

# CHAPTER 19

## PRACTICE AND PROCEDURE

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## **FORMS**

- Complaint for Damages for Sexual Harassment, Retaliation, Breach of Contract, Wrongful Discharge in Violation of Public Policy .....
- Answer to Complaint for Damages for Sexual Harassment, Retaliation, Breach of Contract, Wrongful Discharge in Violation of Public Policy .....
- Form Interrogatories—Employment Law .....
- List of Judicial Council Jury Instructions .....

**RESERVED**

## PRACTICE AND PROCEDURE

[19:1] **Scope:** This Chapter deals with procedural issues commonly encountered in litigating employment-related claims. The focus is on how various pretrial and trial procedures are *used* in employment litigation, rather than on an extended discussion of the specific rules governing each procedure. Those rules apply in civil litigation generally and are thoroughly discussed in other Practice Guides.

*Cross-refer:* For rules governing:

- pretrial civil procedure in California courts, see Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG);
- trial and post-trial procedures in California courts, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG);
- pretrial civil procedure in federal courts, see Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG);
- trial and post-trial procedures in federal courts, see Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG).

### A. PLAINTIFF'S FORUM SELECTION

1. [19:2] **Forums Available:** Before commencing suit, plaintiffs must determine whether their claims should (or must) be filed in state or federal court. Cases fall into three categories:
  - a. [19:3] **State court only option:** Some employment actions may be filed only in state court: e.g., contract and tort claims where there is no diversity of citizenship between the parties and no federal claim is raised.
  - b. [19:4] **Federal court only option:** A few employment related claims may be filed only in federal court: e.g., matters as to which federal jurisdiction is exclusive, such as claims based on collective bargaining agreements (see ¶15:161) and certain ERISA claims (see ¶15:402).
  - c. [19:5] **Either state or federal court:** Many employment cases may be filed in either state or federal court, including diversity of citizenship cases exceeding \$75,000 and "federal question" cases (e.g., Title VII cases) in which state and federal courts have *concurrent jurisdiction* (see ¶19:101).

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 [19:6] **PRACTICE POINTER:** Plaintiffs suing on employment-related claims usually choose a California state court rather than federal court because California law is almost always more favorable to plaintiffs than federal law, and most state court judges are more familiar with California law than federal law. Also, plaintiffs' counsel are often more familiar with state court procedures than federal procedures.

A plaintiff's initial choice, however, may be overridden by *defendant's right to remove* to federal court diversity and federal question cases and certain class actions; see ¶19:236 *ff.* and 19:771.5 *ff.*

On the other hand, plaintiffs may be able to avoid removal by raising only nonfederal claims and joining at least one defendant who is a citizen of the same state as plaintiff (but "sham" joinders will be disregarded); see ¶19:322 *ff.*

Because of the much more plaintiff-friendly environment in California state courts, plaintiff's counsel should carefully draft the complaint to prevent removal. The addition of a legitimate nondiverse defendant, or the careful pleading of only state law claims, is usually enough to prevent removal.

*Cross-refer—other factors affecting forum choice:* Numerous other factors affect the choice between state and federal courts generally. See discussion in:

- Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3; and
- Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 1.

[19:7-14] *Reserved.*

2. [19:15] **Choice of Law Considerations:** Before filing suit, plaintiffs should consider what substantive law the forum court will apply to their claims.
  - a. [19:16] **Federal claims:** There is no choice of law issue in cases "arising under" federal law (e.g., claims under Title VII, ADA, ADEA, etc.). Federal substantive law applies regardless of whether the action is filed in *state or federal court*.

The Supremacy Clause (U.S. Const., Art. VI) obligates state courts adjudicating federal claims to enforce and apply federal substantive law, even if it is contrary to local policies. This requirement includes limitations on remedies available for the federal claim. [*Monessen Southwestern Ry. Co. v. Morgan* (1988) 486 US 330, 335, 108 S.Ct. 1837, 1842—

state courts may not award prejudgment interest on federal claim where federal law does not authorize such awards]

*Cross-refer:* See Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 1.

[19:17-24] Reserved.

- (1) [19:25] **Compare—federal courts “borrow” state law on certain issues:** Federal courts may “borrow” relevant state law on certain issues.

(a) [19:26] **Civil rights claims:** Federal courts are instructed to borrow the forum state’s laws on *issues federal law does not cover* in civil rights cases (e.g., survivability of action), unless doing so would be inconsistent with the purposes of the relevant federal law. [See 42 USC §1988(a)]

(b) [19:27] **Statute of limitations:** Where a claim arises under a pre-1991 federal statute that does not contain its own statute of limitations, federal courts may “borrow” the “most analogous” statute of limitations under the forum state’s laws. (E.g., in civil rights cases, federal courts look to the personal injury statute of limitations (two years in California; see CCP §335.1).) [See *Wilson v. Garcia* (1985) 471 US 261, 266-267, 105 S.Ct. 1938, 1942]

*Compare—post-1990 statutes:* No such “borrowing” is required for claims under federal statutes enacted after 1990. If no other statute of limitations is provided, a blanket four-year statute applies. [28 USC §1658]

*Cross-refer:* See Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 1.

[19:28-34] Reserved.

- b. [19:35] **State law claims in federal diversity actions:** A federal court in a diversity of citizenship case must apply the same “substantive” rules as a forum state court would apply, so that the outcome will be the same in either court. [*Erie R.R. Co. v. Tompkins* (1938) 304 US 64, 78-79, 58 S.Ct. 817, 822-823]

The *Erie* doctrine applies both in cases originally filed in federal court and in cases removed from state court on diversity grounds. [*Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 US 487, 496, 61 S.Ct. 1020, 1021-1022—forum state’s choice of law rules are “substantive” and must be applied by federal court after action removed from state court]

- (1) [19:36] **Compare—“procedural” rules:** Even in diversity cases, however, federal courts apply their own

rules of “procedure.” [See *Erie R.R. Co. v. Tompkins*, *supra*, 304 US at 78-79, 58 S.Ct. at 822-823]

Federal courts also apply their own rules of evidence, even in cases applying state substantive law. [See FRE 101]

Whether a particular rule is “substantive” or “procedural” depends on whether it could have an *outcome-determinative* effect. [See *Gasperini v. Center for Humanities, Inc.* (1996) 518 US 415, 426, 116 S.Ct. 2211, 2219]

(a) [19:37] **Burden of proof on summary judgment:** The burden of proof on summary judgment motions in employment discrimination cases is the same under California and federal law (i.e., the *McDonnell Douglas Corp. v. Green* burden-shifting approach; see ¶7:390 *ff.*). Some states, however, use a different standard on summary judgment. But because this difference is rarely “outcome-determinative,” a federal court sitting in diversity must apply the federal burden-shifting approach as a rule of “procedure.” [*Snead v. Metropolitan Prop. & Cas. Ins. Co.* (9th Cir. 2001) 237 F3d 1080, 1090 (dealing with Oregon law)—also recognizing “overriding federal interests” in disposing of employment discrimination cases at an early stage]

*Cross-refer:* See further discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Chs. 1 and 4.

[19:38-49] *Reserved.*

c. [19:50] **Choice of law in state courts:** Where an action filed in a California court involves persons, property or transactions located in other states, the California court must determine *which state's laws* to apply.

(1) [19:51] **Effect of parties' agreement:** If the parties have agreed which state's laws shall govern disputes arising under the contract, the agreement will usually be enforced, provided:

- the chosen law *bears a “substantial relationship”* to the parties or their transaction, or there is “any other reasonable basis for the parties’ choice of law”; and
- the chosen law is not contrary to California’s fundamental policy or, if it is, California does not have a materially greater interest than does the chosen state in the determination of the particular issue. [*Nedlloyd Lines B.V. v. Sup.Ct. (Seawinds Ltd.)* (1992) 3 C4th 459, 466, 11 CR2d 330, 334]

[19:51.1-51.4] *Reserved.*

- [19:51.5] California Employee's contract with New York Employer stated it was to be "governed by and construed according to" New York law. Employee filed suit in California for age discrimination in violation of the California FEHA and for wrongful termination in violation of California public policy. These claims were subject to New York law because they were "*inextricably intertwined with construction and enforcement of the agreement.*" [*Olinick v. BMG Entertainment* (2006) 138 CA4th 1286, 1299-1300, 42 CR3d 268, 278-279 (emphasis added)—California action barred, however, by forum-selection clause designating New York as exclusive forum; see ¶19:150]
  - [19:52] An employee's *covenant not to compete* with his or her employer is unenforceable under Bus. & Prof.C. §16600 (see ¶14:260 ff.). The "strong public policy" underlying §16600 overrides any *contractual provision designating another state's law* as controlling on the validity of a noncompete clause. [*Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 CA4th 881, 902, 72 CR2d 73, 86—covenant not to compete signed by Maryland employee held unenforceable under Bus. & Prof.C. §16600 as to California employer who recruited Maryland employee; but see *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 C4th 697, 707-708, 128 CR2d 172, 180—California court may not enjoin Minnesota Employer from suing in Minnesota to enforce noncompetition agreement drafted in Minnesota even though Bus. & Prof.C. §16600 bars such agreements; see further discussion at ¶14:270 ff.]
- (2) [19:53] **Statutory choice of law rules:** Absent the parties' agreement to a choice of law, statutory choice of law rules govern in certain circumstances:
- (a) [19:54] **Contract interpretation:** "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." [Civ.C. §1646]
  - (b) [19:55] **Interpretation of written instrument:** "The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place." [CCP §1857]

(3) [19:56] “**Governmental interests and comparative impairment**” approach: Absent a contractual choice of law provision or statutory rule, California courts use a “governmental interests and comparative impairment” analysis to choose applicable law. Under this approach, California courts:

- First, determine the applicable legal rule in each potentially concerned state, to see whether a conflict actually exists (thus avoiding “false” conflicts);
- Second, determine *what interest*, if any, each state has in having its laws applied to the particular case; and
- Third, if the laws are different and if each state has an interest in having its laws applied (a “true” conflict), apply the law of the state *whose interests would be more impaired* if its law were not applied. [See *Bernhard v. Harrah's Club* (1976) 16 C3d 313, 320, 128 CR 215, 219; *Offshore Rental Co., Inc. v. Continental Oil Co.* (1978) 22 C3d 157, 161-166, 148 CR 867, 869-873]
- [19:57] Club Med (a British West Indies corporation) employed a California resident at several of its resorts, including Guadeloupe, France. Employee sued Club Med in California on both *tort* and *contract* claims related to her employment.

Under California’s “governmental interests” test, French law governed her *tort* claims. France’s interest in encouraging local industry and reliably defining the liability of an employer doing business within its borders prevailed over California’s interest in providing compensation to its residents. [*Arno v. Club Med Inc.* (9th Cir. 1994) 22 F3d 1464, 1468 (applying Calif. Law)]

But California law governed Employee’s *contract* claims. France had no legitimate interest in having its law apply to a contract made in California between a California resident and a British West Indies Corporation doing business in New York. Therefore, California law, rather than French law, applied to implied-in-fact employment contract claims. [*Arno v. Club Med Inc.*, *supra*, 22 F3d at 1468-1469]

- [19:58] A California resident sued his Saudi employer for injuries sustained while working in Saudi Arabia. Saudi law governed the employer’s liability. California’s connection was insufficient to justify applying California law. [*McGhee v. Arabian Ameri-*

*can Oil Co.* (9th Cir. 1989) 871 F2d 1412, 1422-1423 (applying Calif. law)]

- [19:59] Maryland law applied to a contract dispute between a Maryland employer who had interviewed a California employee for a job in Maryland. The employer's only contact with California was telephoning an employment offer, which was "too tenuous" a contact to justify applying California law. [*Edwards v. United States Fid. & Guar. Co.* (ND CA 1994) 848 F.Supp. 1460, 1465; *Tucci v. Club Mediterranee, S.A.* (2001) 89 CA4th 180, 193, 107 CR2d 401, 411—employer's liability for injuries suffered in Dominican Republic by employee hired in California governed by Dominican Republic law]

[19:60-69] *Reserved.*

### 3. Jurisdictional Considerations

- a. [19:70] **Subject matter jurisdiction:** The court in which the action is filed must be competent to render a judgment; i.e., the federal or state constitution or statutes must empower it to adjudicate the type of lawsuit involved and to render a judgment for the amount in controversy.
  - (1) [19:71] **Federal courts:** Federal courts are courts of *limited* subject matter jurisdiction. They may adjudicate only the following kinds of cases:
    - (a) [19:72] **Federal question jurisdiction:** Federal courts may adjudicate cases "arising under" federal law (U.S. Constitution or laws or treaties of the U.S.). [See 28 USC §1331]
      - 1) [19:73] **"Well-pleaded complaint" rule:** The allegations necessary to state a claim in a well-pleaded complaint determine whether the claim "arises under" federal law. Allegations not essential to a well-pleaded claim do not confer federal jurisdiction. [See *Willy v. Coastal Corp.* (5th Cir. 1988) 855 F2d 1160, 1169—employee's state law claim for wrongful discharge did not "arise under" federal law merely because he was allegedly discharged for refusing to violate federal statutes; *Rains v. Criterion Systems, Inc.* (9th Cir. 1996) 80 F3d 339, 345-346—state law claim for discharge in violation of public policy did not "arise under" federal law merely because the violated public policy included a federal statutory violation; *Eastman v. Marine Mechanical Corp.* (6th Cir. 2006) 438 F3d 544, 552 (same)]

a) [19:74] **Anticipated federal defense not sufficient:** A federal court does not have jurisdiction over a state law claim because of a defense that raises a federal issue, even if plaintiff anticipates and pleads the federal issue in the complaint. [See *Phillips Petroleum Co. v. Texaco, Inc.* (1974) 415 US 125, 127-128, 94 S.Ct. 1002, 1004—federal question must appear on face of complaint unaided by the answer]

b) [19:75] **Compare—preempted state law claims “recharacterized” as federal claim:** In a few limited areas, a federal law's preemptive force is so strong that it replaces state law. This rule applies primarily to:

- claims under Labor Management Relations Act §301 (see ¶15:260 ff.);
- claims under the civil enforcement provisions of ERISA (see ¶15:320 ff.).

In such cases, the *only* claim that can be asserted is a *federal* claim. Thus, a complaint alleging what appear to be purely state law claims is “recharacterized” as one “arising under” federal law, creating federal jurisdiction. [See *Metropolitan Life Ins. Co. v. Taylor* (1987) 481 US 58, 66, 107 S.Ct. 1542, 1548, discussed at ¶15:24]

2) [19:76] **Title VII actions:** Federal courts have (nonexclusive) jurisdiction “of actions brought under” Title VII. [42 USC §2000e-5(f)(3)]

“Actions brought under” means suits to enforce substantive rights Title VII protects—i.e., to remedy an unlawful employment practice. [See *Chris v. Tenet* (4th Cir. 2000) 221 F3d 648, 652]

a) [19:76.1] **Covered employers:** The 15-employee threshold for employer coverage under Title VII (see ¶7:29) is a substantive element of the claim, not a jurisdictional requirement. [*Arbaugh v. Y&H Corp.* (2006) 546 US 500, 516, 126 S.Ct. 1235, 1245; see also ¶19:414]

b) [19:77] **For fees only?** According to one court, if the Title VII violation is settled before suit is filed, a federal court has no jurisdiction under Title VII to award attorney

fees and costs incurred in effecting the settlement: "(A) suit solely for attorney's fees and costs is not an 'action brought under' Title VII, i.e., a suit to enforce the substantive protections of Title VII . . ." [Chris v. Tenet, supra, 221 F3d at 654 (internal quotes omitted)]

*Cross-refer:* Federal question jurisdiction is discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2B.

[19:78-84] Reserved.

- (b) [19:85] **Diversity jurisdiction:** Federal courts also have jurisdiction to adjudicate claims between citizens of different states (and certain cases involving aliens) where the amount in controversy exceeds \$75,000 exclusive of interest and costs. [See 28 USC §1332]
- 1) [19:86] **"Complete diversity" required:** The basic requirement is that all plaintiffs must have different "citizenship" from all defendants. If any plaintiff is a citizen of the same state as any defendant, in most cases there is no diversity jurisdiction. [*Pullman Co. v. Jenkins* (1939) 305 US 534, 541, 59 S.Ct. 347, 350]
  - a) [19:86.1] **Compare—class actions removed from state court:** Only "minimal" diversity is required on removal of state court class actions based on state law claims to federal court; see ¶19:770 ff.
  - 2) [19:87] **"Citizenship" of individuals:** "Citizenship" for diversity purposes means a person is a citizen of the U.S. and domiciled in a particular state. [*Coury v. Prot* (5th Cir. 1996) 85 F3d 244, 249-250]
  - 3) [19:88] **"Citizenship" of legal representatives:** The citizenship of a legal representative for diversity purposes is the same as that of the party or entity represented. [See 28 USC §1332(c)(2)]
  - 4) [19:89] **"Citizenship" of partnership or association:** Similarly, a partnership or association has the citizenship of its members. Thus, if partners are citizens of several different states, the partnership entity is a citizen of each of those states. If the opposing party is domi-

ciled in any of those states, there is no diversity jurisdiction. [Carden v. Arkoma Assocs. (1990) 494 US 185, 195, 110 S.Ct. 1015, 1019]

- 5) [19:90] **“Citizenship” of corporations:** A corporation may have dual “citizenship” (so that complete diversity is lacking if plaintiff is a citizen of *either* state). It is a citizen of the state in which it is incorporated *and also* of the state in which it has its “principal place of business.” [28 USC §1332(c)(1)]

- a) [19:91] **“Principal place of business”?** Courts apply differing tests for determining a corporation’s “principal place of business,” including its “nerve center,” its “place of operations” and its “total activities.” [See *Industrial Tectonics, Inc. v. Aero Alloy* (9th Cir. 1990) 912 F2d 1090, 1094—“total activities” test; *Metropolitan Life Ins. Co. v. Estate of Cammon* (7th Cir. 1991) 929 F2d 1220, 1223—“nerve center” test; *Kelly v. United States Steel Corp.* (3rd Cir. 1960) 284 F2d 850, 854—“place of operations” test]

**Caution:** This issue is presently before the U.S. Supreme Court in *Hertz Corp. v. Friend*, Case No. 08-1107 (cert.grntd. 9/4/09).

- b) [19:91.1] **Foreign corporations:** A corporation incorporated in a foreign country but doing business in the U.S. is deemed a citizen of *both* the foreign country and the state in the U.S. in which it has its principal place of business. [See *Slavchev v. Royal Caribbean Cruises, Ltd.* (4th Cir. 2009) 559 F3d 251, 254]

*Cross-refer:* Federal diversity jurisdiction is discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2C.

- (c) [19:92] **Supplemental jurisdiction:** Federal courts may exercise discretion to adjudicate claims transactionally related to claims within their “federal question” or “diversity jurisdiction” . . . provided all claims are so related that they form part of the “same case or controversy under Article III” of the U.S. Constitution. [28 USC §1337(a)]

- 1) [19:92.1] **Class actions on state law claims:** Federal courts may exercise diversity jurisdiction in class actions based on state law claims if at least one *named* plaintiff's claim exceeds \$75,000, and other elements of diversity jurisdiction are satisfied. [*Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005) 545 US 546, 549, 125 S.Ct. 2611, 2615]

*Compare—removal jurisdiction:* Broader provisions apply on removal of state court class actions to federal court; see ¶19:770 ff.

- 2) [19:92.2] **In FLSA collective actions:** Although an FLSA collective action binds only

(Text cont'd on p. 19-11)

**RESERVED**

class members who affirmatively “opt in” (see ¶11:1290 ff.), federal courts exercising supplemental jurisdiction may grant *class action relief* on related state law claims against class members who do not affirmatively “opt out.” [Lindsay v. Government Employees Ins. Co. (DC Cir. 2006) 448 F3d 416, 420]

*Cross-refer:* Federal supplemental jurisdiction is discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2B.

[19:93-99] Reserved.

- (2) [19:100] **California courts:** California superior courts are courts of general subject matter jurisdiction. They adjudicate any and all cases *except those*:
- within the *exclusive jurisdiction of federal courts* (¶19:103); or
  - required by statute to be heard by administrative agencies or other tribunals (e.g., workers’ compensation claims, see *Greener v. Workers’ Comp. Appeals Bd.* (1993) 6 C4th 1028, 1043, 25 CR2d 539, 548); or
  - involving governance of “*religious*” or “*ecclesiastical*” matters, such as claims related to hiring, firing, discipline of clergy or other employees whose primary responsibility is dissemination of church doctrine (*Schmoll v. Chapman Univ.* (1999) 70 CA4th 1434, 1438-1445, 83 CR2d 426, 429-433).

*Cross-refer:* Subject matter jurisdiction of California state courts is discussed in detail in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.

- (3) [19:101] **Concurrent federal-state court jurisdiction:** Most “federal question” cases may be filed in either federal or state court; i.e., federal and state courts have *concurrent* subject matter jurisdiction. Indeed, a *presumption* of concurrent jurisdiction exists that is overcome only by (a) an express statement by Congress, (b) unmistakable implication from the legislative history, or (c) a disabling incompatibility between federal and state adjudication. [*Tafflin v. Levitt* (1990) 493 US 455, 459-460, 110 S.Ct. 792, 795]

- (a) [19:102] **Application—Title VII:** For example, federal and state courts have concurrent jurisdiction over Title VII actions. [*Yellow Freight System, Inc. v. Donnelly* (1990) 494 US 820, 821, 110 S.Ct. 1566, 1567]

(b) [19:103] **Compare—exclusive federal jurisdiction:** But, under the U.S. Constitution or by federal statute, there are a few matters over which federal courts have exclusive jurisdiction. As to these matters, state courts lack subject matter jurisdiction. For example:

- 1) [19:104] **ERISA breach of fiduciary duty claims:** Federal courts have exclusive jurisdiction in civil actions for breach of fiduciary duty brought by a participant or beneficiary of an employee benefit plan covered by the Employee Retirement Income Security Act (ERISA) against the plan fiduciary. [See 29 USC §§1104, 1109, 1132(e)(1)]
- 2) [19:105] **Compare—concurrent jurisdiction for other ERISA claims:** State courts have concurrent jurisdiction in actions to recover benefits due, to enforce rights under the terms of the plan, or to clarify rights to future benefits. [29 USC §1132(e)(1); see *Franchise Tax Board of State of Calif. v. Construction Laborers Vacation Trust for Southern Calif.* (1983) 463 US 1, 24, 103 S.Ct. 2841, 2854, fn. 26]

*Cross-refer:* Exclusive vs. concurrent federal jurisdiction is discussed further in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2A.

[19:106-114] Reserved.

- b. [19:115] **Personal jurisdiction:** In order to render a valid judgment, the court selected by plaintiff must have “personal jurisdiction” over the defendants named or joined in the action in addition to subject matter jurisdiction.
- (1) [19:116] **Federal courts—no nationwide personal jurisdiction:** Federal courts generally do *not* have nationwide personal jurisdiction. They ordinarily may exercise jurisdiction over persons outside the state only to the same extent as local state courts. [*Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co., Ltd.* (1987) 484 US 97, 104-105, 108 S.Ct. 404, 410; see FRCP 4(k)(1)(A)]
    - (a) [19:117] **Exception—statutes may confer nationwide personal jurisdiction:** In certain limited areas, Congress has conferred upon federal district courts nationwide powers of personal jurisdiction.
      - [19:118] For example, in actions to recover benefits due under the terms of an ERISA plan

(or to enforce rights under the plan or clarify the right to future benefits), “process may be served in any . . . district where a defendant resides or may be found.” [29 USC §1132(e)(2)]

*Cross-refer:* For other statutes conferring nationwide personal jurisdiction on federal courts, see Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 3.

- (2) [19:119] **State courts:** California courts may “exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” [CCP §410.10]
- (3) [19:120] **Constitutional bases for personal jurisdiction:** Due process requires an adequate basis for jurisdiction over the party that plaintiff seeks to bind with the court’s judgment. Such bases include:
  - service within the state (physical presence);
  - domicile;
  - consent (see ¶19:150); and
  - “minimum contacts” with the forum state (below).
- (4) [19:121] **“Minimum contacts” doctrine:** “Minimum contacts” means the relationship between the nonresident defendant and the forum state is such that exercise of personal jurisdiction does not offend “traditional standards of fair play and substantial justice.” [*International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement* (1945) 326 US 310, 316, 66 S.Ct. 154, 158]
  - (a) [19:122] **Individual assessment:** This doctrine applies to each defendant individually; i.e., each defendant’s contacts with the forum state must be assessed individually. [*Calder v. Jones* (1984) 465 US 783, 790, 104 S.Ct. 1482, 1487]

But agency concepts also apply, and “minimum contacts” by a nonresident’s agents or employees are imputed to the nonresident. (E.g., foreign corporations are consistently held subject to local personal jurisdiction based upon their agents’ activities within the forum state.) [See *Keeton v. Hustler Magazine, Inc.* (1984) 465 US 770, 781, 104 S.Ct. 1473, 1482, fn. 13; and *Taylor-Rush v. Multitech Corp.* (1990) 217 CA3d 103, 113-114, 265 CR 672, 677]

    - 1) [19:123] **Employer-employee:** Jurisdiction over a nonresident employer does not automatically confer personal jurisdiction over its

nonresident employees and agents. [*Keeton v. Hustler Magazine, Inc.*, supra, 465 US at 781; 104 S.Ct. at 1482, fn. 13]

- 2) [19:124] **Parent-subsidiary:** A parent corporation's "contacts" with the forum do not automatically create personal jurisdiction over its subsidiaries; and vice versa. [See *J.M. Sahlein Music Co., Inc. v. Nippon Gakki Co., Ltd.* (1987) 197 CA3d 539, 544, 243 CR 4, 7; *Serafini v. Sup.Ct. (Khadir)* (1998) 68 CA4th 70, 79, 80 CR2d 159, 165—no personal jurisdiction over 50% shareholder of parent corporation based on subsidiary's dealings in Calif.]

But a different result obtains where one acts as *agent* of the other in its dealings. [*Checker Motors Corp. v. Sup.Ct. (Garamendi)* (1993) 13 CA4th 1007, 1019-1020, 17 CR2d 618, 625-626—holding company's "contacts" with California imputed to operating entities controlled by same individuals]

[19:125-134] *Reserved.*

- (b) [19:135] **"General" vs. "limited" personal jurisdiction:** "General" personal jurisdiction extends to *all* claims against the defendant, even those *unrelated* to defendant's "contacts" with the forum state. "Limited" or "specific" jurisdiction is restricted to claims arising from the defendant's forum-related "contacts." [See *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 445-446, 58 CR2d 899, 906-907]

- 1) [19:136] **General jurisdiction:** General personal jurisdiction requires a showing that defendant's activities in California were "*continuous*," "*systematic*" and "*substantial*." [See *Vons Cos., Inc. v. Seabest Foods, Inc.*, supra, 14 C4th at 445, 58 CR2d at 906]

- [19:137] A foreign corporation's general manager and other employees resided in the forum state, and it had bank accounts, directors' meetings and other significant corporate activity there. Those contacts were sufficient to support general personal jurisdiction in the forum state, so that the corporation could be sued on claims unrelated to its in-state activities. [*Perkins v. Benguet Consolidated Mining Co.* (1952) 342 US 437, 445, 72 S.Ct. 413, 418]

- 2) [19:138] **“Limited” jurisdiction:** A court may assert “limited” or “specific” personal jurisdiction over causes of action arising out of a defendant’s forum-related activities upon a showing of:
- *Purposeful availment*: The nonresident defendant performed some act by which *it purposefully availed* itself of the privilege of conducting activities in California, thereby invoking the “benefits and protections” of California laws;
  - *Forum-related claim*: The claim against the nonresident defendant arises out of or results from its forum-related activities; and
  - *Reasonableness*: The exercise of jurisdiction is not unreasonable. [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 477-478, 105 S.Ct. 2174, 2184-2185; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 446-448, 58 CR2d 899, 906-908]
- [19:139] Employer, a Florida-based company, was not subject to local personal jurisdiction simply because it hired a job applicant from the forum state. Although Employer used a recruiter to attract job applicants throughout the country, subjecting it to local jurisdiction wherever an applicant resided would “unnecessarily restrict nationwide searches for candidates.” [*Conti v. Pneumatic Products Corp.* (6th Cir. 1992) 977 F2d 978, 983]

[19:139.1-139.4] *Reserved.*

- a) [19:139.5] **Effect of Internet hiring?** An employer who advertises open positions or solicits resumes or applications over the Internet is probably not subject to personal jurisdiction in another state on that basis alone. [See *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F3d 414, 419-420—defendant’s passive Web site advertisements not sufficient to establish personal jurisdiction in plaintiff’s state]

*Cross-refer:* “General” vs. “limited” personal jurisdiction is discussed in detail in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3; and

Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 3.

[19:140-149] Reserved.

- (5) [19:150] **Forum-selection clause as consent to local jurisdiction:** An employment agreement may contain a “forum-selection clause” that expressly or implicitly subjects the parties to a particular court’s jurisdiction. Such agreements are enforceable: “Parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.” [*National Equip. Rental, Ltd. v. Szukhent* (1964) 375 US 311, 316, 84 S.Ct. 411, 414; *Zenger-Miller, Inc. v. Training Team, GmbH* (ND CA 1991) 757 F.Supp. 1062, 1069—absence of minimum contacts irrelevant]
- (a) [19:151] **Rationale:** Personal jurisdiction requirements may be waived. Thus, enforcing a forum-selection clause that has been “freely negotiated” is not “unreasonable and unjust” and does not offend due process. [*M/S Bremen v. Zapata Off-Shore Co.* (1972) 407 US 1, 15, 92 S.Ct. 1907, 1916; *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 473, 105 S.Ct. 2174, 2182, fn. 14; *Smith, Valentino & Smith, Inc. v. Sup.Ct. (Life Assur. Co. of Pa.)* (1976) 17 C3d 491, 496-497, 131 CR 374, 377]
- (b) [19:152] **Consent express or implied:** The consent to local personal jurisdiction may be *express* (e.g., “In the event of a dispute, both employer and employee will be subject to the jurisdiction of the courts of the State of California, regardless of their residence”); or it may be *implied* from the parties’ agreement that any dispute be litigated in the designated forum. [See *National Equip. Rental, Ltd. v. Szukhent* (1964) 375 US 311, 315-316, 84 S.Ct. 411, 414—agreement that “rights and liabilities of the parties (shall be) determined, in accordance with the laws of the State of New York” bound parties to submit to jurisdiction in New York (parentheses added)]
- (c) [19:153] **Law governing validity:** If the claim arises under federal law, federal law governs the validity and effect of forum-selection clauses. [See *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 US 585, 590, 111 S.Ct. 1522, 1525]

However, in diversity cases, a split of authority exists whether state or federal law determines the validity and effect of forum-selection clauses. [See

*Manetti-Farrow, Inc. v. Gucci America, Inc.* (9th Cir. 1988) 858 F2d 509, 513—federal law governs; compare *Alexander Proudfoot Co. World Headquarters v. Thayer* (11th Cir. 1989) 877 F2d 912, 918-919 (contra)—forum state law governs]

(d) **Application**

- [19:154] Employee, a California resident, signed at Employer's corporate headquarters in Illinois an employment agreement for services to be rendered in California. A forum-selection clause in the agreement designated an Illinois forum for "any disputes arising from his employment." After termination, Employee sued in California for age discrimination. The forum-selection clause was valid given the strong presumption in favor of forum-selection clauses. The clause allowed Employer to conserve its resources by permitting it to answer claims only in its own state, and Employee would not be unduly burdened by pursuing the claim in Illinois. [*Flake v. Medline Indus., Inc.* (ED CA 1995) 882 F.Supp. 947, 949-950]
- [19:155] Former Employee who had been employed in Saudi Arabia sued Employer in California for breach of contract, emotional distress, fraud and age discrimination. His employment contract stated that Saudi Arabia courts "shall have sole jurisdiction over any disputes" arising out of the agreement. The forum-selection clause was valid absent any showing of fraud, and therefore enforced. [*Spradlin v. Lear Siegler Mgt. Services Co., Inc.* (9th Cir. 1991) 926 F2d 865, 867]
- [19:155.1] Employee worked in California for a subsidiary of German Corporation. He sued the parent German Corporation for breach of a stock option agreement. That agreement provided it was to be governed by German law and that Hamburg, Germany, was to be "the place of jurisdiction." Suit in California was dismissed: "California law does not prohibit parties to a contract to voluntarily and freely agree to another forum and the law governing there." [*Intershop Communications AG v. Sup. Ct. (Martinez)* (2002) 104 CA4th 191, 201, 127 CR2d 847, 854]
- [19:155.2] *Employment discrimination claims* are subject to forum-selection clauses, provid-

ed the designated forum affords an adequate remedy. [*Olinick v. BMG Entertainment* (2006) 138 CA4th 1286, 1299-1300, 42 CR3d 268, 278-279—age discrimination claim subject to New York choice of law and forum-selection clauses]

- (e) [19:156] **“Convenience” transfers available:** If the forum designated is inconvenient to witnesses, transfer to a more convenient forum under 28 USC §1404(a) or CCP §397(c) may be an option; see ¶19:264 *ff.*

*Cross-refer:* Forum-selection clauses are discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Chs. 3 and 4; and Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.

[19:157-164] *Reserved.*

4. [19:165] **Venue:** Venue rules determine *which* court, among several that have subject matter jurisdiction over the dispute and could exercise personal jurisdiction over defendant, is the *proper* court in which to commence the action.

- a. [19:166] **Federal courts:** In federal practice, “venue” means the federal district or districts in which suit is proper.

- (1) [19:167] **General rules (28 USC §1391):** The “general rules” of federal venue are:

- (a) [19:168] **Diversity cases:** Where subject matter jurisdiction is based *solely* on diversity of citizenship, venue is proper in the following judicial districts (and no others) (28 USC §1391(a)):

- If *all defendants reside in the same state*, a district where any defendant resides. [28 USC §1391(a)(1)]
  - OR, a district in which a “substantial part of the *events or omissions*” on which the claim is based occurred, or where is located a “substantial part of the *property*” that is the subject of the action. [28 USC §1391(a)(2) (emphasis added)]
  - OR, *if there is no district in which the action may otherwise be brought*, “a district in which *any* defendant is subject to *personal jurisdiction* at the time the action is commenced.” [28 USC §1391(a)(3) (emphasis added) (so-called “residual” venue)]
- 1) [19:169] **Corporate “residence”:** “For purposes of venue . . . a defendant that is a corpo-

ration shall be deemed to reside in *any* judicial district in which it is *subject to personal jurisdiction* at the time the action is commenced . . ." [28 USC §1391(c) (emphasis added)]

- 2) [19:170] **Effect of including federal claim:** When a complaint invokes *both* diversity and federal question jurisdiction, *the rules in federal question cases* (below) govern venue. [28 USC §1391(b); *Macon Grocery Co. v. Atlantic Coast Line R.R. Co.* (1910) 215 US 501, 509-510, 30 S.Ct. 184, 187-188]

- (b) [19:171] **Federal question cases:** Except as special venue statutes otherwise provide (¶19:180 ff.), venue in federal question cases is proper in the following judicial districts (and no others) (28 USC §1391(b)):

- If *all defendants reside in the same state*, a district where any *defendant* resides. [28 USC §1391(b)(1)]
- OR, a district in which a "substantial part of the *events or omissions*" on which the claim is based occurred, or a "substantial part of the *property*" that is the subject of the action is located. [28 USC §1391(b)(2) (emphasis added)]
- OR, if there is no district in which the action may otherwise be brought, the district "in which any defendant *may be found*" (so-called "residual" venue). [28 USC §1391(b)(3) (emphasis added)]

- 1) [19:172] **Pendent venue:** If all asserted claims *arise out of the same transaction or occurrence* ("a common nucleus of operative facts"), proper venue as to a *federal* claim can support venue on the other claims (federal or nonfederal). [See *Beattie v. United States* (DC Cir. 1984) 756 F2d 91, 100-102 (disapproved on other grounds in *Smith v. United States* (1993) 507 US 197, 113 S.Ct. 1178)]

[19:173-179] *Reserved.*

- (2) [19:180] **Special venue statutes:** Numerous federal statutes contain special venue provisions.

- (a) [19:181] **Title VII actions:** Because Title VII states it "shall govern" employment discrimination actions, venue in Title VII actions is proper *only* in the following judicial districts:

- “any judicial district *in the State* in which the unlawful employment practice is alleged to have been committed”;
- OR, the district in which the relevant employment records are “maintained and administered”;
- OR, the district where the complainant “would have worked but for the alleged unlawful employment practice”;
- OR, if defendant cannot be found in any of the above districts, the district where defendant has its principal office. [42 USC §2000e-5(f)(3)]

1) [19:182] **Effect:** The effect of this statute generally is to allow suit in either the *employee's home district* (i.e., the judicial district in which plaintiff worked or would have worked) *or the employer's home district* (i.e., where the adverse decision was made). [*Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 504-505]

The general venue provisions of 28 USC §1331(b) do *not* apply. Thus, venue *may not* be maintained merely on the basis of defendant's “residence,” etc. [*Johnson v. Payless Drug Stores Northwest, Inc.* (9th Cir. 1991) 950 F2d 586, 587-588; see also *Bolar v. Frank* (2nd Cir. 1991) 938 F2d 377, 379—same]

2) [19:183] **“Any judicial district *in the State*”?** Courts are split on whether the phrase “any judicial district *in the State* in which the unlawful employment practice is alleged to have been committed” (above) means what it says. [See *Garus v. Rose Acre Farms, Inc.* (ND IN 1993) 839 F.Supp. 563, 566—venue proper in any judicial district in *state* where illegal acts oc-

(Text cont'd on p. 19-19)

curred; *Aitkin v. Harcourt Brace Jovanovich, Inc.* (WD NY 1982) 543 F.Supp. 987, 988—same; but see *Thurmon v. Martin Marietta Data Systems* (MD PA 1984) 596 F.Supp. 367, 368—venue proper only in judicial district where alleged misconduct occurred]

- 3) [19:184] **Effect of joining other claims:** Where a plaintiff's complaint contains both Title VII and non-Title VII causes of action, the Title VII venue requirements must be satisfied. If they are not, the court may either dismiss the action or transfer it (see below) to a district where venue is proper for both claims. [See *Lengacher v. Reno* (ED VA 1999) 75 F.Supp.2d 515, 519]

[19:185-194] *Reserved.*

- (b) [19:195] **Compare—ADA and ADEA cases:** Neither the Americans with Disabilities Act (ADA) nor the Age Discrimination in Employment Act (ADEA) contain a specific venue provision. Courts disagree whether the general rule for federal question cases (28 USC §1331(b)) or the Title VII venue provision (42 USC §2000e-5(f)(3)) applies to such actions.
  - 1) [19:196] **View that general venue rule applies:** Because the ADA and ADEA do not have a specific venue provision, the rule generally applicable to federal question cases applies. [*Gilbert v. Texas Mental Health & Mental Retardation* (ND TX 1995) 888 F.Supp. 775, 776-777 (ADA case); *Rebar v. Marsh* (11th Cir. 1992) 959 F.2d 216, 219 (ADEA case)]
  - 2) [19:197] **View that Title VII venue provision applies:** The ADA provides that the “powers, remedies and procedures” of Title VII apply to disability discrimination cases under the ADA (42 USC §12117(a)). Venue is effectively such a “procedure,” and therefore Title VII venue rules apply. [*Chubb v. Union Pac. R.R. Co.* (D CO 1995) 908 F.Supp. 853, 854-855]
- (c) [19:198] **Other specific venue provisions:** Other statutes provide additional venue selections for plaintiffs in employment litigation (i.e., in addition to the “general rules of venue” previously discussed), including:
  - 1) [19:199] **Employee Retirement Income Security Act of 1974 (ERISA):** Venue is

proper in any district where the plan is administered, where the breach took place, or where defendant resides or may be found. [29 USC §1132(e)(2)]

a) [19:200] **Effect:** Because ERISA authorizes nationwide service for defendants in actions to recover benefits due under the terms of an ERISA plan (see ¶19:118), defendants may be sued and venue lies wherever plaintiff chooses to bring the action. [See *McCracken v. Automobile Club of So. Calif., Inc.* (D KS 1995) 891 F.Supp. 559, 562]

2) [19:201] **Petition to confirm/vacate arbitration award:** Unless the parties have agreed otherwise, venue for a motion to confirm an arbitration award lies in the district where the award was made. [9 USC §9]

Similarly, unless the parties have agreed otherwise, venue for a motion to modify, vacate or correct an award lies in the district where the award was rendered. [9 USC §§10, 11]

These venue provisions are permissive and venue on the above motions may also be based on the general venue statute (28 USC §1391). E.g., venue is proper where defendant resides even if the award was made elsewhere. [*Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.* (2000) 529 US 193, 195, 120 S.Ct. 1331, 1334]

[19:202] Reserved.

