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**[EXCERPTS]**

# California Civil Litigation and Discovery

Second Edition

(Litigation By The Numbers®  
Substantive Companion)

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## TABLE OF CONTENTS

PREFACE .....	vii
PARALEGAL DEFINED/REGULATIONS .....	Ch. 1 - Pg. 1
BILLABLE HOURS .....	Ch. 2 - Pg. 1
Billable Hours Basics .....	Ch. 2 - Pg. 1
The Importance of Billable Hours .....	Ch. 2 - Pg. 2
Achieving Billable Hour Success .....	Ch. 2 - Pg. 2
Some Helpful Hints on Billable Hours and Productivity .....	Ch. 2 - Pg. 3
A Word About the Ethics of Billing .....	Ch. 2 - Pg. 4
OUR COURT SYSTEMS AND SOURCES OF LAW .....	Ch. 3 - Pg. 1
Our Court Systems .....	Ch. 3 - Pg. 1
Federal Court System .....	Ch. 3 - Pg. 2
California State Court System .....	Ch. 3 - Pg. 3
Sources of Law .....	Ch. 3 - Pg. 3
Primary Sources of Law vs. Secondary Sources of Law .....	Ch. 3 - Pg. 3
The Hierarchy of Legal Authority within Primary Sources of Law .....	Ch. 3 - Pg. 4
Substantive Law vs. Procedural Law .....	Ch. 3 - Pg. 5
Differences Between Criminal and Civil Law .....	Ch. 3 - Pg. 6
Small Claims Court .....	Ch. 3 - Pg. 7
OVERVIEW OF CIVIL LITIGATION AND THE PARALEGAL'S ROLE .....	Ch. 4 - Pg. 1
Plaintiff Performs Pre-Litigation Analysis .....	Ch. 4 - Pg. 1
Plaintiff Commences the Lawsuit .....	Ch. 4 - Pg. 2
Plaintiff Serves the Defendant .....	Ch. 4 - Pg. 2
Defendant Defaults/Responds to/or Attacks the Complaint .....	Ch. 4 - Pg. 2
Discovery .....	Ch. 4 - Pg. 3
Law and Motion .....	Ch. 4 - Pg. 4
Alternative Dispute Resolution .....	Ch. 4 - Pg. 4
Post-Trial Motions and Requests for Costs .....	Ch. 4 - Pg. 5
Appeal .....	Ch. 4 - Pg. 6
Enforcement of Judgment .....	Ch. 4 - Pg. 6
THE PRE-LITIGATION STAGE OF THE CIVIL LAWSUIT .....	Ch. 5 - Pg. 1
Deciding Whether to Take The Case .....	Ch. 5 - Pg. 1
Pre-Litigation Planning .....	Ch. 5 - Pg. 7
Informal Discovery to Investigate the Merits and Gather Evidence .....	Ch. 5 - Pg. 8
Considering Various Causes of Action .....	Ch. 5 - Pg. 8
Sources of Information .....	Ch. 5 - Pg. 10
When to Sue - Statute of Limitations .....	Ch. 5 - Pg. 11
Who to Name in the Lawsuit .....	Ch. 5 - Pg. 12
Standing/Real Party in Interest Requirement .....	Ch. 5 - Pg. 12
The Requirement of Capacity .....	Ch. 5 - Pg. 14
Naming DOE Defendants .....	Ch. 5 - Pg. 15
Joinder Of Parties .....	Ch. 5 - Pg. 15
A Word About How the Parties May Change .....	Ch. 5 - Pg. 18
Substitution of Parties .....	Ch. 5 - Pg. 18

Intervention by a New Party .....	Ch. 5 - Pg. 19
Cross-Complaint/Impleader .....	Ch. 5 - Pg. 20
Interpleader .....	Ch. 5 - Pg. 20
Where to Sue .....	Ch. 5 - Pg. 21
Subject Matter Jurisdiction .....	Ch. 5 - Pg. 22
California State Court Jurisdiction .....	Ch. 5 - Pg. 22
Federal Court Jurisdiction .....	Ch. 5 - Pg. 25
Concurrent Jurisdiction .....	Ch. 5 - Pg. 26
Non-jurisdictional Issues .....	Ch. 5 - Pg. 27
Venue .....	Ch. 5 - Pg. 27
Forum <i>non conveniens</i> .....	Ch. 5 - Pg. 28
Personal Jurisdiction .....	Ch. 5 - Pg. 28
Constitutionally Sufficient Basis .....	Ch. 5 - Pg. 29
Long Arm Statutes .....	Ch. 5 - Pg. 30
PLEADINGS IN GENERAL .....	Ch. 6 - Pg. 1
History .....	Ch. 6 - Pg. 1
Purpose/Types of Pleading .....	Ch. 6 - Pg. 1
Effect of Pleadings .....	Ch. 6 - Pg. 2
COMMENCING THE LAWSUIT .....	Ch. 7 - Pg. 1
The State Court Complaint .....	Ch. 7 - Pg. 1
The Parts of the Complaint .....	Ch. 7 - Pg. 1
The Caption .....	Ch. 7 - Pg. 1
The Body .....	Ch. 7 - Pg. 3
Jurisdictional Allegations .....	Ch. 7 - Pg. 3
General Allegations .....	Ch. 7 - Pg. 5
Specific Allegations .....	Ch. 7 - Pg. 6
Hints for Drafting Causes of Action .....	Ch. 7 - Pg. 7
The Prayer for Relief .....	Ch. 7 - Pg. 12
Hints for Drafting the Prayer .....	Ch. 7 - Pg. 12
The Subscription and Verification .....	Ch. 7 - Pg. 13
The Summons .....	Ch. 7 - Pg. 15
Service of the Summons and Complaint .....	Ch. 7 - Pg. 16
Personal Service .....	Ch. 7 - Pg. 16
Substituted Service .....	Ch. 7 - Pg. 17
Service by Mail with Acknowledgment of Receipt .....	Ch. 7 - Pg. 17
Service by Publication .....	Ch. 7 - Pg. 17
Service Outside California .....	Ch. 7 - Pg. 18
Return of Summons .....	Ch. 7 - Pg. 18
Notes on Federal Practice .....	Ch. 7 - Pg. 18
DEFAULT BY DEFENDANT .....	Ch. 8 - Pg. 1
APPEARANCE BY DEFENDANT .....	Ch. 9 - Pg. 1
Motion to Quash Service of Summons .....	Ch. 9 - Pg. 1
Responding to the Complaint .....	Ch. 9 - Pg. 2
Answering the Complaint .....	Ch. 9 - Pg. 2
Admissions .....	Ch. 9 - Pg. 3
Denials .....	Ch. 9 - Pg. 3
Affirmative Defenses .....	Ch. 9 - Pg. 4

