GUIDELINES FOR COMPLEX LITIGATION IN RIVERSIDE SUPERIOR COURT

(revised 6-12-17)

(To jump to a particular subject listed in this Table of Contents, hold "Control" and click on the page number)

INTRODUCTION

(Revised 12-15-16)

Purpose of these Guidelines

In this webpage, the Court sets forth guidelines intended to assist counsel. Except to the extent that these guidelines repeat the substance of a statute, rule of court, local rule, or decisional law, nothing stated herein is intended to be binding on the parties unless and until it is incorporated into an order. Instead, this webpage describes some of the issues that the Court considers when dealing with particular types of complex litigation. It is hoped that, by advising counsel in advance of some of the issues that are of concern to the Court, counsel will better be able to answer the Court's concerns and thereby speed the Court's management and decision-making of the case, saving the parties both time and money.

Rules of Court

The Court will expect counsel to be familiar with and to fully comply with:

- California Rules of Court, rules 3.400 through 3.403 (concerning the designation of cases as complex), and rules 3.750 and 3.751 (concerning the management of complex cases).
- Riverside Superior Court Local Rule 3160 (concerning complex cases).

ISSUES COMMON TO COMPLEX LITIGATION GENERALLY

(Revised 6-12-17)

Applications – In General

- Any application depending upon the truth of some factual assertion must be supported either (1) by a declaration or other evidentiary support or (2) a stipulation to the truth of those facts. In the absence of such support, the Court is likely to deny the application on the basis of that omission alone.
- If you are seeking some sort of relief, such as the continuance of a hearing or status conference, do not simply file a declaration, a stipulation, or a status conference statement explaining why you believe that you are entitled to that relief. Without more, such a document will be merely filed by the court clerk, and will not be read by the judge until a day or two before the next hearing, if then. Instead, submit a declaration or stipulation *with a proposed order*. When accompanied by a proposed order, all such declarations and stipulations are sent directly to the judge to be acted upon within a matter of days.
- Be candid with the Court. Any motion or application for relief should describe any prior motion or application in the same case for the same or similar relief, including the name of the party who brought the prior motion or application, the date of the ruling on that motion or application, and the nature of that ruling.

Applications – Ex Parte Applications

- With few exceptions, ex parte applications must prove "the nature of the emergency and the reasons irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice." (Cal. Rules of Court, rule 3.1175(a)(1).) That showing should include an explanation of why, even with the exercise of reasonable diligence, that emergency could not have been avoided.
- A party making an ex parte application must "[a]ttempt to determine whether the opposing party will appear to oppose the application." (Cal. Rules of Court, rule 3.1204(a)(2).) In the Court's opinion, such an attempt should be made by telephone. Written notice asking the opposing party to inform the moving party of the opposing party's intentions is unlikely to be viewed as complying with that rule.
- An ex parte application for an order shortening time for notice of a hearing on a motion is separate from the motion itself. Accordingly, a party desiring an order shortening time should first (a) reserve the earliest available hearing date for the motion and (b) file the motion, and only then bring an ex parte application for an

order shortening time. The Court will generally refuse to deem the ex parte application to constitute the motion to be heard.

Applications – For Appointment of Guardian ad Litem

- The Judicial Council form for an application for appointment of a guardian ad litem asks the applicant to confirm that no guardian or conservator of the estate of the person who is the subject of the application has already been appointed for the. (See form # CIV-010, paragraph 5.c.) The applicant frequently leaves that paragraph blank, implying that such a guardian or conservator already exists. If that occurs, the Court is likely to deny the application on that ground that if there is already an appointed guardian or conservator, there is no demonstrated need for a separate guardian ad litem.
- Counsel frequently seek to have the parents of minor parties appointed as the guardians ad litem of those minors in cases in which the parents are co-plaintiffs with the minors. If that occurs, the Court is likely to deny the application on the ground that, as a claimant seeking to recover from the same defendants, the proposed guardian ad litem has a potential conflict of interest with the minor. Similar conflicts potentially arise when the proposed guardian ad litem is a co-defendant with the minor. The Court is likely to ask whether there are any other relatives or friends who could serve who are not co-parties and thus do not have potential conflicts of interests and, if not, to require the applicant to complete paragraph #7 of the form by explaining why the proposed guardian ad litem should be appointed despite the potential conflict of interest.
- If the application seeks the appointment of guardian ad litem for an allegedly incompetent adult, the applicant should set an evidentiary hearing at which the Court can confirm that the proposed ward is truly incompetent, i.e., lacks "the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case.". (Cf. *In re James F*. (2008) 42 Cal.4th 901, 910.)

Case Management Conference and Joint Statement

Prior to the initial case management conference, the parties shall meet and confer concerning the issues specified in California Rules of Court, rule 3.750(b). (Cal. Rules of Court, rule 3.750(d); RSC Local Rule 3160.)

Thereafter, the parties shall prepare a joint statement of (a) matters agreed upon, (b) matters upon which the court must rule at the conference, and (c) a description of the major legal and factual issues involved in the litigation. (Cal. Rules of Court, rule 3.750(d); RSC Local Rule 3160.) The joint statement should be in lieu of a case management statement on Judicial Council form CM-110.

The joint statement shall be filed no later than five calendar days before the case management conference. (RSC Local Rule 3160.)

Civility

The Court sees far too many disputes that could have been avoided had the parties exercised a greater degree of professionalism. Counsel appearing in the complex departments should strive to comply with the "Guidelines of Professional Courtesy and Civility" adopted by the Riverside County Bar Association and the Riverside Superior Court in 1997 and the "California Attorney Guidelines of Civility and Professionalism" adopted by the State Bar in 2007 and by the Riverside County Bar Association in 2008. A copy of those guidelines may be found on the "Civil" page of the Riverside Superior Court website, labelled "Riverside Civility Guidelines" and "State Bar Civility Guidelines," respectively.

Consolidation

- The Court expects counsel to strictly comply with California Rules of Court, rule 3.350, and Riverside Superior Court Local Rule 3199, both of which concern consolidation.
- Any request to consolidate cases, whether presented by stipulation or by motion, should describe the nature and extent (a) of any formal or informal discovery and (b) of any mediations or other settlement efforts conducted in the respective cases.
- Consolidation brings all complaints and cross-complaints into a single action, but does not eliminate the distinctions between those pleadings. Counsel should keep in mind that, regardless of consolidation, every defendant or cross-defendant named in multiple complaints or cross-complaints must be served with each one, and must in turn file responsive pleadings to each one. Similarly, the dismissal of a defendant from one complaint does not result in the dismissal of that defendant from any consolidated complaint.
- Consolidation can be cumbersome. Counsel should not ask for consolidation until simpler alternatives have been considered. For instance, the practical benefits of consolidation sought by counsel might also be obtained by an order that all discovery propounded in a related action may be admissible in any other related action, or that all mediations and mandatory settlements conferences in related cases be held concurrently. This is particularly true when counsel do not want a joint trial, as when the plaintiffs are represented by different law firms.

Costs of Suit

- A proposed judgment should not recite the amount of costs that the prevailing party hopes to be awarded. Nor should it state that "costs of suit are awarded in the sum of $_____." Instead, the judgment should recite that the prevailing party "is entitled to recover [his][her][its] costs of suit in an amount to be determined in accordance with Code of Civil Procedure section 1034 and California Rules of Court, rule 3.1700."
- An amendment of the judgment is not permitted simply to add the amount of attorney's fees or other costs. (RSC Local Rule 1045(b).)
- If a cost memo is filed and no motion is filed to challenge it, a proper means of memorializing the consequence of those events, if desired, is to serve notice of entry of costs. (RSC Local Rule 1045(b).) Generally, the Court will not issue orders deciding what those recoverable costs are when no one has challenged the cost memo.

Discovery – Stay

All formal discovery in complex cases is stayed pending further order of the Court. (RSC Local Rule 3160, subd. B.) Unless otherwise ordered, the stay generally remains in effect until all named defendants have filed responsive pleadings, have been defaulted, or have been dismissed.

Informal discovery is never stayed, and the parties are encouraged to engage in it.

Discovery – Meet-and-Confer Requirements

In most situations, a party seeking to compel further responses to discovery must meet and confer with the opposing party before bringing a motion to compel. (See, e.g., Code Civ. Proc., § 2030.300, subd. (b).)

A letter does not constitute a meeting. Therefore, in the Court's view, merely sending a letter does not satisfy that statutory requirement, even if the letter asks the recipient to call the sender, and even if the recipient responds to that letter in writing.