(3) [19:203] **Compare—court may transfer despite proper venue:** Although venue is proper in the district where the action is commenced, the court may transfer the action to another federal district “for the convenience of parties and witnesses and in the interests of justice.” [28 USC §1404(a); see ¶19:264]

*Cross-refer:* Venue rules in federal courts, including the effect of forum-selection clauses and waiver of improper venue, are discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 4.

Procedures for challenging improper venue and for “convenience” transfers are discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 4.

[19:204-214] Reserved.

b. [19:215] **State courts:** State court venue rules designate a particular county or counties within California as the "proper" place for trial.

(1) [19:216] **General rule—actions triable at any defendant's residence:** Except as otherwise provided, venue is proper in "the county in which the *defendants or some of them reside* at the commencement of the action . . ." [CCP §395(a) (emphasis added)]

(a) [19:217] **"Residence" means domicile:** For venue purposes, a person's residence is interpreted as the domicile—i.e., the place he or she resides with the intent to remain indefinitely. [*Enter v. Crutcher* (1958) 159 CA2d Supp. 841, 844-845, 323 P2d 586, 589]

If a *corporation* is joined as a codefendant, venue is proper *either* in the county where any individual defendant resides *or* where the corporation's headquarters are located (its "residence" for venue purposes; see below). [*Hale v. Bohannon* (1952) 38 C2d 458, 472, 241 P2d 4, 12]

(2) [19:218] **Other counties may also be "proper":** By statute, many important types of actions are triable *either* at defendant's residence *or* in certain other counties. (E.g., an action for injury or death may be filed either at defendant's residence or where the injury occurs; see CCP §395(a).) In such cases, plaintiff may file suit in any of these counties.

Keep in mind, however, that although venue is proper, defendant may seek a transfer of venue on "convenience" grounds; see ¶19:278.

(a) [19:219] **Actions against corporations:** Actions against a corporation are triable *either* in the county:

- where it has its *principal* place of *business* (its "residence" for venue purposes); *or*
- where the *contract* was made or is to be performed (whether specified in writing or not); *or*
- where the *obligation or liability* arose or the breach occurred. [CCP §395.5]

(3) [19:220] **FEHA actions:** The Fair Employment and Housing Act (Gov.C. §12900 et seq.) has a special venue requirement that *supersedes* the general venue rules, above. An action for a FEHA violation may be brought "in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are

maintained . . . or in the county in which the aggrieved person would have worked . . .” [Gov.C. §12965(b)]

The effect of this rule is that FEHA claimants generally sue closer to where they work, rather than at an out-of-town company headquarters or where a defendant resides.

- (4) [19:221] **Causes of action with conflicting venue provisions (“mixed action” rule):** If the complaint alleges two or more causes of action, each governed by a different venue rule (or names two or more defendants who are subject to different venue standards), venue must be proper as to *all* causes of action and defendants joined. If not, any defendant may seek a change of venue . . . usually to the county where one of the defendants resides. [*Brown v. Sup.Ct. (C.C. Myers, Inc.)* (1984) 37 C3d 477, 488, 208 CR 724, 730]

- (a) [19:222] **Exception for FEHA claims:** There are some cases, however, in which for *public policy reasons*, plaintiff’s right to choose the place of trial is preferred over defendant’s right to have the action tried at its residence. [*Brown v. Sup.Ct. (C.C. Myers, Inc.)*, supra, 37 C3d at 487, 208 CR at 729-730]

- [19:223] P sued for intentional infliction of emotional distress, wrongful discharge and violation of the FEHA, all arising out of the *same facts*. Venue was proper under the FEHA, which allows suits in the county where the “unlawful practice is alleged to have been committed” (see ¶19:220). Defendants were *not* entitled to a change of venue to the county of their residence. “Although the mixed action rule recognizes a preference for trial in the county of a defendant’s residence, *that preference is outweighed by the strong countervailing policy* of the FEHA which favors a plaintiff’s choice of venue.” [*Brown v. Sup.Ct. (C.C. Myers, Inc.)*, supra, 37 C3d at 488, 208 CR at 731 (emphasis added)]

[19:223.1-223.4] Reserved.

- (5) [19:223.5] **Compare—transfer for “convenience of witnesses”:** Although the action must be commenced in a county in which venue is proper, the court has *discretion*, on motion of either party, to transfer the action to another county “when the convenience of witnesses and the ends of justice would be promoted by the change.” [CCP §397(c)]

This section applies to any action or proceeding—even actions under statutes such as the FEHA giving plaintiff the broadest possible choice of venue. [*Richfield Hotel Mgt., Inc. v. Sup.Ct. (Riddell)* (1994) 22 CA4th 222, 225, 27 CR2d 161, 163—plaintiff sued in Tulare County, complaining of sexual harassment at her former employment in San Mateo County; case ordered transferred to San Mateo where all potential witnesses lived or worked and all relevant documents were located]

➡ [19:224] **PRACTICE POINTER:** When choosing between several counties in which venue is proper, plaintiff's counsel should consider not only the cost of litigating in each county but also the reasonably anticipated jury reaction to the case and to the type and amount of damages sought. Research may include review of recent jury verdicts or consultation with jury research firms utilizing focus groups.

*Cross-refer:* Venue rules in California state courts are discussed in detail in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.

[19:225-234] Reserved.

## B. DEFENDANT'S CHALLENGES TO FORUM PLAINTIFF SELECTS

[19:235] The defendant employer may be able to challenge the forum plaintiff selects by removing the action from state court and/or moving to transfer the case to a different court.

1. [19:236] **Removal From State Court:** If suit is commenced in a state court, defendant should consider whether the case is removable to federal court.
  - a. [19:237] **Advantages vs. disadvantages to defendant:** Proceeding in federal court usually has several advantages for defendants, but also has disadvantages for certain defendants, particularly state employers:
    - Removal may take away any “home court” advantage for plaintiffs (particularly if the action is filed in a rural county in which plaintiff's attorneys regularly practice);
    - If the case goes to a jury, a unanimous verdict is required in federal court (whereas a 3/4 verdict, nine out of 12 jurors, suffices in state court);
    - Defendants may prefer federal court procedures, including the federal court's management of pretrial discovery and motion practice.
    - Prospective jurors in federal court are chosen from a different segment of the community. State jurors are

randomly selected from Department of Motor Vehicles license records and county voter registration records. Federal jurors are drawn only from voter registration records, which many believe produces a more conservative jury panel.

- Plaintiff may sacrifice any right to a jury trial by not demanding one before or within 10 days after notice of the petition for removal, or (if no answer was filed in state court prior to removal) within 10 days after defendant files an answer in federal court. [FRCP 81(c); see ¶19:497]

In those rare instances where defendant prefers to have the claims adjudicated by jurors and plaintiff did not demand a jury trial, defendant must formally demand a jury trial. This should be done either before removing (ideally in the answer filed in state court), or if no answer was filed before removal, in a postremoval answer filed in federal court, or in the removal notice or a separate jury demand filed within 10 days thereafter.

- b. [19:238] **Grounds for removal:** Federal courts may adjudicate cases removed from state court that could have been filed originally in federal court:
  - claims “arising under” federal law (28 USC §1441(b), see ¶19:72);
  - claims exceeding \$75,000 between citizens of different states (28 USC §1441(a), see ¶19:85).

Removal jurisdiction may also exist in *class actions* (commenced after 2/18/05) in which state law claims total *at least* \$5 million even if complete diversity of citizenship is lacking and defendant is a citizen of the forum state (28 USC §1453; see ¶19:770 ff.).

- (1) [19:239] **Removal of claims “arising under” federal law (“federal question” claims):** This power includes claims under Title VII, ADA, ADEA, FMLA, WARN Act, etc. (“Federal question” jurisdiction is discussed at ¶19:72 ff.)

It also includes FLSA cases. Although the FLSA states suit “may be maintained” in any federal *or state* court of competent jurisdiction (29 USC §216(b)), this refers to commencement or continuation of suit; it is *not* a bar to removal. [*Breuer v. Jim’s Concrete of Brevard, Inc.* (2003) 538 US 691, 697, 123 S.Ct. 1882, 1886]

- (a) [19:240] **Compare—preempted state law claims “recharacterized” as federal claim:** In a few, limited areas, a federal law’s preemptive force is so strong that it displaces state law. This rule applies primarily to:

- claims under the Labor Management Relations Act §301 (see ¶15:260 ff.);
- claims under ERISA's civil enforcement provisions (see ¶15:320 ff.).

In such cases, the *only* claim that can be asserted in a well-pleaded complaint is a *federal* claim. Thus, a complaint alleging what appear to be purely state law claims is "recharacterized" as one "arising under" federal law, allowing removal to federal court. [See *Metropolitan Life Ins. Co. v. Taylor* (1987) 481 US 58, 66, 107 S.Ct. 1542, 1548, discussed at ¶15:24]

*Cross-refer:* For further discussion of the complete preemption doctrine, see Ch. 15, *Preemption Defenses*. Removal jurisdiction and complete preemption are discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.

[19:240.1-240.4] *Reserved.*

- (b) [19:240.5] **Removal of state law claims joined with federal claim?** Whenever a "separate and independent claim or cause of action" based on federal question jurisdiction is "joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, *in its discretion, may remand all matters in which State law predominates.*" [28 USC §1441(c) (emphasis added)]

1) [19:240.6] **No remand where state law claims based on same facts as federal claim:** Remand is improper, however, where the federal and state employment discrimination claims involve "substantially the same facts." [See *Smith v. Amedisys Inc.* (5th Cir. 2002) 298 F3d 434, 439—where the single wrong is sexual harassment and discrimination, various state law claims on different theories (battery, intentional infliction of emotional distress) are *not* "separate and independent" causes of action]

- (2) [19:241] **Removal based on diversity of citizenship:** Removal is also authorized where all plaintiffs and all defendants are "citizens" of different states and the claim exceeds \$75,000. Diversity jurisdiction is discussed further at ¶19:85 ff.

- (a) [19:242] **Limitation—“no local defendant rule”:** Even if there is complete diversity, removal is not allowed if anyone “joined and served” as a defendant is a citizen of the state in which the action is filed. [28 USC §1441(b)]

The effect of this rule is that removal may be effected only by *nonresident* defendants. (If a local defendant is named in the complaint, the nonresident defendant must remove *before the local defendant is served*; see 28 USC §1441(b).)

- (b) [19:242.1] **Compare—class actions:** Under the Class Action Fairness Act of 2005 (CAFA), certain class actions filed after 2/18/05 and based on state law claims are removable even in the absence of complete diversity and even where defendant is a local citizen; see ¶19:771.5 *ff.*

►[19:243] **PRACTICE POINTER FOR PLAINTIFFS:**

A plaintiff who does not wish to litigate in a federal forum may *avoid removal* by (1) refraining from asserting claims under any federal statute, *and* (2) not naming any defendant whose residence creates diversity of citizenship with plaintiff *or* expressly alleging in the complaint a specific amount of damages that falls below the federal jurisdictional minimum.

[19:244-249] *Reserved.*

- c. [19:250] **Removal procedure:** First, defense counsel must analyze plaintiff's complaint to determine if diversity of citizenship or a federal question appears on the *face of a well-pleaded complaint*. If not, defense counsel must wait until some later pleading, motion or discovery response reveals grounds for removal.

Defendant then has 30 days to effect removal by the following procedures:

- *File a notice of removal in the federal district court* for the district in which the state court action is pending;
- *Attach copies of all state court pleadings and orders* served on defendant;
- *Obtain the joinder of all codefendants* who have been served in the state court action (or explain why such defendants have not been joined); and
- *Serve a copy of the notice of removal on plaintiff and the state court clerk.* [See 28 USC §1446]

*Cross-refer:* See detailed discussion of removal procedure in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.

► [19:250.1] **PRACTICE POINTER:** Many federal district judges will issue an Order to Show Cause upon receipt of your removed lawsuit, demanding that you establish the basis of the federal court's jurisdiction. Failure to satisfy the court that it has jurisdiction will result in the case being remanded to state court, plus sanctions for improper removal (see below).

- d. [19:251] **Removal waives improper venue:** In actions removed from state court, venue is *automatically proper* in the federal district court located where the state action was pending. By choosing to remove to that court, defendant waives any venue objection under state or federal law. [See 28 USC §1441(a); and *Polizzi v. Cowles Magazines, Inc.* (1953) 345 US 663, 665-666, 73 S.Ct. 900, 902-903]
- e. [19:252] **Risks in improper removal:** If grounds for removal are lacking or there is a defect in removal procedure, the federal court will order a *remand* to the state court and may order defendant to pay plaintiff "just costs . . . including attorney fees" where the removing party lacked an *objectively reasonable basis* for seeking removal. [28 USC §1447(c); *Martin v. Franklin Capital Corp.* (2005) 546 US 132, 140-141, 126 S.Ct. 704, 711]

Further, a federal court may impose Rule 11 sanctions if it determines the removal was vexatious or in bad faith. [See *Willy v. Coastal Corp.* (1992) 503 US 131, 139, 112 S.Ct. 1076, 1081]

- f. [19:253] **Waiver of removal right:** A contract may waive a party's right to remove to federal court if it *clearly and unequivocally* gives the other party the right to choose the forum in which any dispute will be *adjudicated* (not merely commenced). [See *Waters v. Browning-Ferris Industries, Inc.* (5th Cir. 2001) 252 F3d 796, 797—employment agreement that gave Employee the right to sue in state court and obligated Employer to consent to jurisdiction and waive any venue objection in any state court, was held to waive Employer's right to remove to federal court (over a strong dissent that the contract did not address where the suit ultimately should be adjudicated)]

[19:254-259] Reserved.

- 2. [19:260] **Motion for Change of Venue (Federal):** There are two grounds on which venue may be changed in federal courts:

- a. [19:261] **Improper venue:** Where venue is improper (i.e., plaintiff has filed the action in a district in which venue is not proper), the court may *dismiss* the action or transfer it to a district in which it could have been brought. [28 USC §1406(a)]
  - (1) [19:262] **Objection may also be raised in answer:** Improper venue may be raised by either preanswer motion (see FRCP 12(b)(3)) or affirmative defense in the answer if no Rule 12 motion has been filed. [See FRCP 12(b),(h)] (The defect is *waived* if not timely raised; see ¶19:471.)
  - (2) [19:263] **Transfer vs. dismissal:** If there is another district in which the action could have been brought, transfer is preferred to the harsh remedy of dismissal. Transfer avoids potential statute of limitations problems, and the cost and effort of filing and serving a new lawsuit. [*Minnette v. Time Warner* (2nd Cir. 1993) 997 F2d 1023, 1026-1027]

- b. [19:264] **“Convenience” of parties and witnesses:** Where venue is *proper*, the court may transfer the action to another district “for the *convenience* of parties and witnesses, in the interest of justice.” [28 USC §1404(a) (emphasis added)]

The transfer must be to a district in which the action could have been filed originally (meaning personal jurisdiction over defendants and proper venue). [28 USC §1404(a)]

[19:264.1-264.4] *Reserved.*

- (1) [19:264.5] **“Interests of justice”:** In evaluating the “interests of justice” for purpose of §1404(a), courts must consider the factors stated in the special venue statutes governing Title VII and ADA actions—i.e., location of books and records; place where plaintiff would have worked but for the unlawful practice; and place where respondent has its principal place of business. [*In re Horseshoe Entertainment* (5th Cir. 2003) 337 F3d 429, 434]
  - [19:264.6] Where relevant *employment records are maintained* is expressly stated as a venue factor in 42 USC §2000e-5(f)(3) (see ¶19:181) and therefore should be weighed in evaluating the “interests of justice” under §1404(a). [*In re Horseshoe Entertainment*, supra, 337 F3d at 434]
- (2) [19:265] **Timing of motion:** A transfer for “convenience” under §1404(a) should be sought as soon as the “inconvenience” becomes apparent—preferably with

or before the first responsive pleading. [See *S.E.C. v. Savoy Indus., Inc.* (DC Cir. 1978) 587 F2d 1149, 1156]

- (3) [19:266] **Compare—§1404(a) “convenience” transfer possible despite waiver:** Defendant's failure to object normally waives any objection that venue is improper. But failure to object to venue does not rule out a motion for transfer under 28 USC §1404(a) for convenience of parties and witnesses. [*Manley v. Engram* (11th Cir. 1985) 755 F2d 1463, 1466]

*Cross-refer:* Procedures for change of venue and motions to transfer in federal court are discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 4.

[19:267-274] Reserved.

### 3. Motion for Change of Venue (California Courts)

- a. [19:275] **Grounds:** The grounds upon which a court may transfer the action include:

- (1) [19:276] **“Wrong court” (transfer mandatory):** On timely motion, the court *must* order a transfer of an action “when the court designated in the complaint is *not the proper court*.” [CCP §§396b, 397(a) (emphasis added)]

• [19:277] Employees filed suit under the FEHA in Los Angeles where they lived. Proper venue, however, lay in Sacramento where they worked and Employer maintained its offices and pertinent records (see ¶19:220). There was no allegation that the unlawful employment practice occurred in Los Angeles. Employer's motion for change of venue must be granted. [*Ford Motor Credit Co. v. Sup.Ct. (Danford)* (1997) 50 CA4th 306, 308, 57 CR2d 682, 683]

- (2) [19:278] **“Convenience of witnesses and ends of justice” (transfer discretionary):** Even if an action is filed in a “proper” county, the court has *discretionary* power to transfer the case to any other county “when the convenience of witnesses and the ends of justice would be promoted by the change.” [CCP §397(c)]

- (a) [19:279] **Parties’ “convenience” not considered:** Only the convenience of nonparty witnesses is considered. Absent extraordinary circumstances, the parties’ convenience is *not* a ground for transfer (unlike the rule in federal court; see 28 USC §1404(a)). [*Wrin v. Ohlandt* (1931) 213 C 158, 160, 1 P2d 991]

- (b) [19:280] **Applies to FEHA actions:** “Convenience” transfers may be ordered in *any* action or

proceeding, including FEHA actions that give plaintiff the broadest possible choice of venue (see ¶19:220). [*Richfield Hotel Mgmt., Inc. v. Sup.Ct. (Riddell)* (1994) 22 CA4th 222, 225, 27 CR2d 161, 163]

- [19:281] Former Employees sued under the FEHA for sexual harassment and wrongful discharge. Employer moved for transfer for convenience of its witnesses. The FEHA's broad venue provision did *not* preclude a venue change under CCP §397(c) for convenience of witnesses and the ends of justice. [*Richfield Hotel Mgmt., Inc. v. Sup.Ct. (Riddell)*, supra, 22 CA4th at 226, 27 CR2d at 163-164—abuse of discretion to deny venue change where former employees made no showing that change would inconvenience their witnesses]
- b. [19:282] **Timeliness of motion:** Grounds for change of venue are forfeited unless presented by a timely motion for transfer to a proper court.

- (1) [19:283] **“Wrong court” motion must be made at outset:** A motion for transfer on the ground that the action was filed in an “improper” court (mandatory transfer) must be made within the time permitted to plead; i.e., within 30 days after service, unless extended by stipulation or court order. [CCP §396b]

The motion may be filed either by itself (i.e., without answering or demurring) or *concurrently* with an answer or demurrer. [CCP §396b]

- (2) [19:284] **“Convenience of witnesses” motion must be made within “reasonable time” after answer:** Until defendant answers, the court cannot ascertain the issues that may be involved at trial and therefore cannot determine which witnesses’ testimony at trial will be necessary or rule effectively on a motion for transfer based on “convenience of witnesses.” [See *Buran Equip. Co., Inc. v. Sup.Ct. (Brobeck, Phleger et al.)* (1987) 190 CA3d 1662, 1665, 236 CR 171, 172]

*Cross-refer:* Procedures for change of venue and motion to transfer in California courts are discussed in detail in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.

4. [19:285] **Motion to Compel Arbitration:** If the complaint involves a dispute covered by an arbitration provision in the employment agreement, the defendant employer may file a motion or petition to compel arbitration concurrently with or in

lieu of a responsive pleading. [See CCP §§1281.1, 1281.4; 9 USC §3]

If the motion or petition is granted, the action is either stayed or dismissed and the matter proceeds to arbitration. If the petition or motion is denied by a California court, the defendant employer has 15 days after the denial to respond to the complaint. [CCP §1281.17]

►[19:286] **PRACTICE POINTER:** In some courts, responding to the complaint or participating in pretrial disclosures or discovery procedures may arguably *forfeit* the right to compel arbitration, on the theory that a party who has decided to take advantage of the judicial system should not be permitted thereafter to seek compelled arbitration. [See *Khan v. Parsons Global Services, Ltd.* (DC Cir. 2008) 521 F3d 421, 427]

To avoid this issue, defendants should demand arbitration at the earliest possible time by filing a motion to stay the litigation and to compel arbitration before or concurrently with their initial responsive pleadings.

*Cross-refer:* See detailed discussion of arbitration procedures in Knight, Chernick, Haldeman & Bettinelli, *Cal. Prac. Guide: Alternative Dispute Resolution* (TRG), Ch. 5

[19:287-294] Reserved.

## C. PLAINTIFF'S COMPLAINT

1. [19:295] **Parties:** Plaintiff's first consideration is who must be named and who *may* be joined as parties to the lawsuit.
  - a. [19:296] **Plaintiff's standing to sue:** The "real party in interest" must prosecute the action (CCP §367; FRCP 17(a)). This term basically means the person or persons having the *right to sue* under *applicable substantive law*.
    - (1) [19:297] **Indirect victims of discrimination:** Plaintiffs will argue that indirect victims of job discrimination have standing to assert Title VII claims if they "allege colorable claims of injury-in-fact that are fairly traceable to acts or omissions by defendants that are unlawful." [*Anjelino v. New York Times Co.* (3rd Cir. 1999) 200 F3d 73, 92]
      - [19:298] Male workers alleged that Employer stopped selecting names from a list of substitute workers at the point where women's names first appeared on the list—preventing men as well as women further down on the list from being hired. Even though any sex-based discrimination was directed at women, the male workers were indirect

victims and had standing to sue under Title VII. [Anjelino v. New York Times Co., supra, 200 F3d at 92]

[19:299] Reserved.

- (2) [19:300] **Employee's family members:** In addition to the employees whose rights have been violated, their *family members* may have damage claims of their own:

- [19:301] Employee was terminated in retaliation for asserting Son's right to medical benefits under Employer's group health plan. Employee, Spouse, and Son were proper plaintiffs. Employee's claim was for wrongful termination. Son's claim was for loss of future medical benefits. Spouse sufficiently alleged a cause of action for *intentional/in infliction of emotional distress*. [Wayte v. Rollins Int'l, Inc. (1985) 169 CA3d 1, 15, 215 CR 59, 67]
  - [19:301.1] A claim for *benefits* allegedly lost under a welfare or pension benefit plan is covered by the Employee Retirement Income Security Act (ERISA), which preempts state law claims (see ¶15:320 ff.).
- [19:302] *Compare*: Employee sued for wrongful termination. Spouse sued for *negligent infliction of emotional distress* and loss of consortium the termination caused. Her emotional distress claim was dismissed because Employer did not direct its actions at her and *owed her no duty of care* in terminating Employee. Her loss of consortium claim was also dismissed, but only because she failed to plead facts sufficient to establish a significant impairment of Employee's participation in their marital relationship. [Anderson v. Northrop Corp. (1988) 203 CA3d 772, 780-781, 250 CR 189, 194-195]

- (3) [19:303] **Employee's bankruptcy trustee:** All causes of action belonging to the bankrupt at the time of filing a Chapter 7 petition (liquidation), or accruing after the filing, become part of the bankruptcy estate. Therefore, the trustee in bankruptcy is the real party in interest as to such causes of action (unless the trustee abandons them). [Cloud v. Northrop Grumman Corp. (1998) 67 CA4th 995, 1004, 79 CR2d 544, 549—wrongful termination claim; Parker v. Wendy's Int'l, Inc. (11th Cir. 2004) 365 F3d 1268, 1272—debtor's failure to list her employment discrimination claim as a potential asset in bankruptcy did not estop bankruptcy trustee from pursuing claim]

[19:303.1-303.4] Reserved.

- (4) [19:303.5] **Class actions, representative suits:** The rules governing class actions and representative suits in civil litigation generally apply in employment litigation.

*Cross-refer: See*

- (state practice) Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 14.
- (federal practice) Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 10.

- (a) [19:303.6] **Bus. & Prof.C. §17200 actions:** Plaintiffs suing on behalf of coworkers for violations of Bus. & Prof.C. §17200 ("unfair competition") must comply with CCP §382 governing class actions. [Bus. & Prof.C. §17203; see ¶19:810]

- (b) [19:303.7] **Private Attorneys General Act (PAGA) actions:** In limited circumstances, plaintiffs may sue on behalf of themselves and other employees under PAGA (Lab.C. §2698 et seq.) for *civil penalties* for Labor Code violations, *without complying with class action requirements*. [Arias v. Sup.Ct. (*Angelo Dairy*) (2009) 46 C4th 969, 981-982, 95 CR3d 588, 596-597; see discussion at ¶17:777 ff.]

- b. [19:304] **Defendants:** All persons against whom a right to relief may be asserted jointly, severally or in the alternative may be joined as defendants. [FRCP 20(a); CCP §379(a)]

- (1) [19:305] **Employer:** A corporate employer is *vicariously liable* for wrongful acts by its agents and employees committed within the course and scope of their employment. Thus, the employer may be sued for wrongful discharge, harassment and other violations of Title VII, the FEHA and other anti-discrimination laws committed by plaintiff's supervisors and coworkers (see ¶7:29).

- (a) [19:306] **Limitation—punitive damages claims:** A corporate employer is *not* subject to punitive damages based on "oppressive, fraudulent or malicious acts" by an agent or employee *unless* it has authorized or ratified such acts or that person is a "managing agent" (see ¶7:1222 ff., 17:407).

- (2) [19:307] **Individual supervisors and coworkers:** An employee's supervisors are generally *not* subject to personal liability for wrongful discharge or violations of anti-discrimination laws (see ¶7:68). But a supervisor or

coworker may be sued individually under certain theories:

- (a) [19:308] **Torts:** A supervisor or coworker may be sued individually for torts committed at the workplace; e.g., defamation, assault, battery, intentional infliction of emotional distress, etc.
- (b) [19:309] **Harassment:** Under California law (not Title VII), *any* employee (supervisor or coworker) who harasses another employee may be held personally liable under the FEHA (see ¶7:179)

[19:310] *Reserved.*

➡ [19:311] **PRACTICE POINTER:** There are both advantages and disadvantages to consider before naming supervisors and coworkers as codefendants in employment litigation:

**Advantages:** The potential benefits to be derived from joining the alleged harasser as a codefendant include:

- *Facilitating discovery* (because party defendants are subject to broader discovery than nonparties);
- *Preventing removal* to federal court (because diversity of citizenship between plaintiff and employer will be disregarded if plaintiff and the codefendant supervisor reside in the same state);
- *Possible litigation advantage* from *potential conflicts* among codefendants;
- *Increasing the settlement "pot"* (because if supervisors and coworkers have insurance or significant assets, additional sources may exist for payment of a judgment or settlement).

**Disadvantages:** But there are also potential disadvantages to consider before joining the alleged harassers as codefendants:

- *Possible litigation disadvantage* if the individual codefendant is "likeable" or appears to have been victimized by being sued personally;
- The risk that the supervisor or coworker may *cross-complain against plaintiff* (e.g., for defamation or other torts);
- The added *cost and complexity* of multi-defendant actions, including risks of unnecessary expense, extended total trial time and jury confusion;

- Possible complications in achieving settlement if the individual codefendant *resists a settlement* that appears reasonable to plaintiff and the defendant employer;
- The risk that if there is little or no basis for individual liability, the claims against the individual defendants will be dismissed even though the claim against the employer is meritorious; and that such dismissal could expose plaintiff *and plaintiff's counsel* to a *malicious prosecution* action.

*Cross-refer:* Parties to the action, including standing to sue, capacity to sue (and defend), and "real party in interest" requirements, are discussed in detail in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 2; and Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 7.

[19:312-319] Reserved.

## 2. Complaints in California Courts

- a. [19:320] **Pleading requirements generally:** The rules governing pleadings in employment cases in California state courts are the same as in civil actions generally: "(P)laintiff is required only to set forth the essential facts of his case with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action." [*Alch v. Sup.Ct. (Time Warner Entertainment)* (2004) 122 CA4th 339, 382, 19 CR3d 29, 61 (internal quotes omitted)]

[19:320.1-320.4] Reserved.

- [19:320.5] *Employment discrimination:* The elements of a claim for employment discrimination in violation of Gov.C. §12940(a) are:  
 "(1) the employee's membership in a classification protected by the statute;  
 "(2) discriminatory animus on the part of the employer toward members of that classification;  
 "(3) an action by the employer adverse to the employee's interests;  
 "(4) a causal link between the discriminatory animus and the adverse action;  
 "(5) damage to the employee; and  
 "(6) a causal link between the adverse action and the damage." [*Mamou v. Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 713, 81 CR3d 406, 428]
- [19:320.6] *Retaliation claims:* The elements of a claim for retaliation in violation of Gov.C. §12940(h) are substantially the same:

- “(1) the employee’s engagement in a protected activity, i.e., ‘oppos[ing] any practices forbidden under this part’;
- “(2) retaliatory animus on the part of the employer;
- “(3) an adverse action by the employer;
- “(4) a causal link between the retaliatory animus and the adverse action;
- “(5) damages; and
- “(6) causation.” [*Mamou v. Trendwest Resorts, Inc.*, supra, 165 CA4th at 713, 81 CR3d at 428 (brackets in original)]
- [19:320.7] *Failure to accommodate disability*: Plaintiff alleged:
  - her employer *knew* she was unable to walk long distances as a result of polio;
  - she asked for accommodation in transporting herself from her car to her work station, which was a “*reasonable*” accommodation under the FEHA;
  - the employer *denied* her request; and
  - she was *injured* as a result thereof.

The complaint adequately pleaded a cause of action for failure to make reasonable accommodation for the employee’s known disability, in violation of the FEHA. [*Bagatti v. Department of Rehabilitation* (2002) 97 CA4th 344, 355, 118 CR2d 443, 450-451]

*Cross-refer:* See Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 6.

➡ [19:321] **PRACTICE POINTERS FOR PLAINTIFFS:** Exercise the same care in drafting a complaint that was used in initially evaluating the case. Anticipate defense counsel’s careful scrutiny of parties and causes of action. Make sure the alleged claims have a sufficient legal and factual basis to withstand attacks on the pleading and to support the certification of merits created by your signing the complaint (see CCP §128.7(b)).

- b. [19:322] **Avoiding removal to federal court:** Having chosen to file suit in state court, plaintiffs’ counsel should consider whether the case will be *removable* by defense counsel to federal court.

To preserve the state court forum, plaintiffs’ counsel may consider:

- [19:322.1] *Joining a nondiverse defendant*: Where diversity of citizenship exists between the plaintiff employee and an out-of-state employer, naming an indi-

vidual defendant who resides in the same state as plaintiff will prevent complete diversity and thus prevent removal on diversity grounds (see ¶19:86).

- [19:322.2] *Limitation*—“sham” joinders: Such joinder must be bona fide. If no real claim exists against the individual defendant, the joinder may be disregarded as “sham.” See Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.
- [19:322.3] *Pleading only state law claims* in the complaint; e.g., suing on contract and tort claims and for FEHA violations, and *ignoring* any Title VII, ADA and ADEA claims. The federal claims may add nothing and will be a basis for removal to federal court.
- *Limitation—complete preemption*: In those few areas in which federal law “completely preempts” state law (e.g., ERISA and LMRA §301; see ¶19:75), state law claims may be “recharacterized” as federal claims, creating removal jurisdiction.

[19:323-329] *Reserved.*

- c. [19:330] **Special pleading requirements in state court actions:** Notwithstanding the general policy of liberality in pleadings, a stricter pleading standard is required as to certain claims or conduct:

(1) [19:331] **Fraud:** Because allegations of fraud involve a serious attack on defendant’s character, fairness requires that such allegations be pleaded with “*particularity*” so the court can weed out nonmeritorious actions before defendant must answer. [*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 C3d 197, 216, 197 CR 783, 795]

(a) [19:332] **Effect:** Plaintiffs must allege every element of a cause of action for fraud factually and specifically, showing “*how, when, where, to whom, and by what means* the representations were tendered.” [*Stansfield v. Starkey* (1990) 220 CA3d 59, 73, 269 CR 337, 345 (emphasis added; internal quotes omitted)]

(b) **Application**

- [19:333] Employee adequately stated a cause of action for “promissory fraud” by alleging:
  - Employer induced Employee to move from New York to California by representing (on specified date) that Employee would re-

- ceive significant salary increases and his employment would continue as long as he performed his job and Employer was financially healthy;
- Employer knew its representations were false when made, because at that time, Employer was planning a merger likely to eliminate Employee's job, Employer secretly intended to treat Employee as if he were subject to termination without cause, and Employer's policy was to give only minimal annual increases;
  - Employee justifiably relied on these misrepresentations by leaving secure New York employment, uprooting his family, purchasing a California home and moving here;
  - Employer terminated Employee after two years of exemplary performance and Employee could not find comparable employment. [*Lazar v. Sup.Ct. (Rykoff-Sexton, Inc.)* (1996) 12 C4th 631, 639, 49 CR2d 377, 381]
- (2) [19:334] **Agency and scope of employment:** Plaintiffs often allege agency and employment relationships in conclusory terms. For example:
- "Each of the defendants was the agent, joint venturer and employee of each of the other remaining defendants, and in doing the things hereinafter alleged, each was acting within the course and scope of said agency, employment, partnership and joint venture with the advance knowledge, acquiescence or subsequent ratification of each and every remaining defendant."
- Caution:* The California Supreme Court has criticized such allegations as "egregious examples of generic boilerplate." [*Moore v. Regents of Univ. of Calif.* (1990) 51 C3d 120, 134, 271 CR 146, 153, fn. 12]
- (3) [19:335] **Conspiracy:** To render defendant liable for wrongs committed by another, the complaint must allege (a) the formation and operation of the conspiracy; (b) the wrongful act or acts done pursuant to the conspiracy; and (c) the resulting damage. [*Wilcox v. Sup.Ct. (Peters)* (1994) 27 CA4th 809, 827, 33 CR2d 446, 457 (disapproved on other grounds in *Equilon Enterprises LLC v. Consumer Cause, Inc.* (2002) 29 C4th 53, 124 CR2d 507)]
- (a) [19:336] **Application—employment claims:** Employment-related claims often contain an allega-

tion that a supervisor or other employee “conspired” with the corporation to commit some wrong upon the plaintiff. However, such “conspiracy” claims fail because employees are agents acting for the corporation: “When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire.” [Black v. Bank of America N.T. & S.A. (1994) 30 CA4th 1, 6, 35 CR2d 725, 728]

- (4) [19:337] **Punitive damages claims:** Where punitive damages are sought, the complaint must allege specific facts showing that defendant acted with “oppression, fraud or malice” toward plaintiff (e.g., that defendant knew the risk involved, intended to harm plaintiff, etc.). [Brousseau v. Jarret (1977) 73 CA3d 864, 872, 141 CR 200, 205; see also Perkins v. Sup. Ct. (General Tel. Directory Co.) (1981) 117 CA3d 1, 6, 172 CR 427, 430]
- (5) [19:338] **Tortious interference with business relations:** A heightened pleading standard also applies to the tort of interference with prospective economic advantage. Specific facts must be pleaded: “Allowing . . . conclusory pleading would be contrary to the cautious policy of the courts about extending tort remedies to ordinary commercial contracts.” [Khoury v. Maly’s of Calif., Inc. (1993) 14 CA4th 612, 618, 17 CR2d 708, 712]

[19:339] Reserved.

- d. [19:340] **Prima facie case:** A complaint must state “the facts constituting the cause of action in ordinary and concise language.” [CCP §425.10(a)]

The essential “facts constituting the cause of action” are discussed in the chapters dealing with particular employment claims, including:

- age discrimination (see ¶8:116 ff.);
- assault and battery (see ¶5:655 ff.);
- breach of contract (including breach of implied covenant of good faith and fair dealing, promissory estoppel, and wrongful demotion, see Ch. 4, *Employment Contract Claims*);
- constructive discharge (see ¶4:345 ff.);
- defamation (see ¶5:370 ff.);
- disability discrimination (see ¶9:121 ff.);

- employment discrimination other than age, disability or harassment (see ¶7:225 ff.);
- false imprisonment (see ¶5:685);
- fraud or misrepresentation (see ¶5:485 ff.);
- harassment (sexual, and other protected types, FEHA, see ¶10:111 ff.);
- intentional infliction of emotional distress (see ¶5:270 ff.);
- interference with employment contract (see ¶5:460);
- invasion of privacy (see ¶5:710);
- negligent hiring and supervision of other employees (see ¶5:615);
- negligent infliction of emotional distress (see ¶5:330 ff.);
- negligent misrepresentation (e.g., to induce employment) (see ¶5:590 ff.);
- retaliation (see ¶5:894.2);
- unfair competition (see ¶14:1 ff.); and
- wrongful discharge in violation of public policy (see ¶5:2 ff.).

**FORM:** COMPLAINT FOR DAMAGES FOR SEXUAL HARASSMENT, RETALIATION, BREACH OF CONTRACT, WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY, see Form 19:A.

[19:341-349] Reserved.

### 3. Complaints in Federal Courts

- a. [19:350] **Pleading requirements generally:** The rules governing pleading employment claims in federal courts are the same as in civil actions generally. [See *Swierkiewicz v. Sorema N.A.* (2002) 534 US 506, 511, 122 S.Ct. 992, 997—"the ordinary rules for assessing the sufficiency of a complaint apply"]

*Cross-refer:* See Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 8.

- b. [19:351] **Statement of claim:** The basic requirement is that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." [FRCP 8(a); see *Swierkiewicz v. Sorema N.A.*, supra, 534 US at 512, 122 S.Ct. at 998]

"(E)ntitled to relief" requires more than conclusions or a "formulaic recitation" of a cause of action. Plaintiff must furnish

*factual allegations* stating *plausible grounds* for relief—i.e., “a statement of circumstances, occurrences, and events” supporting the claim presented. The factual allegations must be “enough to raise a right to relief above the speculative level . . .” [Bell Atlantic Corp. v. Twombly (2007) 550 US 544, 555-557, 127 S.Ct. 1955, 1965 & fn. 3]

Moreover, in a discrimination case, plaintiff must allege facts sufficient to “plausibly suggest (defendant’s) discriminatory state of mind.” [Ashcroft v. Iqbal (2009) US , , 129 S.Ct. 1937, 1952 (parentheses added); see Fowler v. UPMC Shadyside (3rd Cir. 2009) 578 F3d 203, 211—Twombly’s “plausibility paradigm” applies to employment discrimination claim]

*Effect:* Conclusionary pleadings that simply parrot the language of the statute are not sufficient (e.g., “I was discriminated against because of my age”). Factual allegations must raise an *inference of discriminatory intent* (e.g., “Employer has stated that it prefers to hire persons under age 40 and I am over age 40.”).