Hints for Drafting the Answer . . . . .	Ch. 9 - Pg. 5
Filing and Serving the Answer . . . . .	Ch. 9 - Pg. 7
Notes on Federal Practice . . . . .	Ch. 9 - Pg. 7
Attacking the Complaint . . . . .	Ch. 9 - Pg. 8
Grounds for Attacking the Complaint . . . . .	Ch. 9 - Pg. 8
The Demurrer . . . . .	Ch. 9 - Pg. 11
Drafting the Demurrer . . . . .	Ch. 9 - Pg. 13
Hints for Drafting the Demurrer . . . . .	Ch. 9 - Pg. 14
Filing and Serving the Demurrer . . . . .	Ch. 9 - Pg. 14
Notes on Federal Practice . . . . .	Ch. 9 - Pg. 14
The Motion to Strike . . . . .	Ch. 9 - Pg. 15
Drafting the Motion to Strike . . . . .	Ch. 9 - Pg. 16
Filing and Serving the Motion to Strike . . . . .	Ch. 9 - Pg. 16
A Special Motion to Strike . . . . .	Ch. 9 - Pg. 16
Cross-Complaints . . . . .	Ch. 9 - Pg. 17
Filing and Serving the Cross-Complaint . . . . .	Ch. 9 - Pg. 19
Notes on Federal Practice . . . . .	Ch. 9 - Pg. 19
AMENDING PLEADINGS . . . . .	Ch. 10 - Pg. 1
Where Leave of Court is Not Required . . . . .	Ch. 10 - Pg. 1
Where Leave of Court Is Required . . . . .	Ch. 10 - Pg. 1
Manner of Amendment . . . . .	Ch. 10 - Pg. 2
The Statute of Limitations and Amended Pleadings . . . . .	Ch. 10 - Pg. 2
DISCOVERY IN GENERAL . . . . .	Ch. 11 - Pg. 1
Scope of Discovery . . . . .	Ch. 11 - Pg. 3
Formal Discovery Tools . . . . .	Ch. 11 - Pg. 6
Discovery Plan . . . . .	Ch. 11 - Pg. 6
Rules Governing Discovery . . . . .	Ch. 11 - Pg. 10
Rules Applicable to All Methods of Propounding Discovery . . . . .	Ch. 11 - Pg. 10
Rules Applicable to All Responses to Formal Discovery . . . . .	Ch. 11 - Pg. 12
Protective Orders . . . . .	Ch. 11 - Pg. 13
Abuses of Discovery . . . . .	Ch. 11 - Pg. 14
Monetary Sanctions . . . . .	Ch. 11 - Pg. 15
Issue Sanctions . . . . .	Ch. 11 - Pg. 15
Evidentiary Sanctions . . . . .	Ch. 11 - Pg. 16
Terminating Sanctions . . . . .	Ch. 11 - Pg. 16
Contempt Sanctions . . . . .	Ch. 11 - Pg. 16
Notes on Federal Practice . . . . .	Ch. 11 - Pg. 16
INTERROGATORIES . . . . .	Ch. 12 - Pg. 1
Advantages of Interrogatories . . . . .	Ch. 12 - Pg. 2
Disadvantages of Interrogatories . . . . .	Ch. 12 - Pg. 2
Types of Interrogatories . . . . .	Ch. 12 - Pg. 3
Contention Interrogatories . . . . .	Ch. 12 - Pg. 3
Document Interrogatories . . . . .	Ch. 12 - Pg. 4
Rules re Drafting Special Interrogatories . . . . .	Ch. 12 - Pg. 4
Hints for Drafting Special Interrogatories . . . . .	Ch. 12 - Pg. 6
Declaration for Additional Discovery . . . . .	Ch. 12 - Pg. 7
Serving Interrogatories . . . . .	Ch. 12 - Pg. 7
Rules re Responding to Interrogatories . . . . .	Ch. 12 - Pg. 7