In the Court's view, to satisfy the meet-and-confer requirement, the parties must either meet in person or speak by telephone. (See, e.g., California Attorney Guidelines of Civility and Professionalism, § 10, example b. ["In complying with any meet and confer requirement in the California Code of Civil Procedure, an attorney should speak personally with opposing counsel and engage in a good faith effort to resolve or informally limit an issue."].)

The failure to comply with the statutory requirement, or to demonstrate that the moving party made a reasonable effort to comply with that requirement, is likely to result in either the denial of any request for sanctions or the denial of the entire motion.

Discovery – Protective Orders

Any proposed protective order dealing with confidential documents should expressly state that nothing in the order excuses compliance with California Rules of Court, rules 2.550 and 2.551.

Judicial Notice

When the Court is being requested to take judicial notice of some document already filed with the Riverside Superior Court, the request should state (a) the full name of the document and (b) the date on which it was filed by the clerk. (Cal. Rules of Court, rule 3.1306(c)(1).) Because the Court maintains all of its files electronically, counsel need not ask the clerk to have the file in the courtroom at the time of the hearing. (*Id*., rule 3.1306(c)(2).) For the same reason, it is not necessary to attach a second copy of that filed document to any request for judicial notice.

Motions – In General – Declarations in Support or Opposition

- To be admissible and persuasive, a declaration should establish that the declarant has personal knowledge of the facts stated in the declaration. Whether the declarant has personal knowledge is an issue of fact, requiring evidence. In other words, the declaration should allege specific facts that, if true, explain how the declarant acquired personal knowledge of the facts the declaration is designed to prove. If the facts stated in the declaration do not themselves demonstrate the basis for the declarant's personal knowledge, conclusory assertions that the declarant has personal knowledge of the facts stated and could competently testify to their truth have "no redeeming value and should be ignored." (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 754.)
- Declarations asserted on information and belief rather than upon personal knowledge are likely to be disregarded because they do not prove the "facts" recited therein. (*Franklin v. Nat C. Goldstone Agency* (1949) 33 Cal.2d 628, 631; *Brown v. Superior Court (People)* (1987) 189 Cal.App.3d 260, 265; *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204-205.)
- Declarations should not be attached as exhibits to other declarations. The Court does not expect to have to examine the declaration of Smith in order to find the declaration of Jones.

- Don't make the judge search for your evidence. If combining several declarations into a single document, the title of the document must identify each one. (Cal. Rules of Court, rule 3.1110(b)(2).) E.g., "Declarations of John Smith and Jane Jones in Support of Defendant's Motion to . . . ." Similarly, when combining a declaration with a memorandum of points and authorities, the first page of the document must identify the attached declaration. (*Ibid*.) For instance: "Memorandum of Points and Authorities in Support of Motion for ___; Declaration of Jane Jones in Support of Motion."

Motions – In General – Evidence in Support or Opposition

The practice of bundling all declarations and other evidence into a single compendium of evidence is discouraged. In a paperless court like this one, searching through the image of a compendium hundreds of pages long for a particular three-page declaration is burdensome.

Motions – In General – Out-of-State Authorities

The Court reads all authorities cited, whether from California courts or otherwise, through on-line resources rather than in books. Therefore, you are no longer required to lodge copies of any out-of-state authorities cited in your motions. (Cal. Rules of Court, rule 3.1113(i)(1).) A copy of a cited authority should be lodged only if it is not available on Lexis and Westlaw.

Motions – To Compel Discovery

- Counsel with disputes regarding responses to multiple sets of written discovery will sometimes combine all of those disputes into the same motion, e.g., a single motion seeking further responses to a set of form interrogatories, a set of special interrogatories, a set of requests for admissions, and a set of requests to produce documents. Too often, the result is a motion of unmanageable size and complexity, burdening both opposing counsel and the court.

  Each set of discovery should be the subject of a separate motion to compel. The only exception should be when the responses to one set of discovery are dependent upon answers to another, for example, a set of requests for admissions and a set of form interrogatories seeking the factual basis for any denials of the requests for admissions.

- By statute, a party planning to bring a discovery motion must first meet and confer with the opposing side in an attempt to resolve the discovery dispute without the need for a motion. When that requirement applies, counsel for the parties should meet with each other, either by telephone or in person, to discuss the areas of

dispute and to attempt to resolve those disputes informally. Merely sending a letter to opposing counsel does not constitute a meeting, and thus does not comply with the letter of the law. In the absence of evidence of such an effort to meet and confer, the Court may deny the motion, refuse to award sanctions, or continue the hearing until such an effort has been made.

Motions – Joinders

Parties wishing to join in a motion or an opposition to a motion filed by another party must file and serve their joinder in compliance with the provisions of Code of Civil Procedure section 1005 for the filing of a notice of motion and an opposition, respectively. If service of the joinder is untimely, the Court is likely to disregard it.

Orders to Show Cause – in General

The Court expects compliance with RSC Local Rule 3116. If no declaration is filed in response to the OSC, the Court is likely to deem that the party to whom the OSC is directed does not oppose the dismissal, imposition of sanctions, or other action described in the OSC.

In Department 5, if the OSC concerns the imposition of sanctions, then counsel should appear in person. (Cal. Rules of Court, rule 3.670(e)(2)(A).)

Orders to Show Cause – Failure to Serve or Failure to Take Default

When the Court issues an order to show cause why monetary or terminating sanctions should not be imposed on a plaintiff or cross-complainant for the failure to serve defendants or cross-defendants, or for the failure to take the default of defendants or cross-defendants who have been served for more than 30 days but have not appeared, the party to whom the OSC is directed should take the following steps:

1. Examine the clerk's on-line record regarding the status of the defendants or cross-defendants named in your complaint, cross-complaint, or complaint in intervention.

2. If the clerk describes the status of any of those defendants or cross-defendant as either "Serve Required" (meaning that the clerk believes that no proof of service of that pleading on that party has ever been filed) or "Served" (meaning that a proof of service has been filed but that no responsive pleading, no request for entry of default, and no dismissal has ever been filed), then you should file a declaration in response to the OSC, as required by rule 3116.

3. The declaration should identify each defendant or cross-defendant named in your pleading the status of which the clerk lists as either Serve Required or Served. As to each one, the declaration should separately either (a) explain why the clerk is mistaken or

(b) explain why there is good cause for the failure to serve or take the default of that party.

4. Our overworked clerks do make mistakes. If you believe that the clerk is incorrect, you should explain the basis for that belief. For instance, if the clerk lists the status of a defendant as Serve Required, but you have filed a proof of service that appears in the Court's file, state the date on which that overlooked proof of service was filed. Similarly, if the defendant has answered or has been defaulted or dismissed, state the date on which the answer was filed or the date on which the default or dismissal was entered.

5. The Court does not need, and does not want, another copy of the proof of service, answer, default, or dismissal itself. If such a document has indeed been filed, then the Court can examine it in the Court's database so long as you provide the date on which it was filed.

6. If the clerk is correct, but you believe that there is good cause for your failure to serve or your failure to take the defendant's default, then your declaration should explain the facts establishing that good cause.

7. A factual showing of good cause for the failure to serve requires more than simply claiming that you have been unable to serve the defendant. The declaration should explain (a) the date on which the defendant or cross-defendant was named, if different from the date the pleading was filed, (b) the date on which the efforts to serve began, (c) the nature of those efforts, (d) the results of those efforts, and (e) the date and nature of the additional steps taken in response to those results. Unsupported claims that the defendant is evading service, or that efforts to serve are continuing, are not sufficient to establish good cause.

8. A factual showing of good cause for the failure to request entry of a default requires more than simply claiming that you are in negotiations with the defendant or the defendant's insurance carrier. The declaration should state (a) the date on which you made contact with the defendant or the defendant's counsel or adjuster, (b) the date that the last offer was exchanged, (c) the length of any extension of time granted, and (d) the date that extension expires. If you have granted an extension longer than that permitted under the Rules of Court or the CMO, then the declaration should explain that decision.

9. If you believe that the clerk's records are erroneous, in addition to filing a timely declaration in compliance with RSC Local Rule 3116, the Court expects you to speak to the clerk's office in an effort to correct those errors by pointing out to the clerk the dates of the overlooked proof of service, answer, entry of default, or dismissal, as the case may be.