(1) [19:352] **Facts sufficient to state a claim:** Under *Iqbal*, above, district courts must conduct a two-part analysis when presented with a motion to dismiss for failure to state a claim:

- First, the factual and legal elements of a claim should be separated. The court must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions.
- Second, the court must then determine whether the facts alleged in the complaint are sufficient to show that plaintiff has a “plausible claim for relief.” I.e., the complaint must do more than allege plaintiff’s entitlement to relief; it *must “show” such an entitlement with its facts*. [Fowler v. UPMC Shadyside, supra, 578 F3d at 210]

[19:352.1-352.4] *Reserved.*

- [19:352.5] *Disparate treatment vs. disparate impact claims:* Disparate impact claims are separate and distinct from disparate treatment claims and *must be separately pled* in the complaint. [See Raytheon Co. v. Hernandez (2003) 540 US 44, 52-53, 124 S.Ct. 513, 519-520—pleading limited to disparate treatment did not allow proof of disparate impact at trial]

[19:353-353.4] *Reserved.*

- [19:353.5] *National origin discrimination:* Allegations that Employee is Hungarian, that others at his

place of employment are French, and that he was terminated because of his national origin stated a claim for national origin discrimination in violation of Title VII. [*Swierkiewicz v. Sorema N.A.*, supra, 534 US at 514, 122 S.Ct. at 999]

*Comment:* *Swierkiewicz* is of doubtful continuing validity. It has been impliedly overruled by *Twombly* and *Iqbal*, above. [See *Fowler v. UPMC Shadyside*, supra, 578 F3d at 211]

- [19:354] *Ethnic origin discrimination:* Allegations that Employer required Employee, because of his Mexican-American origin, to comply with different terms and conditions of employment than it required of non-Mexican-American coworkers, was held an adequate statement of a Title VII disparate treatment claim. [*Ortez v. Washington County, State of Oregon* (9th Cir. 1996) 88 F3d 804, 808]
- [19:355] *Disability discrimination:* Courts disagree as to the amount of specificity required for ADA claims:
  - One view is that an ADA complaint is sufficient if it alleges that the plaintiff suffers from a disability covered by the Act even if does not specifically identify the major life activity in which plaintiff is substantially limited: “An accusation of discrimination on the basis of a particular impairment *provides the defendant with sufficient notice* to begin its defense against the claim.” [*EEOC v. J.H. Routh Packing Co.* (6th Cir. 2001) 246 F3d 850, 854 (emphasis added)]
  - But other courts may require more specificity. [See *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.* (10th Cir. 1999) 168 F3d 1228, 1230 (dictum)—“plaintiff must specifically plead . . . the impairments and the major life activities he or she asserts are at issue”]
- [19:356] *Hostile environment sexual harassment:* Allegations detailing demeaning comments about women that plaintiff’s male supervisor made, and unwelcome physical conduct of a sexual nature he initiated by standing “uncomfortably close” to plaintiff, were held sufficient to *put defendant on notice* of plaintiff’s claim for hostile environment sexual harassment under Title VII. [*Gregory v. Daly* (2nd Cir. 2001) 243 F3d 687, 692-693]

[19:356.1-356.4] Reserved.

- [19:356.5] *Age discrimination*: Allegations that Employer had stated he wanted to “energize” Employee’s department and then demoted Employee, age 53, transferred his responsibilities to a 32-year-old, and later fired Employee, stated a claim for age discrimination. [*Swierkiewicz v. Sorema N.A.*, supra, 534 US at 514, 122 S.Ct. at 999]
- [19:356.6-356.9] *Reserved.*
- [19:356.10] *Retaliation and wrongful termination*: Hospital Nurse’s complaint alleged that she was fired after reporting false billing and reimbursement practices and substandard patient care to Hospital’s CEO, and contained examples of such improper practices and care. The complaint was sufficient under Rule 8(a) to plead claims for retaliation and wrongful termination under the federal False Claims Act and its California counterpart. [*Mendiondo v. Centinela Hosp. Med. Ctr.* (9th Cir. 2008) 521 F3d 1097, 1105]

(2) [19:357] **Compare—conclusions insufficient:** On the other hand, bald assertions and conclusions of law are not adequate; a complaint consisting only of naked assertions fails to state a Title VII claim.

- (a) [19:358] **Examples:** Allegations (without supporting facts) that plaintiff was:
  - “treated poorly on the job and harassed”;
  - “required to work in places where prejudice existed”; and
  - “denied opportunities to be promoted” were held insufficient to state a claim upon which relief may be granted. [*Simpson v. Welch* (4th Cir. 1990) 900 F2d 33, 35]
- [19:359] Conclusory allegations of “racial discrimination” with regard to “terms of employment” are not sufficient to place an employer on notice that plaintiffs are bringing a compensation-discrimination action based on a protected class. [*Williams v. Boeing Co.* (9th Cir. 2008) 517 F3d 1120, 1131]

[19:360-369] *Reserved.*

c. [19:370] **Special pleading rules:** FRCP 9 contains special pleading rules, including:

- (1) [19:371] **Fraud or mistake:** The circumstances constituting fraud or mistake shall be stated “*with particularity*.” [FRCP 9(b)]

[19:371.1-371.4] *Reserved.*

- [19:371.5] Because the federal False Claims Act (FCA) is an anti-fraud statute and requires fraud allegations, a complaint charging *violations* of the FCA is subject to FRCP 9(b)'s strict pleading standards. But an employee's complaint that she was fired in *retaliation* for investigating *suspected* violations of the FCA "does not require a showing of fraud and therefore need not meet the heightened pleading requirements of Rule 9(b)." [*Mendiondo v. Centinela Hosp. Med. Ctr.* (9th Cir. 2008) 521 F3d 1097, 1103—hospital nurse fired after she reported to law enforcement that her supervisors instructed her to commit acts constituting Medicare fraud]
- (2) [19:372] **Special damages:** If claimed, items of special damages must be specifically stated. [FRCP 9(g)]
- "Special damages" are those "damages that are *unusual* for the type of claim in question—that are *not* the natural damages associated with such a claim." [*Avitia v. Metropolitan Club of Chicago, Inc.* (7th Cir. 1995) 49 F3d 1219, 1226 (emphasis added)]
- d. [19:373] **Repleading not required after removal from state court:** Following removal of an action from state court, repleading of the claims contained in the state court complaint is *not* required unless the court so orders. [FRCP 81(c)]
  - e. [19:374] **Plaintiffs may seek leave to sue anonymously:** Courts may allow plaintiffs to sue under pseudonyms in *exceptional* cases involving highly sensitive matters or a real risk of harm from disclosure of their identities. [*Does I Through XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F3d 1058, 1062]
    - [19:375] Foreign garment industry workers filed a FLSA class action against their employer under the pseudonyms "Jane Does I-XXIII," alleging that disclosure of their names would likely result in deportation, arrest and physical and economic retaliation against them and their families. Plaintiffs were allowed to conceal their identities from defendants, at least until the district court ruled on the motion to certify the class action and potential class members were given an opportunity to join the suit. [*Does I Through XXIII v. Advanced Textile Corp.*, *supra*, 214 F3d at 1063]
    - [19:376] But a mere risk of embarrassment does not permit suit under a fictitious name. Those using the courts must generally be prepared to accept public

scrutiny. [*Doe v. Frank* (11th Cir. 1995) 951 F2d 320, 324—employee who claimed discrimination based on his alcoholism not allowed to sue as “Doe”]

[19:377-399] Reserved.

## D. DEFENDANT'S CHALLENGES AND RESPONSES TO COMPLAINT

1. [19:400] **Preliminary Considerations:** Before filing a responsive pleading or motion, defendants should consider:

- *Removal to federal court?* If a federal question or diversity of citizenship of the parties is disclosed in a complaint filed in state court, defendant has only 30 days within which to remove to federal court (see ¶19:250 ff.).
- *Jurisdiction over subject matter and parties?* While lack of subject matter jurisdiction is not waived, lack of personal jurisdiction may be waived if not timely raised (see ¶19:410 ff.).
- *Venue?* If the complaint is filed in a court in which venue is improper, failure to object at the outset generally waives the defect (see ¶19:260 ff.).
- *Arbitration agreement?* If a binding arbitration agreement exists, a motion to compel arbitration should be filed as soon as possible to avoid issues of waiver or forfeiture (see ¶19:285 ff.).

[19:401-409] Reserved.

2. [19:410] **Challenging Jurisdiction:** Instead of responding on the merits, defendant may challenge the court's jurisdiction to hear the action.

a. [19:411] **Challenging subject matter jurisdiction:** Defendant may object that the court lacks subject matter jurisdiction—i.e., that it is not competent to adjudicate the *claims* plaintiff asserts.

(1) [19:412] **Federal procedures:** Defendant may move to dismiss the complaint for “lack of jurisdiction over the subject matter.” [FRCP 12(b)(1)] (Alternatively, defendant may raise the objection as an affirmative defense in the answer; or move to dismiss on this ground at any time during the course of the proceeding.)

(a) [19:413] **Facial or factual attacks:** A Rule 12(b)(1) motion may be based on matters appearing on the face of the complaint, or on matters judicially noticeable by the court, or on *extrinsic evidence* (e.g., declarations).

*Cross-refer:* See Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 9.

- (b) [19:414] **Failure to state federal claim as “jurisdictional” defect?** Failure to allege the essential elements of a federal claim is generally *not* a jurisdictional defect within Rule 12(b)(1)’s meaning. Rather, the defect is challenged by a motion to dismiss under Rule 12(b)(6) for “failure to state a claim upon which relief can be granted.” [See *Bell v. Hood* (1946) 327 US 678, 682, 66 S.Ct. 773, 776—“(I)t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction”]

The Supreme Court has laid down a “bright line” rule: “(W)hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” [Arbaugh v. Y&H Corp. (2006) 546 US 500, 516, 126 S.Ct. 1235, 1245—Title VII’s 15-employee minimum not jurisdictional]

- (c) [19:414.1] **Significance for state law claims:** A federal court lacking subject matter jurisdiction—i.e., no diversity or federal question jurisdiction—*may not exercise supplemental jurisdiction* over related state law claims.

*Cross-refer:* See detailed discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 9.

[19:415-418] Reserved.

- (2) [19:419] **California procedures:** Lack of subject matter jurisdiction may be raised in California by demurrer. [CCP §430.10(a)—“The court has no jurisdiction of the subject of the cause of action alleged in the pleading”] (Alternatively, lack of subject matter jurisdiction may be raised by motion at any time during the proceedings.)

A demurrer for lack of subject matter jurisdiction rarely lies because the defect rarely appears on the face of the complaint. Unlike federal practice (see ¶19:413), California law does not permit extrinsic evidence to be used as the basis for a demurrer (*except* matters the court may *judicially notice*). [See CCP §430.30(a)]

*Compare—motion for summary judgment:* A motion for summary judgment may be used to raise lack of subject

matter jurisdiction where the defect does not appear on the face of the complaint.

*Cross-refer:* See further discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 7.

### (3) Application

- (a) [19:420] **Failure to exhaust administrative remedy:** Timely filing of an administrative complaint and exhaustion of that remedy are prerequisites to maintaining a civil action for damages under either Title VII or the FEHA (see discussion at ¶16:3 ff.).

Under Title VII, timely filing of charges with the EEOC is a “statutory precondition to suit” and failure to do so may be raised by motion to dismiss under Rule 12(b). [See *Jasch v. Potter* (9th Cir. 2002) 302 F3d 1092, 1096, fn. 3—open question whether motion lies under FRCP 12(b)(1) for lack of subject matter jurisdiction or 12(b)(6) for failure to state a claim or is a “non-enumerated 12(b) motion”]

But under the FEHA, it is regarded as a *jurisdictional defect* (see ¶16:251). [*Okoli v. Lockheed Technical Operations Co.* (1995) 36 CA4th 1607, 1613, 43 CR2d 57, 61]

- 1) [19:420.1] **Effect:** A complaint in a FEHA action in California courts is subject to demurrer if it fails to allege administrative exhaustion (or in the unlikely event it alleges plaintiff did *not* obtain a right-to-sue letter from the DFEH). If the complaint alleges compliance with the administrative exhaustion requirement, defendant may place the matter in issue by a general denial. (Better practice, however, would be for defendant to plead plaintiff’s failure to comply as an affirmative defense in the answer and to move for summary judgment on this ground.)

- (b) [19:421] **Employer with less than 15 employees exempt under Title VII:** Title VII’s 15-employee threshold is part of any claim for relief under Title VII. Lack of a sufficient number is a defense to any claim but does *not* affect the court’s subject matter jurisdiction: “(W)hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” [*Arbaugh v. Y&H Corp.* (2006) 546 US 500, 516, 126 S.Ct. 1235, 1245—because 15-employee threshold is nonjurisdictional, lack of

sufficient employees is waived if not raised at outset by motion to dismiss]

[19:422-429] *Reserved.*

- b. [19:430] **Challenging personal jurisdiction:** The procedures for attacking personal jurisdiction are as follows:

- (1) [19:431] **Federal procedure:** Defendants may attack the court's personal jurisdiction over them by filing a *motion to dismiss* under FRCP 12(b)(2) ("lack of jurisdiction over the person").

Alternatively, they may raise the defense in the answer. If not raised by motion or answer, the defect is *forfeited*; see FRCP 12(h).

►[19:432] **PRACTICE POINTERS FOR PLAINTIFFS:**

Plaintiffs should anticipate that nonresidents may move to dismiss and should line up jurisdictional proof *before* filing suit: e.g., by examining telephone directories and trade publications; checking with city and state licensing authorities; and obtaining declarations by competent witnesses showing the nonresidents' activities in the forum state.

If defendant moves to dismiss, plaintiffs should consider conducting jurisdictional discovery, particularly if the defendant's declarations raise credibility issues. (If a "hold" on discovery is in effect, leave of court may be required to conduct such discovery.)

►[19:433] **PRACTICE POINTER FOR DEFENDANTS:**

Defendant must be sure to raise any objection to personal jurisdiction at the outset (by motion or in the initial responsive pleading) to avoid forfeiting the objection.

Consider combining your motion to dismiss with an *alternative motion to transfer* the action for convenience of parties or witnesses under 28 USC §1404(a) (see ¶19:264 *ff.*). Doing so may increase the likelihood that the court will grant one of the motions.

*Cross-refer:* Procedures to challenge personal jurisdiction in federal court are discussed further in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Chs. 3 & 9.

(2) [19:434] **California procedures:** To challenge a California court's personal jurisdiction, defendant may file a *motion to quash service of summons* under CCP §418.10(a)(1).

(a) [19:435] **Before demurrer or answer:** Defendant must file a motion to quash *before* answering or demurring to the complaint. An answer or demurrer constitutes a *general appearance* and waives any defect in personal jurisdiction.

*Cross-refer:* Procedures to challenge personal jurisdiction in California state courts are discussed further in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.

[19:436-444] *Reserved.*

### 3. Other Challenges to Complaint

a. [19:445] **Federal procedures:** In federal practice, defendants may move to dismiss a complaint on various other grounds, including "failure to state a claim upon which relief can be granted" (FRCP 12(b)(6)).

- *Facial attack:* Unlike a FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction (¶19:412), a Rule 12(b)(6) motion is limited to matters appearing on the complaint's face or which the court may *judicially notice*.
- *Effect of attaching declarations, extrinsic evidence:* If a Rule 12(b)(6) motion presents matters outside the pleadings, the court may treat it as a *motion for summary judgment* (in which event, the rules governing summary judgment motions apply). [FRCP 12(b)]

Defendants may move for a "more definite statement" before answering. [FRCP 12(e)]

And, defendants may move to strike "any redundant, immaterial, impertinent or scandalous matter" (FRCP 12(h)).

*Cross-refer:* Challenges to pleadings in federal court are discussed in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 9.

[19:446-447] *Reserved.*

b. [19:448] **California procedures:** In California practice, defendants may demur on various other grounds, including a "general demurrer" for "failure to state facts sufficient to constitute a cause of action" (CCP §430.10(e)).

- *Facial attack:* In ruling on a general demurrer, the court may consider only defects appearing on the face of the complaint or judicially noticeable matters.

- *Effect of attaching declarations, extrinsic evidence:* Unlike federal practice (above), California courts *may not* treat a demurrer supported by extrinsic evidence as a motion for summary judgment.

Defendants may also demur on the ground that the complaint is “uncertain . . . ambiguous or unintelligible.” [CCP §430.10(f) (internal quotes omitted)]

And, defendants may move to strike “irrelevant, false or improper matters” in the complaint (CCP §436).

*Cross-refer:* Challenges to pleadings in California state courts are discussed in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 7.

[19:449-450] *Reserved.*

- c. [19:451] **Grounds for general demurrer or Rule 12(b)(6) motions in employment cases:** Defendants may raise various defenses and objections by “general demurrer” in California state courts, or a Rule 12(b)(6) motion to dismiss in federal court, *if the defect appears on the face of a well-pleaded complaint or from matters the court may judicially notice.* (Otherwise, the proper procedure to raise the objection is by an affirmative defense in the answer followed by a motion for summary judgment.)

The following are examples of grounds that sometimes appear *on the face of the complaint* (or judicially noticeable matters) in employment cases, and thus may be ground for demurrer in California or a Rule 12(b)(6) motion to dismiss in federal court:

- [19:452] *No fundamental public policy supporting tort action for wrongful discharge* (see ¶15:35 ff.);
- [19:453] *Workers’ compensation as exclusive remedy* (see ¶15:505);
- [19:454] *Failure to exhaust collective bargaining remedy* (see ¶16:345 ff.);
- [19:455] *Failure to exhaust administrative remedy* (i.e., failure to file charges with the EEOC or California DFEH; see ¶16:3 ff.);
- [19:455.1] *Failure to exhaust employer’s internal grievance procedures* (see ¶16:370 ff.);
- [19:456] *Where supervisors or coworkers are named defendants, no individual liability for job discrimination* (as distinguished from retaliation or harassment) (see ¶7:179 ff.);
- [19:457] *Statute of limitations* (see ¶16:385);

- [19:457.1] *Collateral estoppel/res judicata* (see ¶16:670 ff.).

➡ [19:457.2] **PRACTICE POINTER:** Most of these grounds are also grounds for summary judgment, which is preferable because it resolves the matter (absent reversal on appeal). An order striking the complaint does not always resolve the case, however, because it may be accompanied by leave to file an amended complaint.

- d. [19:458] **Attacking punitive damages claims:** Because specific factual allegations showing “malice, oppression or fraud” are required to support a punitive damages claim (¶19:337 ff.), a *motion to strike* may be useful in employment litigation where the complaint seeks punitive damages.

*Comment:* If plaintiffs allege only legal conclusions (e.g., “malice,” “despicable conduct,” “wanton disregard,” etc.), defendants may file a motion to strike the “improper matter.” Although plaintiffs will almost certainly be granted leave to amend, they may be unable to amend the complaint to allege facts that support a punitive damages claim.

➡ [19:459] **PRACTICE POINTER:** Counsel for defendant employers must balance the cost and time required for a motion to strike and follow up challenges to amended complaints, against the possibility of utilizing early discovery (including plaintiff’s deposition) to obtain helpful admissions that there is no evidentiary basis for a punitive damages claim.

- e. [19:460] **Attacking SLAPP suits:** California law permits defendants who are sued for speech or conduct relating to matters of public interest—so-called “Strategic Lawsuits Against Public Participation” or SLAPP suits—to file an “anti-SLAPP motion.” [See CCP §425.16]

The most common causes of action subject to challenge as SLAPP suits are:

- defamation;
- intentional or negligent infliction of emotional distress;
- interference with contract or prospective economic advantage;
- breach of fiduciary duty; and
- malicious prosecution. [See *Zamos v. Stroud* (2004) 32 C4th 958, 12 CR3d 54]

*Cross-refer:* See detailed discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 7.

► [19:460.1] **PRACTICE POINTER FOR DEFENDANTS:** Where appropriate, an anti-SLAPP motion can be a potent weapon for defendants because it “freezes” discovery, may dispose of the action in its infancy, and entitles prevailing defendants to recover their attorney fees.

One disadvantage is the risk that denial of the motion may foreclose a later malicious prosecution action against plaintiff (because the denial shows “probable cause” for plaintiff’s action). [*Wilson v. Parker, Covert & Chidester* (2002) 28 C4th 811, 815, 123 CR2d 19, 21]

(1) [19:461] **Application to employment disputes?**

Not every workplace dispute is a matter of public interest. Nor is it enough that public policy favors criticism of unlawful workplace activities: “[U]nlawful workplace activity below some threshold level of significance is not an issue of public interest, even though it implicates a public policy.” [*Rivero v. American Fed. of State, County & Mun. Employees, AFL-CIO* (2003) 105 CA4th 913, 924, 130 CR2d 81, 90; *Olaes v. Nationwide Mut. Ins. Co.* (2006) 135 CA4th 1501, 1511, 38 CR3d 467, 474—private employer’s investigation of sexual harassment complaint, involving a small group of coworkers, not a matter “of public interest”]

“(T)he constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, *such that it warrants protection* by a statute that embodies the public policy of encouraging *participation in matters of public significance*.” [*Du Charme v. International Broth. of Elec. Workers* (2003) 110 CA4th 107, 118, 1 CR3d 501, 510 (emphasis added)]

- [19:461.1] Anti-SLAPP motions are more frequently applicable in employment disputes involving a *governmental employer* because such disputes are more likely to involve matters of public concern. [See *Bradbury v. Sup.Ct. (Spencer)* (1996) 49 CA4th 1108, 1111, 57 CR2d 207, 209—anti-SLAPP statute protects public employers and employees who speak out about an official investigation]
- [19:461.2] Still, anti-SLAPP motions may sometimes be proper in private-sector employment litigation. [See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 CA4th 294, 308, 106 CR2d 906, 918—anti-SLAPP motion proper in employer’s suit

against former employee for disclosing allegedly confidential information to attorneys representing former employee in wrongful discharge action; *Greka Integrated, Inc. v. Lowrey* (2005) 133 CA4th 1572, 1580, 35 CR3d 684, 691—suit against employee for disclosing employer's confidential information subject to anti-SLAPP motion because disclosure made in response to subpoenas, a protected activity; *Neville v. Chudacoff* (2008) 160 CA4th 1255, 1258, 73 CR3d 383, 385-386—defamation claim against former employer based on letter to former employee's customers was subject to anti-SLAPP motion because it related to anticipated litigation, a protected activity]

- (2) [19:462] **Available in federal court actions:** Defendants sued in federal court may file an anti-SLAPP motion to challenge claims based on California law. [See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.* (9th Cir. 1999) 190 F3d 963, 970-973; *Thomas v. Fry's Electronics, Inc.* (9th Cir. 2005) 400 F3d 1206, 1206-1207]

But “procedural” matters are still governed by the Federal Rules of Civil Procedure, so the California statute’s discovery “freeze” provision does not apply in federal court. [See *Metabolife Int'l, Inc. v. Wornick* (9th Cir. 2001) 264 F3d 832, 846]

- (3) [19:463] **Appeal of anti-SLAPP ruling:** An order granting or denying an anti-SLAPP motion is immediately appealable in both state and federal court. [CCP §425.16(i); see *Zamani v. Carnes* (9th Cir. 2007) 491 F3d 990, 994—denial of anti-SLAPP motion immediately appealable in federal court pursuant to collateral order doctrine]

- (a) [19:464] **Effect of delaying appeal:** Failure to timely appeal an immediately appealable order precludes review of the order on appeal from the final judgment. [CCP §906; *Maughan v. Google Technology, Inc.* (2006) 143 CA4th 1242, 1246-1247, 49 CR3d 861, 865; see *Price v. Kramer* (9th Cir. 2000) 200 F3d 1237, 1256-1258 (not an anti-SLAPP ruling)]

[19:465-469] Reserved.

#### 4. Answers

- a. [19:470] **General rules of pleading:** The rules governing pleading of answers in employment cases in federal or state court are the same as those governing answers to civil actions generally.

Basically, the answer must contain *denials* or *affirmative defenses* necessary to controvert the complaint's material allegations. [CCP §431.30(b)—answer to contain "general or specific denial of the material allegations of the complaint . . . and statement of any new matter constituting a defense"; FRCP 8(b)—body of the answer must, in "short and plain terms," *admit* or *deny* each of the complaint's material allegations, and state *the party's defenses* to each asserted claim]

- (1) [19:471] **Effect of failure to plead affirmative defense:** Affirmative defenses constitute "new matter" and therefore are not in issue under a general denial (see CCP §431.30(b)(2)). If a defense is omitted, it may be deemed *forfeited*. [FRCP 8(d)]
- (2) [19:472] **Leave to amend routinely granted:** To avoid forfeiture, defendant may *seek leave to amend the answer* to allege omitted defenses. Leave to amend is routinely granted before trial, unless defendant's failure to raise the defense sooner substantially prejudices plaintiff.

*Cross-refer:* Pleading rules in California state courts are discussed in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 6. Pleading rules in federal courts are discussed in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 8.

- b. [19:473] **Common defenses in employment cases:** The following affirmative defenses are commonly asserted in employment litigation and must be specially pleaded:

- [19:474] *Failure to exhaust administrative remedy* (see ¶16:3 ff.).
- [19:474.1] *Failure to exhaust employer's internal grievance procedures* (see ¶16:370 ff.).
- [19:475] *Binding arbitration agreement as bar to action* (see ¶18:310 ff.).

➡ [19:476] **PRACTICE POINTER:** Defendants should consider filing a *motion to stay* (and/or to compel arbitration) concurrently with the answer. Otherwise, plaintiffs may argue that by participating in the lawsuit, defendant has forfeited the right to arbitration despite raising the defense in the answer.

- [19:477] *Statute of limitations* (see ¶16:385 ff.).

- [19:478] *Laches as defense to equitable relief* (see ¶16:560 ff.).
- [19:479] “Unclean hands” (see ¶16:570).

► [19:480] **PRACTICE POINTER:** Where employee misconduct constituting “unclean hands” is first discovered during the litigation, defense counsel should seek leave to amend the answer to assert this matter as an affirmative defense. Such “after-acquired evidence” may bar or limit the employee’s remedies (see discussion at ¶17:470 ff.).

- [19:481] *Failure to mitigate damages* (see ¶17:490 ff.).
- [19:482] *Collateral estoppel/res judicata* (see ¶16:670 ff.).
- [19:483] *Judicial estoppel* (see ¶16:740 ff.).
- [19:484] *Settlement or release* (see ¶16:770 ff.).
- [19:485] *Truth, consent and privilege as defenses to defamation* (see ¶5:400 ff.).
- [19:486] *Bona fide occupational qualification defense (BFOQ) to discrimination claims* (see ¶7:61, 7:851 ff., 8:471 ff. & 9:2380 ff.).
- [19:487] *Business necessity defense to disparate impact claims* (see ¶7:571 ff.).
- [19:488] *Workers’ compensation as exclusive remedy* (see ¶15:505 ff.).
- [19:489] *Federal preemption of state law claims (ERISA, LMRA, RLA, NLRA)* (see ¶15:1 ff.).

► [19:490] **PRACTICE POINTER:** Because of their jurisdictional impact, preemption defenses should be raised by preanswer motion rather than merely in the answer (or, where appropriate, as the basis for removing the action to federal court).

- [19:491] *Constitutional defenses to punitive damages claims* (see ¶17:446 ff.).

**FORM:** ANSWER TO COMPLAINT FOR DAMAGES FOR SEXUAL HARASSMENT, RETALIATION, BREACH OF CONTRACT, WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY, see Form 19:B.

5. [19:492] **Counterclaims and Cross-Complaints:** Occasionally, an employer who has been sued by an employee may

wish to file its own claims against that employee. Possible examples:

- claims for misappropriation of the employer's property (e.g., trade secrets; see ¶14:80, 14:250); or
- claims for competitive acts during employment (e.g., seizing business opportunities; see ¶14.3 *ff.*).

In such cases, the employer may (and sometimes must) file a counterclaim (federal practice) or cross-complaint (state practice). The rules governing these pleadings in employment litigation are basically the same as those in civil litigation generally.

 [19:492.1] **PRACTICE POINTER FOR DEFENDANTS:**

Employers may choose *not* to assert counterclaims against former employees because juries are often sympathetic to the former employees and reluctant to award damages to the employer. (However, such awards are not unheard of; see ¶14:9.)

*Cross-refer:*

- For rules governing cross-complaints in California state courts, see Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 6.
- For rules governing counterclaims and cross-claims in federal courts, see Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 8.

[19:493-494] Reserved.

## E. JURY DEMAND

1. [19:495] **Federal Courts—Early Deadline:** Plaintiffs may include a demand for jury trial in a federal court complaint. Otherwise, a separate jury demand must be filed and served on all other parties no later than *10 days after service of the last pleading* directed to the issue to be tried to a jury. [FRCP 38(b)]

*Compare—right to jury trial:* The right to jury trial depends on whether the claim or issue is analogous to a "suit at common law" and whether the relief sought is legal or equitable in nature; see ¶19:843 *ff.*

- a. [19:496] **Effect of delay:** Failure to make a timely demand forfeits a party's right to jury trial. [FRCP 38(d); *Russ v. Standard Ins. Co.* (9th Cir. 1997) 120 F3d 988, 990 ("bright line rule")]
- b. [19:497] **Caution—actions removed from state court:** Different rules apply in actions removed from state court:
  - If an express jury demand was made before removal, the jury right is preserved; no additional demand is required. [FRCP 81(c)]

- But if no express jury demand was made in state court and defendant *answered* the complaint before removal, plaintiff must file a formal jury demand in federal court *within 10 days after being served with the notice of removal*. (Likewise, a defendant who desires a jury trial in these circumstances must file a formal jury demand in federal court within 10 days after petitioning to remove the action.) [FRCP 81(c)]

If defendant removed the action from state court *before answering* the state court complaint, the time limit for a jury demand is generally 10 days after defendant files an answer in federal court (10 days after service of last pleading directed to jury-triable issue). [FRCP 81(c); see *Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1063]

➡ [19:497.1] **PRACTICE POINTER FOR PLAINTIFF'S COUNSEL:** Treat a removal notice as a "red flag" if you want a jury trial! Although federal judges have discretion to grant a jury trial after the deadline (see FRCP 39(b)), the presumption is *against* granting such relief.

If relief from waiver is refused and a jury trial is important to your case, consider moving for a *dismissal without prejudice* in order to commence a new action.

[19:497.2-497.4] *Reserved.*

- c. [19:497.5] **Failure to object to jury demand as consent to jury trial:** Where a party demands a jury trial on an issue that is not jury triable, the opposing party's failure to object may be deemed "consent" to the jury. [See FRCP 39(c); *Broadnax v. City of New Haven* (2nd Cir. 2005) 415 F3d 265, 270-272—defendant's failure to object to plaintiff's demand for jury trial on lost wages under Title VII (equitable remedy) deemed consent to jury determination]

*Cross-refer:* See further discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.

- 2. [19:498] **Compare—State Court:** The rules in California state courts are far more lenient: A jury demand in California courts may be made when the case is set for trial (see CCP §631(a)(4)); and, although relief from waiver is discretionary, *relief from waiver is favored* where it would not disrupt the court's business or prejudice the opposing party.

*Cross-refer:* See further discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 12 Part I.

[19:499] *Reserved.*

## F. DISCOVERY

1. [19:500] **In General:** The materials below focus on discovery issues commonly encountered in connection with employment claims.

The rules governing discovery in employment litigation are the same as those governing discovery in civil proceedings generally. Except as noted, the rules in federal and state court are similar.

*Cross-refer:* For rules governing discovery procedures in California state courts, see Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8. For rules governing discovery procedures in federal courts, see Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

- a. [19:501] **Disclosure requirements in federal court:** Unlike California law, federal law requires parties to a federal action to make certain disclosures *without awaiting formal discovery requests* by an opposing party:

- (1) [19:502] **Early meeting and disclosure requirements:** The parties to a federal action must meet early in the case to discuss case management and discovery issues. Shortly afterwards, each party must furnish to the other:
  - “relevant” documents and list of witnesses;
  - computation of damages claimed with supporting documentation; and
  - copies of any liability insurance policies. [FRCP 26(a)(1)]

► [19:502.1] **PRACTICE POINTER:** Many federal district judges conduct a *scheduling conference* very soon after the Rule 26 meeting report has been filed with the court. You should be prepared to answer detailed questions about the meeting and the extent to which the requirements for early exchange of documents have been met.

► [19:502.2] **FURTHER PRACTICE POINTER:** Be aware that under FRCP 30(d)(2), a deposition is normally limited to “one day of seven hours.” This often comes as an unpleasant surprise to unwary counsel because a party’s deposition in a wrongful termination or harassment case often lasts much longer than that (especially if the plaintiff was a long-term employee, or if numerous claims are asserted against multiple defendants). To avoid being “stung” by this limitation, be sure to ask the district court, either in the Rule 26 meeting report or at the pretrial scheduling confer-

ence, for more time in taking specified depositions.  
[See FRCP 26(b)(2) & (f)(3)]

Neglecting to ask the district court at the outset for more time in taking such depositions may force you to file a motion with the district court for relief if your opponent objects to continuing the deposition beyond seven hours.

- (2) [19:503] **Pretrial disclosure requirements:** Later in the case, each party must also disclose *without formal discovery requests* from other parties:
- the identity of each *expert witness* to be called at trial, together with required background information and reports from certain types of experts; and
  - detailed information regarding the witnesses and documents to be offered at trial. [FRCP 26(a)]

► [19:504] **PRACTICE POINTER FOR PLAINTIFFS:**

Plaintiffs should consider *pleading their federal claims in detail*, with as many factual allegations as possible, even if this is not required by rules governing pleading. Detailed pleadings may avoid any question about which witnesses and documents were “relevant” and strengthen plaintiff’s claim to exclude evidence that defendant failed to disclose.

► [19:505] **PRACTICE POINTER FOR DEFENDANTS:**

Defense counsel should consider an early motion to strike or dismiss federal claims if the grant of such a motion would reduce the scope of defendant’s disclosure obligation.

In any case, counsel should attempt to clarify the scope of defendant’s disclosure obligation at the early meeting by identifying facts that are undisputed (thus eliminating any need to disclose), and attempting to obtain from plaintiff a stipulation as to exactly what claims are being made. Including this information in the report provided to the judge for use at the early conference may narrow or preclude debate on this subject later in the litigation.

*Cross-refer:* See further discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

- b. [19:506] **“Freeze orders” to preserve evidence:** Federal cases hold that litigants owe an “uncompromising duty to preserve” what they know, or reasonably should know, will be relevant evidence in a pending lawsuit *or one in the off-*

ing, even though no discovery request or “freeze order” to preserve the evidence has yet been made. Sanctions for failure to preserve relevant evidence may be imposed under the court’s inherent power. [See *Kronisch v. United States* (2nd Cir. 1998) 150 F3d 112, 130; see also Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11]

California law provides no mechanism for preservation of evidence before a lawsuit is filed. But once a lawsuit is filed, California courts have inherent power to issue injunctions in aid of discovery. This power may be used to enjoin destruction of evidence relevant to pending civil litigation if there is a risk of irreparable harm from such destruction. [See *Northpoint Homeowners Ass’n v. Sup.Ct. (Arutunian/Kinney & Assocs.)* (1979) 95 CA3d 241, 244, 157 CR 42, 44; *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385, 389; see also Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8]

### (1) Application

- [19:507] Employer sued former employees for misappropriation of its files and computer storage media. Employer claimed that even innocent use of its media could result in destruction of potential evidence. A “freeze order” was issued prohibiting defendants from destroying, deleting or secreting from discovery any of their electronic storage media. (The order also required defendants to allow a court-appointed expert to copy all of the storage media, including computer hard drives and discs, to recover lost or deleted files and to perform automated searches of that evidence under guidelines agreed to by the parties or established by the court.) [*Dodge, Warren & Peters Ins. Services, Inc. v. Riley*, supra, 105 CA4th at 1419, 130 CR2d at 389]

[19:508] Reserved.

- (2) [19:509] **Limitation—bond requirement:** Under California law, an injunction may not be issued unless the party seeking the injunction furnishes an undertaking to indemnify the party enjoined for whatever damage may be suffered if the injunction is improvidently granted. [See CCP §529; *Northpoint Homeowners Ass’n v. Sup.Ct. (Arutunian/Kinney & Assocs.)*, supra, 95 CA3d at 244, 157 CR at 44]
- c. [19:510] **Electronic discovery (“e-discovery”):** Many employment cases turn on electronic evidence such as e-mail messages and Internet postings. [See *Gates v. Cater-*

*pillar, Inc.* (7th Cir. 2008) 513 F3d 680, 684-685—disciplining and then terminating employee for excessive Internet and telephone use and inappropriate e-mail messages to customers]

FRCP 16(b)(3)(B)(iii) requires case scheduling orders to make appropriate provisions “for disclosure or discovery of electronically stored information,” and FRCP 26(f)(3)(C) requires the parties to “meet and confer” on this topic early in the litigation. Likewise, FRCP 34(b), governing document production, allows the requesting party to indicate the form in which such electronically-stored data is to be produced (e.g., printed on paper or stored on a disk or portable hard drive).

Finally, the federal rules allow the parties to enter “quick-peek” and “claw-back” agreements to reduce the burden of scouring electronically-stored data for privileged content without sacrificing the ability to assert the privilege and recover and exclude from evidence any privileged information that was produced. [See Committee Note to 2006 Amendments to FRCP 26(f)]

If a party has intentionally destroyed electronic evidence (e.g., deleting e-mail messages) in order to suppress the truth, a court may impose “spoliation” sanctions (see ¶19:1066). Such sanctions can be avoided if the party who allowed the evidence to become “spoiled” can show that it took reasonable steps to preserve the information or that the information was innocently destroyed prior to being on notice of the need to preserve it. [See *Bakhtiari v. Lutz* (8th Cir. 2007) 507 F3d 1132, 1135]

*Cross-refer:* See detailed discussion in:

- Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8;
- Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

[19:511-514] Reserved.

## 2. Plaintiff's Discovery

- a. [19:515] **Discovery procedures—in general:** Plaintiffs commonly use the following discovery procedures in employment litigation:
  - interrogatories;
  - inspection demands;
  - requests for admission; and
  - depositions of the employer, supervisors and other employees.
- b. [19:516] **Document inspection:** Plaintiffs have the right to inspect and copy documents in the employer's posses-

sion relating to the claims asserted. [See FRCP 34; CCP §2031.010 et seq.]

 [19:517] **PRACTICE POINTER FOR DEFENSE COUNSEL:** Consider making the documents available for review and copying at defendant's place of business, especially where the requested documents are voluminous and plaintiff's counsel may not actually need all the documents.

- (1) [19:518] **Personnel records:** Quite apart from litigation discovery, the employee has the right to inspect the *employee's own* personnel file at any reasonable time. [See Lab.C. §1198.5(a)]

Most other payroll and personnel records are also subject to discovery. But attorney-client privilege may protect communications from counsel (see ¶19:550 *ff.*); and a right to privacy may protect *personnel records of other employees* (see ¶19:581 *ff.*).

- (a) [19:519] **Notice to employee whose records sought:** Where another employee's records are sought by subpoena (including former employees), a copy of the subpoena and notice of privacy rights must be served on that employee before production of the documents. [See CCP §1985.6]

*Cross-refer:* See detailed discussion of this procedure in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.