Hints for Responding to Interrogatories .....	Ch. 12 - Pg. 8
Answering Interrogatories .....	Ch. 12 - Pg. 9
Objecting to Interrogatories .....	Ch. 12 - Pg. 9
Objecting and Responding to Interrogatories .....	Ch. 12 - Pg. 10
Serving Responses to Interrogatories .....	Ch. 12 - Pg. 11
Challenging Responses to Interrogatories .....	Ch. 12 - Pg. 11
Notes on Federal Practice .....	Ch. 12 - Pg. 12
DEPOSITIONS .....	Ch. 13 - Pg. 1
Advantages of Depositions .....	Ch. 13 - Pg. 2
Disadvantages of Depositions .....	Ch. 13 - Pg. 2
Types of Depositions .....	Ch. 13 - Pg. 3
Rules re Noticing Depositions in General (Party and Non-Party) .....	Ch. 13 - Pg. 6
Objecting to a Notice of Taking Deposition .....	Ch. 13 - Pg. 7
Requiring Production of Personal Records of a Consumer .....	Ch. 13 - Pg. 7
Sanctions Relating to Depositions .....	Ch. 13 - Pg. 9
Notes on Federal Practice .....	Ch. 13 - Pg. 9
Conducting the Deposition .....	Ch. 13 - Pg. 9
Role of the Paralegal in Depositions .....	Ch. 13 - Pg. 10
Before the Deposition .....	Ch. 13 - Pg. 10
During the Deposition .....	Ch. 13 - Pg. 11
After the Deposition .....	Ch. 13 - Pg. 11
Deposition Summaries .....	Ch. 13 - Pg. 11
INSPECTION AND PRODUCTION OF DOCUMENTS, TANGIBLE THINGS, LAND, AND OTHER PROPERTY .....	Ch. 14 - Pg. 1
Rules re Drafting Inspection Demands .....	Ch. 14 - Pg. 2
Hints for Drafting Inspection Demands .....	Ch. 14 - Pg. 3
Serving the Inspection Demand .....	Ch. 14 - Pg. 4
Rules re Responding to Inspection Demand .....	Ch. 14 - Pg. 4
Agreeing to comply with a demand .....	Ch. 14 - Pg. 5
Stating an inability to comply with a demand .....	Ch. 14 - Pg. 5
Objecting to a demand .....	Ch. 14 - Pg. 6
Protective Orders .....	Ch. 14 - Pg. 7
Serving the Written Response to Inspection Demand .....	Ch. 14 - Pg. 7
Locating and Organizing Documents for Production .....	Ch. 14 - Pg. 7
Challenging Responses to Inspection Demand .....	Ch. 14 - Pg. 8
The Production .....	Ch. 14 - Pg. 9
Notes on Federal Practice .....	Ch. 14 - Pg. 9
REQUESTS FOR ADMISSION .....	Ch. 15 - Pg. 1
Advantages of Requests for Admission .....	Ch. 15 - Pg. 1
Disadvantages of Requests for Admission .....	Ch. 15 - Pg. 2
Rules re Drafting Requests for Admission .....	Ch. 15 - Pg. 2
Hints for Drafting Requests for Admission .....	Ch. 15 - Pg. 3
Serving Requests for Admission .....	Ch. 15 - Pg. 4
Rules re Responding to Requests for Admission .....	Ch. 15 - Pg. 5
Hints for Responding to Requests for Admission .....	Ch. 15 - Pg. 6
Serving the Response to Requests for Admission .....	Ch. 15 - Pg. 6
Challenging Responses to Requests for Admission .....	Ch. 15 - Pg. 7
Untimely or No Response .....	Ch. 15 - Pg. 7

Notes on Federal Practice .....	Ch. 15 - Pg. 7
<b>PHYSICAL AND MENTAL EXAMS .....</b>	<b>Ch. 16 - Pg. 1</b>
Advantages of IME's .....	Ch. 16 - Pg. 1
Disadvantages of IME's .....	Ch. 16 - Pg. 1
Rules re IME's of Personal Injury Plaintiffs/Cross-Complainants .....	Ch. 16 - Pg. 2
Service of a Demand for IME .....	Ch. 16 - Pg. 2
Response to Demand for IME .....	Ch. 16 - Pg. 2
Service of a Response to Demand for IME .....	Ch. 16 - Pg. 3
Conduct of the IME .....	Ch. 16 - Pg. 3
Challenging Response to Demand for IME .....	Ch. 16 - Pg. 3
The IME Report .....	Ch. 16 - Pg. 3
Mental Examinations .....	Ch. 16 - Pg. 4
Notes on Federal Practice .....	Ch. 16 - Pg. 4
<b>EXPERT WITNESS DISCOVERY .....</b>	<b>Ch. 17 - Pg. 1</b>
Demand for Exchange of Expert Witness Lists .....	Ch. 17 - Pg. 1
Service of the Demand .....	Ch. 17 - Pg. 2
Exchanging Expert Witness Information .....	Ch. 17 - Pg. 2
Depositions of Expert Witnesses .....	Ch. 17 - Pg. 3
Notes on Federal Practice .....	Ch. 17 - Pg. 3
<b>MOTIONS .....</b>	<b>Ch. 18 - Pg. 1</b>
The Parts of a Motion .....	Ch. 18 - Pg. 2
Notice .....	Ch. 18 - Pg. 2
Memorandum of Points and Authorities .....	Ch. 18 - Pg. 3
Declaration .....	Ch. 18 - Pg. 5
Filing and Serving the Motion .....	Ch. 18 - Pg. 6
Opposing the Motion .....	Ch. 18 - Pg. 6
Replying to the Opposition .....	Ch. 18 - Pg. 7
Tentative Ruling/Hearing/Order .....	Ch. 18 - Pg. 7
Ex Parte Applications .....	Ch. 18 - Pg. 7
Discovery Motions .....	Ch. 18 - Pg. 9
Dispositive Motions .....	Ch. 18 - Pg. 9
Motion for Judgment on the Pleadings .....	Ch. 18 - Pg. 10
Motions for Summary Judgment and Summary Adjudication .....	Ch. 18 - Pg. 11
<b>ALTERNATIVE DISPUTE RESOLUTION AND SETTLEMENT .....</b>	<b>Ch. 19 - Pg. 1</b>
Alternative Dispute Resolution .....	Ch. 19 - Pg. 1
Arbitration .....	Ch. 19 - Pg. 2
Voluntary Non-Judicial (or "Private") Arbitration .....	Ch. 19 - Pg. 2
Judicial Arbitration (Mandatory or Voluntary) .....	Ch. 19 - Pg. 3
Mediation .....	Ch. 19 - Pg. 5
Settlement .....	Ch. 19 - Pg. 6
Mandatory Settlement Conferences .....	Ch. 19 - Pg. 6
Statutory Offers to Compromise .....	Ch. 19 - Pg. 7
When Settlement is Reached .....	Ch. 19 - Pg. 9
<b>TRIAL PREPARATION AND TRIAL .....</b>	<b>Ch. 20 - Pg. 1</b>
Jury Trial or Bench Trial .....	Ch. 20 - Pg. 2
Requesting and Selecting a Jury .....	Ch. 20 - Pg. 2