Pleadings – Amended Pleadings

When a party is seeking to modify a pleading, the Court prefers that an amended pleading be filed rather than an amendment to the pleading, except in the following instances:

- When correcting the name of a party pursuant to Code of Civil Procedure section 473, subdivision (a)(1);
- When adding the true name of a fictitiously named defendant pursuant to Code of Civil Procedure section 474; and
- When modifying a complaint or cross-complaint solely to add additional plaintiffs or cross-complainants to join in the same allegations already asserted by the existing plaintiffs or cross-complainants.

When leave of court is required to file an amended pleading, the Court expects the party seeking leave to meet and confer with opposing counsel to explore the possibility that the parties can arrive at a stipulation by which the parties either consent to leave being granted or, hopefully, render the amendment unnecessary. Any motion for leave to amend should include a declaration establishing that such a stipulation was sought but that the effort was unsuccessful.

Pleadings – Challenges to Pleadings and Motions to Amend Pleadings

The Court should not be asked to evaluate the sufficiency of a pleading until the pleader has stated his or her case or defense as strongly as possible. Therefore, before filing a demurrer, a motion to strike, a motion for judgment on the pleadings, or any other challenge to an opponent's pleading, the parties should meet and confer to determine whether the challenge is arguably meritorious and, if so, whether the parties will stipulate to leave to amend being granted to allow the pleading to be amended in an attempt to cure the asserted defect.

By "meet and confer," the Court means that counsel for the parties should meet with each other, either by telephone or in person, to discuss any arguable defects in the pleadings, and whether those potential defects can be resolved or diminished by amendment. Merely sending a letter to opposing counsel does not constitute a meeting, and thus does not comply with the Court's expectations.

Any challenge to a pleading, and any motion for leave to amend a pleading, should include a declaration describing those meet-and-confer efforts and establishing that such a stipulation was sought without success.

In the absence of evidence of such an effort to meet and confer, the Court may deny the motion, sustain the demurrer, or continue the hearing until such an effort has been made.

Sealing Records

Any party asking the Court to make a decision on the basis of documents that the party believes should be sealed from public view shall strictly comply with California Rules of Court, rules 2.550 and 2.551.

The motion to seal should not be set to be heard on the same day as the hearing on the underlying motion. It is difficult for counsel to argue or for the Court to decide a motion unless it is first known what is in or out of the evidentiary record. Therefore, the hearing on the motion to seal should be heard before the hearing on the underlying motion. An unsuccessful moving party has 10 days in which to decide whether to withdraw the lodged documents rather than allow them to be unsealed. (Rule 2.551(b)(6).) To give the court the time to consider the effect of that decision, the interval between the two hearings should be at least 15 days.

Any motion to seal documents should be drawn as narrowly as possible. You should not request to seal an entire document when the sensitive information is limited to a single word, number, or paragraph.

Service – Electronic

Counsel should remember that the proof of service of any document served electronically must state the time of the service (Cal. Rules of Court, rule 2.251(i)(1)(B)), because service after 5 PM is deemed to have occurred on the following day (*id.*, subdivision (h)(4)).

Service of Summons – Timing

In complex cases, the plaintiff must serve the summons, complaint, and notice of the initial Case Management Conference on all defendants no later than 30 days prior to the date by the Court for that initial conference. (RSC Local Rule 3160.)

Service of Summons – by Publication

- Service by publication is unlikely to provide actual notice to a defendant. Therefore, in order to obtain leave to serve a defendant by that means, a plaintiff must strictly comply with the statutory prerequisites for service of summons by publication. (*County of Riverside v. Superior Court* (1997) 54 Cal.App.4th 443, 450.)
- The plaintiff must show that it exercised reasonable diligence in attempting to serve the defendant through some other means. (Code Civ. Proc., § 415.50, subd. (a).) To establish that the plaintiff exercised reasonable diligence in attempting to locate and serve the defendant, the declaration must describe a thorough and systematic investigation conducted in good faith, including, e.g., recent inquiries

of known relatives, friends, employers, and other persons likely to know defendant's whereabouts; searches of city directories, telephone directories, tax rolls, and internet databases; and inquiries of occupants of any real estate involved in the litigation. (See *Watts v. Crawford* (1995) 10 Cal.4th 743, 749, fn. 5; *Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 42.) Any declaration concerning the nature and extent of the search for the defendant must be on personal knowledge. (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 42.)

If the plaintiff knows the former residence or business address of the defendant, the plaintiff should inquire of the current occupant, owner or landlord, and neighbors as to the defendant's present address, the identity of any of the defendant's friends or family, or the defendant's workplace.

If the plaintiff is aware of a valid mailing address (even if, like a post office box, the defendant cannot be personally served at that address), it must attempt service by mail before seeking leave to serve by publication. (*Transamerica Title Ins. Co. v. Hendrix* (1995) 34 Cal.App.4th 740, 745.)

- The application must establish that a cause of action exists against the defendant to be served by publication. (Code Civ. Proc., § 415.50, subd. (a)(1).) The declaration supporting the application must state competent, admissible evidence tending to show that a cause of action exists against the party to be served by publication. (*Harris v. Cavasso* (1977) 68 Cal.App.3d 723, 726.) The declaration must be made by a witness with personal knowledge of the facts supporting the existence of the claim. Counsel for the plaintiff rarely has such personal knowledge.

  A verified complaint is insufficient to establish such a prima facie showing of the existence of a cause of action, regardless of whether it is signed by the plaintiff (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 42) or by plaintiff's counsel on information and belief (*Harris v. Cavasso* (1977) 68 Cal.App.3d 723, 726).

- The summons must be published in the newspaper "that is most likely to give actual notice to the party to be served . . . ." (Code Civ. Proc., § 415.50, subd. (b).) The application should explain why the newspaper proposed by the plaintiff satisfies that standard.

  Counsel for plaintiffs frequently propose publication in newspapers that are designed to appeal to a specialized audience – e.g., the Daily Journal or the Business Journal – rather than newspapers of general circulation. The Court is likely to reject such applications absent a showing that a specialized newspaper directed to the legal community or business community is the one most likely to give actual notice to this particular defendant.

  To limit the cost of publication, counsel for plaintiffs frequently propose publication in the smallest newspaper that has been determined to be of "general circulation" in the county in which the defendant is thought to reside. Without

more, the fact that a paper is one of general circulation in the county is insufficient to show that it is the paper most likely to give actual notice to the defendant.

- An application for leave to serve a defendant by publication should be presented to the clerk's office with the fee appropriate for a "declaration and order." It should never be made in the form of a noticed motion. It should not be made in the form of an ex parte application unless there is some exigent circumstance that requires an immediate ruling.
- If a plaintiff is seeking leave to serve multiple defendants by publication, a separate application should be submitted for each defendant.
- Counsel will occasionally seek leave to serve a corporation by publication. Such an application will be denied. Service by publication is permissible only when the party cannot be served by other means. (Code Civ. Proc., § 415.50, subd. (a).) One of the persons who can be served on behalf of a corporation is the Secretary of State. (Corp. Code, § 1702, subd. (a) [active corporations]; *id.*, § 2011, subd. (b) [dissolved corporations].) Because the Secretary of State can always be personally served, the prerequisites for service by publication can never be met for a corporate defendant.

Service of Summons - on Corporation by Delivery to Secretary of State

- Active corporations: "If an agent for the purpose of service of process has resigned and has not been replaced or if the agent designated cannot with reasonable diligence be found at the address designated for personally delivering the process, or if no agent has been designated, and it is shown by affidavit to the satisfaction of the court that process against a domestic corporation cannot be served with reasonable diligence upon the designated agent by hand in the manner provided in Section 415.10, subdivision (a) of Section 415.20 or subdivision (a) of Section 415.30 of the Code of Civil Procedure or upon the corporation in the manner provided in subdivision (a), (b) or (c) of Section 416.10 or subdivision (a) of Section 416.20 of the Code of Civil Procedure, the court may make an order that the service be made upon the corporation by delivering by hand to the Secretary of State . . . ." (Corp. Code, § 1702, subd. (a).)
- Suspended corporation: "[A] domestic corporation that has been 'suspended' by the Secretary of State for failure to file appropriate tax returns, and has no designated agent for service of process, but continues to operate as an ongoing business during the period of suspension, may be validly served pursuant to section 416.10." (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 302.)