[19:519.1-519.4] *Reserved.*

- (b) [19:519.5] **Relevancy:** The other employees' circumstances must be close enough to the issues involved in plaintiff's case to make comparisons productive. [*Balderston v. Fairbanks Morse Engine Div. of Coltec Industries* (7th Cir. 2003) 328 F3d 309, 320]

[19:519.6-519.9] *Reserved.*

- (c) [19:519.10] **Least intrusive means:** Because of the other employees' privacy interests, discovery should be limited to the least intrusive means necessary to obtain the required information. [*Perez v. County of Santa Clara* (2003) 111 CA4th 671, 678, 3 CR3d 867, 874]

- [19:519.11] Nurse claimed racial discrimination in the disciplinary process at Hospital. She sought discovery of Hospital's personnel records of 65 other nurses. They objected to

disclosure of their records. An order denying discovery was upheld. Plaintiff had less intrusive means of obtaining the information—e.g., through interrogatories listing the type and number of disciplinary acts regarding nurses identified by race but not by name. [Perez v. County of Santa Clara, *supra*, 111 CA4th at 678, 3 CR3d at 874]

- (2) [19:520] **Statistical data re work force:** In employment discrimination cases, plaintiffs often seek to discover data about the demographic characteristics (e.g., race, sex, age) of the workforce, and pay and promotions of employees with different characteristics.
- (a) [19:521] **Relevancy as limitation:** Such information may be relevant for discovery purposes in *disparate impact* cases (see ¶7:530 *ff.*), where tailored to the employment practice at issue and limited to a reasonable time period.

Statistical information may also be relevant for discovery purposes in *disparate treatment* cases (see ¶7:355 *ff.*). Statistics demonstrating the employer treated other employees more favorably than plaintiff may show that its allegedly nondiscriminatory reasons for its action against plaintiff were *pretextual*. But the data must provide an “apples to apples” comparison—e.g., relating to employees at the same worksite, with the same qualifications and duties, and under the same supervisor as plaintiff. [See *Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F2d 1356, 1363-1364; *Guruwaya v. Montgomery Ward, Inc.* (ND CA 1988) 119 FRD 36, 39, aff’d (9th Cir. 1989) 879 F2d 865]

- (b) [19:521.1] **Comment:** Even if such information is important as circumstantial evidence, it may be expensive to compile and defendants may resist discovery. The outcome of a motion to compel may turn on the court’s view of the relevance of particular statistical information to understanding the possible disparate impact of a challenged personnel practice or the intention of the decisionmakers who allegedly committed intentional employment discrimination.
- (3) [19:522] **Internal investigations re plaintiff’s claims:** Company reports of internal investigations conducted as the basis for a management response to plaintiff’s claims may be discoverable. Discovery may be denied, however, if the investigation is protected by the attorney-client privilege or attorney work product doctrine—e.g.,

where the investigation was conducted as part of the employer's litigation defense.

In sexual harassment cases, employer investigations are legally required (see Gov.C. §12940(j)(1)—immediate corrective action required); and may be the basis for an *Ellerth/Faragher* “good faith” defense (see ¶10:335 ff.).

- (a) [19:523] **By employer’s counsel:** Attorney-client privilege issues often arise where the employer’s in-house or outside counsel conduct the investigation (see ¶19:551).
- (b) [19:524] **By neutrals:** Plaintiff is generally entitled to discover a report to the employer of investigations by a neutral third party (subject to privacy protections, ¶19:569 ff.) where the employer relies on the neutral’s report in defense of its conduct.
  - [19:525] Employer hired an independent and neutral person (ombudsman) to investigate and mediate workplace disputes. To facilitate trust in the process, the neutral maintained strict confidentiality of all materials gathered in an investigation. Nonetheless, in a subsequent age discrimination action, plaintiff was entitled to discover the neutral’s notes and information. [*Carman v. McDonnell Douglas Corp.* (8th Cir. 1997) 114 F3d 790, 793-794]

 [19:526] **PRACTICE POINTER FOR DEFENSE COUNSEL:** If the action is filed in federal court and your discovery response asserts a privilege-based objection, be sure to *prepare and attach a privilege log* to your response. Failure to do so may waive the privilege. [See *Burlington Northern & Santa Fe Ry. Co. v. United States Dist.Ct.* (9th Cir. 2005) 408 F3d 1142, 1149]

Although not required in California courts at the time of objection, serving a privilege log along with the objection is a good idea. It may make it apparent to opposing parties that they would be unsuccessful in an attempt to compel disclosure.

*Cross-refer:* Privilege logs are discussed in detail in:

- Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11; and
- Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.

- (4) [19:527] **Insurance policies:** Under CCP §2017.210, a plaintiff is entitled to discover "the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment" against a defendant.

*Cross-refer:* See detailed discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.

[19:528-534] Reserved.

- c. [19:535] **Official Form Interrogatories (California):** California law allows parties to propound to each other "Official Form Interrogatories" developed by the Judicial Council (see CCP §2033.710 et seq.). Their advantage is that they are *not subject to the 35-question limit* applicable to other interrogatories (CCP §2030.030) and are usually objection-proof.

The Official Form Interrogatories developed for employment litigation (Judicial Council form DISC-002) include, among other topics, specific interrogatories on:

- contract formation;
- reasons for adverse employment action;
- employee's contentions re discrimination;
- employee's contentions re harassment;
- disability discrimination;
- discharge in violation of public policy;
- employer's internal complaint procedures; and
- loss of income, physical and mental injury, and other damages claimed.

**FORMS:** These Official Form Interrogatories are reproduced at the close of this Chapter; see *Form 19:C*.

- d. [19:536] **Identifying employer's decisionmakers:** Most defendants in employment litigation are corporations or business entities that act through officers and managers.

Because the Official Form Interrogatories may not reveal this information, plaintiffs' counsel should serve the employer with specially prepared *interrogatories* asking the *identity of each such person who participated in the decision* being challenged and other persons with knowledge of the facts of the case. Depositions should be scheduled accordingly.

- e. [19:537] **Deposing decisionmakers:** In deposing the corporation's decisionmakers in an employment discrimination case, plaintiffs usually seek evidence of discriminatory intent and may consider pursuing the following topics:

- plaintiff's work history and entries in his or her personnel file;

➡ **PRACTICE POINTER:** Ask decisionmakers about notes and memoranda they may have kept regarding plaintiff or other employees under their supervision *apart from* the company's personnel files.

- periodic evaluations by plaintiff's supervisor or manager;
- admissions of good job performance claimed by plaintiff;
- nature and quality of plaintiff's work as compared to other employees who were subject to the same supervisor(s) and received better treatment or promotions;
- details regarding each instance of plaintiff's allegedly unsatisfactory performance (nature, date, witnesses, etc.);
- what warnings or specific suggestions for improvement, if any, were given to plaintiff (when, where, by whom, etc.);
- whether there was improvement in plaintiff's performance after warnings or suggestions and, if not, whether the warnings or suggestions were renewed;
- who participated in the decision to discharge or take other adverse employment action against plaintiff;
- what reasons were stated for the adverse decision at the time of the decision;
- who else was present or overheard the discussions;
- description and location of any document evidencing the decision taken and reasons given for it;
- identity and demographic characteristics (race, gender, age, etc.) of other employees subject to the same supervisor(s) or decisionmaker(s) and whether each of them received the same treatment as plaintiff in respect to hiring, salary, benefits, shift assignment, performance evaluations, etc. (to show a pattern or practice of discriminatory conduct).

[19:538] Reserved.

- f. [19:539] **Deposing other corporate officers and agents:** Plaintiff's counsel will consider deposing each officer or agent of the corporation with knowledge of the facts of the case. Such deposition testimony may reflect inconsistencies that support an inference that the employer's stated

"neutral" reasons for its actions are a pretext for intentional employment discrimination (in an equal employment action) or for action contrary to its contractual obligation (as where employment termination must be for "cause") or for tortious conduct.

- (1) [19:540] **High-ranking executives?** A court may grant a protective order to prevent deposing high-ranking executives who are not claimed to be personally involved in the alleged discriminatory acts, and where "more convenient, less burdensome, or less expensive" means exist for determining whether they have information bearing on plaintiff's claims. [*Patterson v. Avery Dennison Corp.* (7th Cir. 2002) 281 F3d 676, 681—refusing to compel deposition of vice president of multinational corporation who worked more than 1000 miles from the plant where plaintiff was employed because the deposition would have been expensive and burdensome and plaintiff failed to show why interrogatories would not provide information sought; see *Liberty Mut. Ins. Co. v. Sup.Ct. (Frysinger)* (1992) 10 CA4th 1282, 1287, 13 CR2d 363, 365—personal injury defendant entitled to protective order where plaintiff seeking to depose corporate president/CEO showed no reasonable indication CEO had personal knowledge of matter and failed to exhaust less intrusive discovery methods]
- g. [19:541] **Discovery re other Title VII complaints:** Discovery regarding other Title VII violations by the employer must be limited to the practices at issue in the case. Discovery may be restricted to a reasonable time period before and after the acts alleged by plaintiff; and to the department or facility where plaintiff worked. [See *Sallis v. University of Minn.* (8th Cir. 2005) 408 F3d 470, 477-478—restricting discovery of other complaints to those raised by coworkers in plaintiff's department filed within 1 year of plaintiff's lawsuit]
- h. [19:542] **Discovery of potential class members:** Upon filing a putative class action complaint (or a collective action under the FLSA), plaintiff may seek an order requiring the defendant to produce the names and addresses of all "*similarly situated*" employees, even though they are not parties to the action (e.g., all employees discharged). This information is relevant and may be necessary in order to identify and notify potential class members. [*Hoffmann-La Roche Inc. v. Sperling* (1989) 493 US 165, 170-171, 110 S.Ct. 482, 486-487; see *Belaire-West Landscape, Inc. v. Sup.Ct. (Rodriguez)* (2007) 149 CA4th 554, 561-562, 57 CR3d 197, 202-203]

[19:543-549] *Reserved.*

i. **Limitations on plaintiff's discovery**

- (1) [19:550] **Attorney-client privilege:** The employer may assert the attorney-client privilege to bar discovery of communications with its attorney.
- (a) [19:551] **Investigation of employee's claims:** Where an attorney is engaged to investigate the employee's in-house claims, the attorney's report to the employer is *not* always or automatically privileged.
  - 1) [19:552] **Summaries of interviews, etc.:** A report that simply summarizes the investigation or presents factual conclusions for management action, and does not contain confidential legal advice, is not privileged from discovery even though it was prepared by an attorney. (But any portion of such a report that contains legal advice or communications made in a legal capacity must be protected.) [See *Wellpoint*

(Text cont'd on p. 19-61)

*Health Networks, Inc. v. Sup.Ct. (McCombs)*  
(1997) 59 CA4th 110, 121-122, 68 CR2d 844,  
851]

- 2) [19:553] **Adequacy of investigation asserted as defense:** An employer that defends an employment discrimination lawsuit on the ground it took reasonable corrective action, by investigating the merits of plaintiff's claims and taking appropriate action, places in issue the adequacy of its investigation. Where the investigation was conducted by an attorney or law firm, the employer's defense "must result in waiver of the attorney-client privilege and work product doctrine . . . The defendant cannot have it both ways." [*Wellpoint Health Networks, Inc. v. Sup.Ct. (McCombs)*, supra, 59 CA4th at 128, 68 CR2d at 855-856; *McGrath v. Nassau County Health Care Corp.* (ED NY 2001) 204 FRD 240, 244]
- [19:554] In a sexual harassment case, the employer's defense was that it conducted a reasonable investigation and took prompt remedial action. Given this defense, the attorney-client privilege did not shield the advice of the outside attorney-investigator, because the employer placed the *sufficiency of the investigation* at issue. [*Johnson v. Rauland-Borg Corp.* (ND IL 1997) 961 F.Supp. 208, 211; see also *Harding v. Dana Transport, Inc.* (D NJ 1996) 914 F.Supp. 1084, 1094—by using its attorney's investigation of sexual harassment allegations as a defense, employer forfeited its attorney-client privilege with respect to content of attorney's investigation]
  - *Work product protection* is likewise forfeited under these circumstances. [*Peterson v. Wallace Computer Services, Inc.* (D VT 1997) 984 F.Supp. 821, 825—plant manager's memos and notes prepared in anticipation of litigation also discoverable]
  - [19:555] Where the Employer alleged adequacy of prelitigation investigation by its human resources consultant (not an attorney) as a defense to sexual harassment claims, plaintiffs were entitled to discover that investigator's files *except for commun-*

cations between the investigator and the employer's attorneys. [Kaiser Found. Hosps. v. Sup.Ct. (Smee) (1998) 66 CA4th 1217, 1223, 78 CR2d 543, 546]

► [19:555.1] **PRACTICE POINTER FOR DEFENSE:**

Counsel advising the employer should help the employer adopt procedures for distinguishing and separating discoverable fact-finding material from privileged legal advice and counseling functions. [See *Kaiser Found. Hosps. v. Sup.Ct. (Smee)*, supra, 66 CA4th at 1227-1228, 78 CR2d at 549]

- (b) [19:556] **Participation in employment decision:** That the employer's counsel participates in a meeting in which an employment decision is made does not render everything said and done at the meeting privileged. If the attorney's advice is merely part of management's evaluation of the employment decision, plaintiffs may argue that no attorney-client privilege exists. [See *Neuder v. Battelle Pacific Northwest Nat'l Laboratory* (D DC 2000) 194 FRD 289, 296—notes of meeting of employer's personnel review committee not protected despite house counsel's participation in meeting, because meeting's primary purpose was to make a business decision regarding termination of employee, not to obtain legal advice]
- (c) [19:557] **Reports to governmental agencies not protected by attorney-client privilege:** Documents drafted for review by the government may not be regarded as confidential communications between attorney and client (e.g., equal employment opportunity requirements imposed on government contractors). [*Cloud v. Sup.Ct. (Litton Industries, Inc.)* (1997) 50 CA4th 1552, 1559-1560, 58 CR2d 365, 369-370—nor in some circumstances are they protectible as attorney work product]

*Cross-refer:* The attorney-client privilege in California state courts is discussed in Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8E. The attorney-client privilege in federal court is discussed in Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8H.

- (2) [19:565] **“Self-critical analysis” or “self-evaluative” privilege?** Employers often prepare what are called “self-critical analysis” documents regarding equal employment opportunity. These documents, often written by the company’s attorneys, are aimed at analyzing whether the company is complying with prior EEOC or DFEH orders, meeting affirmative action plans, etc. These documents sometimes contain potentially damaging statements.

Employees in discrimination cases often seek discovery of such documents because evidence that an employer violated an affirmative action plan may be relevant to the question of discriminatory intent.

- (a) [19:566] **Federal courts:** Some federal courts hold such information protected from discovery:
- “The prevailing view is that self-critical portions of affirmative action plans are privileged and not subject to discovery by plaintiffs . . . although courts have sometimes permitted discovery in conjunction with a protective order maintaining the confidentiality of self-critical studies.” [*Coates v. Johnson & Johnson* (7th Cir. 1985) 756 F2d 524, 551 (without recognizing privilege)]

The Ninth Circuit “has not recognized this novel privilege.” [*Union Pac. R.R. v. Mower* (9th Cir. 2000) 219 F3d 1069, 1076, fn. 7]

Moreover, without specifically discussing the self-critical analysis privilege, the U.S. Supreme Court has *declined* to recognize a qualified privilege for peer review materials relevant to charges of racial or sexual discrimination by a university in tenure decisions regarding faculty members. [*University of Pennsylvania v. EEOC* (1990) 493 US 182, 189, 110 S.Ct. 577, 582]

- 1) [19:566.1] **Mandatory vs. voluntary reports:** Some cases limit the privilege to reports mandated by the government (e.g., EEOC affirmative action compliance reports): “The justification for asserting the privilege in discrimination cases is to protect those businesses that are required to engage in critical self-evaluation from exposure to liability resulting from their mandatory investigations.” [See *Morgan v. Union Pac. R.R. Co.* (ND IL 1998) 182 FRD 261, 264-265; *Webb v. Westinghouse Elec. Corp.* (ED PA 1978) 81 FRD 431, 434]

Others cases apply the privilege only to reports *voluntarily* prepared by the Employer in an effort to prevent workplace discrimination, on the ground that if the report is mandated by the government, there is no reasonable expectation of confidentiality. [Reid v. Lockheed Martin Aero-nautics Co. (ND GA 2001) 199 FRD 379, 387— reports voluntarily commissioned by Employer regarding its work culture for minority employees, designed solely for internal use, held protected by self-critical analysis privilege in Title VII action]

- 2) [19:567] **Privilege waived if employer offers evidence showing equal opportunity compliance:** By offering evidence of its equal opportunity efforts to prove nondiscrimination, the employer “opens the door” and waives whatever qualified privilege may have existed: “(A)n employer should not be able to offer its affirmative action policy before the trier of fact as a manifestation of nondiscrimination and at the same time be able to hide self-critical evaluations that may undercut the employer’s portrayal of its efforts.” [Coates v. Johnson & Johnson, *supra*, 756 F2d at 552]

*Cross-refer:* See further discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

- (b) [19:568] **California courts:** California courts do *not* recognize any privilege for “self-critical analysis” documents. [Cloud v. Sup. Ct. (*Litton Industries, Inc.*) (1997) 50 CA4th 1552, 1558-1559, 58 CR2d 365, 369—plaintiffs in age discrimination case held entitled to discover employer’s affirmative action plans and self-critical analysis documents]

[19:568.1-568.4] *Reserved.*

➡ [19:568.5] **PRACTICE POINTER FOR DEFENSE COUNSEL:** Even if the court refuses to recognize a privilege for “self-critical analysis,” it may still be willing to impose limitations on discovery. Employer’s counsel should therefore consider seeking a *protective order* redacting portions of the report on *relevance* grounds and limiting or barring further disclosure.

- (3) [19:569] **Privacy protection:** Even highly relevant, nonprivileged information may be shielded from discov-

ery in California if its disclosure would impair a person's "inalienable right of privacy" under Calif. Const. Art. 1, §1. [*Britt v. Sup.Ct. (San Diego Unified Port Dist.)* (1978) 20 C3d 844, 852-864, 143 CR 695, 699-708]

The U.S. Constitution also guarantees a right to privacy. [*Griswold v. Connecticut* (1965) 381 US 479, 85 S.Ct. 1678; *Palay v. Sup.Ct. (County of Los Angeles)* (1993) 18 CA4th 919, 931, 22 CR2d 839, 847]

(a) [19:570] **Protection not absolute:** The protection afforded is qualified, not absolute. In each case, the court must *carefully* balance the right of privacy against the need for discovery, and may order disclosure if it would serve a "compelling state interest." [*Britt v. Sup.Ct. (San Diego Unified Port Dist.)*, supra, 20 C3d at 852-864, 143 CR at 699-708]

(b) [19:571] **Whose privacy protected:** The privacy protected may be that of one of the parties or of some third person.

1) [19:572] **Privacy rights of employer (business entity)?** It is unclear whether a corporation, partnership or other business entity may claim a right of privacy to limit discovery in civil cases. [See *Roberts v. Gulf Oil Corp.* (1983) 147 CA3d 770, 793, 195 CR 393, 408]

2) [19:573] **Confidential evaluations by third persons:** Confidential letters of recommendation (or nonrecommendation) by outsiders regarding the employee may be entitled to privacy protection. [*Board of Trustees of Leland Stanford Jr. Univ. v. Sup.Ct. (Dong)* (1981) 119 CA3d 516, 529-533, 174 CR 160, 167-169]

[19:574-579] *Reserved.*

(c) [19:580] **Information protectible:** Every employer maintains a large amount of confidential information about its employees. Some employers also maintain confidential information about their customers. The following types of confidential information are often sought by plaintiffs in employment cases:

1) [19:581] **Personnel records of other employees:** The personnel records of other employees may be sought to bolster an employee's claims of discrimination or harassment.

For example, in discrimination cases, plaintiffs may seek confidential information regarding:

- supervisors or coworkers who may (or may not) be parties to the suit;
- other employees who are not parties to the suit; and
- the employer's customers who are not parties to the lawsuit.

In a sexual harassment suit, plaintiffs may seek:

- the alleged harasser's personnel records;
- information regarding complaints by other employees about the alleged harasser and personnel records of those employees;
- information regarding the internal handling and investigation of complaints against the alleged harasser.

*Limitation—special subpoena requirements:* Special procedural requirements apply to subpoenaing such records; see CCP §1985.6, discussed at ¶19:685.

- a) [19:582] **California law:** Under California law, such records are protected from discovery "unless the litigant can show a *compelling need* for the particular documents and that the information *cannot reasonably* be obtained through depositions or from nonconfidential sources." *[Harding Lawson Associates v. Sup.Ct. (Bailey)* (1992) 10 CA4th 7, 10, 12 CR2d 538, 539 (emphasis added); see also *Alch v. Sup.Ct. (Time Warner Entertainment Co.)* (2008) 165 CA4th 1412, 1432, 82 CR3d 470, 487—compelling need shown for relevant nonsensitive information]

- 1/ [19:582.1] **Compare—disclosure of employees' identities to class action plaintiff:** No serious invasion of privacy is involved in disclosing current and former employees' names to plaintiffs' counsel in an employment (wage and hour) class action, after requiring the defendant employer to send them letters stating their address and phone numbers will be given to counsel *unless* they timely return an enclosed post card. The "opt-out" notice adequately protects their right to privacy. *[Belaire-West Landscape, Inc. v. Sup.*

*Ct. (Rodriguez) (2007) 149 CA4th 554,  
561-562, 57 CR3d 197, 203]*

[19:582.2-582.4] Reserved.

- 2/ [19:582.5] **Compare—witnesses' addresses and telephone numbers:** The addresses and telephone numbers of persons identified as percipient witnesses generally cannot be withheld on privacy grounds: "Generally, witnesses are not permitted to decline to participate in civil discovery, even when the information sought from them is personal or private." [*Puerto v. Sup.Ct. (Wild Oats Markets, Inc.)* (2008) 158 CA4th 1242, 1256, 70 CR3d 701, 712—reversing order requiring plaintiffs to secure witnesses' consent to disclosure of their names and addresses]
- b) [19:583] **Federal law:** Federal courts *balance plaintiff's need* for the information against the other employees' claims of confidentiality or privacy. [See *Sanchez v. City*

(Text cont'd on p. 19-67)

**RESERVED**

*of Santa Ana* (9th Cir. 1990) 936 F2d 1027, 1033-1034—access to other employees' personnel files denied on grounds of official information privilege, overbreadth, and equal access to the information; see also *Gehring v. Case Corp.* (7th Cir. 1994) 43 F3d 340, 342—in age discrimination case, access to personnel files of younger employees was denied on privacy grounds where other employees' circumstances were not close enough to plaintiff's to make comparisons productive; *Atkinson v. Denton Pub. Co.* (5th Cir. 1996) 84 F3d 144, 148—disparate treatment claim limited primarily to alleged bias of one supervisor did not entitle plaintiff to files of employees who were terminated before supervisor's tenure; but see *Gatewood v. Stone Container Corp.* (SD IA 1996) 170 FRD 455, 458—race discrimination plaintiff entitled to personnel files of similarly situated employees, affirmative action plans, EEO-1 reports and OCR findings]

[19:584] Reserved.

- 2) [19:585] **Plaintiff's personnel file; privacy considerations:** Plaintiff's own personnel records are generally discoverable. But defendant may withhold from discovery particular documents in the file in order to protect the privacy rights of third parties. For example, the personnel file may contain confidential letters regarding the employee that outsiders have written. Disclosure would impair the confidentiality they expected their communications would receive. [*Board of Trustees of Leland Stanford Junior Univ. v. Sup.Ct. (Dong)* (1981) 119 CA3d 516, 526, 174 CR 160, 165—outsiders' communications to university investigating faculty member]
- 3) [19:586] **Faculty selection proceedings:** Discussions at faculty meetings regarding appointment of or granting tenure to proposed faculty members are intended to be confidential. Although no statutory privilege exists, California cases hold the *privacy rights of those present* at such proceedings limit discovery of their comments regarding a proposed candidate. Attendees are thus free to express candid appraisals of the candidate without fear of dis-

closure. [*Scharf v. Regents of Univ. of Calif.* (1991) 234 CA3d 1393, 1408-1409, 286 CR 227, 237; *Kahn v. Sup.Ct. (Davies)* (1987) 188 CA3d 752, 769, 233 CR 662, 673—privacy rights of those providing information in peer review process justify denying professor's demand for disclosure]

- a) [19:587] **Compare—federal courts:** Federal courts offer no such protection in employment discrimination cases. [See *University of Penn. v. EEOC* (1990) 493 US 182, 189, 110 S.Ct. 577, 582]

One California case appeared to concede that privacy concerns would likely yield to the "strong policy" contained in "federal or state antidiscrimination statutes." [*Scharf v. Regents of Univ. of Calif.*, supra, 234 CA3d at 1410, 286 CR at 238 (dictum) (emphasis added)]

- 4) [19:588] **Financial information:** Financial records pertaining to a party or nonparty are within the zone of privacy. [See *Valley Bank of Nevada v. Sup.Ct. (Barkett)* (1975) 15 C3d 652, 655-656, 125 CR 553, 556—borrower suing bank sought disclosure of bank's loan files regarding certain other customers; they were entitled to notice and opportunity to object before the files were discoverable]
- 5) [19:589] **Sexual history and practices:** An intrusion upon sexual privacy may only be done on the basis of *practical necessity*. Therefore, a plaintiff claiming harassment may not discover information about the alleged harasser's past sexual relationships with other employees. A discovery request covering sexual conduct with unknown third parties at unknown times is too broad, and would encompass voluntary conduct rather than instances of workplace harassment. [*Boler v. Sup.Ct. (Everett)* (1987) 201 CA3d 467, 474, 247 CR 185, 189]
- 6) [19:590] **Tax returns:** The right of privacy protects tax returns filed by either a party or nonparties. [*Schnabel v. Sup.Ct. (Schnabel)* (1993) 5 C4th 704, 714-715, 21 CR2d 200, 205-206]

Federal courts will not order production of tax returns unless a *compelling* need for access to

them exists because the information is otherwise unavailable. [*Premium Service Corp. v. Sperry & Hutchinson Co.* (9th Cir. 1975) 511 F2d 225, 229]

[19:591-599] *Reserved.*

- (d) [19:600] **Waiver issues:** The employee may be held to have waived any right of privacy as to certain claims asserted against the employer:

1) [19:601] **Mental or emotional state:** By claiming damages for *emotional distress* (e.g., from sexual harassment), plaintiff waives any privacy right as to his or her present mental or emotional condition and may be ordered to submit to a mental exam. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)* (1987) 43 C3d 833, 839-840, 239 CR 292, 297]

a) [19:602] **Compare—sexual conduct:** Emotional distress claims do *not* waive privacy protection for plaintiff's past or present *sexual conduct*, absent any claim of detriment to plaintiff's present sexuality. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, supra, 43 C3d at 842, 239 CR at 299]

2) [19:603] **Marital relationship:** A plaintiff who claims emotional distress may be questioned regarding his or her marital relationship *as it relates* to the asserted claim. [*Tylo v. Sup.Ct. (Spelling Entertainment Group)* (1997) 55 CA4th 1379, 1388, 64 CR2d 731, 736]

- (e) [19:604] **Burden on party seeking discovery:** The party seeking discovery of information within the "zone of privacy" must show that the information is:

— *essential* to determining the truth of the disputed matters; and  
— not available from other sources or through less intrusive means. [*Britt v. Sup.Ct. (San Diego Unified Port Dist.)* (1978) 20 C3d 844, 859-862, 143 CR 695, 704-707; *Harris v. Sup.Ct. (Smets)* (1992) 3 CA4th 661, 665, 4 CR2d 564, 567]

1) [19:605] **Higher burden where third party's privacy affected:** A plaintiff's need for information "will not easily override a third party's privacy rights." [*Olympic Club v. Sup.Ct. (City & County of San Francisco)* (1991) 229 CA3d 358, 363, 282 CR 1, 3; *Board of Trustees of Leland Stanford Junior Univ. v. Sup.Ct. (Dong)*

(1981) 119 CA3d 516, 526-527, 174 CR 160, 165]

- (f) [19:606] **Court must balance interests:** The court must then "carefully balance" the interests involved—i.e., the claimed right of privacy versus the *public interest in obtaining just results in litigation.* [*Valley Bank of Nevada v. Sup.Ct. (Barkett)* (1975) 15 C3d 652, 657, 125 CR 553, 555]

The more "sensitive" the information (e.g., personal financial information, customer lists, trade secrets, etc.), the greater the need for discovery that must be shown. [*Hofmann Corp. v. Sup.Ct. (Smaystrla)* (1985) 172 CA3d 357, 362, 218 CR 355, 357]

- 1) [19:607] **Discovery orders narrowly drawn:** Any discovery order should be carefully tailored to protect the interests of the party seeking discovery while not unnecessarily invading the privacy of the party whose privacy is threatened. [*Schnabel v. Sup.Ct. (Schnabel)* (1993) 5 C4th 704, 714, 21 CR2d 200, 205]

If the competing interests may be "accommodated" by allowing *partial disclosure* of the confidential information, the order should be limited accordingly. [*Valley Bank of Nevada v. Sup.Ct. (Barkett)*, supra, 15 C3d at 657, 125 CR at 555]

- [19:608] Female workers sued Employer, claiming job discrimination in favor of male coworker who was *not* a party to the action. An order allowing discovery of the male coworker's *entire* personnel file was improper. The court should have considered whether plaintiffs could obtain the information by less intrusive means (e.g., deposing the male coworker). Even if inspecting the file is necessary, the court should first examine it *in camera* and order disclosure *only of those parts relevant* to the lawsuit. [*EI Dorado Sav. & Loan Ass'n v. Sup.Ct. (Savoca)* (1987) 190 CA3d 342, 345-346, 235 CR 303, 304-305]

*Cross-refer:* For further discussion of the right of privacy as a limitation on discovery in California courts, see Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8; in federal courts, see Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

- (4) [19:615] **Limits on discovery of defendant's financial condition in punitive damages cases:** Without a court order, plaintiffs claiming punitive damages may require defendant to identify:
- *documents* in its possession that are *admissible* (not merely relevant) on the issue of its profits or financial condition; and
  - *witnesses* employed by or related to defendant "who would be most competent to testify" about its financial condition. [Civ.C. §3295(c)]
- Beyond these matters, *no* pretrial discovery regarding defendant's finances is permitted without a court order, which may issue only upon the court finding a "substantial probability" that plaintiff will prevail on the punitive damages claim. [Civ.C. §3295(c)]
- (a) [19:616] **Burden of proof:** In a related context, one court has held that to establish a "substantial probability," plaintiff must "demonstrate the existence of sufficient facts to establish a *prima facie* case for punitive damages, having in mind the higher clear and convincing standard of proof." [*Looney v. Sup.Ct. (Medical Center of No. Hollywood)* (1993) 16 CA4th 521, 538, 20 CR2d 182, 193 (emphasis added)]
- (b) [19:617] **Presumption in favor of limiting disclosure to opposing counsel:** Even if the court orders discovery of defendant's finances, defendant is "*presumptively entitled to a protective order*" limiting disclosure *solely* to opposing counsel and solely for purposes of the lawsuit. [*Richards v. Sup.Ct. (Lee)* (1978) 86 CA3d 265, 272, 150 CR 77, 81 (emphasis added)]
- Cross-refer:* See further discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.
- (5) [19:618] **Privilege to withhold tax returns:** Taxpayers (individuals *and corporations*) may argue that they are privileged to withhold disclosure of copies of both their federal and state tax returns and the information contained therein. [See *Webb v. Standard Oil Co. of Calif.* (1957) 49 C2d 509, 513-514, 319 P2d 621, 624]
- (a) [19:619] **Compare—underlying records not protected:** The records and data upon which the return is based (i.e., the taxpayer's checkbooks, journals and ledgers) remain subject to discovery.
- (b) [19:620] **Privilege not absolute:** Unlike other privileges, the privilege for tax returns is *not* abso-

lute and may be outweighed where a public policy greater than that of confidentiality is involved (e.g., may not be asserted to avoid child support obligations). [Schnabel v. Sup. Ct. (*Schnabel*) (1993) 5 C4th 704, 721, 21 CR2d 200, 210—spouse of shareholder of closely held corporation entitled to corporation's tax returns in marriage dissolution action]

*Cross-refer:* See further discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.

[19:621-629] Reserved.

### 3. Defendant's Discovery

- a. [19:630] **Discovery procedures—in general:** Defendants commonly use the following discovery methods in employment litigation:
  - interrogatories;
  - document inspection demands;
  - business records subpoenas;
  - requests for admissions;
  - physical and mental examinations; and
  - depositions and subpoenas.
- b. [19:631] **Document inspection demands:** The defendant employer has the right to demand production of any documents in the plaintiff employee's possession related to the asserted claims. [See CCP §2031.010 et seq.]

►[19:632] **PRACTICE POINTER:** The inspection demand should be *broadly worded* to cover *documents, diaries, journals and records* relating to the particular acts and events alleged in the complaint, any claim asserted, any damage claimed, attempts to obtain other employment, etc.

Such a request may bring to light plaintiff's possession of *unauthorized* copies of employer records (and thus allow the employer to seek their return as well as provide a possible basis for an after-acquired evidence defense; see ¶16:615 ff.).

Also, some plaintiffs keep *everything*, including memos or notes that the employer may have discarded as being insignificant.

Employer defendants may later argue that a plaintiff's failure to produce documents in response to a valid inspection demand should bar plaintiff from offering those documents in evidence.

c. **Physical and mental examinations of plaintiff**

- (1) [19:633] **Right to physical examination where personal injury claimed (California):** A plaintiff employee who claims personal injury must submit to one physical examination on the employer's written demand. *No prior court order* is required. [See CCP §2032.220(a),(b)]
- (a) [19:634] **Not applicable to mental exams:** Mental exams are not available on demand, even if plaintiff claims "mental suffering and emotional distress" as a result of his or her personal injury. [CCP §2032.310(a)]
- (b) [19:635] **Compare—federal practice:** There is no right to a physical exam in federal court; the court may order a physical (or mental) examination only for "good cause" shown. [FRCP 35(a); see *Turner v. Imperial Stores* (SD CA 1995) 161 FRD 89, 92-97—collecting cases where courts have found presence and lack of "good cause"]
- (2) [19:636] **Examination upon court order:** Absent a claim for personal injury, defendant must make a motion for court order based on a showing of "good cause" to obtain a physical or mental examination of plaintiff. [CCP §§2032.310(a), 2032.320(a); and see FRCP 35(a), above]
- (a) [19:637] **"Good cause":** "Good cause" generally requires a showing of both:  
— "relevancy to the subject matter"; and  
— specific facts justifying discovery; i.e., allegations showing the need for the information and the lack of means for obtaining it elsewhere. [*Schlagenhauf v. Holder* (1964) 379 US 104, 114-122, 85 S.Ct. 234, 240-245; *Vinson v. Sup.Ct. (Peralta Comm. College Dist.)* (1987) 43 C3d 833, 839, 239 CR 292, 297]
- (3) [19:638] **Examination limited to conditions "in controversy":** The examination is limited to whatever portions of plaintiff's body or conditions are "in controversy" in the lawsuit. [CCP §2032.020(a)]

The burden is on defendant (as the party seeking discovery) to show, by declarations or other evidence, that the examinee's condition is "in controversy" in the action.

- (a) [19:639] **Allegations of "mental" or "emotional" distress place mental condition "in controversy":** A party who chooses to allege that he has mental and emotional difficulties can hardly

deny his mental state is in controversy.” [See *Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, supra, 43 C3d at 839, 239 CR at 297—plaintiff claimed emotional distress from sexual harassment by former employer]

- (b) [19:640] **Compare—allegations re past injury:** A physical exam cannot be compelled where no continuing injury is claimed; e.g., where plaintiff only alleges physical injury in the past. [*Doyle v. Sup.Ct. (Caldwell)* (1996) 50 CA4th 1878, 1886-1887, 58 CR2d 476, 481-482]

Nor can a defendant compel a mental exam where plaintiff claims no continuing injury; e.g., where plaintiff only alleges past but no present or future emotional distress. [*Doyle v. Sup.Ct. (Caldwell)*, supra, 50 CA4th at 1886-1887, 58 CR2d at 481-482]

- [19:641] “Good cause” for a mental examination was shown where plaintiff claimed *continuing mental anguish* and *emotional distress* as a result of prior sexual harassment by defendant, and justifying facts were shown with specificity. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, supra, 43 C3d at 840-841, 239 CR at 298]

- (4) [19:642] **Plaintiff may seek to avoid mental examination by offering appropriate stipulations:** Plaintiffs claiming personal injury may attempt to *avoid* a mental examination by stipulating that:
- they are making no claim for mental and emotional distress “over and above that usually associated with the physical injuries claimed”; and
  - they will offer *no psychiatric testimony* at trial in support of any claimed emotional distress. [See CCP §2032.320(b),(c)]

- (5) [19:643] **Vocational assessments?** Courts differ on whether a plaintiff who claims lost wages or earning capacity may be ordered under FRCP 35 to submit to an interview with a vocational expert retained by defendant. [See *Jefferys v. LRP Publications, Inc.* (ED PA 1999) 184 FRD 262, 262—FRCP 35 covers vocational assessments; *Storms v. Lowe's Home Ctrs., Inc.* (WD VA 2002) 211 FRD 296, 297—vocational assessment *cannot* be ordered under Rule 35 except in connection with physical or mental examination]

- (a) [19:643.1] **Comment:** “Good cause” for such an interview is more likely to be found where plaintiffs

have hired their own vocational expert to support claims of lost wages and earning capacity.

*Cross-refer:* See further discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8; and Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

[19:644-649] *Reserved.*

- d. [19:650] **Deposition of plaintiff:** Deposing plaintiff is usually the most important discovery procedure in employment cases.

➡[19:651] **PRACTICE POINTER:** Under California law, defendant may obtain *priority* in depositions by noticing plaintiff's deposition within 20 days after being served (CCP §2025.210(b) provides a "hold" on deposition notices by plaintiff during this period; no such automatic priority exists under federal law).

It is usually advantageous to depose plaintiff at the earliest possible time. In setting the deposition date, however, leave enough time to review documents and interview potential defense witnesses so that you thoroughly understand defendant's side of the case. Whenever possible, schedule your inspection of documents in plaintiff's hands in advance of the deposition date.

Also consider using written discovery beforehand to obtain the identities of previous or subsequent employers (see ¶19:684) or medical providers (see ¶19:666). This will enable you to subpoena relevant records from such witnesses, where appropriate, in advance of taking plaintiff's deposition.

- (1) [19:652] **Audio or video recording of plaintiff's deposition:** In *addition* to the stenographic recording, an audio or video tape recording of the deposition may be made if the parties so agree or if the deposition notice so provides. [CCP §2025.330(c); FRCP 30(b)(2)]

Videotape depositions can be extremely effective and are becoming more common in employment cases, particularly for plaintiff's deposition.