Phases of Trial .....	Ch. 20 - Pg. 3
Opening Statements .....	Ch. 20 - Pg. 4
Direct Examination .....	Ch. 20 - Pg. 4
Cross-Examination .....	Ch. 20 - Pg. 4
Motion for Nonsuit .....	Ch. 20 - Pg. 5
Motion for Directed Verdict .....	Ch. 20 - Pg. 5
Closing Arguments .....	Ch. 20 - Pg. 5
Jury Instructions .....	Ch. 20 - Pg. 6
Jury Verdict/Court Decision .....	Ch. 20 - Pg. 6
Reimbursement of Costs .....	Ch. 20 - Pg. 7
Post-Trial Motions .....	Ch. 20 - Pg. 7
Motion Notwithstanding the Verdict .....	Ch. 20 - Pg. 7
Motion for New Trial .....	Ch. 20 - Pg. 7
Motion to Vacate Judgment .....	Ch. 20 - Pg. 8
Motion to Stay Enforcement of Judgment .....	Ch. 20 - Pg. 8
 APPEALS .....	 Ch. 21 - Pg. 1
Notice of Appeal .....	Ch. 21 - Pg. 1
Record on Appeal .....	Ch. 21 - Pg. 1
Briefs .....	Ch. 21 - Pg. 2
Decision and Standards of Review .....	Ch. 21 - Pg. 2
Publication of the Opinion .....	Ch. 21 - Pg. 3
 ENFORCEMENT OF JUDGMENT .....	 Ch. 22 - Pg. 1
Identifying Assets of the Debtor .....	Ch. 22 - Pg. 1
Placing a Lien on Real Estate or Personal Property .....	Ch. 22 - Pg. 2
Levying on Assets .....	Ch. 22 - Pg. 3
Satisfaction of Judgment .....	Ch. 22 - Pg. 3
 GLOSSARY/INDEX	

The following excerpts from the **Litigation By The Numbers - Substantive Companion** are intended to provide examples of the format, style, and tone of the book. The format and language are simple and straightforward, i.e., “user friendly,” and the substance is comprehensive and practical.

\* \* \*

## Pre-Litigation Planning

Before the attorney actually files the complaint, facts must be investigated, research must be completed, and analysis must be performed on several levels. The attorney will need to determine whether the case has merit and whether the defendant has any defenses. If there is a basis for the lawsuit, then the attorney has to plan his/her strategy for preparing the complaint.

This “pre-litigation planning” involves determining:

- *What to allege* in the complaint . . . . . This requires consideration of potential **causes of action**, their **elements**, and an analysis as to whether the facts support each of the elements.
- *When to file* the complaint . . . . . This involves **statutes of limitations** and **pre-filing notices**.<sup>1/</sup>
- *Who to name* in the complaint. . . . . This requires an understanding of **standing, capacity, DOE defendants, joinder**.
- *Where to file* the complaint. . . . . This requires an understanding of **subject matter jurisdiction, personal jurisdiction, venue** and **forum non conveniens**.
- *What relief to seek* in the complaint. . . This requires an understanding of the types of remedies available for the various causes of action.

**NOTE: These are not necessarily in order.**<sup>2/</sup>

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<sup>1/</sup> You may be required to notify the defendant of the claim before filing a lawsuit, or there may be some advantage to doing so.

<sup>2/</sup> For example, a defendant can be identified first, and then various causes of action to be alleged against that defendant can be determined. There *is* some logic to the order, though -- you can't determine the court in which to bring the action until you know the causes of action being alleged (subject matter jurisdiction issue) and the identity of the defendant (personal jurisdiction issue); and you can't determine the applicable statute of limitations until you know the causes of action. The analysis is not linear -- you might have to go back and forth a bit. For example, you could conclude that you meet all of the elements of a particular cause of action, but then find that the cause of action is not available because the statute of limitations has expired. (Back to the drawing board . . .)

### Informal Discovery to Investigate the Merits and Gather Evidence

If you represent the potential plaintiff, you will start informal discovery in the pre-litigation phase of the lawsuit, immediately upon the first contact with the client. You will be seeking information about what people said, did, or heard about the incident giving rise to the dispute (e.g., the car accident, the breach of contract, etc.), and you will be looking for documents relevant to the incident. This information should reveal the strengths and weakness of the potential client's position, and the opposing party's potential defenses, thus aiding the attorney's evaluation of the merits of the case. Remember C.C.P. § 128.7 requires that when the attorney signs a pleading, she/he is swearing that the pleading is not frivolous or filed for improper purposes, based upon the initial investigation. Therefore, initial investigation as to the merits of the action is essential.

For many reasons, it is important to start informal discovery right away.

- Information gathered early is more likely to be accurate and complete -- people forget or their memory blurs as time passes.
- More complete and unguarded information can be obtained before commencing the lawsuit (people often become cautious or hesitant to give information when a lawsuit is pending), and when a party is represented by counsel, it is unethical to contact them directly.
- For the plaintiff, early investigation might spare them from filing a losing case; for the defendant, early investigation might prevent the case from proceeding beyond the pleading stage.

In undertaking discovery (informal or formal, for that matter), the paralegal needs to keep in mind these three critical questions:

- What **relevant** information do I have?
- What relevant information do I need?
- How do I get the relevant information I need?

### Considering Various Causes of Action

*But, how do you know what's relevant?* Knowing what's relevant in any particular lawsuit requires an understanding of:

- The possible **causes of action** -- the legal theories entitling the plaintiff to recover from any or all of the defendants.
- The **elements** of each possible cause of action.
- The evidence required to prove each element (i.e., establish a **prima facie case**).

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**Whether you represent the plaintiff or the defendant, you must know the elements of the cause(s) of action at-issue in the complaint.**

Example: The tort of battery is defined as “an act done with intent to cause harmful or offensive touching of another.” To establish a cause of action for battery, the plaintiff must prove every one of the elements of battery, as follows:

- Act that was voluntary
- Intent (defendant knew his/her actions would touch or injure another or was substantially certain they would)
- Causation (“but for” the defendant’s actions, the plaintiff would not be injured the way they were)
- Harmful or offensive (act) (applying the “reasonable man” standard that under the same or similar circumstances a reasonable man would have considered it harmful or offensive)
- Touching of (physical touching or by extension)
- Another

Consider the following statement: “Defendant almost hit the Plaintiff when the crowded bus they were riding in jerked, and he was thrown off balance.” A cause of action for battery cannot be alleged on these facts for three reasons:

- (1) The defendant’s act was not voluntary (the act was caused by the lurching bus).
- (2) There was no intent (it was an involuntary act, and therefore he had no intent to injure her).
- (3) There was no touching (*almost* doesn’t count).