- Corporation that has suspended its charter: A corporation that has forfeited its charter may be served by service on the trustee of the corporation. (Code Civ. Proc., § 416.20.)
- Dissolved corporation: A dissolved corporation "may be served by delivering a copy thereof to an officer, director or person having charge of its assets or, if no such person can be found, to any agent upon whom process might be served at the time of dissolution. If none of such persons can be found with due diligence and it is so shown by affidavit to the satisfaction of the court, then the court may make an order that summons or other process be served upon the dissolved corporation by personally delivering a copy thereof, together with a copy of the order, to the Secretary of State or an assistant or deputy secretary of state. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State." (Corp.Code, § 2011, subd. (b).)
- Foreign corporation: See Corporations Code section 2114.
- Before applying for leave to serve the Secretary of State on the ground that no agent or officer of the corporation can be located, the Court expects the applicant to have attempted to locate and serve every officer named in the latest Statement of Information (Corp. Code, § 1502) filed by that corporation with the Secretary of State. That document is available at the Secretary of State's office, but apparently not from its website.
- A corporate applicant for a contractor's license must submit the names of every officer of the corporation to the CSLB. (Bus. & Prof. Code, § 7065, subd. (b).) Thereafter, the contractor must advise the CSLB of any changes in that information. (Bus. & Prof. Code, § 7083.) Therefore, for a contractor, the CSLB is another potential source of the identity of corporate officers. However, the Court expects plaintiffs to check both sources before concluding that the plaintiff cannot locate and serve any officers of the corporation.
- If a plaintiff knows the current address of an officer or agent for service of process, but has been unable to serve that officer or agent personally, the Court expects the plaintiff to attempt service by mail to the officer's or agent's address.
- If a plaintiff knows the former business address of a corporate defendant, but has been unable to locate a current address for the defendant or for any officer or agent for service of process, the Court expects the plaintiff to attempt service by mail to the corporation's former business address.
- An application for leave to serve a defendant through the Secretary of State should be presented to the clerk's office with the fee appropriate for a "declaration and order." It should never be made in the form of a noticed motion. It should not be made in the form of an ex parte application unless there is some exigent circumstance that requires an immediate ruling.

- If a plaintiff is seeking leave to serve multiple defendants by serving the Secretary of State, a separate application should be submitted for each defendant.

Settlement – Notice of Settlement

When the parties have succeeded in settling an entire case, the plaintiff or other party seeking affirmative relief must file a Notice of Settlement. (Cal. Rules of Court, rule 3.1385(a)(1).) However, no such notice should be given in class action cases, because settlements of those cases must be judicially approved. (Cal. Rules of Court, rule 3.769.)

The notice should be given on the Judicial Council form. Upon receiving a notice on that form, the clerk's office will vacate all future hearing and trial dates and issue an order to show cause re dismissal consistent with the information in the notice. Counsel should not draft their own notice on pleading paper. The clerk is unlikely to give the proper effect to such a notice.

Counsel should be aware that among the hearings that may be vacated are any hearings on motions for determination of good faith settlement. If that occurs, call the clerk to have those hearings re-set.

Note that a notice of settlement is appropriate only when the entire action is settled. No notice of settlement pursuant to rule 3.1385 should be filed when the settlement is of less than the entire action.

Settlement – Good Faith Settlements

- A party seeking a determination that a settlement is in good faith should to do so by notice (Code Civ. Proc., §.877.6, subd. (a)(2)) rather than by noticed motion (*id*., subd. (a)(1)) unless either (1) the party expects the effort to be opposed or (2) the party will be requesting an order shortening time for the hearing on the motion.
- Certified mail may be either with or without a return receipt. A notice of an application for determination of good faith settlement must be served by "certified mail, return receipt requested." (Code Civ. Proc., § 877.6, subd. (a)(2).) Therefore, the proof of service of any such notice must specify that it was mailed both by certified mail and with return receipt requested.
- If the party seeking a determination that a settlement is in good faith is asking to have any complaint or cross-complaint dismissed as to that party, the application or motion must describe the pleading to be dismissed. (See Cal. Rules of Court, rule 3.1382.) Because there are often a multitude of complaints and cross-complaints in complex cases, the pleadings to be dismissed should be identified both by name and by filing date. The proposed order should also identify the specific complaint or cross-complaint to be dismissed in the same manner. If the

proposed order fails to specifically identify the pleading to be dismissed, the request for dismissal is likely to be denied.

- Parties seeking a determination that a settlement is in good faith frequently employ very expansive descriptions of the claims to be barred. The Court is unlikely to sign any ordering purporting to bar any claims except those described by statute, i.e., claims "for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc., § 877.6, subd. (c).) The proposed order should use the statutory language.
- The statute authorizes the court to determine the good faith of a settlement on the motion or application of a "party to the action." (Code Civ. Proc., § 877.6, subd. (a)(1).) If the action has already been dismissed, either in its entirety or as to the moving or applying party, counsel should cite to authority supporting the Court's jurisdiction to grant the relief at the request of someone who is not currently a party to a pending action.

Settlement – Motions to Vacate Judgment and Dismiss Action

As a condition of a post-judgment settlement, parties will occasionally seek to vacate the judgment and dismiss the action. There are statutory conditions on the power of appellate courts to do so (Code Civ. Proc., § 128, subd. (a)(8)), but none on the trial court. Nevertheless, the Court is likely to observe the same restrictions.

Settlement – Minor's Compromises

All compromises of a minor's claim must be approved by the Court. (Prob. Code, § 3500, subd. (b).) Probate Code section 3401 does not create an exception to that requirement for settlements under $5,000. Section 3401 concerns only the identity of the person who can hold the minor's money. It does not say that settlements under $5,000 do not require judicial approval.

Stipulations

- The Court will not act on stipulations from a party that has not paid its first-appearance fee.
- When counsel are stipulating to a party being granted leave to file a pleading (e.g., an amended complaint or a complaint in intervention), the Court suggests that the most efficient technique is to stipulate to the filing of the pleading "submitted concurrently with this stipulation" rather than stipulating to the pleading "attached hereto as Exhibit A." If counsel feels compelled to attach the proposed pleading to the stipulation as an exhibit, the exhibit should be a copy of the pleading, never the original. The signed original should be submitted separately to be filed by the

clerk after the Court signs the order granting leave. The Court will generally not sign an order that "deems" the exhibit to be the filed pleading.

Similarly, when stipulating to the issuance of an order containing the signatures of others, such as a proposed CMO containing the signatures of a discovery referee or mediator, the original document should be submitted separately from the stipulation and any exhibit thereto.

TRIALS IN GENERAL

(revised 7-6-16)

Continuances of Trial

Continuances of trial are not a matter of right, even if both sides agree. To the contrary, trials may be continued only on a showing of good cause. (Cal. Rules of Court, rule 3.1332(c).) A stipulation to continue a trial should both (a) recite the facts that are relied upon to establish good cause and (b) stipulate to the truth of those facts.

Any request to continue a trial should be by noticed motion. Such requests should be made by ex parte application only (a) if there is insufficient time before the trial to bring a noticed motion, or (b) if there are other exigent circumstances justifying ex parte relief.

Because a request to continue must be brought "as soon as reasonably practical once the necessity for the continuance is discovered" (Cal. Rules of Court, rule 3.1332(b)), it is extraordinarily unlikely that any continuance will be granted on the day of trial.

Electronic Evidence

Departments 5 and 10 are equipped to allow the electronic presentation of evidence. Counsel are encouraged to present evidence electronically to the extent possible. Prior to the Trial Readiness Conference, counsel should meet and confer regarding the possibility of jointly presenting electronic evidence.

Forfeiture of Right to Jury Trial

A party forfeits its right to a jury trial by failing to post jury fees within the time limits of Code of Civil Procedure section 631.

If the Court has declared that a party has forfeited its right to a jury trial, that party should not post jury fees until that party has obtained relief from that forfeiture.

If a party wishes to obtain relief from that forfeiture, it should bring a noticed motion heard not later than the trial readiness conference, or if no TRC is set, then not later than 21 days before the date first set for trial.

Pretrial Order

At the beginning of any trial, the Court is likely to enter an order substantially similar to the following. References to "counsel" include any party who is self-represented.

A. All Trials:

1. Other than the parties and any retained expert witnesses, all witnesses are excluded from the courtroom until they are called to testify.

2. Counsel shall direct their respective witnesses not to refer to any subject evidence of which has been excluded by a ruling on a motion in limine, by this order, or by any other court order.

3. While a witness is testifying, counsel shall always have another witness in the courthouse, ready to testify.

4. No recess will be taken or continuance granted for the failure of a witness to appear absent proof of service of either a subpoena or a notice to appear.