- (a) [19:653] **Deposition notice must state recording will be made:** Absent stipulation by all counsel, audio or video recording of a deposition is allowed only if the deposition notice states the deposing party's intention to record the testimony by either of these methods. [CCP §§2025.220(a)(5), 2025.330(c)]

- (2) [19:654] **Coverage:** The major areas defense counsel usually cover in deposing plaintiffs in employment cases include:
- the factual basis for any charge of discrimination plaintiff made to the DFEH or EEOC;
  - the factual basis for the complaint's allegations;
  - plaintiff's employment history prior to the employment that is the subject of the complaint;
  - whether plaintiff ever filed other discrimination charges with the DFEH or EEOC and, if so, when and under what circumstances;
  - authentication of documentary evidence (including notes or memoranda plaintiff kept);
  - identification of all individuals who have knowledge of the facts (or confirmation that plaintiff does not know of such potential witnesses);
  - plaintiff's recollection of statements made by each such individual (when, where, by whom, to whom, etc.);
  - acknowledgment of facts reflecting that employment was at will;
  - acknowledgment of terms and provisions of personnel manuals and that plaintiff has read such manuals;
  - admissions regarding job performance deficiencies claimed by the employer;
  - admissions regarding specific warnings from the employer or supervisor;

*(Text cont'd on p. 19-69)*

- steps plaintiff took to improve his or her performance;
- identity of persons in the same protected group who were treated better than plaintiff;
- admissions that plaintiff was no more qualified than persons allegedly given preference;
- admissions that a supervisor or other decision-maker never made biased or discriminatory statements (or if such statements are claimed, details regarding such statements and persons present);
- acknowledgment that plaintiff was terminated or adversely treated for a legitimate, nondiscriminatory reason;
- acknowledgment that plaintiff *knows of no facts indicating the employer's stated reason was not the true reason* for the action taken;
- acknowledgment that plaintiff has no witnesses or documents indicating the employer's stated reason was false;
- details regarding all damage claims (nature and amount, relevant time-frames, documentation, etc.), including claims of emotional distress, details regarding visits to doctors, hospitals, psychologists, clergy, etc., including identification of health care providers consulted, statements made by providers and medications prescribed and taken;
- plaintiff's efforts to mitigate damages by obtaining other employment.



[19:655] **PRACTICE POINTERS:** Plaintiff's deposition is an essential part of the defense of an employment lawsuit. It is the basis for determining whether to move for summary judgment or summary adjudication of particular causes of action. It may also be the basis for factual stipulations, motions in limine to exclude irrelevant or otherwise inadmissible evidence, impeachment of plaintiff's trial testimony, and for deterring testimony by plaintiff that would make impeachment necessary.

**Time limits in federal court:** Covering the above topics often takes longer than the "one day, seven-hours" limit provided by FRCP 30(d)(2) (see ¶19:502.2). This is especially true where plaintiff was a long-term employee or an alleged pattern of harassment dates back for many years. To avoid being hin-

dered, *ask the court in advance* for more time for plaintiff's deposition. Otherwise, if your opponent objects to going over the seven-hour limit, you will have to file a motion with the district court for relief.

**Goals:** Defense counsel's most important goals in deposing the plaintiff are:

- *To limit and foreclose plaintiff's claims* by committing plaintiff to a single version of relevant events. Depositions can be used for impeachment at trial; and on summary judgment motions, plaintiff's deposition *cannot be contradicted* by postdeposition declarations or narrative "corrections" to a deposition transcript. [See *D'Amico v. Board of Med. Examiners* (1974) 11 C3d 1, 21-22, 112 CR 786, 801; *Foster v. Arcata Associates, Inc.* (9th Cir. 1985) 772 F2d 1453, 1462]
- *To provide a basis for representing to the court* that the defense motion for summary judgment or summary adjudication is based upon plaintiff's own deposition testimony, excepting only authenticated business records and declarations from other witnesses concerning matters that are not or cannot be controverted by plaintiff's competent testimony.
- *To find the facts in plaintiff's own words.* Plaintiff's deposition is defense counsel's chance to hear plaintiff's story as plaintiff will tell it at trial, rather than in the language of the complaint or answers to interrogatories drafted by plaintiff's counsel. In rare instances, plaintiff's deposition may be the source of all that can be learned about an element of a claim or defense. In most circumstances, defense counsel should already know the essential facts from predeposition investigation and preparation. If surprise is to occur, however, plaintiff's deposition is a better occasion than virtually any later time!

**Preparation:** Before the deposition, defense counsel should review all relevant documents and interview witnesses to all relevant events, including actions and statements by plaintiff.

Key factual issues should be identified:

- Who can corroborate what the truthful plaintiff will say?
- What testimony by plaintiff cannot (apparently) be contradicted?

- What are the essential documents that plaintiff should be asked to authenticate?
- What documents show plaintiff's contemporaneous statements and actions?
- What subjects must be covered in order to enable a full record?

Develop a chronology of events, witnesses and documents to be refined and expanded based on plaintiff's deposition and later discovery.

Consider whether to obtain signed statements or other written confirmations by individuals interviewed.

Develop a deposition outline, including coverage of uncontradicted (and contradicted) facts that defense counsel expects plaintiff's deposition may establish.

Get the administrative record if one exists.

Get plaintiff's documents. There may not be many, but some may be surprising. Plaintiff's deposition is almost always the only time before trial in which plaintiff can be questioned under oath about documents plaintiff has produced.

**Conducting deposition:** At the deposition, defense counsel should bear in mind that no checklist can substitute for common sense, skill and experience, and that a clear and helpful deposition record depends on alert pursuit of lines of inquiry that open during the deposition.

Keep in mind that the judge may read portions of the transcript of plaintiff's deposition in connection with a summary judgment motion, motion in limine or during trial. Therefore, *conduct the deposition as if the judge was watching*. Doing so makes it less likely that you will engage in meaningless arguments and petty disputes and makes a far better impression on the trial judge.

- Consider a stipulation and order protecting legitimate interests in confidentiality.
- *Consider videotaping plaintiff's testimony.* Although videotapes increase expense and are not necessary to impeachment at trial, they may add an important dimension to deposition evidence: i.e., videotapes show pauses, body language and voice tones that deposition transcripts do not. A videotaped prior inconsistent sworn statement by the very witness who is testifying at trial can have great power when played to the jury immediately after the challenged testimony. Videotapes may also induce civility in all lawyers present: The seg-

ment played to the jury will not only show the witness's answer, but defense counsel's question as well. Defense counsel's voice should be natural, tactful and firm, just as it would be at trial.

- Give the deposition opening statement in plain words in a question/answer format. ("Do you understand that . . . ?")
- Ask clear questions.
- Tie down the testimony—and then stop! Use "close out" questions on each area covered, such as:
  - "Have you told us everything that happened on that occasion?"
  - "Do you have anything else in writing pertaining to this event?"
  - "Have you told us about each and every injury you suffered?"
  - "Have you told us about each and every item of financial loss or expense you suffered?"
- Questions to avoid: Any version (and there are many!) of "Did you really mean that?" or "Say that again?"
- If plaintiff will not admit key points, try to pin plaintiff down to "I don't know" or "I can't remember" answers.
- Don't argue "on the record." Speeches by counsel on the deposition record generally waste time, lengthen transcripts and irritate judges and other readers. Discovery disputes can generally be pursued elsewhere, in informal discussions or through discovery motion practice if necessary.
- Don't agree to the "usual stipulations." There aren't any.
- Agree to helpful stipulations. To the extent permitted by applicable rules, these may include the following as appropriate to a particular situation:
  - Agree to a time period measured from the postmark date of the reporter's transmittal of the transcript to the witness' counsel within which the witness may read the transcript and make corrections necessary to assure that the transcript reflects the witness' testimony;
  - Agree that the witness may sign under penalty of perjury under the laws of the State of California and need not sign before a notary;

- Agree that corrections and signature page shall be faxed to counsel taking the deposition;
- Agree that a copy of the unsigned uncorrected transcript may be used for all evidentiary purposes if corrections are not timely transmitted, and that the fax corrections and signature may likewise be used if the originals are not timely produced on reasonable notice; and
- Agree that the reporter shall be relieved of all obligations under applicable rules to the extent necessary to carry out this stipulation.

**Postdeposition:** Get a diskette allowing word search, plus a hard copy of the transcript in miniaturized condensed format.

► [19:656] **PRACTICE POINTERS RE DEPOSING PLAINTIFF'S EXPERTS:**

As with other depositions, no checklist can substitute for common sense, skill and experience. Considerations that particularly affect the deposition of plaintiff's experts (e.g., economists or medical experts) include the following:

- When in federal court, remember the "one day, seven hours" time limit for depositions (FRCP 30(d)(2), see ¶19:502.2). If you will need more time to depose the plaintiff's expert, ask for this at the pretrial scheduling conference. Otherwise, if you run out of time and plaintiff's counsel or the witness is unwilling to extend the deposition, you will have to file a motion for an order allowing more time, and this may come at a stage of the litigation when completing the deposition quickly is critical.
- Unless you are experienced in the expert's particular field, retain an expert consultant for the defense to assist you in reviewing and understanding the expert's report before the deposition.
- Ask your consultant to help plan questions for plaintiff's expert, and, if necessary, to be present at the deposition to assist you in understanding what the expert is saying.
- At the deposition, ask plaintiff's expert to *identify each matter* on which he or she has been engaged to form an opinion; and also whether he or she has an opinion on *any other matter* relevant to the dispute.
- As to each matter so disclosed, obtain the expert's testimony describing the facts assumed as the

basis for his or her opinion, the analysis performed and the opinions formed.

[19:657-664] *Reserved.*

e. **Limitations on discovery by defendant**

- (1) [19:665] **Privacy protection:** Defense counsel in employment cases often seek information that plaintiff claims is protected by a constitutional right of privacy.

The scope of privacy protection and the procedures for discovery are the same as discussed under the limitations on discovery by plaintiff (see ¶19:569 ff.).

The following are examples of discovery requests that plaintiff's counsel may contend impermissibly invade plaintiff's right of privacy:

- (a) [19:666] **Overbroad requests for plaintiff's medical records:** The constitutional right of privacy applies to a party's medical history. "An individual's right of privacy encompasses not only the state of his mind, but also his viscera . . ." [*Division of Med. Quality, Bd. of Med. Quality Assur. v. Gherardini* (1979) 93 CA3d 669, 679, 156 CR 55, 61]

Health care plans and providers are also prohibited by statute from unauthorized disclosure of their patients' medical information. [See Civ.C. §56.10 et seq.]

- 1) [19:667] **Balancing required:** Again, however, privacy protection is not absolute. Medical histories are discoverable where the need for discovery *outweighs* privacy concerns.

Ordinarily, discovery of medical history relevant to damages is allowed because defendants have no other means to obtain this information. [*Palay v. Sup.Ct. (County of Los Angeles)* (1993) 18 CA4th 919, 933-934, 22 CR2d 839, 848]

But this need does *not* automatically make discoverable plaintiff's "lifetime" medical history. Plaintiff's right of privacy is protected as to physical and mental conditions *unrelated to the injury sued upon*. [*Britt v. Sup.Ct. (San Diego Unified Port Dist.)* (1978) 20 C3d 844, 864, 143 CR 695, 708]

- [19:668] A plaintiff does not waive her right of privacy by claiming a particular sensitivity to comments about her breasts

because of past medical procedures. Even if the medical condition is *relevant*, relevancy is not the standard. Instead, the trial court must balance plaintiff's privacy invasion against defendant's need for the information and, if necessary, perform an in camera review of records sought in discovery. [*Lantz v. Sup.Ct. (County of Kern)* (1994) 28 CA4th 1839, 1853-1857, 34 CR2d 358, 366-369]

- [19:669] Even if some documents in plaintiff's medical records justify the discovery, the court should conduct an in camera review and produce only those documents. [*Lantz v. Sup.Ct. (County of Kern)*, supra, 28 CA4th at 1856-1857, 34 CR2d at 368-369]

- (b) [19:670] **Overbroad requests concerning plaintiff's mental condition:** The right of privacy protects a party's mental condition. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)* (1987) 43 C3d 833, 838-844, 239 CR 292, 296-300]

- [19:671] Where plaintiff makes *no claim* of mental or emotional distress, a "garden variety" personal injury action seeking damages for "pain and suffering" does *not* place plaintiff's mental condition in issue. Plaintiff's right to privacy in his or her postinjury psychotherapeutic records outweighs any need for discovery of that information. [*Davis v. Sup.Ct. (Williams)* (1992) 7 CA4th 1008, 1016, 9 CR2d 331, 336]
- [19:672] But by claiming continuing *emotional distress* from sexual harassment or discrimination, a plaintiff may waive his or her privacy right as to a present mental or emotional condition and its cause (and thus be subject to a CCP §2032.020 mental examination). [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, supra, 43 C3d at 838-844, 239 CR at 296-300]

[19:673-679] Reserved.

- (c) [19:680] **Discovery requests re plaintiff's sex life:** The right of privacy protects information about a party's sexual practices. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, supra, 43 C3d at 841, 239 CR at 298]

- 1) [19:681] **Privacy not waived by alleging emotional distress:** A plaintiff does not waive his or her privacy right as to past or present sexual practices by claiming emotional distress from sexual harassment, absent any claim of damage to his or her present sexuality. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, supra, 43 C3d at 841, 239 CR at 298; *Mendez v. Sup.Ct. (Peery)* (1988) 206 CA3d 557, 566-567, 253 CR 731, 736]
  - 2) [19:682] **Compare—statutory protection in sexual harassment cases:** In addition to privacy rights, CCP §2017.220 limits discovery as to plaintiff's sexual conduct with individuals other than the alleged perpetrators in sexual harassment cases (see ¶19:1033.50).
- (d) [19:683] **Privacy objections forfeited by failure to object?** The Discovery Act provides that failure to respond *timely* to discovery requests forfeits “any objection . . . including one based on privilege or the protection for work product.” [CCP §2030.290(a) (emphasis added) (applicable to interrogatories, but similar waiver provisions apply to other discovery procedures)]

Whether these provisions apply to privacy objections is unclear. Arguably, privacy rights are subject to a *constitutional privilege* and may not be forfeited by a “technical shortfall.” [*Boler v. Sup.Ct. (Everett)* (1987) 201 CA3d 467, 472, 247 CR 185, 187-188, fn. 1—dictum because third persons’ rights involved]

*Cross-refer:* See further discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.

- (2) [19:684] **Plaintiff’s former employment:** Defendant may obtain employment records held by a nonparty (e.g., a former employer) only by subpoena. [See CCP §1985.6]

For example, defendants are generally entitled to discover plaintiff’s previous employer’s payroll records and personnel files (including performance evaluations). A heightened showing of relevancy may be required, however, to obtain a former employer’s records of plaintiff’s medical history. (Plaintiffs may object to such disclosure on privacy grounds and on relevancy grounds if the information is remote in time.)

- (a) [19:685] **Special procedures governing subpoena:** Special notices and procedures are re-

quired for production of “employment records” held by a nonparty in order to protect the “employee’s right of privacy. The purpose of these procedural requirements is to give the employee (plaintiff) an opportunity to seek a court order to quash or limit the subpoena before the records are disclosed. [CCP §1985.6(e), penultimate sent.]

Additional requirements may apply where the former employer is a law enforcement agency. [See Ev.C. §1043—noticed motion and showing of “good cause” required]

[19:685.1-685.4] Reserved.

- (3) [19:685.5] **Plaintiff’s immigration status:** Illegal immigrants who were discharged for *union activities* in violation of the NLRA cannot recover backpay in proceedings before the NLRB (see ¶11:1224). But that does not appear to foreclose their right to sue for violations of their employment rights under Title VII and the FEHA. [See *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F3d 1057, 1069; and discussion at ¶11:1224 ff.]

Discovery as to plaintiffs’ immigration status generally is *not* permitted in Title VII or FEHA actions because disclosure of illegal immigration status could deter plaintiffs from bringing meritorious claims due to the risk of deportation or criminal proceedings. Discovery in such cases would be “a substantial burden both on the plaintiffs themselves and on the public interest in enforcing Title VII and FEHA.” [*Rivera v. NIBCO, Inc.*, supra, 364 F3d at 1064; *Galaviz-Zamora v. Brady Farms, Inc.* (WD MI 2005) 230 FRD 499, 502—immigration status not subject to discovery in backpay action under FLSA and migrant farm labor statute; *EEOC v. Restaurant Co.* (D MN 2007) 490 F.Supp.2d 1039, 1047—even an undocumented alien has standing to pursue discrimination and harassment claims]

- (a) [19:685.6] **Rationale:** Plaintiffs’ illegal immigration status is *not relevant* to determining whether the employer has violated Title VII. Although this information may affect plaintiffs’ eligibility for certain statutory remedies (i.e., reinstatement, see ¶11:1224), and thus could be useful to the employer in evaluating plaintiffs’ claims, its value is “substantially outweighed by the harm the discovery would cause the plaintiffs.” [*Rivera v. NIBCO, Inc.*, supra, 364 F3d at 1070; *EEOC v. Restaurant Co.*, supra, 490 F.Supp.2d at 1047]

- (b) [19:685.7] **California statutes:** The rule is statutory in California: Employers may not inquire or seek discovery as to an employee's immigration status unless it is shown by "clear and convincing evidence" that the inquiry is necessary in order to comply with federal immigration law. [See Lab.C. §1171.5(a); CCP §3339(a); Gov.C. §7285(a)—making all remedies, *except reinstatement*, available to all employees in California regardless of their immigration status; *and further discussion at ¶11:1224*]

[19:685.8-685.9] Reserved.

➡ [19:685.10] **PRACTICE POINTER FOR EMPLOYERS:** Courts are more likely to permit pre-trial discovery as to a plaintiff's immigration status if the employer-defendant can prove *it would have terminated plaintiff's employment* upon learning that plaintiff could not lawfully work in the United States. [See *Rivera v. NIBCO, Inc.*, *supra*, 364 F3d at 1071—rejecting employer's argument that discovery of plaintiff's immigration status should be permitted under the "after-acquired-evidence" doctrine (see ¶16:626), because *employer failed to prove* "it would actually have fired the employees had it known that they were undocumented"]

- (4) [19:686] **Identity of employees who contacted plaintiff's attorney re class action:** The right of privacy under California Constitution, Art. I, §1, may shield the identity of employees who respond to an attorney's letter regarding a class action against their employer: "Case law recognizes that compelling disclosure of the identity of persons who consult with counsel implicates their right of privacy." [*Tien v. Sup.Ct. (Tenet Healthcare Corp.)* (2006) 139 CA4th 528, 539, 43 CR3d 121, 128—employees' fear of *potential retaliation* outweighed employer's interest in learning their identities where employer already knew all potential members of class and was free to contact them to determine if they had any relevant information]

*Cross-refer:* See detailed discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.

- (5) [19:687] **Matters subject to protective orders:** Courts may limit discovery of matters whose relevance is *outweighed* by the threat of "unwarranted annoyance, embarrassment or oppression" (CCP §2030.090(b); FRCP 26(c)(1)). For example:

- [19:687.1] **Arrest records:** Absent some particularized suspicion that a claimant may have been arrested for work-related misconduct, discovery of his or her arrest records may be precluded. [*EEOC v. Area Erectors, Inc.* (ND IL 2007) 247 FRD 549, 553]
- [19:687.2] **Prior civil litigation:** Discovery regarding a party's prior civil litigation that is unrelated to his or her present claims may also be precluded. The result may be different, however, where the plaintiff alleges personal injury; prior litigation concerning personal injuries is generally allowed because it could lead to the discovery of admissible evidence. [*EEOC v. Area Erectors, Inc.*, supra, 247 FRD at 553]

[19:688-691] *Reserved.*

- f. [19:692] **Psychotherapist-patient privilege:** Both state and federal courts recognize a privilege protecting psychotherapist-patient communications from compelled disclosure. [Ev.C. §912; *Jaffee v. Redmond* (1996) 518 US 1, 12-13, 116 S.Ct. 1923, 1929-1930]

- (1) [19:693] **Waiver by seeking emotional distress damages?** An employee does *not* waive the psychotherapist-patient privilege by suing for damages for "garden variety" emotional distress incidental to employment-related claims. [*Ruhlmann v. Ulster County Dept. of Soc. Services* (ND NY 2000) 194 FRD 445, 448]

The result may be different, however, where plaintiff alleges significant emotional harm or plaintiff's mental condition is "at the heart of the litigation"—i.e., a core issue in the lawsuit. [*Ruhlmann v. Ulster County Dept. of Soc. Services*, supra, 194 FRD at 449]

[19:694-699] *Reserved.*

4. [19:700] **Discovery Sanctions:** Sanctions may be imposed for discovery abuse according to rules applicable to civil proceedings generally.

- a. [19:701] **Default or dismissal:** Courts are usually reluctant to impose terminating sanctions (default or dismissal) for discovery abuse. However, "when a litigant's conduct abuses the judicial process, dismissal of a lawsuit is a remedy within the inherent power of the court." [*Martin v. DaimlerChrysler Corp.* (8th Cir. 2001) 251 F3d 691, 694—plaintiff's false answers to questions regarding prior lawsuits and medical conditions justified dismissal of employment

discrimination lawsuit; *Liberty Mut. Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 CA4th 1093, 1105-1106, 78 CR3d 200, 209-210]

*Cross-refer:* For detailed discussion of discovery sanctions, see:

- (state practice) Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 8.
- (federal practice) Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 11.

[19:702-704] Reserved.

## G. SUMMARY JUDGMENT/SUMMARY ADJUDICATION

1. [19:705] **In General:** Although the summary judgment and summary adjudication procedure is equally available to plaintiffs and defendants, defendants are much more likely to use it in an employment case. The employer's objective is to eliminate as many claims as possible before trial. A motion for summary judgment or summary adjudication ("partial summary judgment" in federal practice) is often the most effective procedure to do so.
2. [19:706] **Procedural Rules:** The rules governing the procedures for summary judgment or summary adjudication motions in employment cases are the same as in civil actions generally. Special rules govern the form and content of moving and opposition papers in federal and state courts.

*Cross-refer:* See detailed discussion in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 10; and Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 14.

- a. [19:706.1] **Federal courts:** Federal courts sitting in diversity apply the Federal Rules of Civil Procedure even though the claims involved arise under state law. Thus, federal burden-shifting rules (below), rather than state rules, govern summary judgment motions in such actions. [*Snead v. Metropolitan Prop. & Cas. Ins. Co.* (9th Cir. 2001) 237 F3d 1080, 1090; see ¶19:37]
3. [19:707] **Burden of Proof on Motion:** The burden of proof is uniquely important on summary judgment or summary adjudication motions in employment cases:
  - a. [19:708] **Initial burden on employer (moving party):** As the moving party, the employer has the burden of establishing that either (1) one or more elements of the employee's cause of action, even if separately pleaded, *cannot be established*, or (2) a *complete defense* to that cause of action exists. [CCP §437c(o)(2); see FRCP 56(c) (burden to show "moving party is entitled to judgment as a matter of law")]

- (1) [19:709] **Affirmative evidence “showing” claim “cannot be established”:** The “tried and true” way to meet this burden is to present affirmative evidence (declarations, etc.) negating, as a matter of law, some essential element of plaintiff’s claim (e.g., failure to exhaust administrative remedies or expiration of the statute of limitations). [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 334, 100 CR2d 352, 363]
- (a) [19:710] **Admissions:** Pleadings or discovery responses (particularly plaintiff’s deposition testimony) may contain admissions disproving an essential element of plaintiff’s claim.
- (b) [19:711] **Declarations:** Similarly, declarations or deposition testimony by witnesses and experts may negate a key element of plaintiff’s claim.
- (2) [19:712] **“Showing” absence of evidence on critical element of plaintiff’s claim:** Another way for defendant to satisfy its burden of proof on a motion for summary judgment or summary adjudication is to “show” that plaintiff’s claim “cannot be established” because of the *absence of evidence* on some critical element of the claim. [*Green v. Ralee Eng. Co.* (1998) 19 C4th 66, 72, 78 CR2d 16, 19]
- (a) [19:713] **Federal courts:** In federal court, a defendant moving for summary judgment may “show” a cause of action has no merit by pointing out to the court, through argument, the absence of evidence to support plaintiff’s claim. [*Celotex Corp. v. Catrett* (1986) 477 US 317, 325, 106 S.Ct. 2548, 2554]
- (b) [19:714] **California courts:** California courts require defendant to produce *direct or circumstantial evidence* showing both that plaintiff does not have and cannot reasonably obtain evidence to support a *prima facie* case. [*Aguilar v. Atlantic*

(Text cont'd on p. 19-81)

**RESERVED**

Such circumstantial evidence may consist of:

- 1) [19:715] *Factually inadequate discovery responses.* [See *Union Bank v. Sup.Ct. (Demetry)* (1995) 31 CA4th 573, 589-590, 37 CR2d 653, 663]
- 2) [19:716] *Legally inadmissible discovery responses.* [*Rio Linda Unified School Dist. v. Sup.Ct. (Diaz)* (1997) 52 CA4th 732, 741, 60 CR2d 710, 716]
- 3) [19:717] *Discovery admissions:* Plaintiff's own deposition testimony may establish plaintiff's lack of knowledge concerning an essential element of his or her claim.

[19:718-724] Reserved.

- b. [19:725] **Plaintiff's burden to controvert:** Once the defendant employer (moving party) has met the initial burden above, the burden shifts to the plaintiff employee (opposing party) to produce *admissible evidence* showing a triable issue of fact. [CCP §437c(o)(2); FRCP 56(e)]

- (1) [19:726] **Sufficient to create "genuine issue":** Although defendant may have the burden of proof at trial, plaintiff's evidence must be sufficient to create a *genuine* issue of fact. There must be "evidence on which the jury could reasonably find for" the opposing party. [*Anderson v. Liberty Lobby, Inc.* (1986) 477 US 242, 252, 106 S.Ct. 2505, 2512]

- c. [19:727] **Application—disparate treatment claims:** Because direct evidence of intentional discrimination is rarely available, courts use a system of shifting burdens for summary judgment motion where plaintiff claims disparate treatment by the employer:

- [19:728] Assuming the complaint alleges facts establishing a *prima facie* case that unlawful disparate treatment occurred, the *initial burden* rests on the *employer* (moving party) to produce substantial evidence (1) negating an essential element of plaintiff's case or (2) (more commonly) showing one or more *legitimate, nondiscriminatory reasons* for its action against the plaintiff employee (e.g., poor job performance).
- [19:729] The burden then shifts to the plaintiff employee (opposing party) to rebut defendant's showing by producing substantial evidence that raises a rational inference that discrimination occurred; i.e., that the

employer's stated neutral legitimate reasons for its actions are each a "pretext" or cover-up for unlawful discrimination, or other action contrary to law or contractual obligation. [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 356, 100 CR2d 352, 379; *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 US 133, 142-143, 120 S.Ct. 2097, 2106]

*Cross-refer: See detailed discussion at ¶7:390 ff.*

#### ► [19:730] **PRACTICE POINTERS FOR DEFENSE COUNSEL:**

**COUNSEL:** A summary judgment motion is an expensive undertaking (preparing declarations, motion papers, etc.). And, denial is certain if there is *any* material factual controversy. Therefore, defense counsel should consider this procedure only where plaintiff cannot controvert crucial facts. To increase your chances of success, consider the following:

- Wait until sufficient time has expired for plaintiff to conduct discovery. (Otherwise, the court will almost certainly grant a continuance.)
- Wherever possible, base your motion entirely on *plaintiff's own deposition and discovery responses*, uncontrovertible documents, or declarations of third parties as to matters that plaintiff cannot refute. (Any conflict between plaintiff's deposition testimony and his or her other sworn statements should not defeat your motion for summary judgment; see *Block v. City of Los Angeles* (9th Cir. 2001) 253 F3d 410, 419, fn. 2.)
- Where plaintiff claims employment discrimination or breach of contractual obligations (e.g., no "cause" for termination where employment was terminable only for "cause"), present declarations with *specific facts* supporting the legitimate, non-discriminatory reason the employer claims for its actions (e.g., evidence of employee's poor job performance, adverse financial conditions, etc.). The more specific this evidence, the less room there is for claims of "pretext."

#### (1) [19:731] **Special problems with use of expert opinion testimony:**

Special problems are raised where the party moving for summary judgment or summary adjudication relies on expert opinion evidence to establish an essential element of the claim or defense. The opposing party may be able to defeat the motion by (1) obtaining controverting expert opinion evidence or (2) showing that the moving party's expert testimony, even

if uncontested, fails to establish an essential element of the claim or defense. [See *Broussard v. University of Calif., at Berkeley* (9th Cir. 1999) 192 F3d 1252, 1258—vocational rehabilitation specialist's conclusory declaration did not provide sufficient credible evidence that employee was substantially limited in major life activity of working such as would defeat employer's motion for summary judgment]

- [19:732] The court properly excluded an expert's affidavit stating that a hostile work environment at Employer's plant was "likely the product of a culture of segregation and isolation pervasive in the area." The affidavit was not based on personal knowledge and did not state facts as to the actual work environment at Employer's plant. [*Celestine v. Petroleos de Venezuela SA* (5th Cir. 2001) 266 F3d 343, 357]

[19:733-739] Reserved.

4. [19:740] **Application—Grounds for Motion:** The following are examples of defenses that may be established and claims that may be defeated using summary judgment or summary adjudication motions:

- a. [19:741] **Failure to exhaust administrative remedy:** Where exhaustion of an available administrative remedy (EEOC or FEHC) is a prerequisite to a lawsuit, plaintiff's failure to exhaust the administrative remedy may be established on motion for summary judgment. (*Cross-refer: This defense is discussed at ¶16:3 ff.*)
- b. [19:741.1] **Failure to exhaust employer's internal grievance procedures:** Similarly, where the employer provides an internal administrative process that includes a quasi-judicial hearing to resolve disputes alleging unlawful employment practices, plaintiff's failure to exhaust that remedy may be established on a motion for summary judgment. (*Cross-refer: This defense is discussed at ¶16:371 ff.*)
- c. [19:742] **Statute of limitations:** Where the relevant facts are undisputed, resolution of a statute of limitations issue is proper on a motion for summary judgment. [See *Romano v. Rockwell Int'l, Inc.* (1996) 14 C4th 479, 487, 59 CR2d 20, 24—limitations periods began to run upon actual termination, rather than when employee was informed discharge was inevitable] (*Cross-refer: This defense is discussed at ¶16:385 ff.*)
- d. [19:743] **"At-will" employment:** Whether employment was terminable "at will" as a matter of law or whether there was an express or implied-in-fact agreement requiring good cause for termination is frequently raised by a summary

judgment motion. Resolution of this issue will often depend upon:

- whether an express employment agreement or other contractual documents declare employment to be "at will";
- whether an integration clause in an employment agreement precludes parol evidence rebutting employment at will; and
- if parol evidence is allowed, whether oral promises or employer practices modified that contract. (*Cross-refer: This topic is discussed in detail at ¶4:45 ff.*)

(1) [19:744] **Written document created at-will employment contract that was not modified by parol evidence:** [*Hoy v. Sears, Roebuck & Co.* (ND CA 1994) 861 F.Supp. 881, 885 (application and personnel manual); *Jenkins v. Eastern Capital Corp.* (ND CA 1994) 846 F.Supp. 864, 869-870 (employment application); *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 CA4th 620, 629-630, 41 CR2d 329, 334 (signed acknowledgment specifying at-will employment); *Davis v. Consolidated Freightways* (1994) 29 CA4th 354, 368, 34 CR2d 438, 445 (administrative manual); *Wagner v. Glendale Adventist Med. Ctr.* (1989) 216 CA3d 1379, 1386-1387, 265 CR 412, 416-417 (employment application); *Rodriguez v. IBM* (ND CA 1997) 960 F.Supp. 227, 231-232 (employee handbook established at-will status); *Hutchins v. TNT/Reddaway Truck Line, Inc.* (ND CA 1996) 939 F.Supp. 721, 724—oral statements of implied contract not to terminate except for good cause did not modify handbook and acknowledgment stating that employment was terminable at will]

(2) [19:745] **Written document did not bar parol evidence to establish implied-in-fact contract:** [*Walker v. Blue Cross of Calif.* (1992) 4 CA4th 985, 993-994, 6 CR2d 184, 189 (disapproved on other grounds in *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 100 CR2d 352)—at-will provision in employee handbook was not a contract establishing nature of relationship as a matter of law, hence plaintiff's long-term employment in good standing and employer's personnel policies created factual issue; *Harden v. Maybelline Sales Corp.* (1991) 230 CA3d 1550, 1556, 282 CR 96, 99—application for employment did not create at-will contract but was one of several factors to consider in determining nature of relationship; *Wilkerson v. Wells Fargo Bank, Nat'l Ass'n* (1989) 212 CA3d 1217, 1227-1228, 261 CR 185, 191 (disapproved on other grounds in *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 C4th 93, 96, 69

CR2d 900, 902)—employee handbook did not presumptively create at-will employment]

- (3) [19:746] **Implied-in-fact contract not to terminate except for good cause found based on circumstances:** [*Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 680, 254 CR 211, 225; *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 CA4th 521, 532-533, 22 CR2d 453, 460—issue of fact whether at-will provision in handbook was modified to include implied contract; *Wilkerson v. Wells Fargo Bank, Nat'l Ass'n*, *supra*, 212 CA3d at 1227-1228, 261 CR at 191—employee handbook was only one factor to consider in determining existence of implied-in-fact contract]

- e. [19:747] **“Good cause” for termination:** Summary judgment may also be proper where the employer claims good cause for termination existed and there is no dispute of material facts. [See *Binder v. Aetna Life Ins. Co.* (1999) 75 CA4th 832, 841, 89 CR2d 540, 545; *Breitman v. May Co. Calif.* (9th Cir. 1994) 37 F3d 562, 564-565—summary judgment denied where, despite objective policy prohibiting falsification of time records, employee testified that it was common practice to add hours in order to reimburse employees for their expenses; *Hoy v. Sears, Roebuck & Co.* (ND CA 1994) 861 F.Supp. 881, 887—objective measure (failure of senior employee to meet sales quota) constituted good cause for termination; *Knights v. Hewlett Packard* (1991) 230 CA3d 775, 780, 281 CR 295, 298—failure to return to work after expiration of several leaves of absence constituted good cause for termination; *Wilkerson v. Wells Fargo Bank, Nat'l Ass'n*, *supra*, 212 CA3d at 1229-1230, 261 CR at 192-193—triable factual issue whether bank employee's conduct was sufficiently severe to constitute good cause for termination (subjective criteria questioned); *Fowler v. Varian Assocs., Inc.* (1987) 196 CA3d 34, 43-44, 241 CR 539, 544-545—dismissal for breach of duty of loyalty upheld for plaintiff's failure to produce evidence of pretext] (Cross-refer: This topic is discussed in detail at ¶4:270 ff.)

- (1) [19:748] **Reduction in force and reorganization constituted “good cause” for discharge as matter of law:** [*Martin v. Lockheed Missiles & Space Co., Inc.* (1994) 29 CA4th 1718, 1733, 35 CR2d 181, 188-189—layoff pursuant to reduction in force sufficient legitimate business reason to prevail on age discrimination claim; *Clutterham v. Coachmen Industries, Inc.* (1985) 169 CA3d 1223, 1227, 215 CR 795, 797—legitimate economic reasons for reorganization; *Gianaculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F2d 1391, 1395—reduction in management force upheld as defense to breach of contract claims; *Rose v. Wells Fargo*

& Co. (9th Cir. 1990) 902 F2d 1417, 1422—summary judgment upheld on age discrimination and contract claims where plaintiff was terminated in reduction in force after most of his duties were eliminated]

In addition to showing a business reason for a reduction in force, an employer defending discrimination charges must provide particularized reasons why plaintiff was selected for layoff instead of other employees (e.g., plaintiff has less seniority, less skills or experience, performance problems, etc.). [*Diaz v. Eagle Produce Ltd. Partnership* (9th Cir. 2008) 521 F3d 1201, 1211-1212; *Davis v. Team Elec. Co.* (9th Cir. 2008) 520 F3d 1080, 1094-1095]

- f. [19:749] **Constructive discharge claims:** A court may decide on summary judgment that claims of constructive discharge are without merit. [*King v. AC & R Advertising* (9th Cir. 1995) 65 F3d 764, 767—work conditions not intolerable; *Turner v. Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 1246-1247, 32 CR2d 223, 227—employee may not quit and sue for single, trivial or isolated acts of employer misconduct; *Casenas v. Fujisawa USA, Inc.* (1997) 58 CA4th 101, 113-119, 67 CR2d 827, 835-839; *Gibson v. Aro Corp.* (1995) 32 CA4th 1628, 1637-1640, 38 CR2d 882, 888-890—demotion did not create intolerable working conditions and employer was not made aware of conditions; *Addy v. Bliss & Glennon* (1996) 44 CA4th 205, 219, 51 CR2d 642, 650—demotion with reduction in pay does not constitute constructive discharge] (*Cross-refer: This topic is discussed in detail at ¶4:405 ff.*)
- g. [19:750] **Age discrimination claims:** A court may decide on summary judgment that the employer's decision to hire less experienced employees who are paid lower salaries does not constitute age discrimination. [*EEOC v. Insurance Co. of North America* (9th Cir. 1995) 49 F3d 1418, 1421; *EEOC v. Newport Mesa Unified School Dist.* (CD CA 1995) 893 F.Supp. 927, 931-932; *Marks v. Loral Corp.* (1997) 57 CA4th 30, 46, 68 CR2d 1, 10] (*Cross-refer: Age discrimination is discussed in Ch. 8, Age Discrimination.*)
- h. [19:751] **Failure to promote claims:** A court may decide on summary judgment that the employer's decision not to promote plaintiff was based on evidence of his or her lack of qualifications. [*Warren v. City of Carlsbad* (9th Cir. 1995) 58 F3d 439, 443—plaintiff produced specific evidence of qualifications to raise a factual issue; *Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F3d 454, 457—plaintiff failed to produce specific evidence comparing his qualifications with successful candidates; *Addy v. Bliss & Glennon* (1996) 44

CA4th 205, 216, 51 CR2d 642, 649—applicant failed to present evidence that she was qualified for position sought] (Cross-refer: This topic is discussed further at ¶7:101 ff.)

[19:751.1-751.4] Reserved.

- i. [19:751.5] **Same-actor doctrine in federal court:** Federal courts may consider as “very strong evidence” against discriminatory animus the fact that the individual who made the allegedly discriminatory decision is the “same actor” who hired the plaintiff. [*Coghlan v. American Seafoods Co. LLC* (9th Cir. 2005) 413 F3d 1090, 1096-1098 & fn. 10—to defeat summary judgment motion, plaintiff must “muster the extraordinarily strong showing of discrimination necessary to defeat the same-actor inference”; but see *Wexler v. White's Fine Furniture, Inc.* (6th Cir. 2003) 317 F3d 564, 573-574 (en banc)—“the same-actor inference . . . is insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of material fact”]
  - (1) [19:751.6] **In California courts:** “(W)here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a *strong inference* arises that there was no discriminatory motive.” [*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 CA4th 798, 809, 85 CR2d 459, 467 (emphasis added; internal quotes omitted); *West v. Bechtel Corp.* (2002) 96 CA4th 966, 980-981, 117 CR2d 647, 658-659—presumption “applies with particular force” where employee fired by same person who hired him scarcely a month earlier]
- j. [19:752] **“Hostile environment” harassment claims:** [*Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F3d 1459, 1463—derogatory statements sufficiently pervasive to require trial of sexual harassment claim; *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F2d 588, 590—a few sporadic incidents did not amount to harassment; *Yamaguchi v. United States Dept. of the Air Force* (9th Cir. 1997) 109 F3d 1475, 1483—summary judgment denied as to sufficiency of employer’s response to harassment; *Lamb v. Household Credit Services* (ND CA 1997) 956 F.Supp. 1511, 1516-1517—nonmanagement-level employee’s knowledge of harassment could not be imputed to employer, and employer took appropriate remedial measures once it received knowledge] (Cross-refer: This topic is discussed further at ¶10:110 ff.)

[19:752.1-752.4] Reserved.