The knowledgeable paralegal on the plaintiff’s side, who realizes that these facts cannot support a cause of action for battery, would not allege battery in the complaint. However, if a cause of action were included in a complaint on these facts, the paralegal on the defendant’s side would see the defects, and would attack the complaint. (See “Attacking the Complaint” in Chapter 9)

In preparation for the client interview, it may be helpful to draft a chart or diagram listing: (a) the elements of the possible causes of action, (b) what has to be proved or disproved, and (c) the possible ways to do so. This visual will be a benefit in preparing for an interview with the client or third party witness, and also will make it easier to develop a discovery plan later on.

\* \* \*

### Standing/Real Party in Interest Requirement

**Standing** requires that there be an actual case and/or controversy before one may sue, and further requires that the person suing be the **real party in interest** (the one who is injured and has a vested interest in the outcome of the case). This is the person who has the right to sue under substantive law. Thus, in planning who to name as plaintiffs in the lawsuit, thought must be given to whether or not they have standing.

The concept of standing dates back to common law when only the legal owner had the right to bring an action for violation of his/her rights. The real party in interest rule requires that the person who is suing must use his/her name and have a legal right to enforce the claim in question. This goes to the existence of a cause of action and whether the plaintiff has a right to relief from the court. The purpose of the rule is to keep the plaintiff from suing again (or other claimants from suing the defendant for the same reason; they may have to be joined in the lawsuit.)

Parties to an action may be private individuals, partnerships, corporations, public bodies (agencies or legal entities). In estate or trust actions, the executor, administrator or trustee is considered the person with standing.

- Claims belonging to a decedent prior to the time of death may be maintained by a personal representative or the decedent's successor in interest.
- Beneficiaries may not sue on behalf of the trust, but may sue the trustee for breach of fiduciary duty.

\* \* \*

### Naming DOE Defendants

A DOE defendant is a fictitiously-named defendant. DOE defendants are commonly named in complaints to substitute for defendants whose identity is not yet ascertained. By holding the place for a later-identified defendant, "DOE" designations are universally used in state court practice to permit filing an action before the expiration of the statute of limitations. Once the identity of a particular DOE defendant is ascertained, the plaintiff amends the complaint to refer to that particular DOE defendant under his/her real name. (See Chapter 10 - "Amending Pleadings")

Naming DOE defendants serves other purposes as well.

- If the plaintiff misnames a defendant (e.g., by using a different middle name than the actual defendant), the judgment would be unenforceable. However, if the plaintiff named DOES in the complaint, the complaint could be amended by substituting the defendant's correct name for one of the DOES, thus correcting the error.
- If the plaintiff does not know the true names of those who injured him/her, but only knows their nick names, the defendants may be initially named as DOE defendants.

- If the plaintiff knows the names of those who injured him/her, but has reason to believe they were not acting alone, the other unidentified defendants may be initially named as DOE defendants.
- If the plaintiff does not know all the facts upon which liability depends, the plaintiff may name DOE defendants under various theories of liability, and then amend the complaint to name the right DOE under the applicable cause of action.

The amended complaint will **relate back** to the date the original complaint was filed, thus satisfying the statute of limitations as to that later-identified DOE, if *all* of the following are satisfied:

- The plaintiff was ignorant of their true names at the time of the original filing, and the original complaint so stated.
- The original complaint alleged that the DOES were responsible for the injury claimed.
- The original complaint contained a valid cause of action against the DOES.
- The amendment inserting the names of the DOES is based on the same general facts as the original complaint.

\* \* \*

### Compulsory Joinder

The Code of Civil Procedure states that a party *must* be joined if:

- the party's presence is required to grant complete relief, or
- the party has an interest in the action which must be protected, or
- the party's absence may expose other parties to double obligations.

Basically then, the plaintiff must join "indispensable parties" (persons whose interest in the litigation is so involved that the case can't be fairly adjudicated without them). Joinder is compulsory if relief cannot be obtained without those parties, and failure to join them would expose the parties in the lawsuit to further litigation.<sup>3/</sup>

- In some cases, if parties are not joined in the action, any right to recover from them is lost.

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<sup>3/</sup> The defendant may attack the complaint based upon the plaintiff's failure to join one or more indispensable parties. (See "Attacking the Complaint" in Chapter 9)

- If a necessary and indispensable party can't be joined for some reason, the court will dismiss the action *without prejudice* (i.e., the party may bring the action later).

#### Examples of Compulsory Joinder

- #1: Five people claim rights to damages from a defendant who drove carelessly into a crowd of people. They all have to be joined to get a fair remedy and prevent additional suits against the defendant.
- #2: In the 2007 case of Anna Nicole Smith's death, several men claimed to be the father of her infant child, so all had to be joined; likewise, there were numerous people claiming her property or money for inheritance, so they all had to be joined in the action to receive a fair resolution.
- #3: The victim of a plane crash would be required to join as defendants, the pilot (who had been drinking) and the airline (who was required to monitor the pilots).

Why is joinder compulsory in these examples?

- It is more economical and efficient for the court to deal with the issue once instead of multiple times.
- Joining all the parties protects the defendant from the same lawsuit being brought over and over.
- Joining all the parties assures that the plaintiffs each receive a fair remedy and avoids the first plaintiff to bring a suit from receiving more than the last plaintiff to bring the suit.

\* \* \*

## Subject Matter Jurisdiction

**Jurisdiction** of the court is generally defined as: the power and authority of a court to hear a particular type of case and amount in controversy and render a legally binding decision over the parties involved. (The underlined elements are described below.)

- The power and authority of the court to hear cases is granted by federal and state constitutions and statutes.
- Subject matter jurisdiction may lie in state court, federal court, or both, depending upon the type of claim involved and the allocation of authority between the state and federal court systems.
- If a court may hear and act: (a) in the particular type of case (e.g., admiralty law, family law, probate, tort) and (b) the amount in controversy, the court has **subject matter jurisdiction** over the case. In order to be able to render a legally binding decision over parties involved in the case, the court must have **personal (or in personam) jurisdiction** over the parties, **in rem jurisdiction** over the real or personal property which is the subject of the lawsuit, or **quasi in rem jurisdiction** over the parties.