5. At the end of each day of trial, counsel shall advise each other of the identity of the witnesses expected to be called the following trial day, and of the order in which they are expected to be called.

6. To the extent possible, exhibits shall be moved into evidence on the first day in which the exhibit was referred to during testimony.

7. At the conclusion of the trial, the clerk may return the exhibits marked or admitted at trial to counsel for the party or parties who offered those exhibits. If so, counsel shall retain those exhibits until one of the following events occurs:

a. All parties agree in writing that the exhibits may be destroyed;

b. Any appeal from the judgment has been finally decided and, in the event of a reversal, any retrial has concluded; or

c. The time for any appeal from the judgment has passed without any notice of appeal being filed.

8. Any party who intends to read from a deposition transcript during trial shall lodge the original transcript with the court on the first day of trial.

9. At the conclusion of the trial, the clerk may return any deposition transcripts lodged with the court to the counsel who lodged the transcript. Counsel shall retain that transcript in accordance with Code of Civil Procedure section 2025.550, subdivision (b).

10. If a party is represented by multiple attorneys, only a single attorney may perform each of the following tasks: (a) presentation of argument regarding a particular motion in limine, jury instruction, or other issue of law; (b) jury selection; (c) opening statement; (d) direct examination of a particular witness and objections during cross-examination of that witness; (e) cross-examination of a particular witness and objections during direct examination of that witness; or (f) closing argument. However, different attorneys may perform different tasks.

B. All Jury Trials:

1. In lieu of the Court reading a statement of the case to the venire panel, counsel may choose instead to give "mini" opening statements at the beginning of jury selection. (Code Civ. Proc., § 222.5, 2d para.) Any such statements shall not exceed three minutes, shall not be argumentative, and shall not involve any exhibits or demonstrations.

2. The Court deems all jurors and any alternate jurors to be present at all necessary times, unless their absence is expressly brought to the attention of the Court on the record.

3. No witness shall testify, no documentary evidence shall be introduced, and no counsel shall ask a question or make any comment in the presence of the jury, concerning any of the following subjects:

a. Settlement negotiations, mediation efforts, statements made during or in reference to those events, or documents prepared for or during those events.

b. The income, wealth, or financial condition of any of the parties.

c. Any other past or current litigation involving, or claims by or against, any of the parties.

d. The retention of any counsel by an insurance company, unless the insurance company is a party to the action.

4. An exhibit used solely to refresh a witness's recollection shall not be displayed to the jury.

5. Jury instructions shall be prepared in accordance with section 8 of Riverside Superior Court Local Rule 3401. By "fully edited," the Court means that the instructions shall be prepared in a form suitable to be copied and handed to the jurors. In particular:

a. All blanks shall be filled in. (Cal. Rules of Court, rule 2.1050(c)(3).)

b. All references to the gender of the parties and to the number of parties shall be corrected.

c. All inapplicable alternative language shall be deleted. If the application of any language cannot be determined until the end of testimony, that language should be left in.

d. All brackets ("[ ]") surrounding applicable alternative language shall be removed.

e. Other than the text of the instruction and the instruction number, no other information shall appear regarding form instructions. Specifically, the following information shall not appear: the title of the instruction; the party requesting the instruction; and whether the instruction is given, modified, or refused.

f. The instructions shall appear in the following order: Any instructions from CACI Nos. 5000 through 5008 shall be at the beginning; any instructions from CACI No. 5009 et seq. shall be at the end; and all other instructions shall be in the

middle. The text of any instructions requested from the CACI 100 series shall be omitted.

g. Proposed special instructions shall include the text of the instruction, the party requesting that instruction, and a citation to the authority supporting that instruction.

6. In addition to the copies of the jury instructions and the verdict form provided to the clerk pursuant to section 9 of Riverside Superior Court Local Rule 3401, counsel designated by the Court shall email those documents (preferably in Microsoft Word) to the clerk of the department by a date to be determined by the Court. All instructions – whether form or special, and whether agreed upon or disputed -- shall be combined into a single word-processing file. The verdict form shall be in a separate word-processing file.

7. If there are multiple alternate jurors and it becomes necessary to discharge a juror and substitute an alternate juror prior to the commencement of deliberations, the alternate shall be chosen at random from the alternates as a whole. (Code Civ. Proc., § 234, 5th para.) If such a substitution becomes necessary after the jury has begun to deliberate, the clerk shall call the alternates in an order chosen at random, but shall order to appear the first alternate with whom the clerk actually speaks.

8. The clerk may administer the oath to the bailiff or other officer taking charge of the jury pursuant to Code of Civil Procedure section 613 outside the presence of the Court, counsel, and the parties.

9. Upon receiving any request, question, or notice from the jury after the jury has begun to deliberate, the Court shall notify counsel for all parties by telephone and will relay the Court's intended response. If all counsel consent to that response, it shall be given without any appearance by counsel. If counsel for any party does not respond to the telephone message within 20 minutes after that notice, the Court may respond to the jury without that party's participation. If counsel for any party objects to the Court's intended response, all counsel will be notified and will be given an opportunity to address the Court.

C. All Jury Trials involving Claims for Personal Injury or Property Damage:

1. No witness shall testify, no documentary evidence shall be introduced, and no counsel shall ask a question or make any comment in the presence of the jury, concerning any of the following subjects:

a. Whether a party is now or was formerly insured against any type of loss or liability.

b. Except as permitted by Civil Code section 3333.1, subdivision (a), any insurance benefits received by the plaintiff.

2. If the plaintiff is making any claims for economic damages in the form of past medical expenses that were satisfied by an insurer, evidence of the amount of those

damages shall be limited to the amount paid by the insurer and accepted by the health care provider in full satisfaction of that health care provider's invoice.

3. If any claim is made against a health care provider, no witness shall testify, no documentary evidence shall be introduced, and no counsel shall ask a question or make any comment in the presence of the jury, concerning the limitation on noneconomic damages. (Civ. Code, § 3333.2 [MICRA].)

CEQA CASES

(Revised 7-6-16)

Rules of Court

The Court expects counsel to be familiar with and to fully comply with California Rules of Court, rule 3.2200, et seq., and RSC Local Rule 3170.

Status Conference

The Court will set a status conference, which may be as early as 60 days after the action is filed.

At the status conference, the parties should be prepared to discuss the following issues:

- The status of service.
- The status and nature of responsive pleadings.
- Whether any respondent or real party in interest contests either:
    - The timeliness of the petition;
    - The propriety of the venue; or
    - The standing of the petitioner.
- Whether any of the claims alleged will require the introduction of evidence extrinsic to the administrative record, and if so:
    - Whether those issues will be tried separately from those issues dependent entirely upon the administrative record.
    - Whether the parties are entitled to a jury trial regarding those issues, and if so, whether the parties will waive that right.
- Whether there are any related petitions concerning the same project.
- The status of the preparation of the administrative record.
- A briefing schedule.
- Page limits on the respective briefs.
- Whether the parties will attempt to mediate the dispute (Gov. Code, § 66031).

Challenges to Pleadings

The Court will expect any respondent or real party in interest that is considering a demurrer, motion to strike, motion for judgment on the pleadings, or other challenge to a pleading to meet and confer with the petitioner before filing any such challenge.

By "meet and confer," the Court means that counsel for the parties should meet with each other, either by telephone or in person, to discuss any potential defects in the pleadings, and whether those potential defects can be resolved by amendment. Merely sending a letter to opposing counsel does not constitute a meeting, and thus does not comply with the Court's expectations.

Any challenge to the pleadings should be accompanied by a declaration describing those meet-and-confer efforts.

Administrative Record

The parties are directed to California Rules of Court, rules 3.2205 through 3.2208

In Department 10, the parties are usually required to prepare the administrative record both in a paper format and in an electronic format. In Department 5, the parties are encouraged to prepare the administrative record in a paper format.

Whether prepared in a paper format or an electronic format, each page of the administrative record shall be consecutively numbered.

If the administrative record is prepared in a paper format:

- The administrative record shall be bound in volumes not exceeding 200 pages each.
- The volumes should be bound with plastic comb bindings, so that the volume will lie flat when opened. Unless the record is less than 200 pages, three-ring binders are not recommended.
- Each volume shall be labeled on the cover and on the spine with the volume number and inclusive page numbers.

The administrative record should not be lodged with the Court until the opposition brief is filed.