- (1) [19:752.5] ***Ellerth/Faragher affirmative defense in federal court:*** Even if a Title VII plaintiff encountered

an otherwise actionable hostile environment, the employer may be entitled to summary judgment if it can establish the *Ellerth/Faragher* affirmative defense—i.e., that it exercised reasonable care to prevent or promptly correct sexually harassing conduct and that plaintiff unreasonably failed to take advantage of the protections offered by the employer. [*Lauderdale v. Texas Dept. of Crim. Justice, Institutional Div.* (5th Cir. 2007) 512 F3d 157, 164-165; see discussion at ¶10:335]

- (a) [19:752.6] **In California courts?** A comparable, “avoidable consequences” defense is available in FEHA sexual harassment cases in California courts. However, this defense likely cannot support summary judgment in favor of the employer since it precludes liability only for those damages that plaintiff could have avoided (which is usually a question of fact). [See *State Dept. of Health Services v. Sup.Ct. (McGinnis)* (2003) 31 C4th 1026, 1044, 6 CR3d 441, 452]
- k. [19:753] **Retaliation claims:** [*Morales v. Merit System Protection Board* (9th Cir. 1991) 932 F2d 800, 802-803—material factual issue existed whether employee was discharged in retaliation for his threat to contact EEOC; *Learned v. City of Bellevue* (9th Cir. 1988) 860 F2d 928, 932—because employee could not have reasonably believed that employer discriminated against him in violation of Title VII, employer was entitled to summary judgment on claim for retaliation for opposing discrimination; *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1987) 813 F2d 1406, 1411-1412—no prima facie case of retaliation because employee not engaged in protected activity; *Folkerson v. Circus Circus Enterprises, Inc.* (9th Cir. 1997) 107 F3d 754, 756—no retaliation because employee was not opposing an unlawful employment practice; *Addy v. Bliss & Glennon* (1996) 44 CA4th 205, 217, 51 CR2d 642, 649—summary judgment proper where employee failed to show causal connection between adverse employment decision and protected activity; *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 CA4th 138, 156, 65 CR2d 112, 123—close timing of several events prevented summary judgment on retaliation claim for job applicant; *Tarin v. County of Los Angeles* (9th Cir. 1997) 123 F3d 1259, 1265—plaintiff’s conclusory statements cannot refute employer’s nondiscriminatory reasons] (Cross-refer: *Retaliation is discussed at ¶7:680 ff.*)

[19:753.1-753.4] Reserved.

- (1) [19:753.5] **Mixed-motives defense to retaliation claims under federal statutes:** In *retaliation* cases under Title VII and 42 USC §1981, defendant may ob-

tain summary judgment by showing that it had mixed motives for the personnel action in question—i.e., that it had *some lawful motive* for the decision besides unlawful retaliation. By contrast, a defendant may *not* obtain summary judgment or summary adjudication of *discrimination claims* under those statutes by showing it had mixed motives; i.e., a single *unlawful motive* supports a discrimination claim. [*Metoyer v. Chassman* (9th Cir. 2007) 504 F3d 919, 934; see 17:840]

- / [19:754] **Disability discrimination claims:** Summary judgment on claims of disability discrimination may be appropriate based on:
  - (1) [19:755] **No evidence of disparate treatment:** [*Evans v. Runyon* (CD CA 1997) 965 F.Supp. 1388, 1390-1391—employee offered no evidence that employer's reason for terminating her (misrepresentations on preemployment questionnaire and medical questionnaire) was a pretext for disability discrimination; *Peacock v. County of Marin* (ND CA 1997) 953 F.Supp. 306, 309-310—employee failed to produce evidence of pretext]
  - (2) [19:756] **No evidence of disability:** [*Thompson v. Holy Family Hosp.* (9th Cir. 1997) 121 F3d 537, 539-540—lifting restrictions are not a substantial limitation of a major life activity so as to constitute a disability under the ADA; *Sanders v. Arneson Products, Inc.* (9th Cir. 1996) 91 F3d 1351, 1353-1354—psychological impairment lasting 3 1/2 months was too short in duration to constitute a disability; *Holihan v. Lucky Stores, Inc.* (9th Cir. 1996) 87 F3d 362, 366—encouraging employee to seek counseling for mental problems was evidence that employer regarded employee as disabled; *Wilmarth v. City of Santa Rosa* (ND CA 1996) 945 F.Supp. 1271, 1277—existence of impairment lasting 2 years and 2 months was temporary and not a disability under the ADA; *Gomez v. American Building Maintenance* (ND CA 1996) 940 F.Supp. 255, 258-259—impairment did not prevent employee from performing broad range of jobs, so that he was not disabled]
  - (3) [19:757] **Employer provided reasonable accommodation for disability:** [*Sharpe v. American Tel. & Tel. Co.* (9th Cir. 1995) 66 F3d 1045, 1050-1051—employer who provided reasonable accommodation for employee's disability could not be liable for failing to offer employee his preferred accommodation; *Prilliman v. United Air Lines, Inc.* (1997) 53 CA4th 935, 953-954, 62 CR2d 142, 152—triable factual issue existed whether employer could have reasonably accommodated em-

ployee by finding alternative position] (Cross-refer: This topic is discussed further at ¶19:1070 ff.)

[19:757.1-757.4] Reserved.

- m. [19:757.5] **FMLA claims:** [*Smith v. East Baton Rouge Parish School Bd.* (5th Cir. 2006) 453 F3d 650, 652—court may decide on summary judgment that position to which plaintiff was assigned after returning from protected medical leave was equivalent to position she held before the leave]
- n. [19:758] **Tameny claims (tortious discharge in violation of public policy):** [*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 CA4th 1359, 1391, 88 CR2d 802, 827—publisher's firing newspaper reporter for dissatisfaction with views expressed not a public policy violation] (Cross-refer: This topic is discussed further at ¶15:3 ff.)
- o. [19:759] **Release of claims:** A motion for summary judgment may be used to determine whether a release signed by the employee bars the present action. [See *Butler v. Vons Cos., Inc.* (2006) 140 CA4th 943, 947-950, 45 CR3d 151, 154-156—triable factual issue whether employee's and union's release of labor grievance arising from altercation with supervisor extended to employee's subsequent racial discrimination action]

[19:759.1-759.4] Reserved.

- p. [19:759.5] **Preemption:** A motion for summary judgment may be used to determine whether a plaintiff's claims are preempted by other laws, such as ERISA, LMRA, NLRA or RLA. [See *Luke v. Collotype Labels USA, Inc.* (2008) 159 CA4th 1463, 1466, 72 CR3d 440, 442—plaintiff's claim of wrongful termination was preempted by FLSA; *Fitz-Gerald v. SkyWest Airlines, Inc.* (2007) 155 CA4th 411, 414, 65 CR3d 913, 914-915—wage and hour claims were preempted by RLA]
- 5. [19:760] **Application—Raising Triable Issues of Fact to Defeat Motion:** Plaintiff may be able to defeat a summary judgment motion by raising triable issues of fact as to the grounds for the employer's motion: "If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed." [*Washington v. Garrett* (9th Cir. 1993) 10 F3d 1421, 1433]

The following are examples of cases in which a triable issue of fact respecting pretext may arise:

- [19:760.1] *Employer shifts nondiscriminatory reasons*: The employer offered *fundamentally different reasons* for its action against the plaintiff: "(S)ubstantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext." [*Kobrin v. University of Minn.* (8th Cir. 1994) 34 F3d 698, 703; *Washington v. Garrett*, *supra*, 10 F3d at 1434—plaintiff first notified that her job was being eliminated for budgetary reasons, later for poor job performance]
- [19:760.2] *Contradicting employer's reasons*: The employee-plaintiff may defeat summary judgment by evidence that calls into question the validity of the employer's stated reasons for its adverse action against plaintiff. [*Zaccagnini v. Chas. Levy Circulating Co.* (7th Cir. 2003) 338 F3d 672, 679—employer said he did not rehire plaintiff because union objected; union official denied this]

To do so, the employee might present evidence showing:

- the employer's stated reasons are factually baseless;
- those reasons were not the actual motivation for the discharge; or
- the employer's proffered reasons were insufficient to motivate the discharge. [*Koski v. Standex Int'l Corp.* (7th Cir. 2002) 307 F3d 672, 677]

- [19:760.3] *Corporate culture of discrimination*: Evidence of a "corporate culture" of discrimination may create an inference of pretext as to the employer's articulated nondiscriminatory reasons: "One could infer . . . that management permitted an atmosphere of racial prejudice to infect the workplace." [*Slattery v. Swiss Reinsurance America Corp.* (2nd Cir. 2001) 248 F3d 87, 92 (emphasis added; internal quotes omitted)]
- [19:760.4] *Biased remarks*: The employer made multiple age-biased remarks, creating an inference of pretext as to its allegedly nondiscriminatory reasons for denying a transfer opportunity to the age-protected plaintiff. [*Ercegovich v. Goodyear Tire & Rubber Co.* (6th Cir. 1998) 154 F3d 344, 355]
- [19:760.5] *Retaliatory motive*: The employer's action, although allegedly for nondiscriminatory reasons, was in *retaliation* for plaintiff's exercise of protected rights. [*Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F3d 1276, 1285—employee laid off on basis of low performance evaluation following her complaints of harassment and discrimination]
- [19:760.6] *Evidence suppressed*: The employer willfully suppressed evidence, creating an inference that the evi-

dence was adverse to its grounds for summary judgment. [See *Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 994, 16 CR2d 787, 796 (disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 25 CR2d 109)—willful suppression of supervisor's personnel records created inference supporting plaintiff's claims that records contained sexual harassment complaints against supervisor]

[19:761-769] Reserved.

## H. OTHER PRETRIAL PROCEDURES

1. [19:770] **Class Actions:** A class action may be appropriate where numerous employees have similar claims against their employer (e.g., numerous employees claiming racial discrimination in layoffs at a particular worksite). A class action avoids the difficulty of joining all individual plaintiffs in a single suit, as well as the potential for inconsistent verdicts in separate suits. It also meets the concern that “(p)otential individual plaintiffs may refuse to identify themselves for fear of harassment or retaliation by the employer.” [*McClain v. Lufkin Industries, Inc.* (ED TX 1999) 187 FRD 267, 278]

*Compare—administrative exhaustion:* Where exhaustion of administrative remedies is required for employment discrimination claims (¶16:2 ff.), the administrative charge must fairly apprise the employer whether it is facing an individual claim or a class claim. [See *Hoffman v. R.I. Enterprises, Inc.* (MD PA 1999) 50 F.Supp.2d 393, 399]

- a. [19:771] **California and federal rules similar:** California's class action statute (CCP §382) and related case law are similar to the rules governing class actions in federal court (FRCP 23).

*Cross-refer:*

- Rules governing class actions in state court are discussed in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 14.
- Rules governing class actions in federal court are discussed in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 10.

- (1) [19:771.1] **Basic FRCP 23 requirements:** Under Federal Rule of Civil Procedure 23, the trial judge must make affirmative findings on each of the following factors before certifying a federal class action: (a) an ascertainable class, (b) a proposed class representative who is a member of the class, (c) class is so numerous as to make joinder of each member impracticable, (d) existence of common questions of law or fact, (e) class representative's claims are typical of those in the class,

(f) adequacy of representation by the class representative, and (g) that *either*:

- prosecution of individual claims would create a risk of inconsistent judgments or substantially impair the ability of nonparties to protect their interests (FRCP 23(b)(1)); or
- defendant has acted or refused to act on grounds generally applicable to the class (FRCP 23(b)(2), see ¶19:773); or
- the common questions of law or fact *predominate* over questions affecting individual class members, and a class action is *superior to other available methods* for adjudicating the controversy fairly and efficiently (FRCP 23(b)(3), see ¶19:776).

(2) [19:771.2] **Basic CCP §382 requirements:** Class actions are allowed "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . ." [CCP §382]

To obtain class certification, plaintiff must establish:

- the existence of an *ascertainable class*;
- a well-defined *community of interest* among class members (which embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class); and
- that a class action is *superior* to individual lawsuits or alternative procedures for resolving the controversy. [See *Sav-On Drug Stores, Inc. v. Sup.Ct. (Rocher)* (2004) 34 C4th 319, 326, 17 CR3d 906, 911-912; *Bufl v. Dollar Fin'l Group, Inc.* (2008) 162 CA4th 1193, 1204, 76 CR3d 804, 812]

[19:771.3] Reserved.

➡ [19:771.4] **PRACTICE POINTER FOR DEFENDANTS:** Defense counsel need not wait to challenge the propriety of the class action until plaintiff files a motion to certify the class. Instead, defendants may move first and file a "preemptive" *motion to deny class certification*. [*Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F3d 935, 940; *Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO v. Byrd* (7th Cir. 1972) 456 F2d 882, 885]

To increase chances for success on the motion, defense counsel should wait until plaintiff has had suffi-

cient time to conduct limited discovery relating to class action requirements. [See *Parker v. Time Warner Entertainment Co., L.P.* (2nd Cir. 2003) 331 F3d 13, 21-22]

- b. [19:771.5] **Removal of class actions to federal court:** Class actions filed in a state court are removable to federal court under the following circumstances:

- (1) [19:771.6] **Federal question cases:** If the claim asserted “arises under” federal law (e.g., violation of Title VII or FLSA, see ¶19:239), the action is removable regardless of the amount of the claim or the citizenship of the parties; or
- (2) [19:771.7] **“Minimal diversity” cases:** Absent a federal claim, the action is removable under the Class Action Fairness Act (CAFA) if:
  - the *combined* claims of all class members exceed \$5 million; and
  - there are at least 100 class members; and
  - *any class member* is a citizen of a different state than *any defendant*. [See 28 USC §1332(d)(2),(5) & §1453 (applicable to class actions *commenced after 2/18/05*)]

*Compare*—“mass actions” (100 or more plaintiffs): “Mass actions” (monetary claims by 100 or more plaintiffs proposed to be tried jointly because they involve common issues of fact or law) are treated the same as “minimal diversity” class actions *except* jurisdiction exists only over *claims exceeding \$75,000* (i.e., there is no supplemental jurisdiction over nonfederal claims). [28 USC §1332(d)(11)]

*Cross-refer:* See detailed discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.

- (a) [19:771.8] **“Home state” exception:** A federal court *cannot* exercise jurisdiction over a “minimal diversity” class action if *either*:

- *more than two-thirds of the class members* and the *primary defendants* are citizens of the state in which the action was originally filed; or
- more than two-thirds of the class members and *at least one defendant* are “citizens” of that state, *and*:
  - the alleged wrongdoing occurred there;
  - “significant relief” is being sought from the local defendant whose alleged conduct

forms a “significant basis” for plaintiffs’ claims; and

- no other class action has been filed within the past three years on behalf of the same persons against *any* defendant asserting the same or similar factual allegations. [28 USC §1332(d)(4)]

[19:771.9] Reserved.

- (b) [19:771.10] **Discretionary refusal:** The federal court may “in the interests of justice” *decline* to exercise jurisdiction where *more than one-third* (but less than two-thirds) of the class members and the *primary defendants* are citizens of the state in which the action was originally filed. [28 USC §1332(d)(3)]

In exercising this discretion, the federal court must consider whether:

- the claim asserted involves matters of national or interstate interest;
- the claims will be governed by the law of the state in which the action was originally filed;
- the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;
- the action was brought in a forum with a “distinct nexus with the class members, the alleged harm, or the defendants”;
- the number of local class members is substantially larger than class members from any other state and they are dispersed among a substantial number of states; and
- any other class action has been filed within the past three years on behalf of the same persons asserting the same or similar factual allegations. [28 USC §1332(d)(3)(A)-(F)]

- (c) [19:771.11] **Procedural considerations:** The removal procedure for “minimal diversity” class actions and “mass actions” is the same as for removal of other actions (see ¶19:250 ff.) *except*:

- *any* defendant may remove (consent of *all* defendants is not required); and
- the one-year outside time limit for diversity-based removal (28 USC §1446(b)) does not apply. [28 USC §1453(b)]

*Cross-refer:* See detailed discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.

- [19:771.12] **PRACTICE POINTER:** Class action plaintiffs who prefer a California state forum

may avoid removal by limiting their class to California citizens and naming as defendants only California citizens, entities or officials. (Doing so, however, may run the risk that your action will be stayed if someone else files a broader, nationwide class action.)

Removal can also be avoided by expressly alleging damages that do not exceed the \$5 million federal jurisdictional minimum.

[19:771.13-771.14] *Reserved.*

- (3) [19:771.15] **Compare—former law:** In class actions commenced before 2/18/05 in which only state law claims are asserted (which was usually the case):
- *complete diversity* of citizenship between the *named parties* was required (see ¶19:241);
  - the “no local defendant” rule applied (see ¶19:242); and
  - if at least one *named* plaintiff’s claim exceeds \$75,000, supplemental jurisdiction could be exercised over the claims of other class members who do not meet the \$75,000 threshold. [*Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005) 545 US 546, 549, 125 S.Ct. 2611, 2615]

*Cross-refer:* See detailed discussion in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 10.

- c. [19:772] **Pleading class claims:** Class action complaints are not required to allege individual violations but may instead allege a “pattern or practice” of discrimination under either Title VII or the FEHA. [See *Alch v. Sup.Ct. (Time Warner Entertainment)* (2004) 122 CA4th 339, 378, 19 CR3d 29, 58] (“Pattern or practice” claims are discussed further at ¶19:803.)
- [19:772.1] A class action complaint adequately alleged age discrimination in violation of the FEHA as follows:
    - Employer maintained a company-wide policy or practice of age discrimination in employment by refusing to hire plaintiffs (class members) on the basis of their age, and by adopting ageist hiring policies that deterred plaintiffs from seeking employment opportunities;
    - Plaintiffs applied for and were rejected and/or deterred from seeking employment by Employer as a result of Employer’s practices;
    - Employer has hired a statistically significant lower number of older writers than would be expected

- given the relevant qualified applicant pool, and these disparities increase in direct relationship to age;
- Employer intentionally discriminated against older applicants for employment. [*Alch v. Sup.Ct. (Time Warner Entertainment)*, supra, 122 CA4th at 379-380, 19 CR3d at 59]
- d. [19:773] **Classes certified under Rule 23(b)(2) (equitable relief):** Classes in employment discrimination cases may be certified under FRCP 23(b)(2) where there are common issues of law or fact among class members and the action seeks *injunctive or declaratory relief* benefiting the class as a whole (e.g., elimination of age, height or weight restrictions).

Significance: Unlike Federal Rule 23(b)(3), below, a Rule 23(b)(2) class may be certified *without giving the members notice and an opportunity to opt out*. I.e., all members of the Rule 23(b)(2) class are included in the certified class and bound by the action's outcome.

Moreover, unlike Rule 23(b)(3) (below), "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions." [*Forbush v. J.C. Penney Co., Inc.* (5th Cir. 1993) 994 F2d 1101, 1105; *Rodriguez v. Hayes* (9th Cir. 2009) 578 F3d 1032, 1051]

- (1) [19:774] **Effect of demand for monetary relief:** But a Rule 23(b)(2) class action is not proper where the "appropriate final relief relates *exclusively or predominantly* to money damages." [FRCP 23(b)(2), Adv. Comm. Note (1966) (emphasis added)]

- (a) [19:774.1] **Compare—backpay:** Backpay is considered equitable relief and can therefore be awarded in a case certified under FRCP 23(b)(2). [*Pettway v. American Cast Iron Pipe Co.* (5th Cir. 1974) 494 F2d 211, 257; see *Cooper v. Southern Co.* (11th Cir. 2004) 390 F3d 695, 720]

**Caution:** This issue is presently before the Ninth Circuit, *en banc*, in *Dukes v. Wal-Mart, Inc.* (2009) 556 F3d 919 (withdrawing earlier opinion and granting rehearing *en banc*).

[19:774.2-774.4] *Reserved.*

- (b) [19:774.5] **Damages "incidental" to injunctive relief:** Class certification under Rule 23(b)(2) may be proper where although monetary relief is sought, such relief is merely "incidental" to the requested equitable relief. [*Allison v. Citgo Petroleum Corp.*

(5th Cir. 1998) 151 F3d 402, 415—damages not incidental in case at bar]

- 1) [19:775] **“Incidental” damages:** “Incidental” means “damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.” [*Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 415 (emphasis omitted); *Cooper v. Southern Co.*, supra, 390 F3d at 720]

Incidental damages are basically:

- those to which class members are *automatically entitled* once liability to the class (or subclass) as a whole is established; and
- capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances. [*Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 415]

Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for Rule 23(b)(2) class actions (e.g., where money is paid to the class members based on declaratory relief applicable to the class as a whole). [*Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 415; *Cooper v. Southern Co.*, supra, 390 F3d at 720]

[19:775.1-775.4] Reserved.

- (c) [19:776] **Damage claims “predominate”:** On the other hand, where monetary relief predominates, due process requires that the class be certified under Federal Rule 23(b)(3), which requires individual notice to class members and opt-out procedural safeguards. In short, plaintiffs may not “shortcut” Rule 23(b)(3) procedures by joining a claim for injunctive or declaratory relief to what is basically a suit for individualized damages. [See *Jefferson v. Ingersoll Int’l, Inc.* (7th Cir. 1999) 195 F3d 894, 898; *Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 411-416]

- 1) [19:777] **Effect of joining claim for Title VII damages?** Courts disagree as to the test for whether joinder of Title VII damage claims by individual class members “predominate” where injunctive or declaratory relief is also sought:

- [19:777.1] One view is that the inherently individualized nature of the determination of damages renders it predominant, and thereby makes class action status under Rule 23(b)(2) inappropriate. [*Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 416]
  - [19:777.2] Other courts reject this bright-line rule and determine whether monetary relief “predominates” on a case-by-case basis. The court must satisfy itself:
    - first, that even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought (i.e., insignificant or sham requests for injunctive relief should not provide cover for damage claims); and
    - second, that the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were plaintiffs to succeed on the merits. [*Robinson v. Metro-North Commuter R.R. Co.* (2nd Cir. 2001) 267 F3d 147, 164]
- 2) [19:778] **Impact on right to jury:** Although issues affecting purely equitable relief may be decided by the court, a jury trial must be provided on issues affecting the class members’ right to legal relief (i.e., money damages). Any overlapping factual issues between the “legal” and “equitable” claims must first be tried to a jury in accordance with the Seventh Amendment. [See *Robinson v. Metro-North Commuter R.R. Co.*, supra, 267 F3d at 170; see ¶19:845 ff.]
- Comment:* The right to a jury trial on issues of money damages may affect the court’s determination whether a class action is manageable at trial. [See *Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 419; *Cooper v. Southern Co.*, supra, 390 F3d at 722]
- (d) [19:779] **Compare—bifurcated proceedings:** Alternatively, a court may certify a class for injunctive relief (Rule 23(b)(2)) and a separate class for monetary relief for individual damages claims that meet Rule 23(b)(3) standards. [*Jefferson v. Ingersoll Int'l, Inc.*, supra, 195 F3d at 899]
- (2) [19:780] **Former employees’ standing for equitable relief?** It is not clear whether putative class members

who no longer work for the defendant employer can be counted in determining the scope of the class, because they do not stand to benefit from the injunctive or declaratory relief sought.

**Caution:** This issue is presently before the Ninth Circuit, *en banc*, in *Dukes v. Wal-Mart, Inc.* (2009) 556 F3d 919 (withdrawing earlier opinion and granting rehearing *en banc*).

[19:781-789] Reserved.

- e. [19:790] **Classes certified on “predominant common questions” ground (FRCP 23(b)(3)):** Certification on the “predominant common questions” ground is proper when:
- a defendant’s unlawful acts “allegedly are the same with regard to each plaintiff”; and
  - plaintiff establishes “by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation.” [*Sav-on Drug Stores, Inc. v. Sup.Ct. (Rocher)* (2004) 34 C4th 319, 332, 17 CR3d 906, 916 (internal quotes omitted)—trial court’s determination must be upheld if supported by substantial evidence; see also FRCP 23(b)(3); and *Cooper v. Southern Co.*, *supra*, 390 F3d at 722]

[19:790.1-790.4] Reserved.

- (1) [19:790.5] **Different forms of discrimination:** Claims arising from different forms of discrimination (e.g., racial and gender) or at *different stages of employment* (e.g., in hiring, in promotion and in discharge) may raise problems of “commonality” and “typicality” of claims. [See *General Tel. Co. of Southwest v. Falcon* (1982) 457 US 147, 158, 102 S.Ct. 2364, 2371—error to permit class actions on behalf of all Mexican-American job applicants without identifying common questions of law or fact]

(a) [19:790.6] **Adequacy of representation:** Adequacy of representation is another problem in such cases. Conflicts may arise, for example, between employees and job applicants who were denied employment and who will, if granted relief, compete with existing employees for promotions, security and fringe benefits. [See *General Tel. Co. of Southwest v. Falcon*, *supra*, 457 US at 158, 102 S.Ct. at 2371, fn. 13]

(b) [19:790.7] **Subclass alternative:** If the court finds that the class representative’s claims are not typical of the entire class, it may consider dividing

the alleged class into subclasses and appoint a different representative for each (e.g., separate subclasses for applicants, existing employees, retirees, etc.).

- (c) [19:790.8] **Exceptional cases justifying class treatment:** A general policy of discrimination may justify a class of both applicants and employees if the discrimination manifested in the same general fashion, such as through *entirely subjective decisionmaking processes or a biased testing procedure* to evaluate both applicants and incumbent employees. [*General Tel. Co. of Southwest v. Falcon*, supra, 457 US at 159, 102 S.Ct. at 2371, fn. 15]
- (2) [19:791] **Individual damage claims:** The class members' claims need not be uniform or identical. Thus, the need for individualized determination of damages does not per se bar class certification: "Predominance is a comparative concept, and the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate." [*Sav-on Drug Stores, Inc. v. Sup. Ct. (Rocher)*, supra, 34 C4th at 334, 17 CR3d at 918 (internal quotes omitted)]
- (a) [19:791.1] **Size of claims:** The size of individual claims does not necessarily determine whether a class action is proper. Class actions may be needed to assure enforcement of statutory policies even where some claims are large enough to provide an incentive for an individual action. [*Bell v. Farmers Ins. Exch.* (2004) 115 CA4th 715, 745, 9 CR3d 544, 569-570]
- [19:791.2-791.4] *Reserved.*
- (3) [19:791.5] **Calculating damages:** The damages sought must be capable of computation by *objective standards applicable to the class as a whole* and cannot depend in any significant way on intangible, subjective differences of each class member's circumstances. [*Allison v. Citgo Petroleum Corp.* (5th Cir. 1998) 151 F3d 402, 415; *Faulk v. Home Oil Co., Inc.* (MD AL 1999) 186 FRD 660,662—claims for compensatory and punitive damages for *intentional discrimination* are "uniquely dependent" on differences in each class member's circumstances]
- (a) [19:791.6] **Court discretion:** The trial court has discretion to formulate an appropriate methodology for determining classwide damages. [*Bell v. Farmers Ins. Exch.*, supra, 115 CA4th at 751, 755-757,

9 CR3d at 575, 579-580; *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F3d 1168, 1192; see further discussion at ¶19:795.10]

- (4) [19:792] **Limited role of expert testimony:** The court may *not* weigh conflicting expert evidence at the class certification stage. Nor may it impose the requirements for admissibility of expert opinion at trial (see ¶19:1091).

"At the class certification stage, it is enough that (party) presented properly-analyzed, scientifically reliable evidence tending to show . . . a common question of fact." [*Dukes v. Wal-Mart, Inc.*, supra, 509 F3d at 1179 (parentheses added)]

[19:793-794] Reserved.

f. **Application**

- (1) [19:795] **Wage and hour claims under state law:** Under California law, an employee may maintain a class action to recover either overtime pay or underpayments of minimum wage on behalf of himself or herself and others similarly situated. If the class is certified, recovery may be had on behalf of all class members who do not affirmatively "opt out" of the action. In addition to the amount of minimum wage or overtime pay due, the court may award interest thereon and *reasonable attorney fees* and costs of suit. [See Lab.C. §1194(a); see *Sav-on Drug Stores, Inc. v. Sup.Ct. (Rocher)* (2004) 34 C4th 319, 340, 17 CR3d 906, 923—public policy encourages use of class action device to enforce California's overtime laws]

- (a) [19:795.1] **"Predominant common questions":** Classes may be certified on the ground of "predominant common questions" of law or fact where each class member's claims are based on the same allegedly unlawful employer practice with respect to wages paid to each class member. [See *Bell v. Farmers Ins. Exch.* (2004) 115 CA4th 715, 746, 9 CR3d 544, 570—class certification proper to challenge employer's classification of class members as "administrative employees" exempt from overtime pay requirements; class action "superior means of adjudicating controversy" (better than requiring 2,000 class members to go through "*Berman*" hearings before Labor Commissioner); *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 CA4th 1524, 1537, 87 CR3d 518, 528—class action brought on behalf of limousine drivers who were not paid for "on call"

time involved single question of law common to all class members]

Even so, the court must consider whether individual issues that are not susceptible to common proof make class treatment difficult if not impossible: "Whether judicial economy will be served in a particular case turns on close scrutiny of the relationship between the common and individual issues." [*In re Wells Fargo Home Mortg. Overtime Pay Litig.* (9th Cir. 2009) 571 F3d 953, 958 (internal quotes omitted)]

- 1) [19:795.2] **Overtime pay exemptions:** The "common question" in most overtime pay class actions is whether the class members are exempt from overtime pay requirements (e.g., as "executive" or "administrative" or "professional" employees). Other individual issues must be considered, however, in determining whether that common question "predominates." [*In re Wells Fargo Home Mortg. Overtime Pay Litig.*, supra, 571 F3d at 958]
  - [19:795.2a] It was an abuse of discretion to focus *solely* on the employer's policy of treating its employees as exempt from overtime pay requirements because they received "commission wages." The court should have considered whether other exemptions might apply (e.g., outside sales, administrative) that would require individualized inquiries (regarding their duties, time spent on each duty, where they primarily work, and their levels of compensation). [*In re Wells Fargo Home Mortg. Overtime Pay Litig.*, supra, 571 F3d at 958]

► [19:795.3] **PRACTICE POINTERS:** To prove the questions are "common" to each class member, plaintiffs may submit declarations showing the class members perform their jobs in *substantially similar* fashion; i.e., that each class member seeking overtime is *required* by company policy to spend time performing nonexempt work (e.g., store managers forced to work cash registers).

Defendants may be able to counter this showing by declarations showing *differences* in the class members' job requirements; e.g., at certain jobsites, adequate nonexempt staff are

available to perform the work allegedly performed by the class members seeking overtime pay (and hence class members were not required to do so).

Surveys showing how the workforce in question *actually spends its time* may provide valuable support for such declarations.

[19:795.4] Reserved.

- 2) [19:795.5] **Compare—claim under Labor Code Private Attorneys General Act (PAGA):** Plaintiffs may sue on behalf of themselves and others under PAGA (Lab.C. §2698 et seq.) to obtain civil penalties for wage and hour violations *without complying with class action requirements*. [*Arias v. Sup. Ct. (Angelo Dairy)* (2009) 46 C4th 969, 981-982, 95 CR3d 588, 596-597; see ¶19:303.7]

[19:795.6-795.9] Reserved.

- (b) [19:795.10] **Calculating classwide damages; unpaid overtime:** The trial court has discretion to use “the statistical methodology of random sampling and extrapolation for determination of aggregate classwide damages” in class actions for unpaid overtime compensation. [*Bell v. Farmers Ins. Exch.* (2004) 115 CA4th 715, 747, 9 CR3d 544, 571]

- [19:795.11] In a class action on behalf of approximately 2,400 insurance claims representatives for unpaid overtime, the court properly determined average weekly unpaid overtime at time-and-a-half rate based on a representative sample of 295 employee who worked an average of 9.4 hours unpaid overtime, with a margin of error of .9 hours. [*Bell v. Farmers Ins. Exch.*, supra, 115 CA4th at 753-754, 9 CR3d at 576-577]

But the court’s method of calculating double-time compensation was improper because it lacked necessary foundational calculations and did not propose an appropriate class size, margin of error or sampling methodology. [*Bell v. Farmers Ins. Exch.*, supra, 115 CA4th at 756-757, 9 CR3d at 579-580]

[19:795.12-795.14] Reserved.

- (c) [19:795.15] **Compare—“opt-in” collective actions under FLSA:** A suit under the Fair Labor

Standards Act (FLSA) for minimum wage violations or unpaid overtime may *not* be maintained as a class action under FRCP 23. Instead, an employee may sue under the FLSA on behalf of himself or herself and “other employees similarly situated.” Those other employees, however, *must* “*opt in*” to the action by giving written consent to being a party to the lawsuit. [29 USC §216(b); see ¶11:1290 ff.; *Haro v. City of Rosemead* (2009) 174 CA4th 1067, 1076, 94 CR3d 874, 880]

“In a class action, once the district court certifies a class under Rule 23, all class members are bound by the judgment unless they opt *out* of the suit. By contrast, in a collective action each plaintiff must opt *into* the suit by giv[ing] his consent in writing . . . As result, unlike a class action, only those plaintiffs who expressly join the collective action are bound by its results.” [*McElmurry v. U.S. Bank Nat'l Ass'n* (9th Cir. 2007) 495 F3d 1136, 1139 (emphasis and brackets in original; internal quotes and citation omitted); *Hipp v. Liberty Nat'l Life Ins. Co.* (11th Cir. 2001) 252 F3d 1208, 1216]

- 1) [19:795.16] **Employees “similarly situated”:** See ¶19:796.1 ff.

►[19:795.17] **PRACTICE POINTER:** A significant disadvantage to collective actions under the FLSA is that many affected employees decline to “*opt in*” because they fear losing their jobs. Opt-out class actions under state law often have a better participation rate.

[19:795.18-795.19] Reserved.

- (2) [19:795.20] **Claims for reimbursement of work-related expenses (Lab.C. §2802(a)):** A class action may be based on an employer’s failure to reimburse “necessary expenditures . . . incurred by the employee in direct consequence of the discharge of his or her duties” (Lab.C. §2802(a); see ¶3:2 ff.). [*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 CA4th 1, 12, 64 CR3d 327, 337-339—claim that shipper improperly classified 209 delivery truck drivers as independent contractors whom it failed to reimburse for work-related expenses properly brought as class action; see *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 C4th 554, 576, 67 CR3d 468, 484—claims by outside sales reps who were not reimbursed for their automobile expenses]

(3) [19:796] **Age discrimination claims:** The Age Discrimination in Employment Act (ADEA) incorporates the FLSA's enforcement provisions, including the "opt-in" class action discussed above (see ¶8:617). Therefore, plaintiffs wishing to sue as a class under the ADEA must utilize the statutory opt-in mechanism, rather than the opt-out class procedure provided under FRCP 23. [*Hipp v. Liberty Nat'l Life Ins. Co.*, supra, 252 F3d at 1216]

(a) [19:796.1] **Plaintiffs "similarly situated":** To maintain an opt-in class action, plaintiffs must demonstrate that they are "similarly situated." [29 USC §216(b)]

The transactions or occurrences on which their claims are based need not be identical; and there need be only *some* common questions of law or fact. This is a "less stringent" standard than required for party joinder under FRCP 20 or a class action under FRCP 23. [*Hipp v. Liberty Nat'l Life Ins. Co.*, supra, 252 F3d at 1214]

(b) [19:796.2] **Procedure:** Several courts have used a two-tiered approach in making the "similarly situated" determination:

- The court makes an initial determination based on the pleadings and any affidavits filed. This usually results in "conditional certification" so that the other employees are given notice and the opportunity to "opt in."
- Later, after the close of discovery, the court revisits the issue of whether the "opt-in" plaintiffs are similarly situated. A stricter standard is applied before certifying the class for trial. Courts consider disparities in the factual and employment settings of individual plaintiffs, whether different defenses exist as to individual plaintiffs, and fairness and procedural considerations.

If the claimants are *not* similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. [*Hipp v. Liberty Nat'l Life Ins. Co.*, supra, 252 F3d at 1218-1219; *Thiessen v. General Electric Capital Corp.* (10th Cir 2001) 267 F3d 1095, 1102]

(c) [19:796.3] **"Piggybacking" administrative exhaustion:** Normally, each employee who wishes to sue for age discrimination must first file a discrimination charge with the EEOC. However, opt-

in plaintiffs who have not filed their own EEOC charges may “piggyback” their claims onto the claim of a representative plaintiff who has filed a timely charge if:

- the representative plaintiff’s EEOC charge is not invalid; and
- all claims arise out of similar discriminatory treatment within the time allowed for filing EEOC charges (i.e., 180 or 300 days before the representative charge was filed). [*Hipp v. Liberty Nat’l Life Ins. Co.*, supra, 252 F3d at 1225—plaintiffs with claims arising after representative charge was filed must file their own EEOC charges]

*Cross-refer:* “Piggybacking” on an EEOC charge is discussed further at ¶16:28.

- (4) [19:797] **Racial discrimination claims:** A class action to *enjoin* racially discriminatory employment practices may be proper under FRCP 23(b)(2) (¶19:773).

But a Rule 23(b)(2) class may not be proper where, in addition to claims for injunctive or declaratory relief, the class members assert *individualized damage claims* that “predominate”; see ¶19:774.

- (a) [19:797.1] **Commonality may exist although class members’ circumstances differ:** A proposed class alleging employment discrimination may consist of members whose factual situations differ. It is enough that they seek a common legal remedy for a common wrong. [See *Parra v. Bashas’, Inc.* (9th Cir. 2008) 536 F3d 975, 978—pay disparities among class members did not prevent certification of class on racial discrimination claim]

- (5) [19:798] **Gender discrimination/harassment claims:** Class actions may be based on gender discrimination or hostile environment harassment claims affecting women in general at a particular worksite or company-wide. [See *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F3d 1168, 1184; *Jenson v. Eveleth Taconite Co.* (D MN 1991) 139 FRD 657, 662-667, aff’d (8th Cir. 1997) 130 F3d 1287, 1290-1291—court found discrimination manifested against women in hiring practices as well as in treatment on the job]

[19:799-800] *Reserved.*

- (6) [19:801] **Disability claims:** In race and gender discrimination cases (above), the identification of class claims is often straightforward. But where the discrimi-

nation claim is based on an employee's physical or mental disability, it may be difficult to identify and certify the class.

Typical issues in disability discrimination cases—e.g., “substantial impairment” of “major life activity” and “reasonable accommodation”—require individualized determinations that normally prevent resolution on a class-wide basis. [*Chandler v. City of Dallas* (5th Cir. 1993) 2 F3d 1385, 1396; *McCullah v. Southern Calif. Gas Co.* (2000) 82 CA4th 495, 500, 98 CR2d 208, 212-213]

- [19:802] A proposed class action challenging the bidding system Employer used for vacant positions could not be maintained on behalf of all persons who had become disabled while employed by Employer. The issue of reasonable accommodation involved individualized, fact-driven determinations ill-suited for class treatment, and plaintiff's claim was not typical of claims of class members. [*McCullah v. Southern Calif. Gas Co.*, supra, 82 CA4th at 501, 98 CR2d at 213]

- (7) [19:803] **Pattern-or-practice discrimination claims:** Pattern-or-practice discrimination cases focus on whether the employer had a policy or practice of discrimination rather than whether any individual decision was discriminatory. [See *Franks v. Bowman Transp. Co., Inc.* (1976) 424 US 747, 772, 96 S.Ct. 1251, 1268—racial discrimination in hiring pattern or practice; *Thieszen v. General Elec. Capital Corp.* (10th Cir. 2001) 267 F3d 1095, 1105; *Robinson v. Metro-North Commuter R.R. Co.* (2nd Cir. 2001) 267 F3d 147, 159]

(a) **Application**

- [19:803.1] A class action may be based on allegations that the employer “engaged in a pattern and practice of discriminating against women in awarding work assignments and skilled positions, in transfers, in promotions, and in making reasonable accommodations for injured plaintiffs, all due to their gender.” [See *Hoffman v. Honda of America Mfg., Inc.* (SD OH 1999) 191 FRD 530, 531]
- [19:803.2] Three groups of women alleged sex discrimination in transfer, promotion and training. The discrimination was allegedly accomplished in the same general manner in each case. Class certification was proper because a general policy and practice of discrimination (standardless subjective evaluation sys-

tem) affected all class members substantially equally. [*Rossini v. Ogilvy & Mather, Inc.* (2nd Cir. 1986) 798 F2d 590, 598]

[19:803.3] Reserved.