**To have jurisdiction, then, the presiding court must have BOTH subject matter jurisdiction and either personal, in rem or quasi in rem jurisdiction.**

\* \* \*

## Amount in Controversy

As noted above, a civil case with more than \$25,000 in controversy (an “unlimited civil case”) may be heard only by a court with general jurisdiction, and a civil case with \$25,000 or less in controversy (a “limited civil case”) may be heard only by a court with limited jurisdiction.

How is the amount in controversy determined?

Courts look at the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, which is in controversy in the action, exclusive of attorneys’ fees, interest or costs. (C.C.P. § 85) The dollar amount stated in the prayer of the complaint is determinative as to the amount in controversy (not trial evidence or the amount of the ultimate judgment).<sup>4/</sup>

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<sup>4/</sup> Sometimes, to avoid the restrictions inherent in limited civil cases, a plaintiff will exaggerate the amount of the claim and file it as an unlimited civil case. To deter this abuse, the court may order the plaintiff to pay for the defendant’s costs incurred in having the case reclassified as a limited civil case.

### Concurrent Jurisdiction

More than one court may have jurisdiction to hear a case. **Concurrent jurisdiction** may occur where:

- (1) More than one superior court has jurisdiction to hear the case, e.g., the Superior Court for the County of Los Angeles and the Superior Court for the County of Alameda. (The first court to assume jurisdiction has the exclusive and continuing jurisdiction over the case, and the second court will defer to the first.)
- (2) Both the state courts and federal courts have jurisdiction to hear the matter.

### Federal Court Jurisdiction

On the federal level, the trial courts are the District Courts. They have **limited jurisdiction**, and thus may only hear certain types of cases.

There are three types of **federal court subject matter jurisdiction**:

- Exclusive jurisdiction
- Federal question jurisdiction
- Diversity jurisdiction

Exclusive Jurisdiction - **Exclusive jurisdiction** is the power of the court to hear a particular kind of case to the exclusion of all other courts. Cases within the exclusive jurisdiction of the federal courts (e.g., admiralty and maritime claims, copyright disputes, bankruptcy cases, antitrust claims, SEC claims, federal labor law cases, and cases where the United States is a party, etc.) must be filed in federal court; they may not be filed in a state court, because only the federal court has the necessary subject matter jurisdiction.

Federal Question Jurisdiction - **Federal question jurisdiction** exists when the type of case or claim arises from violations of the U.S. Constitution, federal law or federal treaties (e.g., American Indian rights, first amendment issues such as freedom of speech and freedom of religion, and civil rights). These cases can be filed in federal or state court as the federal court does not have exclusive jurisdiction over them.

Diversity jurisdiction - **Diversity jurisdiction** requires satisfaction of a two-prong test:

- (1) The case must be a civil action where *the matter in controversy exceeds \$75,000*;
- and
- (2) The dispute must be *between citizens of different states*. In that regard, the purpose of diversity jurisdiction is to provide a *neutral forum* for citizens of different states or countries to prevent any perceived bias by the courts. Accordingly, *all* plaintiffs must be of different citizenship than *all* defendants, i.e., no plaintiff may be a citizen of the same state as any defendant.

### Concurrent Jurisdiction

**Concurrent jurisdiction** exists when a case may be brought in *either* the federal or the state court. For example, cases involving federal questions, such as civil rights, may have jurisdiction in both the federal and California courts; a personal injury case brought by a plaintiff in California against a defendant in Arizona, seeking in excess of \$75,000 in damages, also would have subject matter jurisdiction in both the federal and California courts.

The plaintiff initially selects the forum to hear the case. When the plaintiff commences the action in state court, and the federal court has concurrent jurisdiction, the defendant may file a motion to **remove** the case to federal court, i.e., transfer a case originally filed in state court to the federal district court. 28 U.S.C. § 1441 *et seq.*

### When Subject Matter Jurisdiction is Lacking

#### ***Lack of subject matter jurisdiction is incurable and fatal:***

- It may be raised by a party at any time (even after judgment is rendered).
- It cannot be waived by the parties (involuntarily or by stipulation).
- The court may raise the issue and dismiss the case.
- If the lack of subject matter jurisdiction is not noted until after the court renders a judgment, the judgment is void.

## Personal Jurisdiction

Personal jurisdiction refers to the power or authority of the court to bring a party before it and make a decision binding on that person or on the person's rights in property involved in the dispute. The plaintiff submits to the personal jurisdiction of the court by filing the complaint. In order to render a valid binding judgment against the defendant, the defendant must be made subject to the personal jurisdiction of the court. If the court lacks personal jurisdiction over the defendant, then the court cannot impose liability on the defendant or affect the defendant's rights. Therefore, in selecting the right court in which to sue, the plaintiff must be sure that the court has personal jurisdiction over the defendant.

There are three types of personal jurisdiction:

- ***In personam*** jurisdiction is jurisdiction over the person.
- ***In rem*** jurisdiction is jurisdiction over property at-issue in the case located within the state.
- ***Quasi in rem*** jurisdiction is jurisdiction over the person, but is restricted to their specific interest in property located within the state.

For a court to have personal jurisdiction over a potential defendant, a two prong test must be satisfied:

- There must be a *constitutionally sufficient basis* for exerting jurisdiction over the person, *and*
- The person must be given *notice* (met by service of process) in a manner that meets constitutional due process and statutory requirements.

In this section we discuss the constitutional basis for exerting jurisdiction over the defendant, and the ways in which the defendant may dispute personal jurisdiction. Notice requirements are dealt with in Chapter 7, under "Service of the Summons and Complaint."<sup>5/</sup>

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<sup>5/</sup> The defendant may attack the validity of the service of the summons on lack of constitutional basis for exerting jurisdiction and/or defective notice. (See "Motion to Quash Service of Summons" in Chapter 9)

### Constitutionally Sufficient Basis

A state may have personal jurisdiction over a potential defendant for a variety of reasons:

- *Physical presence* in the forum state (the state in which the lawsuit is filed). If the defendant is physically in the forum state when he/she is served with the summons and complaint, the court of the forum state has personal jurisdiction over the defendant.
- *Domicile* in the forum state. States have personal jurisdiction over people living or planning to live indefinitely in the state.<sup>6/</sup>
- *General appearance*. No matter where the defendant resides or does business, a state will have personal jurisdiction over a potential defendant if the *defendant makes a general appearance* in court in the case, thereby submitting to the court's jurisdiction.<sup>7/</sup>
- *Agreement*. No matter where the defendant resides or does business, a state will have personal jurisdiction over a potential defendant if the *defendant has agreed to submit* to the jurisdiction of the court by contract or other agreement.