The parties shall lodge with the Court an appendix of those documents or pages of documents to which the parties have cited in their respective briefs. (Cal. Rules of Court, rule 3.2205(c).) The parties should lodge a joint appendix containing all those documents or pages cited by any party. That joint appendix of excerpts shall file lodged when the reply brief is filed. In the event that the parties cannot agree to lodge a joint appendix or have been excused from doing so, the petitioner's appendix shall be lodged when the reply brief is filed, and the respondent's appendix shall be lodged when the respondent's opposition is filed.

Briefing and Hearing Date

The agency and the real party in interest should file a single joint responsive brief, unless otherwise ordered by the Court. (Cf. Cal. Rules of Court, rule 3.2227(a)(3).)

If multiple petitions have been filed and consolidated, either entirely or for purposes of briefing and trial, the petitioners should file joint opening and reply briefs unless otherwise ordered by the Court.

Generally, the trial on the allegations of the petition will be conducted as a short cause matter on a Friday. However, no hearing date will be set until after the matter is fully briefed. At the time that the briefing schedule is set, the Court will set a status conference at least one week after the reply brief is due. At the status conference, the Court will set a hearing date at least four weeks in the future.

The Court's clerk will attempt to call counsel one or two days before the status conference to arrange a hearing date that is acceptable to all counsel. If all parties agree, the hearing date will be set and the status conference will be vacated.

Any stipulation and proposed order to modify the briefing schedule in a way that extends the date the reply brief is due should also continue the status conference to a date not less than five court days after the reply brief is due.

CLASS ACTIONS

(Revised 7-6-16)

Rules of Court

The Court expects counsel to be familiar with and to fully comply with California Rules of Court, rules 3.760 through 3.771, concerning the management of class action cases.

Case Management

The court expects the parties to engage in private mediation at the earliest practicable time, i.e., as soon as all parties have obtained, through formal or informal discovery, sufficient information from the opposing party(s) to enable them to engage in meaningful mediation.

No motion for class certification or to deny class certification should be filed without leave of court. Before leave to file such a motion is requested, the Court expects the parties to have exhausted efforts to mediate a resolution of the case.

Discovery

The parties are encouraged to engage in informal discovery to the greatest extent possible, both for certification issues and for trial preparation.

Pursuant to RSC Local Rule 3160, when a plaintiff designates an action as complex, all formal discovery is stayed. The Court will generally issue a case management order lifting that stay, effective as soon as all defendants have answered.

However, the stay is unlikely to be lifted for all purposes. Because the Court expects the parties to exhaust efforts at mediation before turning their attention to class certification, the parties should limit their initial rounds of discovery to those factual issues essential to a meaningful mediation.

Before propounding any formal discovery concerning class-certification issues, the parties are encouraged to meet and confer to discuss both (a) the scope and sources of the information needed to support or oppose such a motion and (b) whether the parties will agree to exchange that information informally.

The Court will frequently order that no discovery motions may be filed without leave of court. If a discovery dispute arises, the parties should meet and confer either in person or by telephone in a good-faith effort to resolve the dispute. If, despite that effort, the parties are unable to resolve the dispute, then counsel should contact the clerk of the department to schedule an informal conference at which the court will discuss the dispute with counsel and, if not resolved to the parties' satisfaction, will consider any request for

leave to file a formal motion. The conference may be conducted by telephone or in person, as counsel prefer. If the opposing side will not agree to participate in the informal conference, then the moving party should bring an ex parte application for leave to file a discovery motion.

Motions for Preliminary Approval of Settlement

If the matter is settled and a motion for preliminary approval of the settlement is filed:

In General

1. The motion should be supported by a declaration from the plaintiff's attorney that, inter alia:

a. Sets forth the attorney's estimate of the number of individuals in the class.

b. Sets forth the attorney's estimate of the total amount of damages, monetary penalties or other relief that the class would be awarded if the action were successful at trial on all of its claims.

c. Sets forth the attorney's estimate of the total amount of damages, monetary penalties or other relief that the class could reasonably expect to be awarded at trial, taking into account the likelihood of prevailing and other attendant risks.

d. Sets forth the attorney's estimate of the recovery by the average class member if the settlement were approved. If the recovery by different class members will vary, the attorney shall also estimate the range (high and low) of possible recoveries.

2. The motion should be supported by declarations both from the plaintiff's attorney and from the defendant's attorney that state (a) whether the attorney is aware of any class, representative or other collective action in any other court in this or any other jurisdiction that asserts claims similar to those asserted in this action on behalf of a class or group of individuals who would also be members of the class defined in this action and, if so, (b) the name and case number of any such case, the nature of the claims asserted, the definition of the class or other parties on whose behalf the action is brought, and the procedural status of that case. Before making a declaration, the attorney shall make reasonable inquiry of other members of the attorney's law firm and any associated law firm to determine whether those individuals are aware of any such similar actions.

3. If the settlement provides that any unclaimed or otherwise unpaid residue of the settlement proceeds are to be distributed to a proposed cy pres recipient:

a. The motion should explain why a cy pres recipient is reasonably necessary.

b. The motion should describe any relationship between the proposed cy pres recipient and (i) any class representative or other party, (ii) any officer, director, or manager of any party, or (iii) any attorney or lawfirm for any party.

c. The motion should be supported by a declaration from a knowledgeable person from the proposed cy pres recipient establishing that the recipient is either (i) a nonprofit organization or foundation that supports projects that will benefit the class or similarly situated persons, or that promotes the law consistent with the objectives and purposes of the underlying cause of action, (ii) a child advocacy program, or (iii) a nonprofit organizations providing civil legal services to the indigent. (See Code Civ. Proc., § 384, subd. (b).) In particular, that declaration should describe the history of the recipient, the types of projects that it has conducted or supported over the last five years, and any particular use to which it would intend to devote the unpaid residue if received.

d. In the Court's view, Code of Civil Procedure section 384, subdivision (b), lists the possible recipients of unpaid residue in a descending order of preference. If the cy pres recipient proposed by the parties is one involved in child advocacy or that provides civil legal services to the indigent, the motion should include a declaration explaining why the parties did not propose an organization that will either "benefit the class or similarly situated persons, or . . . promote the law consistent with the objectives and purposes of the underlying cause of action."

4. The motion should discuss the proposed method of giving notice, the alternative methods considered, and the reasons that the proposed method is the one most likely to give actual notice to the greatest number of class members. If the identities of the class members are not known, the parties should consider publication of notice in print, on the web, and through social media.

5. If the settlement requires the class members to submit claims, the motion should explain why a claim process is reasonably necessary.

a. If the defendant knows (a) the identity of the class members, (b) their addresses, and (c) the facts necessary to calculate the recovery of each class member, the Court is likely to require a strong showing of necessity for a claims process. Under those circumstances, the requirement that the class members file claims is an unnecessary procedural hurdle that serves primarily to reduce the number of class members being compensated.

b. For example, in wage-and-hour actions brought on behalf of employees of an employer, requiring current employees to file claims is rarely justified because the employer knows the addresses of the employees. By contrast, requiring claims from former employees might be justified if the employer's information regarding their addresses is likely to be inaccurate, e.g., if the workforce is highly transient and the class includes employees from many years ago.

6. Any release to be given by the participating class members should generally be limited to (a) the claims stated in the complaint and those based on the facts alleged in the complaint, and (b) the defendants named in the complaint, together with their officers, directors, employees and agents. If any other parties are sought to be released, the

settlement agreement should both identify those other parties and explain the facts that justify their inclusion.

7 If the settlement contemplates the use of an administrator to implement the terms of the settlement, the motion should be supported by a declaration describing the administrator's competence, the fee to be charged by the administrator, and whether that fee is (a) fixed, (b) hourly, or (c) hourly with a cap. If the fee is fixed, the declaration should explain how the price was calculated.

8. The motion should describe how the value of any uncashed checks will be distributed.

9. If the settlement includes compensation for unpaid wages, the motion should describe how the employer's share of any applicable payroll taxes will be handled. The Court suggests that the employer's share not be paid out of the gross settlement fund. The Court is not likely to include the amount of those payments when calculating the plaintiff's counsel's percentage attorney's fee.

10. The documents that will be read by or used by the class members – the proposed notice, objection form, exclusion form, and any claim form – should be drafted in a manner that is likely to be readily understood by the members of the class. To assist the Court in determining whether those documents comply with that directive, the motion should include evidence concerning the likely age, education, and experience of the class members, and of their ability to read and comprehend English.