- [19:803.4] *Compare*: Pattern-or-practice class actions have been *rejected under the ADA* because the ADA protects only disabled individuals who are "qualified" (able to perform the job with reasonable accommodation), and this cannot always be determined on a class-wide basis. [*Hohider v. United Parcel Service, Inc.* (3rd Cir. 2009) 574 F3d 169, 186—employer allegedly had "pattern or practice" of not allowing workers who had taken medical leave to return to work if they had medical restrictions]

(b) [19:803.5] **Stages of trial:** These cases are typically tried in two or more stages:

- 1) [19:803.6] **Liability stage:** During the first stage, plaintiffs' burden is to produce evidence showing that a policy, pattern, or practice of intentional discrimination against the protected group *existed*. Plaintiffs need not prove that every employee in the group was in fact a victim of the policy. [*International Brotherhood of Teamsters v. United States* (1977) 431 US 324, 360-361, 97 S.Ct. 1843, 1867-1868; *Thiessen v. General Elec. Capital Corp.*, supra, 267 F3d at 1105; *Robinson v. Metro-North Commuter R.R. Co.*, supra, 267 F3d at 159]

- 2) [19:803.7] **Remedial stage:** If plaintiffs meet this burden, the court can award prospective equitable relief. [*International Brotherhood of Teamsters v. United States*, supra, 431 US at 360-361, 97 S.Ct. at 1867-1868; *Robinson v. Metro-North Commuter R.R. Co.*, supra, 267 F3d at 159]

If the victims of the discriminatory practice also seek individual relief, the case moves into the second or subsequent stages to determine whether each individual plaintiff was a victim of the discriminatory practice. [*International Brotherhood of Teamsters v. United States*, supra, 431 US at 361, 97 S.Ct. at 1868; *Thiessen v. General Elec. Capital Corp.*, supra, 267 F3d at 1106]

[19:803.8-803.9] Reserved.

- (c) [19:803.10] **Proof:** Pattern and practice evidence may consist of statistical evidence, sampling evidence, expert testimony and “other indicators of a defendant’s centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.” [*Sav-on Drug Stores, Inc. v. Sup.Ct. (Rocher)* (2004) 34 C4th 319, 333, 17 CR3d 906, 917; see *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F3d 1168, 1179-1180]

Such evidence does *not* dispense with the proof of damages, but rather offers a “different method of proof.” [*Sav-on Drug Stores, Inc. v. Sup.Ct. (Rocher)*, supra, 34 C4th at 333, 17 CR3d at 918]

- (d) [19:803.11] **Presumption:** Importantly, by having prevailed in the liability stage of trial, the individual employees reap a significant advantage for purposes of the remedial stage: They are entitled to a *presumption* that the employer discriminated against them. The burden is then on the employer to show justification for whatever action was taken against each class member. [*Robinson v. Metro-North Commuter R.R. Co.*, supra, 267 F3d at 159; *Thiessen v. General Elec. Capital Corp.*, supra, 267 F3d at 1106]

- (8) [19:804] **Disparate impact claims:** Plaintiffs must establish by a preponderance of the evidence that the employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. To make this showing, plaintiff's evidence must:
- identify a policy or practice;
  - demonstrate that a disparity exists; and
  - establish a causal relationship between the two.  
[*Robinson v. Metro-North Commuter R.R. Co.*, supra, 267 F3d at 160]

Comment: Note that proof of discriminatory *intent* is *not* required. This makes it easier to certify class actions in disparate impact cases than in disparate *treatment* cases.

- (9) [19:805] **Deterred applicants:** An employer's company-wide, systematic policy of discrimination (“Whites-only”) “can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.” Thus, deterred applicants are not precluded from seeking relief through a class action based on such discrimination. [*Alch v. Sup.Ct. (Time Warner Entertainment)*

(2004) 122 CA4th 339, 385, 19 CR3d 29, 64 (internal quotes omitted)]

- (a) [19:805.1] **Available remedies?** Deterred applicants may be entitled to injunctive and perhaps other classwide relief. To obtain individual relief, however, a deterred applicant would have the “not always easy burden of proving he or she” (i) *would have applied* for a job during the limitations period had it not been for the employer’s discriminatory practices, and (ii) *would have been discriminatory rejected* had he or she applied. [*Alch v. Sup. Ct. (Time Warner Entertainment)*, supra, 122 CA4th at 383, 19 CR3d at 62]

[19:806-809] *Reserved.*

2. [19:810] **Unfair Competition Actions:** Under California law, plaintiffs may sue for “unfair competition,” which is defined to include *any unlawful business practice* (i.e., any violation of federal or California law). [Bus. & Prof.C. §17200]

Violation of any applicable employment law may give rise to a §17200 action. For example:

- Failure to pay overtime wages. [*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 C4th 163, 169, 96 CR2d 518, 522]
- Improper deductions from wages. [*Hudgins v. Nieman Marcus Group, Inc.* (1995) 34 CA4th 1109, 1126, 41 CR2d 46, 57]
- Violation of state minimum wage laws. [*Bureerong v. Uvawas* (CD CA 1996) 922 F.Supp. 1450, 1477]
- Violation of age discrimination laws. [*Herr v. Nestle U.S.A., Inc.* (2003) 109 CA4th 779, 789, 135 CR2d 477, 484]

*Cross-refer:* See further discussion in Ch. 14 (*Unfair Competition*) at ¶14:486 ff.

- a. [19:811] **Standing to sue:** A private person must have “suffered injury in fact” and “lost money or property as a result of such unfair competition” to have standing to sue under §17200. The action may *not* be maintained on behalf of other persons *unless class action requirements* are met. [See Bus. & Prof.C. §17204]

*Compare—prior law:* Before the statute was amended in 2004, a §17200 action could be brought by “any person acting for the interests of itself, its members *or the general public*.” There was no requirement that the plaintiff have suffered economic injury. [See *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 C4th 223, 232, 46 CR3d 57, 64—amendment applies to cases pending when it took effect]

- b. [19:812] **Class action rules apply:** A private individual who satisfies the standing requirements (above) may bring an action on behalf of others. Any such action must comply with the rules governing class actions (CCP §382). [Bus. & Prof.C. §§17203, 17204]

*Compare—prior law:* Before the 2004 amendments to the unfair competition statutes, plaintiff could bring a “representative action” (a “non-class class”), which was subject to less stringent requirements than a class action. [See Stern, *Bus. & Prof.C. §17200 Practice* (TRG), Ch. 7]

- (1) [19:812.1] **Standing of representative sufficient:**

As in a class action, only the class representatives in a UCL action must meet the standing requirement of having “suffered injury in fact” and having “lost money or property as a result of” the defendant’s unfair competition. [*In re Tobacco II Cases* (2009) 46 C4th 298, 321, 93 CR3d 559, 577]

- (a) [19:812.2] **Misrepresentation claims:** In a UCL action based on claims of fraud or misrepresentation, plaintiffs must allege that they actually relied on, and were injured by defendant’s misrepresentations. [See *In re Tobacco II Cases*, supra, 46 C4th at 328, 93 CR3d at 583 (not an employment case)]

[19:812.3-812.4] *Reserved.*

- c. [19:812.5] **Statute of limitations:** A four-year statute of limitations applies to §17200 actions even when based on violations of an underlying statute with a shorter statute of limitations. [Bus. & Prof.C. §17208; see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 C4th 163, 178-179, 96 CR2d 518, 529]

- d. [19:813] **Limited remedies:** However, the remedies available in a §17200 action are limited:

- (1) [19:814] **No damages:** Courts may grant *injunctions* and *restitutary relief*, but may *not* award damages (compensatory or punitive). [See Bus. & Prof.C. §17203]

- [19:815] *Backpay* the employer owes may be recovered as *restitution* in an unfair competition action under §17200. [*Cortez v. Purolator Air Filtration Products Co.*, supra, 23 C4th at 173, 96 CR2d at 524-525—recovery of overtime wages unlawfully withheld from over 175 employees]

- (2) [19:816] **No disgorgement of gain:** The trial court may not order disgorgement of all benefits defendant

may have received from its unlawful practice (e.g., failing to pay overtime wages). It may only order restitution to persons from whom money or property has been unfairly or unlawfully obtained. [*Cortez v. Purolator Air Filtration Products Co.*, supra, 23 C4th at 172, 96 CR2d at 524; see also *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 CA4th 997, 1016, 36 CR3d 592, 604-605—nonrestitutionary disgorgement of profits also not available]

- (3) [19:817] **No “fluid recovery”:** In a class action, plaintiffs may obtain a “fluid recovery”; i.e., defendant’s total liability is paid into a fund, against which individual class members may make claims, the residue distributable pursuant to court order. However, restitution in the form of disgorgement into a “fluid recovery fund” is *not* an available remedy in a §17200 action. [*Kraus v. Trinity Management Services, Inc.* (2000) 23 C4th 116, 137, 96 CR2d 485, 500]
- (a) [19:818] **Effect:** The consequence of this limitation is that plaintiffs in a §17200 action may obtain restitution *only for themselves*, not for the public at large; whereas in a class action, the recovery is for *all persons harmed* (except those who affirmatively “opt out”). Thus, to obtain full relief for an unlawful practice, a class action must be filed.
- (4) [19:819] **No jury trial:** Because only equitable relief may be granted, a §17200 claim may not be tried to a jury. [*Beasley v. Wells Fargo Bank* (1991) 235 CA3d 1383, 1392, 1 CR2d 446, 450]

This is so even where:

- the §17200 claim is based on a statutory violation that would otherwise be jury triable (e.g., violation of wage and hour laws (Lab.C. §1194(a))); and
- the employer raises a legal issue as a defense (e.g., whether plaintiffs are exempt from overtime laws). [*Hodge v. Sup.Ct. (AON Ins. Services)* (2006) 145 CA4th 278, 284-285, 51 CR3d 519, 523-524]

 [19:819.1] **PRACTICE POINTER FOR PLAINTIFFS:** Pursuing a §17200 claim should be considered where plaintiffs are willing to accept equitable remedies only (no damages), and for tactical reasons want their claims tried to a court and not a jury.

- e. [19:820] **Equitable defenses:** Because an unfair competition action is equitable in nature, “what would otherwise be equitable defenses may be considered by the court when the court exercises its discretion over which, if any, remedies

authorized by §17203 should be awarded.” [Cortez v. Purolator Air Filtration Products Co., supra, 23 C4th at 179-180, 96 CR2d at 530]

Thus, defendants may be able to assert matters such as *unclean hands, laches and equitable estoppel* in addition to any defenses they can assert to the underlying statutory violation.

[19:821-829] Reserved.

3. [19:830] **Intervention:** Other employees whose rights may be affected by the relief plaintiff seeks may seek leave to intervene in the action. [CCP §387(a); FRCP 24]

Leave to intervene may be granted where the applicant “claims an interest relating to the property or transaction which is the subject of the action . . .” [FRCP 24(a)(2); see CCP §387—“interest in the matter in litigation”]

- [19:830.1] White, male employees had an interest in their employment status and seniority rights sufficient to intervene *to contest a proposed settlement* of a Title VII action for race and gender discrimination, where the proposed settlement provided a remedy that *might* result in the white, male employees’ loss of relative seniority. It need not be proved with certainty that particular employees would lose seniority rights. [Brennan v. N. Y.C. Bd. of Ed. (2nd Cir. 2001) 260 F3d 123, 131; see also Edwards v. City of Houston (5th Cir. 1996) 78 F3d 983, 1004 (en banc)—objectors’ interest in equal access to promotion system and promotion opportunities justifies intervention]

*Cross-refer:*

- The rules governing intervention in California state courts are discussed in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 2.
  - The rules governing intervention in federal courts are discussed in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 7.
- a. [19:831] **Consent decree may be binding on nonparties:** A settlement or judgment ordinarily does not affect claims of nonparties even if they had a direct interest in the lawsuit and could have intervened but chose not to do so. [See Martin v. Wilks (1989) 490 US 755, 762-763, 109 S.Ct. 2180, 2185—consent decree based on settlement between City and black firefighters in Title VII race discrimination case did not bar subsequent reverse discrimination claims by white firefighters who had not been joined as parties to the original action]

However, employment practices *authorized by a consent judgment* in employment discrimination cases in federal

court may not be challenged by nonparties who had *notice* of the case and a reasonable opportunity to object to the judgment; or whose interests were adequately represented by someone who had challenged the judgment on the same grounds. [See 42 USC §2000e-2(n)(1)(B) (as amended by Civil Rights Act of 1991, §108 (overruling *Martin v. Wilks*, above, on this point))]

4. [19:832] **Bifurcation:** A federal court may order a separate trial of any claim or issue to further convenience, expedite the proceedings, avoid prejudice or enhance economy. [FRCP 42(b); see also Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 16]

Similarly, a California court may order certain issues tried before others when doing so would promote the convenience of witnesses, the ends of justice or the economy or efficiency of handling the litigation. [CCP §598; see also Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 12 Part I]

The procedure is not restricted to dividing a case into two trials; trifurcation or even multifurcation can be ordered. [See *Coughlin v. Owens-Illinois, Inc.* (1993) 49 CA4th 1879, 1885-1886, 27 CR2d 214, 217 (detailing steps in trifurcated proceedings)]

- a. [19:833] **Purpose:** The usual purposes of bifurcation are to avoid wasting time and money, or to avoid risks of confusion or prejudice, where one issue may be dispositive (e.g., to resolve liability before presenting evidence concerning damages). [See *Gatto v. County of Sonoma* (2002) 98 CA4th 744, 751, 120 CR2d 550, 554-555—bifurcation to try statute of limitations issue first]

Bifurcation is inappropriate, however, where the issues of liability and damages are too closely interwoven to separate without confusion. [See *Miller v. Fairchild Indus., Inc.* (9th Cir. 1989) 885 F2d 498, 511]

- b. **Application**

- [19:834] *Illegal immigration status:* Bifurcation on the issues of liability and remedies was appropriate where there was a “concern that causes of action under Title VII not be dismissed or lost through intimidation on account of the existence of particular remedies.” [See *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F3d 1057, 1069—plaintiffs’ illegal immigration status could affect certain statutory remedies but was irrelevant to resolution of Title VII liability issue; see discussion at ¶11:1224 ff.]
- [19:835] *Integrated enterprise test:* The “integrated enterprise test” is used to determine if employees of several business entities can be regarded as employed

by a single employer; e.g., for purpose of the 15-employee minimum under Title VII (see ¶7:48), or to render one or all of them liable for employment discrimination or wrongful termination. Factors to consider include interrelation of operations, common management, common ownership and financial controls, and centralized control of labor relations. This test is designed to further Congress's intent to broadly construe Title VII, including its definition of "employer." [See *Laird v. Capital Cities/ABC, Inc.* (1998) 68 CA4th 727, 737-738, 80 CR2d 454, 460-461; *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F2d 1211, 1213]

➡ [19:835.1] **PRACTICE POINTER:** Where the number of persons employed by each entity is less than 15, defense counsel may ask the court to *bifurcate* the trial to determine whether there is an "integrated enterprise." Doing so permits the jury to resolve a mundane yet dispositive question before becoming inflamed by evidence concerning allegedly unlawful employment practices.

5. [19:836] **Motions to Address Plaintiff's Death:** Plaintiff's death before judgment in a pending lawsuit precludes recovery of damages for emotional distress or pain and suffering; but it does not affect the right to recover other predeath loss or damage, such as lost wages, medical expenses and punitive damages. [CCP §§377.21, 377.31, 377.34, 669; see *County of Los Angeles v. Sup.Ct. (Schonert)* (1999) 21 C4th 292, 303-304, 87 CR2d 441, 449]
  - *Motion to strike:* If plaintiff's death occurs very early in the state court litigation (before a responsive pleading is due), defendant may *move to strike* the appropriate portions of the complaint seeking nonrecoverable damages. [See CCP §§435-437]
  - *Motion to exclude evidence at trial:* If the death occurs later in the litigation, defendant should file a *motion in limine* (¶19:900) to exclude evidence of the nonrecoverable damages. [See *Macy's Calif., Inc. v. Sup.Ct. (Tussy-Garber)* (1995) 41 CA4th 744, 748, 48 CR2d 496, 498, fn. 2; see *DeCastro West Chodorow & Burns, Inc. v. Sup.Ct. (Initial Amalgamation, Ltd.)* (1996) 47 CA4th 410, 421-422, 54 CR2d 792, 800—motion for summary judgment or for summary adjudication will *not* lie to challenge recovery of single item of compensatory damages]
  - a. [19:836.1] **Motion to substitute decedent's executor or administrator as plaintiff:** The court may make appropriate orders substituting decedent's personal representative

or successor in interest as plaintiff. [See CCP §337.33; FRCP 25(a)]

*Cross-refer:* Procedures for substitution of parties are discussed in:

- Weil & Brown, *Calif. Prac. Guide: Civil Procedure Before Trial* (TRG), Ch. 2; and
- Schwarzer, Tashima & Wagstaffe, *Calif. Prac. Guide: Federal Civil Procedure Before Trial* (TRG), Ch. 7

[19:837] Reserved.

## 6. Statutory Offers to Compromise and Offers of Judgment

- a. [19:838] **State court actions:** In state court actions (and in contractual arbitrations), either party may tender to the opponent a statutory offer to compromise the lawsuit. [CCP §998]

(1) [19:838.1] **Penalties for defendant's rejection of plaintiff's offer:** If defendant rejects plaintiff's offer and fails to obtain a more favorable result at trial (or arbitration), the court *may* (discretionary) order defendant to pay reasonable postoffer fees for plaintiff's expert witnesses both in preparation for and during trial (or arbitration). In addition, in actions for "personal injury" (which may include certain employment claims, ¶17:737 *ff.*), plaintiff is entitled to 10% interest on the judgment from the date of the offer. [CCP §998(d); Civ.C. §3291]

(2) [19:838.2] **Penalties for plaintiff's rejection of defendant's offer:** If plaintiff rejects defendant's offer and fails to obtain a more favorable result at trial (or arbitration), plaintiff cannot recover court costs (including attorney fees when authorized by statute or contract) after the offer was made and must pay defendant's postoffer court costs. Also, the court *may* order plaintiff to pay defendant's expert witness fees both for preparation and during trial (or arbitration). [CCP §998(c),(e); see *Seever v. Copley Press, Inc.* (2006) 141 CA4th 1550, 1562, 47 CR3d 206, 214—court must take into account parties' economic resources in awarding expert witness fees under §998 to avoid pressuring less affluent parties to accept unreasonable offers]

(a) [19:838.3] **Defendant's attorney fees as "costs"?** CCP §998's provisions for awarding "costs" to defendant do *not* change the requirements for a statutory fee award. I.e., regardless of a CCP §998 settlement offer, a prevailing defendant is entitled to attorney fees under the FEHA only if the action is deemed *unreasonable, frivolous or meritless*. [*Mangano v. Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526, 531]

- (3) [19:838.4] **Acceptance of offer silent as to fees no bar to statutory fee award:** Where a CCP §998 offer is accepted, and the offer is silent as to costs and fees, statutory attorney fees are recoverable *in addition* to the amount of the accepted offer: “A section 998 offer to compromise excludes fees only if it says so expressly.” *[Engle v. Copenbarger & Copenbarger (2007) 157 CA4th 165, 169, 68 CR3d 461, 464]*

*Cross-refer:* CCP §998 is discussed in detail in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 12 Part II; and Haning, Flahavan & Kelly, *Cal. Prac. Guide: Personal Injury* (TRG), Ch. 4.

- b. [19:838.5] **Federal court actions (FRCP 68):** In federal court actions, *defendant* may make a Rule 68 offer to allow judgment to be taken. If plaintiff rejects the offer and obtains a judgment for less than the offer, plaintiff cannot recover court costs and must pay defendant’s postoffer costs, including certain statutory attorney fees recoverable as costs. (But Rule 68 has no effect if the verdict is for *defendant*.)

*Cross-refer:* FRCP 68 offers are discussed in detail in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 15.

- (1) [19:838.6] **Compare—diversity actions:** Rule 68 does not preclude plaintiffs in diversity actions from making settlement demands under state offer of judgment rules; i.e., CCP §998 (above) is deemed “substantive” for *Erie* doctrine purposes and therefore applies in federal diversity actions. [See *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.* (7th Cir. 1995) 60 F3d 305, 307; *MRO Communications, Inc. v. American Tel. & Tel. Co.* (9th Cir. 1999) 197 F3d 1276, 1281]

[19:838.7-838.9] *Reserved.*

► [19:838.10] **PRACTICE POINTERS FOR PLAINTIFFS:**

Plaintiffs asserting *statutory claims* gain no real advantage by tendering a CCP §998 offer where the statutes on which the claims are based already authorize a fees and costs award if plaintiffs prevail at trial (see ¶17:570 ff., 17:600 ff.).

On the other hand, plaintiffs asserting *common law* claims may enhance their ability to recover expert witness fees, and perhaps even prejudgment interest, if the defense rejects their CCP §998 offer.

► [19:838.11] **PRACTICE POINTERS FOR DEFENDANTS:** For defendants in *statutory* actions that provide for costs and attorney fees awards, the real advantage of

these offers is the potential to reduce plaintiff's attorney fees award. Where plaintiff rejects defendant's offer and obtains a judgment that is not more favorable, the court is unlikely to award such a prevailing plaintiff the full measure of attorney fees or expert witness fees. [See *Seever v. Copley Press, Inc.* (2006) 141 CA4th 1550, 1560-1562, 47 CR3d 206, 213-214—"appropriate and indeed necessary for trial courts to 'scale' those awards downward to a figure that will not unduly pressure modest- or low-income plaintiffs into accepting unreasonable offers"; and ¶19:838.2]

Also, where plaintiff recovers less than defendant's offer, the defendant's postoffer costs will be deducted from plaintiff's recovery. This can make a big difference in smaller cases when significant litigation costs have been expended.

One significant drawback of tendering an offer under either CCP §998 or FRCP 68 is that, if plaintiff accepts the offer, a *judgment* will be entered against the defendants.

[19:839] Reserved.

## I. RIGHT TO JURY TRIAL

[19:840] The right to jury trial in employment litigation differs somewhat under federal and state rules.

*Compare—timeliness of jury demand:* The federal and state rules also differ on the timeliness of a jury demand and the likelihood of relief from waiver; see ¶19:495 ff.

1. [19:841] **Federal Courts:** The right to jury trial in federal courts is determined by federal law, even in diversity cases.
  - a. [19:842] **U.S. Constitution:** The Seventh Amendment "preserves" the right to trial by jury in "suits at common law." [U.S. Const., 7th Amend.]
    - (1) [19:843] **"Suits at common law":** This phrase means actions historically tried in "law" courts as distinguished from proceedings in "equity," in which plaintiff seeks legal relief (money damages) as opposed to equitable relief (injunctions, declaratory relief, etc.). [*Tull v. United States* (1987) 481 US 412, 417, 107 S.Ct. 1831, 1835]
  - b. [19:844] **Statutes:** The Seventh Amendment is not limited to actions at common law. A right to jury trial may attach to legal rights created by statute: "The Seventh Amendment requires a jury trial on demand whenever the statute creates legal rights and remedies that are enforceable in an action for damages in the ordinary courts of law." [*Curtis v. Loether* (1974) 415 US 189, 194, 94 S.Ct. 1005, 1008]

In determining whether a jury right exists, courts consider:

- whether the statutory claim is *analogous* to claims historically tried to juries at common law; and
  - (more importantly) *whether the relief sought is legal or equitable* in nature. [*Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry* (1990) 494 US 558, 565, 110 S.Ct. 1339, 1345]
- c. [19:845] **Jury right determined on issue-by-issue basis:** The Seventh Amendment right to jury trial depends on the nature of the issue being tried, rather than the character of the overall action. The relative importance of the issues is immaterial. *Even “incidental” legal issues are jury triable.* [*Dairy Queen, Inc. v. Wood* (1962) 369 US 469, 477, 82 S.Ct. 894, 899-900]

- (1) [19:846] **Where legal and equitable issues tried together:** When legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both. I.e., any common issues of fact must be *decided first by the jury* before the judge resolves the equitable issues. [*Dairy Queen, Inc. v. Wood*, *supra*, 369 US at 470-473, 82 S.Ct. at 896-897]
- [19:846.1] For example, when a Title VII pattern-or-practice discrimination claim seeking compensatory damages is joined with a disparate impact claim seeking equitable relief, the pattern-or-practice claim must be tried first to a jury if there are common factual issues necessary to the resolution of each claim. [*Robinson v. Metro-North Commuter R.R. Co.* (2nd Cir. 2001) 267 F3d 147, 170]

 [19:846.2] **PRACTICE POINTER:** If there are both legal and equitable issues to be tried together, be sure to clarify this before trial commences. Bring the matter to the attention of the trial judge, either in your final pretrial conference order or by way of an *in limine* motion, so that the judge will be mindful of the issues he or she will be required to resolve at the end of the jury trial.

#### d. Application

- (1) [19:847] **Backpay claims:** Where a backpay award is *discretionary*, the claim is equitable in nature and neither party may demand a jury trial. But where a backpay award is *mandatory* upon a finding of wrongdoing, a jury right is recognized. [See *Curtis v. Loether* (1974) 415 US 189, 197, 94 S.Ct. 1005, 1010]

- [19:848] *Title VII*: There is no right to have a jury determine the amount of backpay in a Title VII action. Backpay remains an equitable remedy to be awarded by the court in its discretion (see ¶17:55). [*Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1069; compare *Broadnax v. City of New Haven* (2nd Cir. 2005) 415 F3d 265, 270—parties' may *consent* to jury determination of backpay, and consent implied from failure to object when issue submitted to jury]

*Comment:* Even if not required, some judges submit the issue for jury determination.

- [19:848.1] *Compare—emotional distress and punitive damages*: Any party may demand a jury trial on claims of intentional employment discrimination and associated emotional distress and punitive damages. [See 42 USC §1981a(c)(1)]
- [19:848.2] *Compare—integrated enterprise?* It is unclear whether a right to jury trial exists on whether related business entities are operating as an “integrated enterprise,” in determining the number of employees involved for Title VII purposes (see ¶7:47 ff.).

*Comment:* Arguably, the question is analogous to the equitable alter ego doctrine, which is *not* jury triable. [See *Dow Jones Co., Inc. v. Avenel* (1984) 151 CA3d 144, 147-148, 198 CR 457, 460]

- [19:849] *FLSA and EPA*: Backpay claims under the Fair Labor Standards Act (FLSA) for wage and hour violations are *mandatory* and therefore a right to jury trial is recognized. The same is true under the Equal Pay Act (EPA), which is part of the FLSA. [See *Lorillard v. Pons* (1978) 434 US 575, 580, 98 S.Ct. 866, 870, fn. 7; *Altman v. Stevens Fashion Fabrics* (ND CA 1977) 441 F.Supp. 1318, 1322—EPA claim]
- [19:850] *Compare—double backpay as liquidated damages*: But an award of up to double backpay as liquidated damages for willful FLSA and EPA violations is *discretionary* (see ¶17:136.10) and therefore triable by the court without a jury. [*McClanahan v. Mathews* (6th Cir. 1971) 440 F2d 320, 322; *Altman v. Stevens Fashion Fabrics*, *supra*, 441 F.Supp. at 1323]

- [19:851] *Compare—backpay incidental to injunctive relief*: Where a complaint seeks to enjoin wage and hour violations and to recover backpay owing for past violations, the backpay claim may be treated as “an equitable claim for . . . restitutive injunctive relief” awardable by the court without a jury. [*Reich v. Tiller Helicopter Services, Inc.* (5th Cir. 1993) 8 F3d 1018, 1034]
- [19:852] *ADEA*: The Age Discrimination in Employment Act (ADEA) expressly provides that factual issues in actions for amounts owing for ADEA violations are jury triable *regardless* of whether equitable relief is also sought. [29 USC §626(c)(2); see also *Lorillard v. Pons* (1978) 434 US 575, 580, 98 S.Ct. 866, 870—backpay claim under ADEA jury triable because ADEA incorporates FLSA procedures and remedies]
  - [19:853] *Compare—liquidated damages*: As under the FLSA, liquidated damage awards for ADEA violations are discretionary and hence jury triable. [*Chilton v. National Cash Register Co.* (SD OH 1974) 370 F.Supp. 660, 665-666]
- [19:854] *FMLA*: Although the Family and Medical Leave Act (FMLA) does not expressly provide a right to jury trial, its legislative history “reveal(s) Congress’s intent to create a right to a jury trial in the FMLA.” [*Frizzell v. Southwest Motor Freight* (6th Cir. 1998) 154 F3d 641, 643]
- [19:855] *Rehabilitation Act*? Federal courts are split regarding whether claims for backpay under §504 of the Rehabilitation Act are jury triable. [See *Lutz v. Glendale Union High School*, *supra*, 403 F3d at 1069—Rehabilitation Act’s incorporation of Title VII’s backpay remedy (¶19:848) precludes jury trial; *Waldrop v. Southern Co. Services, Inc.* (11th Cir. 1994) 24 F3d 152, 159—backpay part of compensatory damages and not “in kind” restitution]
- [19:856] *WARN Act*: The WARN Act does not specifically provide a right to jury trial and courts are divided on whether such a right exists. See *discussion at ¶6:742*.
- [19:857] *ADA*: Because the Americans with Disabilities Act (ADA) incorporates the backpay remedies under Title VII (see ¶19:848), there is no right to have a jury determine backpay in ADA

cases. [*Lutz v. Glendale Union High School*, supra, 403 F3d at 1067-1069]

[19:858-859] Reserved.

- (2) [19:860] **Reinstatement:** Reinstatement is clearly a form of equitable relief; therefore, a court and not a jury determines a claim for reinstatement: “*(T)he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.” [42 USC §2000e-5(g)(1) (emphasis added); see *Ramos v. Roche Products, Inc.* (1st Cir. 1991) 936 F2d 43, 49-50]
- (3) [19:861] **Front pay:** Defendant employers may argue that a front pay award under Title VII is an alternative to the equitable remedy of reinstatement (see ¶17:221) and therefore a form of discretionary equitable relief awarded by the court, not a jury. [*EEOC v. W&O, Inc.* (11th Cir. 2000) 213 F3d 600, 615 (collecting cases); see *Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 US 843, 854, 121 S.Ct. 1946, 1952, fn. 3]
- (a) [19:862] **Compare—ADEA claims:** The Age Discrimination in Employment Act (ADEA) provides a right to jury trial on factual issues in any action “*for recovery of amounts owing* as a result of a violation of this chapter, *regardless of whether equitable relief is sought* by any party in such action.” [29 USC §626(c)(2) (emphasis added)]

Courts are split on whether “amounts owing” includes front pay claims under the ADEA:

- [19:863] Several cases hold “amounts owing” means unpaid wages and liquidated damages. “Front pay” is an *equitable* remedy and hence the trial judge must determine both whether an award is appropriate *and the amount* of the award. [*Dominic v. Consolidated Edison Co. of New York, Inc.* (2nd Cir. 1987) 822 F2d 1249, 1257-1258 (emphasis added); *Newhouse v. McCormick & Co., Inc.* (8th Cir. 1997) 110 F3d 635, 643]
- [19:864] However, other cases hold “amounts owing” includes front pay; therefore, although whether to award front pay is decided by the court, the *amount* of the award is a jury question. [*Doyne v. Union Elec. Co.* (8th Cir. 1992)

953 F2d 447, 450-451; *Roush v. KFC Nat'l Management Co.* (6th Cir. 1993) 10 F3d 392, 398; *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1347]

- 1) [19:865] **Comment:** The latter approach can lead to unexpected results; e.g., a judge might find a front pay award appropriate but the jury might conclude the employee could find work immediately and therefore award nothing!
- (4) [19:866] **Compensatory and punitive damages:** A claim for compensatory and punitive damages in employment litigation is jury triable.
  - [19:867] *Title VII:* Title VII expressly provides that any party may demand a jury where plaintiff seeks compensatory or punitive damages for intentional discrimination. [42 USC §1981a(c)(1)(a); see ¶19:848.1]

The amount of damages and all factual issues relating to such claims (e.g., whether employer intentionally discriminated) must be submitted to the jury. [*Allison v. Citgo Petroleum Corp.* (5th Cir. 1998) 151 F3d 402, 422]

- (5) [19:868] **Disparate impact claims:** *Only equitable relief* is authorized in disparate impact cases (42 USC §1981a(c); see ¶7:533.5). Therefore, there is no right to jury trial on such claims. [*Allison v. Citgo Petroleum Corp.*, supra, 151 F3d at 423; *Taylor v. District of Columbia Water & Sewer Auth.* (D DC 2002) 205 FRD 43, 47]

[19:869-874] Reserved.

- e. [19:875] **Compare—advisory juries:** Although a claim or issue is not jury triable, federal courts may empanel an advisory jury to render a verdict that “has the same effect as if trial by jury had been a matter of right.” [FRCP 39(c)]

*Cross-refer:* The right to jury trial in federal courts is discussed further in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 16.

2. [19:876] **State Courts:** The Seventh Amendment to the U.S. Constitution (above), which guarantees a federal right to jury trial in civil cases, does not apply to trial in state courts. [*Jehl v. Southern Pac. Co.* (1967) 66 C2d 821, 827, 59 CR 276, 280]

The California Constitution guarantees the right to a jury trial in civil cases (Cal. Const. Art. I, §16). By statute, that right exists in actions (among others) “for money claimed as due upon con-

tract, or as damages for breach of contract, or for injuries.” [CCP §592]

- a. [19:877] **“Law vs. equity” distinction:** The right to jury trial provided by the California Constitution is the right as it existed at common law when the Constitution was adopted, and thus applies to “a civil action at law, but not in equity.” [*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 C3d 1, 8, 151 CR 323, 326]

CCP §592, above, like the constitutional provision, is historically based and does not expand the jury trial right beyond its common law scope. [*Crouchman v. Sup. Ct. (El Dorado Investors)* (1988) 45 C3d 1167, 1174, 248 CR 626, 629]

- b. [19:878] **“Gist of the action” as test:** Unlike federal law where the right to jury trial is determined on an issue-by-issue basis (¶19:845), the right to jury trial in California depends on the “gist of the action,” which encompasses the relief sought: “The legal or equitable ‘gist’ of the action is ordinarily *determined by the mode of relief* to be afforded.” [*Walton v. Walton* (1995) 31 CA4th 277, 291, 36 CR2d 901, 908 (emphasis added)]

- (1) [19:879] **“Hybrid” actions:** Sometimes, legal and equitable issues are raised in the same cause of action (e.g., employees claim they were defrauded into signing a release and seek to rescind the release and enforce the released claim); or equitable defenses are raised to legal claims. If the legal and equitable issues are *severable*, the judge will decide the equitable issues, while the right to jury trial is preserved for the legal issues. [*Selby Constructors v. McCarthy* (1979) 91 CA3d 517, 526, 154 CR 164, 169]

If the issues are not severable, the right to a jury is determined under the “gist of the action” test (above). Thus, assertion of an equitable defense to a legal claim does not affect the parties’ right to a jury trial on the legal claim, and the court may submit the equitable defense to the jury. [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 CA4th 612, 622, 12 CR2d 741, 746—equitable defense of unclean hands properly submitted to jury because it was intertwined with legal causes of action]

[19:880] *Reserved.*

- c. [19:881] **Alternative, mutually exclusive remedies:** In some cases, plaintiffs may be entitled to *either* legal or equitable relief but not both—e.g., a suit for specific performance of a contract or damages for its breach. Plaintiffs do not jeopardize the right to a jury trial by seeking both remedies in the same complaint. But at some point, plaintiffs

must make an *election of remedies* and the right to jury trial depends on which remedy is chosen. [See *Raedeke v. Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 671, 111 CR 693, 696; *Walton v. Walton*, *supra*, 31 CA4th at 292, 36 CR2d at 908—by electing to proceed on equitable claim, plaintiffs rendered legal claim moot]

- d. [19:882] **Order of trial:** Where both legal and equitable issues or claims are to be tried, the court may order a severance. The court may try the equitable issues first, without a jury. If its determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury. [*Raedeke v. Gibraltar Sav. & Loan Ass'n*, *supra*, 10 C3d at 671, 111 CR at 696]
  - (1) [19:883] **Compare—federal rule:** Federal courts are more rigid in protecting the Seventh Amendment right to jury trial on legal issues. To preserve a party's jury trial right, legal issues generally must be tried by the jury before the equitable issues are tried by the court. [See *Beacon Theatres, Inc. v. Westover* (1959) 359 US 500, 510-511, 79 S.Ct. 948, 956-957]
- e. [19:884] **Application:** California law is far less developed than federal law on the right to jury trial in employment litigation. California courts determine the right to jury by the “*gist of the action*” (i.e., the “mode of relief” sought, ¶19:878).
  - (1) [19:885] **FEHA claims:** Plaintiffs seeking money “damages” in a civil action under the FEHA have a right to trial by jury. [*Camargo v. California Portland Cement Co.* (2001) 86 CA4th 995, 1018, 103 CR2d 841, 855, fn. 7; *Asare v. Hartford Fire Ins. Co.* (1991) 1 CA4th 856, 869, 2 CR2d 452, 459]
    - [19:886] *Backpay and front pay* are treated as elements of “damages” determined by a jury. [See *Cloud v. Casey* (1999) 76 CA4th 895, 909, 90 CR2d 757, 765—plaintiff entitled to prove “the full extent of her *damages* necessary to make her ‘whole,’ *including both back pay and front pay*” (emphasis added)]
    - [19:887] *Compare—federal courts:* Backpay and front pay are *discretionary under Title VII* and determined by the court without a jury; see ¶19:847.
    - [19:888] *Reasonable accommodation of disability:* Where disability discrimination is claimed under the FEHA, the question whether plaintiff is requesting a reasonable accommodation is jury triable. [*Bell v. Wells Fargo Bank, N.A.* (1998) 62 CA4th 1382, 1389, 73 CR2d 354, 358, fn. 6]

- (2) [19:889] **Employment torts:** Common law tort claims against an employer (e.g., *Tameny* claims) are jury triable. [See *Asare v. Hartford Fire Ins. Co.* (1991) 1 CA4th 856, 866, 2 CR2d 452, 457, fn. 4]

[19:890-899] Reserved.

## J. MOTIONS IN LIMINE

[19:900] A party makes a motion in limine “at the threshold” of trial to obtain a ruling excluding inadmissible evidence before trial and thus avoid the necessity of objecting during the course of trial. Its purpose is to “avoid the obviously futile attempt to ‘unring the bell’” when highly prejudicial evidence is offered and then stricken at trial. [*People v. Morris* (1991) 53 C3d 152, 188, 279 CR 720, 739; see *Luce v. United States* (1984) 469 US 38, 40, 105 S.Ct. 460, 462, fn. 2—includes “any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered”].

If the court denies a motion in limine, there generally is *no need to object again during trial*. Once a party has made an objection and the court has made a definitive ruling, the issue is preserved for appeal. [FRE 103; *Burch v. Gombos* (2000) 82 CA4th 352, 360, 98 CR2d 119, 125, fn. 11]

►[19:901] **PRACTICE POINTER:** Identify all potential prejudicial topics, including topics requiring an unnecessary expenditure of trial time, and determine if there is any basis for a motion in limine. Don’t wait until the evidence is offered during trial! A successful motion prevents opposing counsel from referring to prejudicial topics during jury voir dire and opening statement, and sets the stage for potential sanctions (monetary or issue) should opposing counsel violate the court’s in limine ruling. Moreover, even an unsuccessful (but reasonable) motion in limine gives you a chance to “educate the judge” regarding key evidentiary issues. Motions in limine may be particularly useful in determining before trial the *proper limits of expert testimony* proffered by either party.

*Listen carefully* to the court’s ruling on in limine motions. Often, the judge will leave the door open to an offer of proof or objections during trial depending on the evidence received. In such cases, failure to raise the issue again during trial may waive the objection. Also, it is not uncommon for the evidence to come in differently than expected and it never hurts to raise the issue again outside the presence of the jury. The judge might change his or her mind.

