as a general demurrer. The Code of Civil Procedure also authorizes several categories of “special demurrers” and the “anti-SLAPP motion,” which have no federal equivalents. See Chapter 3(B)(2) and (F)(2). If either plaintiff’s action is classified as a limited civil case, you must determine what restrictions may exist on the types of motions and pleadings that can be filed in response to his or her complaint.

4. Pam and Paul must comply with statutory directives requiring the diligent prosecution of their cases. The Code of Civil Procedure generally provides specific time frames within which plaintiffs must serve defendants with process and must bring their case to trial. An action that is subject to case management statewide and local rules under the Trial Court Delay Reduction Act must be served and brought to trial within a much shorter time frame than under the diligent prosecution statutes. There are no express grounds within the FRCP for federal dismissals for lack of diligent prosecution once the complaint has been served in a timely fashion.

5. Once the initial pleading is filed, the next question is whether one or both of the plaintiffs’ causes of action are subject to court-annexed judicial arbitration or mediation under California’s alternative dispute resolution system.

(a) Unlike the general practice in most federal districts, many California cases are automatically subject to judicial arbitration. The court will determine whether the amount in controversy in Pam’s and Paul’s action requires referral to judicial arbitration.

(b) There is also a question whether under California’s judicial arbitration system your clients’ right to a jury under the Constitution of California is adequately protected. Will your clients lose their right to jury trial if they undergo judicial arbitration?

(c) In the California counties that have enacted the Civil Action Mediation Program, the court may order Pam and Paul’s action to be submitted to mediation in an attempt to lead the parties toward a resolution of their dispute. You will need to research whether the superior court in the county in which Pam and Paul’s complaint is filed has a court-required or voluntary mediation program.

6. After the Edible Widgets lawsuit is filed and answered, Lee will likely spend substantial time on discovery. A few examples will illustrate some of the issues that might arise during the discovery process.

(a) In contrast to the federal discovery rules, California litigants are not required to make automatic initial disclosures to other parties in the absence of a formal discovery request. You must determine the proper methods by which to obtain discovery or production of information in Pam’s and Paul’s state civil litigation.
(b) Under both the FRCP and the CCP, there are express but distinct limitations on the number of interrogatories and other discovery devices that may be served. California imposes some additional restrictions on the form in which various discovery methods must be prepared. If Paul’s case is an unlimited civil case and Pam’s is a limited civil case, their two cases might be subject to different limitations on the number of interrogatories and depositions.

(c) In California practice, must discovery responses be supplemented automatically when the response is—or becomes—inaccurate or outdated? Under the federal rules, the answering party must revise certain types of information, even when no subsequent request to update has been made. You must ascertain whether Pam and Paul are entitled to automatic updates of the defendants’ previous answers, or whether they must submit a new discovery request to ensure the continuing accuracy of those earlier responses.

(d) Lee must understand the legal protection afforded to the files generated during the pendency of this suit. In particular, are office memoranda, especially those that contain Lee’s impressions about the various aspects of this case, shielded from discovery to a greater extent in California than under federal law?

(e) You must research the procedural requirements that govern Pam, Paul, and the defendants in seeking or providing discovery of electronically stored information under California law.

7. There are a number of other pretrial procedures that may significantly affect the direction and outcome of Pam’s and Paul’s litigation.

(a) While California summary judgment motions largely conform to federal procedure, California’s summary judgment statute is far more detailed and contains many more requirements than its federal rule counterpart. Lee must be familiar with California’s relatively lengthy notice period for summary judgment motions, as well as the types of moving and opposition papers that must be filed in state court.

(b) Formal written offers of judgment are made for the purpose of shifting the costs of litigation to the other party when their judgments are less than the amount offered to them prior to trial. Lee may wish to make such an offer to the Edible Widgets defendants, on behalf of plaintiffs Pam and Paul. While only the party defending an action can make such an offer in federal court, California law encourages all parties to use this device for settling cases.

8. If the Edible Widgets case is presented to a jury, Lee will have a different experience in state court than in federal court. Voir dire is controlled primarily by the judge in the federal system, but lawyers in California civil actions take a more active role and have more freedom to
question prospective jurors. The two judicial systems also differ as to whether a unanimous verdict is required.

9. After the trial is completed, one of the parties may wish to bring a motion for new trial on one or more of the many state statutory grounds. The judge, for example, may believe that Pam or Paul did not receive enough damages from the jury. A California judge has authority to grant a conditional new trial motion on this ground, whereas a federal judge may not do so.

10. Lee will have to decide whether to bring an appeal after the superior court has entered a final judgment in the case, or whether a particular pretrial or trial ruling meets the criteria for immediate review through an appeal or via a petition for an extraordinary writ.

(a) In your federal civil procedure course, you might have heard your professor refer to the “Alice-in-Wonderland” nature of federal appellate jurisdiction. This type of jurisdiction consists primarily of case law analysis of the “finality” of prejudgment orders in the federal system. California, however, has a detailed statutory scheme for determining which specific interlocutory judgments and orders are appealable. If Lee wishes to appeal from a judge’s order prior to final judgment, it may be easier to determine the appealability of such orders in California than if the same case were pending in a federal court.

(b) If the trial court renders a nonappealable order or judgment, Lee must decide whether to pursue review by a petition for an extraordinary writ. Civil writ applications are filed more frequently in California appellate courts than in the federal system. A writ petition may be the exclusive means of appellate review for certain California trial court rulings.

11. Another potential procedural issue is the effect of a prior judgment. For example, suppose that several years after their food poisoning suit became final, Pam and Paul discovered that bacteria in the Edible Widgets also affected their reproductive systems, rendering them infertile. Under California procedure, it might be possible for Pam and Paul to sue the defendants a second time—if Lee can establish the existence of distinct legal rights that were adversely affected by similar conduct of the defendants. In federal actions involving federal questions and in most states other than California, Pam and Paul might not be able to bring a subsequent suit for their newly-discovered injuries.

This hypothetical is a snapshot of California practice and raises many intriguing state/federal procedural differences. It will reappear in the context of various notes in the ensuing chapters to facilitate your understanding of some of the major themes presented in this casebook.