11. If the Court rejects any proposed order, notice, objection form, exclusion form or claim form, any revised version should be accompanied by a "red-lined" version showing how the earlier version was modified

The Order

1. The proposed order should include, as attachments to the order, the proposed notice, proposed exclusion form, proposed objection form, and any proposed claim form. The Court is likely to modify those proposed forms. Therefore, the Court is not likely to issue an order that merely incorporates by reference the forms attached to the settlement agreement. The settlement agreement must be filed, but should not also be attached to the proposed order.

2. Counsel should carefully review both the terms and the terminology of the proposed order and accompanying forms (proposed notice, objection form, exclusion form, and claim form, if any) to confirm that the various documents are consistent with each other and with the settlement agreement.

3. The proposed order shall provide that the notice shall be accompanied by an objection form that the class members may use. If the objection forms are to be submitted to the administrator rather than the court, then the order shall require the administrator to submit any timely objections to the court by a declaration filed concurrently with the plaintiffs' motion for final approval.

4. The proposed order should provide that the notice shall be accompanied by an exclusion ("opt-out") form that the class members may use.

5. The proposed order should state the name of any claims administrator, and shall describe the nature of the services that the administrator will be required to perform, either directly or by reference to the settlement agreement.

6. The proposed order should not require an objecting party to do either of the following:

a. To appear, either personally or through counsel, at the hearing on the motion for final approval for that party's objection to be considered.

b. To file or serve a notice of intention to appear at the hearing on the motion for final approval.

7. If the proposed order includes a provision enjoining the class members from filing any actions or administrative claims or proceedings pending the final hearing on the settlement, or for any other period, the motion should include citations to authority for the issuance of such an injunction without notice to or opportunity to be heard by the individuals to be enjoined.

8. If notice is to be given by mail, and if the class members will be required to submit a claim form, the order should provide:

a. That the notice be accompanied by a stamped envelope addressed to the claims administrator; and

b. That the claims administrator be required to send a reminder notice a reasonable time before the claims deadline to all class members who have not yet submitted a claim.

9. The order should require that either counsel or the administrator give notice to any objecting party of any continuance of the hearing of the motion for final approval.

The Notice

1. Unless the notice describes the approximate recovery by the individual class member to whom the notice is sent, the notice should include an estimate of the likely recovery by the average class member. If the recovery by different members will vary, the notice should also include an estimate of the range of possible recoveries.

2. To avoid discouraging any dissenting class members from objecting to the proposed settlement, the notice should clearly indicate that the Court has determined only that there is sufficient evidence to suggest that the proposed settlement might be fair, adequate, and reasonable, and that any final determination of those issues will be made at the final hearing.

3. The notice should advise the class members of where they can find the settlement agreement, by describing (a) the full title and filing date of the declaration or other document to which it is attached when filed with the Court, (b) the address of the

courthouse to which the case is assigned, and (c) the address of the court's website at which the case file can be viewed on-line.

The Claim Form

1. To avoid infringing upon the class members' privacy more than necessary, the information required to be provided by the class member on any claim form should not exceed the minimum information necessary to process the claim.

The Objection Form

1. The proposed order should include an objection form. If the drafting of an objection were to be left to the class members, the written objections that they submit might omit the case name or number, or might bear a title that does not clearly identify the document as an objection. The Court prefers that the parties agree (a) that any objection be sent to the administrator and (b) that the administrator, rather than the objecting party, be charged with providing copies of the objection to counsel. If, nevertheless, the agreement provides that the objection form is to be filed with the court rather than submitted to the administrator, then the objection form shall comply with California Rules of Court, rule 2.111.

2. The information required to be provided by an objecting class member on the objection form should not exceed the minimum information necessary to (a) identify the objector as a person entitled to object to the settlement and (b) to describe the nature of the objection.

3. If a claim must be submitted to participate in the settlement, the objection form should remind the objector that, to participate in the settlement in the event that the objection is overruled, the objector must also submit a claim.

Motions for Final Approval of a Settlement, and Judgment

If the matter is settled and a motion for final approval of the settlement is filed:

1. The order granting preliminary approval will set the date for the hearing on the plaintiff's motion for final approval. Promptly after the entry of that order, the plaintiff should reserve a law and motion hearing on the date set in the order.

2. Any request for a "service," "enhancement," or "incentive" payment to a named class representative should be supported by a declaration from the proposed recipient in which the declarant (a) describes the services performed by the declarant to further the prosecution of the action, (b) estimates the time incurred by the declarant in performing those services, (c) describes any risks undertaken by the declarant in prosecuting the action, (d) describes any adverse consequences actually suffered by the declarant as a result of prosecuting the action, and (e) describes any benefits received by the declarant as a result of prosecuting the action.

3. Any request for compensation for the services of any claims administrator should be supported by a declaration from the claims administrator describing the services performed, the time incurred to perform those services, and either the hourly rate charged for those services or the agreed-upon flat fee.

4. The Court must determine whether the attorney-fee award is fair to the class. Therefore, any request for compensation for attorney's fees should be supported by a declaration that:

a. Authenticates copies of the time records maintained by the plaintiff's attorneys for the services performed in this case. If no time records were maintained, then the declaration should state that fact, and should (i) state the date on which legal services were provided, (ii) describe in detail the nature of those services, (iii) estimate the time incurred in performing those services, and (iv) describe the basis for that estimate.

b. Describes both (i) the hourly rate or rates customarily charged by each attorney for that attorney's time during the period in which those services were performed, and (ii) the attorney's experience and expertise that justify such a rate.

5. Any request for compensation for expenses incurred by the plaintiff's attorneys should be supported by a detailed declaration or other evidence describing the date, nature, and amount of each expense incurred.

6. The order granting the motion for final approval shall set a deadline for the filing of a report concerning the amount of money distributed. (Code Civ. Proc., § 384, subd. (b).)

7. Because it would potentially expose the class members to a contempt charge, the judgment should not bar or otherwise enjoin the class members from prosecuting the released claims.

8. Neither the proposed order nor the proposed judgment shall provide for the dismissal of the action. (Cal. Rules of Court, rule 3.769(h).)

9. Any report pursuant to Code of Civil Procedure section 384, subdivision (b), should be in the form of a declaration from the administrator or other declarant with personal knowledge of the facts, and should be accompanied by a proposed amended judgment.

10. If the Court either denies the motion for final approval or continues the hearing on the motion, and if the plaintiff thereafter files any amended stipulation, proposed order or judgment, or other document in support of either that motion or a renewed motion, the plaintiff should submit directly to the clerk of the department a declaration authenticating a "red-lined" version of the amended document, showing how the earlier version was modified. (The Court's imaging system is not in color. Therefore, if the document is filed first, the red highlighting is reduced to black, making it less useful.)

Requests for Complete or Partial Dismissal of Class Claims

If the plaintiff seeks to dismiss the entire action, any defendant in the action, or the class allegations in the action:

1. Because any such dismissal requires court approval, the plaintiff may not use the preprinted Request for Dismissal, Judicial Council form CIV-110. Instead, the request should be made by the submission to the court of both (a) a declaration from plaintiff's counsel and from each named plaintiff and (b) a proposed order of dismissal.

2. The declarations must comply with California Rules of Court, rule 3.770(a), pertaining to any consideration being paid for the dismissal. Because the purpose of the requirement is to avoid collusion between the parties to the detriment of the potential class members, the showing should be made by declaration rather than by stipulation.

3. If the dismissal is in exchange for any consideration, the application should explain each of the following:

   a. What is the form and value of the consideration, and to whom is it to be paid?

   b. If the consideration is in the form of one or more monetary payments, how were the payments calculated?

   c. How is the retention of that consideration either by the plaintiff or the plaintiff's attorney consistent with their respective fiduciary duties to the class?

   d. If the plaintiff is to give a release in addition to a dismissal, what is the scope of that release?

4. Because the Court must also decide whether notice of the dismissal should be given to actual or potential class members (Cal. Rules of Court, rule 3.770(c)), the declaration should also state (a) whether any formal or informal notice of the existence of the action has been given to any of the potential class members by either the plaintiff or plaintiff's counsel, and (b) if so, the nature and extent of that notice.

5. If the members of the putative class are readily identifiable – e.g., all owners of homes in a particular tract – the Court may require the plaintiff to get notice to all putative class members to allow them the opportunity to object to the requested dismissal.