So, if a defendant is physically in the state when served with process or lives or does business in the state, or submits to jurisdiction by making a general appearance in the case, or previously agreed by contract or other agreement to submit to the jurisdiction, the court has personal jurisdiction over the defendant. But there are additional circumstances where an out-of-state defendant may be subject to personal jurisdiction.

### Long Arm Statutes

**Long arm statutes** authorize the assertion of personal jurisdiction over defendants outside the borders of the forum state when the party has "minimum contacts" with the forum state, as established by the case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).<sup>8/</sup> Each state has the right to enact its own long arm statute in line with *International Shoe*. California has enacted the broadest long arm statute of all of the states. California's long arm statute allows it to assert personal jurisdiction over an out-of-state defendant as long as California has a *sufficient relationship with the defendant and the litigation to make it reasonable to require the defendant to defend the action in the California courts*.

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<sup>6/</sup> The authority of the court extends to the border of the state in which it is located.

<sup>7/</sup> When a defendant makes an appearance in a case (for example by responding to a complaint or filing a document with the court), the appearance (a "general appearance") constitutes a consent to the jurisdiction of the court). Only when the defendant makes a "special appearance," discussed later, is this not the case.

<sup>8/</sup> *International Shoe* held that it is not fair for a court to assert jurisdiction over an out-of-state party unless the party's contacts with the forum state are such that the party "could reasonably expect to be haled into court" in that state. This jurisdiction must "not offend traditional notions of fair play and substantial justice."

Personal jurisdiction over an out-of-state defendant can be *general* (applies to the defendant in general, no matter what the case or controversy involves) or *limited* (applies to the defendant only as regards a particular case):

- *General jurisdiction* results from *substantial activity*, e.g., doing business in California, which justifies jurisdiction over all of the defendant's acts in the forum state. To justify general jurisdiction, the activity or contact must be "substantial, continuous, and systematic."
- *Limited jurisdiction* results from *limited activity*, e.g., the defendant crossed the California border to purchase a beverage at a convenience store, and knocked over and broke a display case at the store, justifying jurisdiction only with respect to the incident which gave rise to the case. As is the case with our example, a single contact may justify personal jurisdiction if the facts of the case arose out of that contact.

As noted above, no matter what the basis for the assertion of personal jurisdiction over the defendant, the plaintiff must also satisfy the second prong of the two-prong test -- *notice* (met by service of process in a manner that meets constitutional due process and statutory requirements). That aspect of personal jurisdiction is discussed in Chapter 7 under "Service of the Summons and Complaint."

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Now let's take a look at a breach of contract cause of action which does hit all of the elements.<sup>9/</sup>

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<sup>9/</sup> The elements of breach of contract are: (1) existence of a contract, (2) Plaintiff performed or was excused from performing its duties under the contract, (3) Defendant breached the contract by failing to perform its duties under the contract, and (4) Plaintiff suffered damages as a result of the defendant's breach. Note how each element is presented in a separate paragraph.

“1. On or about January 10, 2007, Plaintiff and Defendant entered into a written contract (the “Contract”) where Plaintiff was to pay Defendant \$52,000 to install ten sliding glass doors and 30 windows (the “Work”) in Plaintiff’s apartment building. A true copy of the Contract is attached as Exhibit A, and incorporated by this reference.

[This paragraph states facts establishing the existence of the contract -- the 1st element.]

2. Under the Contract, Plaintiff was to pay the Defendant a deposit of \$26,000, by May 1, 2007, and the balance of \$26,000 when Defendant finished the Work. On April 25, 2007, Plaintiff paid Defendant \$26,000.

[This paragraph states facts establishing that Plaintiff performed its duties as required -- the 2<sup>nd</sup> element.]

3. Under the Contract, Defendant was to complete the Work by May 15, 2007. Defendant did not do so by May 15, 2007, or at all. Defendant has refused to return Plaintiff’s \$26,000 deposit.

[This paragraph states facts establishing that Defendant failed to perform its duties under the Contract -- the 3rd element.]

4. As a result of Defendant’s refusal to comply with the terms of the Contract, Plaintiff has been damaged in the amount of \$26,000.”

[This paragraph states facts establishing that Defendant’s breach caused Plaintiff damage -- the 4th element.]

#### Hints for Drafting Causes of Action

- Before you start drafting, know the facts of the case -- who, what, when, how, and what types of damages are sought -- and know the parties and their relationships.
- Strive to draft pleadings that are clear and precise so as to avoid attacks by the opposition and eliminate the need to file amended pleadings to cure defects. In other words, DO IT RIGHT THE FIRST TIME.
- Keep in mind the purpose of the complaint -- to put the other party on notice of the basis of the suit to allow them to properly prepare an answer.
- Make sure each party is named in the caption and referred to in the body.
- Make sure the capacity of each party is stated in the caption, e.g., as an individual, a corporation, etc.

- For your own use, prepare a list of the elements of each cause of action (e.g., for battery you would list voluntary act, intent, causation, harmful or offensive touching of another). Then, using one paragraph for each element, draft the case story (using essential or ultimate facts). That way you will be sure to allege each and every element of the cause of action. Remember that California is a *fact pleading* state.

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- Plead the “**ultimate facts**” or the facts that relate to the elements; do not plead unnecessary facts or conclusions.

Examples:

Alleging that “*the defendant failed to deliver the contracted goods to plaintiff*” is an “ultimate” fact.

Alleging that “*the defendant breached the contract*” is a conclusion of law (to be determined by the court).

Alleging that “*defendant Smith purposefully drove his car through the gate*” is too conclusory.