6. Any request should explain why the putative class members will not be prejudiced by the requested dismissal.

CONSTRUCTION DEFECT CASES

(Revised 7-6-16)

Service of Summons

In construction-defect cases, counsel for plaintiffs will sometimes refrain from serving the summons and complaint for months, apparently in anticipation that counsel will be retained by other homeowners in the same housing development, prompting the need for an amended complaint. This practice is not acceptable. "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." (Cal. Rules of Court, rule 3.110(b).) In complex cases in this Court, the deadline is even shorter: The plaintiff must serve the summons, complaint, and notice of the initial Case Management Conference on all defendants no later than 30 days prior to the date by the Court for that initial conference. (RSC Local Rule 3160.)

Service of Notices on Counsel

In any construction defect case in which a cross-complaint has been filed, the Court encourages the parties to use an electronic service provider. The Court has contractual arrangement with all of those of which it is aware: Case Anywhere; Case Homepage; File & Serve Xpress; and Legal Document Server. Counsel presenting a proposed CMO are encouraged to select the provider of their choice and include relevant provisions in the proposed order.

Amendments to Complaints

Modifying a complaint solely to name additional homeowner plaintiffs to join in the same allegations already asserted by the existing plaintiffs should be accomplished by an amendment to the complaint, as opposed to an entirely amended complaint. Any such amendments may be filed without leave of court to the extent permitted by the CMO. If not permitted by the CMO, or if a CMO time limit for doing so has passed, then leave of court is required.

Amended Complaints and Cross-Complaints

Except to the extent permitted by Code of Civil Procedure section 472 or by the CMO, leave of court is required before filing any amended complaint or cross-complaint.

After an amended complaint or cross-complaint is filed, all defendants and cross-defendants should be served.

Answers: To Amended Complaints, to Amendments to Complaints, and to Consolidated Complaints

As a matter of convenience, plaintiffs and defendants frequently agree between themselves that a defendant's answer to a prior complaint will be deemed to constitute its answer to an amended complaint, or that a defendant's answer in one action will also constitute the defendant's answer to the complaint in a consolidated action. The result is that the Court cannot determine whether a defendant has answered a particular pleading without searching for possible stipulations or orders excusing the defendant's obligation to file a separate answer. Therefore, the Court is unlikely to accept any such stipulations in the future.

The Court will deem any answer filed prior to the filing of an amendment to a complaint or cross-complaint (as opposed to an amended complaint or cross-complaint) to be an answer to the complaint or cross-complaint as amended by that amendment, unless the defendant or cross-defendant files another answer prior to the expiration of the time in which to do so.

With that exception, all amended complaints, amended cross-complaints, amended complaints in intervention seeking affirmative relief, and consolidated complaints and cross-complaints should be separately answered, regardless of whether the defendant or cross-defendant has previously answered an earlier version of the complaint or cross-complaint, and regardless of whether the defendant or cross-defendant has answered a similar pleading in a consolidated case.

Stays of Prosecution

The plaintiffs and the developer will often ask the Court to stay the prosecution of the action while the parties pursue either their remedies under Civil Code section 895, et seq., or some other form of alternative dispute resolution. The Court will generally oblige those requests, provided that they are of a limited and reasonable duration. However, those same parties frequently ignore the stay that they had requested, by filing and serving amended complaints and cross-complaints.

In the Court's view, an unqualified stay of prosecution applies to all plaintiffs and all cross-complainants. Otherwise, the scope of the stay is ambiguous. Does it toll the running of the deadlines in Code of Civil Procedure sections 583.250, 583.310, and 583.420? May a cross-defendant demur to the cross-complaint? Can a cross-defendant obtain discovery from the plaintiffs?

Accordingly, unless the order enacting the stay expressly provides otherwise, any stay of proceedings will be interpreted as enjoining all parties from (a) filing or serving any complaint, cross-complaint, complaint in intervention, or responsive pleading, and (b) litigating any claim or defense asserted in any such pleading by demurrer, motion, or otherwise.

Case Management Orders (CMO)

Before the appointment of a discovery referee, any proposed CMO, amended CMO, or amended CMO timeline should be submitted to the Court either (1) with a stipulation by all parties who have appeared in the case to date, or (2) if no such stipulation can be reached, by a noticed motion. After the appointment of a discovery referee, any such proposal should be submitted to the Court either (1) in the form of a recommendation from the discovery referee, (2) by stipulation of the parties, or (3) by a noticed motion. Proposals that do not comply with these directives may be summarily denied.

The parties will frequently propose a CMO timeline that either identifies no date for the first mediation ("TBD") or identifies only the month in which they hope the mediation will occur. The Court will no longer approve such indefinite timelines. Instead, the Court will insist that the date of at least the first mediation be expressly stated.

No date for a mediation or mandatory settlement conference should be included in any proposed timeline unless the parties have contacted the mediator and received the mediator's assurance that the mediator is available on that date and will reserve that date for the particular case while the Court considers the proposed timeline.

Appointment of Discovery Referees and Mediators

Because of the concern that information obtained in confidence by a mediator might influence decisions made by a discovery referee if the same person were to fill both roles in the same case, the Court may not appoint the same person as both mediator and discovery referee unless all named parties, including named cross-defendants, have stipulated to do so.

Mandatory Settlement Conferences (MSC)

The CMO generally requires the parties and their insurance adjusters to personally appear at the MSC. Any request for relief from that requirement should be submitted to the Court unless the order setting the MSC requires that such a request be submitted to the settlement referee.

Regardless of whether the request is directed to the settlement referee or to the Court, it should be served on all parties.

Any such request is an application. Like any application or motion, it should be supported by admissible evidence. Any such request supported only with a letter or other unsworn statement from counsel is likely to be rejected.

Any request to be excused from the obligation to appear in person addressed to the Court should be supported by a declaration on personal knowledge (1) establishing the facts justifying the excuse, (2) describing the extent to which that party, attorney, or adjuster participated in any prior mediation or settlement efforts, and (3) stating whether the party, attorney, or adjuster was personally present at any prior mediations or settlement conferences.

Enforcement of Settlement

If a settlement agreement is breached, it may be enforced in an action for breach of contract. If the parties stipulate to the settlement, that stipulation may be enforced by motion pursuant to Code of Civil Procedure section 664.6 or section 664.7.

Parties to settlement agreements in construction defect cases often ask the Court to employ a third remedy, by ordering the non-performing party to appear and show cause why it has not performed. The Court is not aware of any authority for such an OSC. It the absence of such authority, the Court is unlikely to grant any such requests.

PAGA CASES

(Revised 12-15-16)

Applications to Approve Settlements

1. Effective June 27, 2016, the Court must review and approve any settlement of any PAGA case. (Lab. Code, § 2699, subd. (*l*)(2).)

a. Prior to this amendment, the Court's responsibility was limited to reviewing and approving "any penalties sought" as part of a proposed settlement agreement of a PAGA case. Because of the expanded scope of the Court's responsibilities, all applications for approval of PAGA settlements shall henceforth be made by noticed motion.

b. Any provision of any case management order in any PAGA cases that states that the Court's review of a PAGA settlement agreement is limited to the penalties to be paid pursuant to the agreement should be disregarded.

2. A court may award a lesser amount than the maximum civil penalty amount if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. (Lab. Code, § 2699, subd. (e)(2); *Amaral vs. Cintax Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213-1214.) If the Court is asked to approve the fairness of the imposition of penalties as part of a settlement agreement, the application or motion should provide the Court with argument and evidence concerning each of the following:

a. The nature of the alleged violations.

b. The number of alleged individual violations, including both the length of the relevant employment period and the number of employees allegedly employed during that period.

c. The total amount of penalties for which the defendant is potentially liable should those allegations are proven.

d. The extent to which the alleged violations would be likely to be found true at trial, considering the weight of the evidence, the clarity of the applicable law, and the strength of any factual or legal defense likely to be asserted by the defendant.

e. The nature and extent of the discovery or other investigation undertaken by the plaintiff to estimate the likelihood of proving those allegations at trial.

f. Whether the defendant's violations were knowing and intentional within the meaning of Labor Code section 226, subdivision (e)(1).

g. The total amount of penalties for which the defendant would be likely to be found liable at trial.

h. Any facts that tend to suggest that the imposition of the total amount of statutory penalties for which the defendant would be likely to be found liable at trial would be unjust, arbitrary and oppressive, or confiscatory.

i. How the amount of the agreed-upon penalties was calculated or otherwise arrived at.

j. Whether the parties utilized the services of any neutral party to mediate this dispute.

k. Any other factors that are material to a determination that the amount of the agreed-upon penalties is fair.