\* \* \*

Service of the Summons and Complaint

The summons and complaint must be served on the defendant(s), and a Proof of Service of Summons must be filed with the court within the time limits set by the applicable court rules, which is 60 days for most cases.<sup>10/</sup> Delay in service may be grounds for sanctions, including dismissal of the action.

Service may be accomplished by:

- Any private person over 18 who is not a party to the action.
- A peace officer.
- A registered process server.

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<sup>10/</sup> See “Service and Proof of Service of Summons and Complaint and Accompanying Documents” § 1.5 of the Procedural Guide for applicable deadlines.

The Code of Civil Procedure allows four methods of service of process on a defendant located *within the State of California*:

- Personal service
- Substituted service
- Service by mail with acknowledgment of receipt
- Service by publication

Strict rules apply to each method of service.<sup>11/</sup> Each method of service is detailed in the Procedural Guide § 1.5, and briefly explained here. Note that service on the defendant's attorney is *not* one of the allowed methods for service of process; service on the attorney is only allowed for subsequently served documents.

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### Grounds for Attacking the Complaint

As noted in prior chapters, there are many requirements for bringing a lawsuit against a defendant. To review:

- The court must have a constitutionally sufficient basis for exerting jurisdiction over the defendant.<sup>12/</sup>
- The defendant must be given notice (met by service of process) in a manner that meets constitutional due process and statutory requirements.<sup>13/</sup>
- The court must have subject matter jurisdiction.<sup>14/</sup>

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<sup>11/</sup> The defendant may attack the validity of the service of the summons if it was not served in accordance with the procedural rules. (See "Motion to Quash Service of Summons" in Chapter 9)

<sup>12/</sup> Recall that there is a constitutionally sufficient basis when the defendant is physically in the forum state when he/she is served with the summons and complaint, the defendant lives in or plans to live indefinitely in the state, the defendant has agreed to submit to the jurisdiction of the court by contract or other agreement, or when the defendant has the required minimum contacts with the state.

<sup>13/</sup> Remember also that there are specific methods for serving process (personal service, substituted service, notice and acknowledgment of receipt, publication), each having very specific procedures which must be followed.

<sup>14/</sup> As noted above, subject matter jurisdiction is the power and authority of a court to hear a particular type of case and amount in controversy and render a legally binding decision. Lack of subject matter jurisdiction is incurable, fatal, and cannot be waived.

- The plaintiff must have standing.<sup>15/</sup>
- The plaintiff must have capacity.<sup>16/</sup>
- All parties must be properly joined.<sup>17/</sup>

In addition, the complaint must be legally sufficient -- it must set forth facts constituting the cause of action in ordinary and concise language that shows a right to a remedy.

When one or more of the requirements for bringing the lawsuit is not met, or the complaint is otherwise not legally sufficient, e.g., it fails to state a cause of action or is vague and ambiguous, the defendant may attack it by way of various motions. Certain attacks must be filed within the 30-day time limit in which to respond to the complaint or they are forever waived; others may be brought at any time, i.e., they are not waivable.

*Non-waivable* grounds permitting a challenge at any time are:

- lack of subject matter jurisdiction
- lack of standing
- failure to state a claim upon which relief can be granted

***The rest are waived if not brought timely!***

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<sup>15/</sup> As noted above, standing requires that there be an actual case and/or controversy before one may sue, and further requires that the person suing be the real party in interest (the one injured and with a vested interest in the outcome of the case). Lack of standing is treated as a subject matter jurisdiction challenge (which may be raised any time in the proceedings) and may even be raised for the first time on appeal. When a party lacks standing to sue, the action must be dismissed, unless the complaint can be amended by substituting a party who does have standing.

<sup>16/</sup> As noted above, the plaintiff must have the capacity to sue. Lack of capacity is *not* a jurisdictional defect, and as such is waived if not brought timely. If the court finds that the plaintiff lacks capacity, the complaint may be amended to substitute a party with capacity.

<sup>17/</sup> As noted above, the plaintiff must join “indispensable parties” -- any person whose interest in the litigation is so involved that the case can’t be fairly adjudicated without them, for one reason or another. Joinder is compulsory if relief cannot be obtained without that party, and failure to join them, would expose the parties to further litigation. A challenge based upon the failure to join an indispensable party or improper joinder must be raised at the outset of the action or it is waived.

### Hints for Drafting Special Interrogatories

- Before you begin, outline the information the interrogatories are designed to obtain. To do so, refer to your Discovery Plan, and ask yourself: “What do I need, what is the source, and how can I state it clearly and precisely?”
- Always remember to stay within the limits of the scope of discovery -- any matter, *not privileged*, that is *relevant to the subject matter* or is *reasonably calculated to lead to the discovery of admissible evidence*.
- Make sure that all of your interrogatories are in the proper format and that they follow all applicable rules, e.g., you have capitalized all defined terms, you have no compound questions, you have no subparts, etc.
- Stick to what is relevant and will get a response that will help you. Asking: “*Were you driving the car negligently when you hit the PLAINTIFF?*” would be a waste of one of your 35 interrogatories, as no one would answer it.
- Carefully craft your interrogatories so they are clear, concise, and not subject to interpretation. (Sloppy interrogatories result in objections and sloppy responses.)
  - DO NOT ASK: “*Where did you get the gun?*” Instead, define “*THE GUN*” as “*the gun used in the 9:30 p.m. January 10, 2007, robbery of the AM/PM store at Bristol and 17<sup>th</sup> Streets in Fullerton, California*” and ask “*Where did you get THE GUN?*”
  - If you are not going to use the defined term more than once, instead of defining it, you can simply include the definition in the question, e.g., “*Where did you get the gun used in the 9:30 p.m. January 10, 2007, robbery of the AM/PM store at Bristol and 17<sup>th</sup> Streets in Fullerton, California?*”
- Make sure the scope of your interrogatory is narrow -- calling for specific information. Overbroad interrogatories lose their relevance, result in vague and overbroad answers, and are objectionable.
- Do not propound more than 35 interrogatories without attaching a Declaration for Additional Discovery.<sup>18/</sup>

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<sup>18/</sup> In the absence of the Declaration, the responding party may simply refuse to respond to any interrogatory past #35.