Don’t diminish the value and importance of your motions in limine by including unnecessary, wasteful motions, such as a request that the court not allow reference to liability insurance coverage, or that the court not admit inadmissible hearsay.

*Focus on what is important in your case. Don't waste the court's time with boilerplate requests.*

*Cross-refer:* For detailed discussion of motions in limine, see:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 4.
- (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 4.

1. [19:902] **Plaintiff's Motions in Limine:** Plaintiffs may use motions in limine to exclude any kind of evidence that could be objected to at trial as inadmissible or that is subject to discretionary exclusion as unduly prejudicial, including:

a. [19:903] **Irrelevant matters unfavorable to plaintiff:** Evidence of matters unfavorable to plaintiff may be excluded if irrelevant to any issue in the case. [See Ev.C. §350 (only relevant evidence admissible); FRE 402 (same)]

- [19:904] In a sexual harassment case, motions in limine were properly granted concerning plaintiff's:
  - viewing X-rated videotapes with her husband;
  - abortions;
  - sexual conduct with persons other than the defendants charged with harassment. [*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 CA4th 397, 410-411, 27 CR2d 457, 463]

- [19:905] Evidence of plaintiff's sexual preferences and conduct was properly excluded in a wrongful discharge suit where it was totally irrelevant to his termination. [*McLain v. Great American Ins. Cos.* (1989) 208 CA3d 1476, 1487, 256 CR 863, 870—defendant admitted it could not show that plaintiff's sexual behavior contributed to his discharge]

[19:906-909] Reserved.

b. [19:910] **Relevant matters highly prejudicial to plaintiff:** A motion in limine can be used to ask the court to exercise its discretion to exclude even relevant evidence if its "probative value is substantially outweighed" by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time. [Ev.C. §352, FRE 403]

[19:911-914] Reserved.

2. [19:915] **Defendant's Motions in Limine:** Defendants may likewise use motions in limine to exclude any kind of evidence that could be objected to at trial as inadmissible or that is subject to discretionary exclusion as unduly prejudicial, including:

a. [19:916] **Irrelevant matters unfavorable to defendant:** Evidence of matters that are legally irrelevant should be

challenged by motion in limine if their mention during trial may create a negative impression of the employer. For example:

- [19:917] Harassment or discriminatory conduct for which any claim is now barred by the *statute of limitations*. [See *Guzman v. Abbott Laboratories* (ND IL 1999) 61 F.Supp.2d 784, 785]
- [19:918] Evidence that the employer has been held liable for employment discrimination in other, unrelated lawsuits.
- [19:919] Settlement offers (see ¶19:1040 ff.).
- [19:920] Employer's insurance coverage or great wealth where unrelated to the lawsuit.
- [19:921] *Discrimination against other employees ("me too" evidence)*: Defendant may move to exclude evidence of alleged discrimination against other employees (e.g., charges filed by other employees with the EEOC or DFEH) which plaintiff may offer as circumstantial evidence that he or she also was the victim of discrimination ("me too" claims). The evidence may be excluded as irrelevant to *this* plaintiff's claim of discrimination. [See *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 CA4th 397, 410-411, 27 CR2d 457, 463—in sexual harassment case, claims that supervisor had also sexually harassed other employees; and ¶19:1037 ff.]
  - [19:922] *Compare—where relevant*: Evidence of discriminatory conduct toward others is less likely to be excluded, however, where plaintiffs allege "a pattern and practice" of discrimination by the employer. [See *Obrey v. Johnson* (9th Cir. 2005) 400 F3d 691, 697-698—"me too" evidence (anecdotal evidence of past discrimination) can be used to establish a racially discriminatory pattern in employer's hiring or promotion practices; *Rossini v. Ogilvy & Mather, Inc.* (2nd Cir. 1986) 798 F2d 590, 604—court may properly consider anecdotal evidence or the *absence* of such evidence in evaluating discrimination claims]

Similarly, where plaintiffs allege *hostile environment harassment*, evidence of conduct toward others may be admitted if plaintiffs either *witnessed* the conduct or had *personal knowledge* of it. [*Beyda v. City of Los Angeles* (1998) 65 CA4th 511, 519-520, 76 CR2d 547, 551-552; *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F3d 917, 924]

- [19:923] *Discriminatory remarks by non-decision-makers*: Remarks by a coworker reflecting bias against the protected group to which plaintiff belongs is irrelevant to a Title VII disparate treatment claim if the co-worker was not involved in the adverse decisionmaking process (and no substantial evidence of hostile environment harassment is produced). [*DeHorney v. Bank of America Nat'l Trust & Sav. Ass'n* (9th Cir. 1989) 879 F2d 459, 468—alleged racial slur by coworker held irrelevant because plaintiff was terminated by branch manager who had no knowledge of her race]
  - [19:923.1] *"Stray remarks" by decisionmakers*: A supervisor's isolated remark made at a *remote* point in time and *unrelated* to the employment action at issue may be excluded as proof of discriminatory intent by the employer; see ¶17:370 ff.
- b. [19:924] **Relevant matters highly prejudicial to defendant:** A party may make a motion in limine to exclude matters whose probative value is "substantially outweighed" by risks of undue prejudice, confusing the jury or undue delay. [Ev.C. §352; FRE 403]

For example:

- [19:925] Unsympathetic facts about the employer's witnesses (e.g., sexual orientation or activities outside the workplace *unrelated* to work performance or credibility as a witness).
- [19:926] Sympathetic factors for plaintiff *unrelated* to losing his or her job or damage claims (e.g., illness in the family, financial needs, etc.).
- [19:927] An *EEOC determination letter* (finding probable cause—or no cause—to believe the employer discriminated against the employee) admittedly has probative value, but may be excluded as unduly prejudicial in a jury trial. [*Walker v. NationsBank of Florida N.A.* (11th Cir. 1995) 53 F3d 1548, 1555—conflicting findings made by different EEOC offices also created risk of jury confusion]

Cross-refer:

- Ev.C. §352 is discussed in Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8F.
- FRE 403 is discussed in Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8F.

## K. JURY SELECTION

1. [19:935] **Number of Jurors:** The number of jurors seated on a particular panel, and the percentage of jurors required to render a verdict, differs in state and federal courts.

► [19:935.1] **PRACTICE POINTER:** Whenever possible, it is a good idea to request a short conference with the trial judge, attended by all parties, to review jury selection procedures and to iron out any foreseeable wrinkles; e.g., how and when to challenge a juror for cause (see ¶19:970), or how many alternate jurors should be seated in state court (see ¶19:935.3), or how many total jurors should be seated in federal court (see ¶19:935.5).

- a. [19:935.2] **State court:** Twelve jurors are required in civil trials in California courts unless the parties agree upon a lesser number. Three-fourths of them must agree upon a verdict. [Cal. Const. Art. I, §16; CCP §618]

This does not include alternate jurors, who are seated to hear trials in protracted cases. Alternate jurors are selected and function in the same manner as other jurors in almost every respect except they do not participate in deliberations unless a juror is dismissed for some reason and the alternate juror empaneled in the dismissed juror's stead. [CCP §234; see ¶19:967—extra peremptory challenge for each alternate juror]

- (1) [19:935.3] **Number of alternate jurors:** As a general rule, a number of trial judges will seat one alternate juror for each week the trial is expected to last. This formula helps to guard against a mistrial in cases where less than 12 jurors are left to hear the evidence and deliberate due to death, illness or other calamities that may befall empaneled jurors. However, there is no hard and fast rule, and the determination of the number of alternate jurors is left to the trial judge's discretion. [See *People v. Williams* (2001) 25 C4th 441, 448, 106 CR2d 295, 299—applying abuse of discretion standard of review to a decision ordering an alternate juror to serve]

[19:935.4] *Reserved.*

- b. [19:935.5] **Federal court:** In federal civil trials, a minimum of six jurors is required, and there may not be more than 12 jurors. Alternate jurors are not selected, and each juror must deliberate. [FRCP 48]

*Comment:* That is not to say, however, that death, illness or some other calamity that befalls an empaneled juror will result in a mistrial if that juror does not hear the evidence and deliberate. Rather, in longer civil trials, federal courts are

prone to seat additional jurors, up to the maximum of twelve, to ensure that at least six are left to hear all of the evidence and deliberate to a verdict. Moreover, where the parties so stipulate, a verdict may result from a panel of less than six jurors. [FRCP 48, Adv. Comm. Notes (1991)]

2. [19:936] **Developing “Favorable” and “Unfavorable” Juror Profiles:**

**Profiles:** Before commencing voir dire, counsel should analyze the strengths and weaknesses of the client's case to develop a “profile” of the type of juror who may be receptive to the client and the case themes (see ¶19:980 ff.).

- a. [19:937] **Avoid stereotypes:** Employment cases frequently deal with issues that push very sensitive buttons with jurors and the results often defy stereotypes. Because of the unique nature of employment cases, counsel should *avoid relying on stereotypes*.

For example, one cannot assume a potential juror will take a particular side in a sexual harassment case because of his or her gender. Female jurors do not always side with female plaintiffs, and male jurors do not always side with employers. For instance, a female juror who has successfully confronted inappropriate conduct from male coworkers may not be sympathetic to a sexual harassment plaintiff. Conversely, a male juror may be sympathetic because he “knows what men are like” or has grievances against employers based on prior negative treatment.

- b. [19:938] **Use of jury consulting service:** In larger cases, counsel should consider using a jury consulting service to assist in jury selection. Such consulting companies provide a variety of services, including telephone surveys, focus groups and mock trials to address key issues. If budget is a consideration, focus groups can be put together quickly and with relatively little expense (e.g., using office staff, friends, etc.).

[19:939-944] *Reserved.*

3. [19:945] **Voir Dire:** The purpose of voir dire is to select a “fair and impartial jury,” although the goal of most trial attorneys is to select a jury predisposed to their case. More specifically, the purpose is to assist counsel in *challenging jurors* (either for cause or peremptorily, ¶19:965 ff.) who may be prejudiced against your client and in selecting jurors who may be receptive to your client's claims or defenses.

Effective voir dire requires determining a juror's opinion and biases about highly emotional subjects, including attitudes about employer-employee relationships, the rights of individuals versus corporations, gender and race issues, older worker rights, the treatment of disabled individuals, etc. Counsel should try to

understand each juror's attitude about what constitutes *justice* in the workplace.

Research indicates that many jurors who vote for the plaintiff are really voting *against* the employer, particularly where it relied on technical matters to justify an adverse employment decision. This anti-employer attitude may be reinforced by high-profile cases featuring egregious lapses of corporate ethics, which confirm some jurors' worst fears about employers.

a. [19:946] **Particular topics:** The topics noted below are usually relevant in questioning prospective jurors on employment-related claims and defenses. These topics may be proposed for use by the court in a written questionnaire format or used by counsel as appropriate in voir dire questioning of potential jurors. Assessing the *strength* of a juror's attitude is often very important. Juror questionnaires can require prospective jurors to rate the depth of their opinions, e.g., from "strongly agree" to "strongly disagree."

(1) [19:947] **Workplace experience:** Counsel for both sides usually question potential jurors regarding relevant employment history and experience in the workplace. (*Questions should be framed to include not only the juror but also his or her close relatives and friends.*)

*General work-related experience:*

- Why did you choose to go into this type of work?
- What do you like about your current job? What do you dislike, and why?
- What are the three most important duties in your current position?
- What is the most important thing you have learned in your current job?
- Have you ever been a union member?
- Have you ever worked for the government as a civil servant?
- Have you ever been self-employed? If so, for how long? If no longer self-employed, why not?
- Have you ever been unemployed for an extended time, and if so, what were the circumstances?

*Personality insights:*

- Do you prefer to work in a structured or flexible environment, and why?
- What personality types do you prefer to work with?
- When you begin working with someone, what do you do to help yourself understand him or her better?
- What sort of behavior makes you really angry?
- Name the person (living or dead) whom you most admire, and state why.

- If you were my client, what would you want me to know about you in deciding whether you are suited to sit on this jury?

*Conflict resolution:*

- Have you ever been released or laid off work? If so, what were the circumstances? How do you feel the situation was handled?
- Have you ever felt that an employment decision affecting you was unfair? If so, describe the circumstances. How do you think the situation should have been handled?
- Have you ever filed any type of employment grievance or lawsuit against an employer? Describe the circumstances. Are you satisfied with how the grievance was resolved? Why or why not?
- Have you ever heard of someone at work being accused of harassment or discrimination? What were the circumstances? Do you think the situation was resolved properly? Why or why not?
- What behavior in a supervisor bothers you the most?
- What qualities do you look for in a supervisor?
- Describe a situation at work where you had to deal with a “difficult person.”
- How would you deal with a situation where an influential person at work asked you to do something unethical?
- Tell us about a time you had to communicate something unpleasant to a supervisor. To a fellow employee. To someone you supervised.

*Jurors with management experience:*

- Have you ever worked as a manager or supervisor of other employees? How many employees did you supervise? What were your responsibilities?
- Have you ever fired or disciplined someone? What were the circumstances?
- Have you ever been responsible for hiring employees? What qualities do you look for in potential candidates?
- Have you ever been responsible for evaluating another employee's job performance? How did you go about doing so?
- What management style do you prefer and why?
- How would you describe your own management style?
- Have you ever been responsible for preparing budgets?

- (2) [19:947.1] **Perceptions of members of protected classes:** Prospective jurors are usually loath to admit biases or prejudices, and attorneys often have difficulty ascertaining whether prospective jurors harbor such sentiments; e.g., negative views about individuals of another race in an action alleging racial discrimination. Nonetheless, attorneys should address the issue directly during voir dire, albeit in a diplomatic and nonjudgmental manner.
- Questions regarding such topics should be prefaced in a manner that underscores the notion that a fair trial for both parties is the utmost priority. Remind the prospective jurors that they are not there to be judged or to judge others. Let them know that it is imperative for them to be frank about their views, even if sharing such attitudes may make them uneasy.
  - Prospective jurors could be told that the case involves issues of racial discrimination involving an employee and supervisor of different races. The jurors could then be asked if they have had negative experiences with people of either race, or if they think that people of either race are generally more prone to mistreat or falsely accuse members of other races.
  - Another approach would be to ask prospective jurors if they would be more inclined to believe or disbelieve witness testimony if that witness were of a particular race. The prospective jurors also could be asked if their past experiences with people of other races or their views of race relations would make it difficult for them to hear and resolve the instant dispute in a fair or impartial manner.
  - It is important that prospective jurors are given the option to discuss personal or confidential matters outside the presence of other prospective jurors. While prospective jurors infrequently request a private discussion, its availability is very important to ensure disclosure on sensitive or embarrassing issues that may bear directly upon a prospective juror's impartiality.
- (3) [19:948] **Prior litigation experience:** Counsel for both sides also usually question prospective jurors regarding prior experience as a party or juror in a civil case. (Again, *questions should be framed to include not only the juror but also his or her close relatives and friends.*)

- Have you ever sued anyone? What were the circumstances? How do you feel about the result?
- Have you ever been sued? What were the circumstances? Are you satisfied with the outcome? Why or why not?
- Have you ever served as a juror in a civil case where the dispute was over money? What were the circumstances? Without telling us what the verdict was, did the jury reach a verdict? Do you agree with the result? Why or why not?
- Have you ever had your deposition taken or testified in court? What were the circumstances? How do

*(Text cont'd on p. 19-113)*

you feel the attorneys asking the questions treated you?

➡ [19:949] **PRACTICE POINTER:** If the case involves sensitive issues, written juror questionnaires should be considered since jurors are likely to give more detailed and honest answers to personal questions, and less likely to change their responses based on other juror's comments.

If written questionnaires are not permitted, counsel should avoid direct inquiries about whether a juror has, for example, ever experienced discrimination. A better approach is to use broad questions, such as, "Have you ever seen sexual harassment anywhere?" A juror is likely to feel more comfortable with this indirect approach and will probably respond with more information. Plaintiff's and defense counsel may also consider asking the court to conduct individualized voir dire in chambers (in counsel's presence) regarding the details of any incident of apparent discrimination (or other personally sensitive subject) reported by a potential juror that may bear on whether that juror could reasonably be expected to consider employment discrimination claims and defenses objectively.

Find out in advance of trial whether and to what extent your trial judge will allow attorney voir dire. (Most federal judges do not allow *any* voir dire by counsel.) Give the judge a list of questions you would like the court to ask, so that you will have an opportunity to learn as much as possible about the prospective jurors, even if you do not have a chance to ask questions yourself.

*Cross-refer—voir dire questions:* For discussion and copies of particular voir dire questions in civil trials generally, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 5.

*Cross-refer—juror questionnaires:* For discussion and copies of juror questionnaire forms in civil trials generally, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 5.

- b. [19:950] **"Ideal" juror profiles:** There is no accurate predictor of "good" versus "bad" jurors in an employment case. Counsel should avoid placing too much reliance on stereotypes without detailed follow-up questioning of the juror. Nevertheless, there are some general profiles of prospective jurors that may be of assistance:
  - A good plaintiffs' juror may be one with no management experience who is willing to second-guess an

employer's decision and substitute his or her own opinion in its place.

Many plaintiffs' counsel favor liberal jurors living in urban areas, union workers/civil servants and those who do not defer to managers' decisions. Jurors in highly empathetic fields, such as nursing, teaching and social work, may be desirable.

In addition, jurors employed in a job similar to plaintiff's are often preferred in the hope they will identify with plaintiff. Those who have experienced an occupational trauma such as being fired, being reassigned or forced to transfer, or who have suffered a life trauma such as a death, chronic illness or divorce in the family, may favor plaintiff. On the other hand, jurors who have suffered adverse employment action (discipline, demotion, discharge, etc.) similar to that suffered by plaintiff may feel plaintiff's complaints are frivolous compared to what they experienced.

Jury consultants warn that gender is not an accurate predictor of juror attitude, especially in sexual harassment cases. Some of the best defense jurors are self-sufficient women from blue-collar backgrounds. Further, women tend to be less tolerant of delays in reporting serious allegations such as physical contact or threats of violence. Younger jurors (those under 30) often apply zero tolerance in sexual harassment cases, likely because they have grown up in an era where they have been told it does not exist.

Research shows that "unhappily retired" jurors tend to be pro-plaintiff. They tend to be cut off from the community with few activities involving others. As a result, these jurors are less likely to regard their actions as having negative consequences for anyone else.

In disability cases, a juror's age makes a big difference. Research reveals that a significant percentage of jurors over age 45 hold pro-plaintiff attitudes.

- Defense counsel generally favor jurors who do not question management's explanations and who believe plaintiff could have improved his or her situation with more effort.

As a rule, defense counsel may seek jurors who are conservative, have managerial experience, have worked hard for a living preferably in a nonunion setting, and live in rural areas. Defense counsel often view former managers as generally advantageous to the defense because they have significant management

experience and do not want to be second-guessed by a jury.

Defense counsel should be careful in using human resource professionals. They often critically evaluate company actions and point out what should have been done differently.

Defense counsel should also be wary of jurors who may have suffered an occupational trauma through downsizing. These jurors are often less than forthright regarding their employment experience. Watch for jurors describing themselves as consultants, self-employed or retired, as they may harbor an anti-employer bias.

Some defense counsel prefer younger jurors who came of age during a strong economy because they may be more self-reliant and feel less empathy for plaintiffs in employment cases. *But beware:* Jury research has shown that "Generation X" jurors (born between 1966 and 1976) tend to award larger monetary damages than any other age group. As a result, jurors in this category may be more desirable for plaintiffs and dangerous for defendants (especially if the jurors have suffered from a downturn in the economy).

[19:951-954] Reserved.

➡ [19:955] **PRACTICE POINTERS:** Attorney-conducted voir dire is your first chance to encourage prospective jurors to consider with an open mind the key elements of your claim or defense. Here are some specific suggestions:

- *Be polite:* Enter each prospective juror's name on a seating chart so you will be able to address that juror by name. Always refer to a prospective juror by name and never by number (e.g., "Juror Number One"). Treat each juror with respect even if you plan to challenge him or her; any sign of disrespect may offend others on the panel.
- *Be professional:* Avoid arguing with the court or opposing counsel in front of the jury. Address opposing counsel formally in the presence of the jury (no first names). Avoid wasting the jurors' time with unnecessary or repetitive questioning. Use short questions and avoid double negatives which often confuse jurors. Keep your voice up and speak clearly so all jurors can hear and remain engaged in the selection process—even those in the back.
- *Be observant:* When questioning a prospective juror, try to maintain eye contact. When the judge or

other counsel is doing the questioning, watch each juror carefully. Clues to jurors' personalities can be gleaned not only from what they say but *how* they say it. Dress can convey whether someone wants to stand out in a crowd, is sloppy or fastidious. Observing the jurors in the hall before trial or on breaks can provide information on what cliques are forming in the pool, who initiates conversations, who is off alone, and other information important in assessing the potential impact of a juror on the dynamics of the jury. Try to gauge the juror's attentiveness, candor, interest, rapport with you or opposing counsel, etc.

- *Listen, really listen,* to each prospective juror's responses to questions asked by the court or opposing counsel as well as to your own questions:
  - For example, the answer to the question, "What do you do for a living?" is often quite revealing: Jurors who answer "I am . . ." may have a different approach to their work and may demonstrate more independence and self-confidence than jurors who answer "I work for . . ." Listen for qualifiers such as "just" and "only" in answers related to the juror.
  - Another question that may provoke a revealing response is, "Have you ever had to fire someone, such as a housekeeper, gardener or contractor, because of unsatisfactory performance?" The *manner* of the prospective juror's response may be as important as the answer. The presence or absence of signs of regret may reflect attitudes regarding employment termination.
  - Beware of tentative answers ("I think so . . .") to questions regarding essential juror characteristics ("Will you fairly decide this case on the basis of the facts?").
  - Never cut off a juror's answer prematurely. Doing so sends the message that you are not interested in the juror's opinion and may have an impact on other jurors.
  - Keep jurors interested by asking them questions in random order instead of following a rigid seating pattern. The element of surprise will keep the jurors paying attention.
- *Watch for clues to juror's personality:* Determining a juror's personality type may help predict how the

juror will react. Research indicates that a juror's career choices and job satisfaction may affect his or her personality type:

- Jurors drawn to teaching, counseling and social work may value helping others and may dislike clear-cut solutions.
- Those who choose technical, mechanical or labor-intensive careers may value practicality and tend to be less forgiving.
- Those drawn to office and clerical positions sometimes prefer order and may place less value on imaginative activities or forgiveness.
- Jurors with scientific occupations tend to be introverted, value scholarly achievements, and may be uncomfortable in social situations.
- At the other extreme, jurors who revel in the arts such as music, literature and drama are likely to avoid traditional situations and may resist being "logical."
- Jurors who are entrepreneurs (e.g., self-employed or in sales) may value being independent and controlling others and may not be as forgiving as other personality types; they often become the foreperson of the jury.

Depending on the makeup of the jury, you may want to adjust whether you appeal to emotion, use graphic exhibits and analogies, feature authority figures, or highlight expert witnesses.

- *Focus on leaders and strong-willed individuals:* You will never be able to remove all jurors who may favor your opponent. Instead, focus on prospective jurors who are "leaders" versus "followers" and on strong-willed individuals who would be inclined to "stick to their guns."

Because "leaders" are likely to influence other jurors, focus on excluding leaders who may favor the opposing party. It is less important to exclude undesirable jurors who are "followers" because they are less likely to change the minds of other jurors.

By the same token, try to exclude prospective jurors who exhibit strong-willed personalities. Although not necessarily leaders, they are more likely to resist going along with others. Individuals who do not exhibit strong-willed personalities are more inclined to follow the consensus of other jurors.

- *Keep notes:* Don't rely on your memory or vague impressions. Keep notes on everything a prospective juror says—favorable, unfavor-

able and neutral facts. Wherever possible, have an assistant jot down juror responses while you are questioning the panel, so you are free to look the juror in the eye and do not appear distracted. Every scrap of information may be helpful in follow-up questioning and in guiding your peremptory challenges. (To avoid giving the impression that you are taking down every word a juror utters, your assistant should be a quiet "mole" seated in the audience and should not be readily identifiable with trial counsel.)

- *Establish rapport:* Try to establish rapport with prospective jurors so they will be receptive to your arguments and views of the evidence. Where you can genuinely do so, express respect for their accomplishments and for anything unique in their backgrounds ("That sounds very exciting . . ."). Express appreciation for their responses where appropriate ("That is very helpful, thank you").
- *Personalize client:* It is also important to "personalize" your client to the prospective jurors.

Plaintiff's counsel, after introducing the client, may refer to plaintiff as "Bob" or "Mary" and may mention plaintiff's family members by name ("Bob's wife, Helen, and his children, Charles and Jean") whenever appropriate.

Defense counsel may personalize the employer by having its *key decisionmakers present in court at all times* and, after introducing them, referring to them by first name ("Frank" and "Linda") rather than last ("Mr. Smith" or "Mrs. Jones"); and by stressing that they are the people plaintiff is accusing of discrimination or other wrongdoing. Refer to the employer by name, "XYZ Co." (*never as "the defendant"*).

- *Be yourself:* Jurors are very adept at recognizing when someone is "acting."

[19:956-964] Reserved.

#### 4. Challenging Prospective Jurors

- a. [19:965] **Challenges for cause:** Challenges for cause lie only on narrow specified grounds of actual, implied or inferable bias concerning a party or issue in the case. [See

- b. [19:966] **Peremptory challenges:** After both plaintiff and defendant have passed for cause, the parties may exercise *peremptory challenges*, beginning with plaintiff's counsel and alternating between plaintiff's and defense counsel until all peremptory challenges are exhausted or both sides consecutively decline further peremptory challenges.
- (1) [19:967] **State court:** In California state courts, each side gets six peremptory challenges (eight where there are several parties on the same side); plus an additional peremptory challenge for each alternate juror appointed. [CCP §§231(c), 234]
- If there are more than two sides, "the court shall grant such additional peremptory challenges to a side as the interests of justice may require," provided that the peremptory challenges of one side do not exceed the aggregate number of peremptory challenges of all other sides. [CCP §231(c)]
- (2) [19:968] **Federal court:** Each party is entitled to three peremptory challenges in federal court. Coparties are considered a single party for challenge purposes but the court has discretion to allow additional peremptory challenges and to permit them to be exercised separately or jointly. [28 USC §1870]
- (3) [19:969] **Limitation—cannot exclude cognizable group:** Peremptory challenges may not be exercised for systematic exclusion of persons of a particular race, gender or other cognizable group from jury service in civil or criminal cases. [*Batson v. Kentucky* (1986) 476 US 79, 89, 106 S.Ct. 1712, 1719—race; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 US 127, 129, 114 S.Ct. 1419, 1421—gender; see also *People v. Wheeler* (1978) 22 C3d 258, 276-277, 148 CR 890, 903 (race)]
- (a) [19:969.1] **Objecting to challenges:** A party who poses a *Batson* objection to the other party's peremptory challenges must establish a *prima facie* case of discrimination by showing the "totality of the relevant facts" gives rise to an *inference* of discrimination. Doing so shifts the burden to the other party to state race-neutral or gender-neutral reasons for exercising the strikes. [*Johnson v. California* (2005) 545 US 162, 170, 125 S.Ct. 2410, 2417]

Once the other party states a nondiscriminatory explanation for its peremptory challenges (even a

frivolous or nonsensical reason), however, the objector bears the burden of *proving* purposeful discrimination by a preponderance of the evidence. [Johnson v. California, supra, 545 US at 171, 125 S.Ct. at 2418]

► [19:969.2] **PRACTICE POINTERS:** If the court overrules your opponent's *Batson* objection for failure to state a prima facie case of discrimination, you should *ask the court for permission to state your race-neutral or gender-neutral reasons on the record* (offering such explanations out of the presence of the remaining prospective jurors to avoid generating any resentment from them). Be sure to state that you are not conceding that your opponent has made a prima facie case.

If the trial court does not allow you to state your reasons on the record, memorialize your reasons for exercising a peremptory challenge at the soonest possible opportunity and ask for permission to *file a written brief to address your explanation*. Creating a record of race-neutral reasons for your challenge will help prevent appellate reversal of a judgment in your favor if the trial court erred in finding your opponent had not stated a prima facie case. [See *Williams v. Runnels* (9th Cir. 2006) 432 F3d 1102, 1108—appellate court could not determine reasonableness of peremptory challenges when trial court found that criminal defendant had not made prima facie showing and refused to allow prosecutor to proffer an explanation]

► [19:969.3] **FURTHER PRACTICE POINT-ER:** Also, to avoid a successful *Batson* challenge, be careful not to ask jurors of different races, genders or other protected categories different questions or to treat those who give similar answers differently (e.g., asking all jurors if they have management experience, but only questioning further nonwhite jurors about their experience). [See *Miller-El v. Dretke* (2005) 545 US 231, 260-264, 125 S.Ct. 2317, 2337-2340 (criminal case)]

[19:969.4] Reserved.

## (b) Application

- [19:969.5] In a sexual harassment case, it was not error to allow Employer's peremptory strike of all three women from the jury panel because Employer gave plausible explanations (unemployment, participation in lawsuit, employment by an insurance company, and limited work experience). Juries in sexual harassment trials need not include female jurors: "The idea that one gender is better suited to hear a class of cases than another, is itself a sexist concept." *[Alverio v. Sam's Warehouse Club, Inc.* (7th Cir. 2001) 253 F3d 933, 942]
- c. [19:970] **Procedure for challenging individual jurors:** The procedures used to challenge a particular juror for cause, or to exercise a peremptory challenge, vary from judge to judge.

➡ [19:970.1] **PRACTICE POINTERS:** First of all, it is advisable to request a conference with the judge before jury selection begins so the parties may understand how and when such challenges or strikes are to be made to ensure they are reflected in the record.

Keep in mind that when you challenge a prospective juror for cause, that juror or other jurors may feel resentment toward you or your client for making the challenge. Therefore, strive to make such challenges *out of the presence of the prospective jurors*, either at sidebar or during a recess, but *on the record* in any event.

- [19:970.2] Where a court will *not* allow for-cause challenges to be made out of the jury's presence, assert the challenge delicately, diplomatically, and in a manner that does not imply the challenged juror is somehow flawed. If possible, phrase your remarks in a way that implies you are trying to do a favor for the juror in question, and seek to articulate more thorough reasons for your position on the record during the next time you are out of the jury's earshot.

For example:

- When challenging a prospective juror for implied bias in state court, you might say something like: "Your honor, ABC Enterprises (or my client) wishes to thank juror number five for his candor, cooperation and patience, and suggests he be excused from obligations on this panel per CCP §229."

- When challenging a prospective juror in federal court (where there is no specific federal rule governing implied bias), you might say something like: "Your honor, Mr. Smith (or the plaintiff, or my client) wants to thank juror number five for her candor, cooperation and patience, and suggests she be excused from jury duty to avoid placing her in the difficult position of having to sit in judgment of a case where she is acquainted with one of the potential witnesses."
- [19:970.3] If you sense that you have crossed a prospective juror by asserting an unsuccessful challenge for cause, seriously consider *peremptorily striking that juror*. If you don't exercise a peremptory strike and have not used all of your strikes once the jury is sworn, you may be precluded from complaining about the denial of your for-cause challenges on appeal.

*Cross-refer:* For detailed discussion of grounds and procedures for challenging jurors for cause or peremptorily, see:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 5.
- (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 5.

5. [19:971] **Challenging Entire Jury Panel:** Under limited circumstances, a party may challenge a jury panel as a whole, rather than asserting challenges to specific jurors.

a. [19:971.1] **Federal court:** A party in federal court may assert the following grounds to challenge the method by which the jury panel was selected:

- violation of the constitutional right to have a jury selected from a fair cross-section of the community (see *Roberson v. Hayti Police Dept.* (8th Cir. 2001) 241 F3d 992, 995; *Timmel v. Phillips* (5th Cir. 1986) 799 F2d 1083, 1086);
- violation of the Equal Protection Clause (see *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 US 614, 629, 111 S.Ct. 2077, 2087);
- substantial failure to meet the statutorily-mandated selection procedures (see 28 USC §1867(c));
- tainting by a prospective juror rendering an expert-like opinion during voir dire (see *Mach v. Stewart* (9th Cir. 1997) 137 F3d 630, 633).

- b. [19:971.5] **State court:** Challenges to an entire venire in state court must be made in writing. [CCP §225(a)(1)] Such challenges must be asserted before any peremptory or for-cause challenges are asserted. [CCP §227(a)]

The state law grounds for challenging an entire venire include:

- systemically excluding cognizable groups (see Cal. Const. Art. I, ¶16; CCP §204(a); *Holley v. J&S Sweeping Co.* (1983) 143 CA3d 588, 593, 192 CR 74, 77); and
- tainting by prejudicial comments made by a prospective juror (see *People v. Martinez* (1991) 228 CA3d 1456, 1465-66, 279 CR 858, 863-64).

*Cross-refer:* For a thorough and detailed discussion of procedures and requirements for challenging an entire venire, see:

- (federal practice) Jones & Rosen, *Rutter Group Prac. Guide: Federal Civil Trials and Evidence* (TRG), Ch. 5.
- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials and Evidence* (TRG), Ch. 5.

[19:972-979] Reserved.

## L. CASE THEMES

[19:980] A case “theme” *explains* the case in commonsense terms to the jurors. It enables them to understand the parties’ motives and the sequence of events—i.e., *why things happened as they did*. A convincing “theme” persuades the jurors and causes them to ignore contradictions in the evidence or weaknesses in the case. (It is also helpful to the judge in understanding relevancy arguments.)

►[19:981] **PRACTICE POINTER:** Experienced litigators start thinking about a case “theme” long before trial. Indeed, from the outset, they search for the most plausible explanation of the events favoring the client’s position that is consistent with the evidence and the law. Pleadings and discovery are then prepared to implement this “theme.”

*Cross-refer:* For detailed discussion of this topic, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 1; and Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 1.

1. [19:982] **Employee Themes—In General:** Employees usually develop themes that portray plaintiff as a loyal, hardworking employee who was used and then disposed of because he or she was too old, a minority, out-spoken against some wrong the company was committing upon society, or for some other unlawful or arbitrary reason.
2. [19:983] **Employer Themes—In General:** A convincing case theme is especially important for defendant employers

because juries usually consist of employees rather than employers and supervisors. The jurors may have preconceived notions of a proper employer-employee relationship; the employer thus must have a convincing explanation for whatever adverse action was taken against the plaintiff employee. Its case theme must portray the decisionmakers as doing the best they could with the facts they had, and must show the employer as fair and reasonable in the face of misconduct or performance shortcomings by the plaintiff employees, or business downturns in layoff cases.

3. [19:984] **Themes for Particular Claims:** The following are examples of themes often used in litigating particular types of employment claims:

**a. Tortious (public policy) discharge cases**

- [19:985] *Plaintiff's themes* may be:
  - “The company silenced the alarm (whistleblower)!”
  - “The company was caught in the wrong, so it punished the whistleblower rather than accepting its own deserved punishment.”
  - “No good deed goes unpunished.”
  - “This is another David and Goliath story . . . the employee took on the mammoth company and should not be punished for it.”
- [19:986] *Defendant's themes* may be:
  - “The plaintiff was a loose cannon who would not listen to reason and exploded without provocation.”
  - “The plaintiff was hurting other employees and the company on which they count for their livelihood.”
  - “No good deed goes unpunished.”
  - “Plaintiff was a grandstander and opportunist who was looking for a chance to sue the company.”
  - “The decisionmakers acted *reasonably*; they looked at the facts carefully and made the best decisions they could with the facts they had.”

[19:987-994] *Reserved.*

**b. Sex (gender) discrimination cases**

- [19:995] *Plaintiff's themes* may include:
  - “The company used a double standard to evaluate the performance of women.”

"No matter how good the work is, it's not good enough if a woman does it."

"An aggressive businessman is respected, but an aggressive businesswoman is not."

"Women have to work twice as hard to be taken half as seriously."

- [19:996] *Defendant's themes* may include:

"Other women working at the company do just fine; this one is not doing her job and is hiding behind her gender."

"The company would not be fair to its hardworking women employees if it allowed someone to get away with poor performance merely because she is a woman."

"This isn't about gender; it's about job performance."

#### c. Age discrimination cases

- [19:997] *Plaintiff's themes* may include:

"The plaintiff gave them the best years of (his or her) life. The Company threw (him or her) away like an old shoe."

"Everybody makes mistakes." (Where company fired employee for what appears to be a series of minor policy infractions.)

"There were two sets of rules, one for (young/white), one for (old/minorities). Plaintiff wanted to play by the rules, but the rules kept changing."

"Younger management was insensitive to older workers and tried to push them out to further their own agendas."

- [19:998] *Defendant's themes* may include:

"It's the economy, not discrimination." (The layoffs were the result of an economic downsizing that affected the whole company, not just plaintiff; economics, rather than discrimination, prompted the employment decision.)

(For other themes applicable to discrimination cases generally, see below.)

#### d. Other discrimination cases

- [19:999] *Plaintiff's themes* may include:

“Actions speak louder than words!” (No one admits to discriminatory motives; you need to look for the signs.)

“Where there’s smoke; there’s fire!” (Where several plaintiffs are treated in a discriminatory manner, with discriminatory comments, etc., there must be a discriminatory motive.)

“No matter what the plaintiff did, it wasn’t good enough.” (Exemplary employee is fired after good reviews, promotions, etc. Why? It must be discrimination.)

“You’d better go along to get along . . . or else.” (In retaliation cases, plaintiffs can argue that they jeopardized their jobs by exercising their legal rights to complain about discrimination.)

- [19:1000] *Defendant's themes* might include any of the following:

“Plaintiff didn’t want to be treated ‘like everyone else’—(he or she) wanted special treatment.”

“Plaintiff didn’t want to play by the rules” (citing to written policies and warnings that apply to all workers).

“This isn’t about discrimination; it’s about money! Because plaintiff didn’t get the salary/benefit/position (he or she) wanted, (he or she) is claiming discrimination as a bargaining chip.”

“Three strikes and you’re out! First, a clear oral warning, then a clear written warning, and then, because the employee’s poor performance continued, it was right to call the ‘third strike’ (termination).” (This is a strong theme where you can establish that plaintiff was informed of policies/expectations and given ample opportunity to conform and improve conduct to those expectations.)

“You may not agree with the Company’s decision, but it was the Company’s decision to make. We’re not here to second-guess the Company’s managers. They must make the tough choices involved in hiring and firing as long as they don’t discriminate.”

## M. OPENING STATEMENT

[19:1010] The opening statement may be the most important part of the trial. Studies show that jurors vote 80% of the time in accordance with their tentative impressions after hearing opening statements. Therefore, counsel must work toward an opening statement that does not argue but still provides a *persuasive summary* of the evidence.

There are several things counsel can do to enhance the effectiveness of an opening statement in employment litigation:

- *Present and develop case themes:* State your case themes clearly and demonstrate how they apply to your client's claims or defenses.
- *Provide "roadmap" of evidence:* Tell the jurors in advance what the evidence will be (both your evidence and the opponent's evidence), what the various documents and records will show, and what testimony each witness will provide. This helps the jurors know what to expect and focus on the crucial issues.
- *Be "up front" about harmful facts:* Wherever possible, mention and explain facts that hurt your client's case *before opposing counsel* does. Your explanation may take some of the "sting" out of the evidence.
- *Hold back some ammunition:* Where the case involves egregious misconduct by management, some experienced plaintiff's counsel prefer *not* to disclose everything during the opening statement. Let the jurors discover some of the egregious facts for themselves during trial!
- *KISS:* Keep it short (under 30 minutes, if possible) and simple! With the court's permission, use *graphs or charts* to list the key elements of your claim or defense. *Repeat your case themes* and explain why particular evidence will be significant.



[19:1010.1] **PRACTICE POINTER:** Buy a transcript of the opposing attorney's opening statement. Review it during the trial, and be prepared to tell the jury at closing argument the many ways in which the opposing party's evidence did not live up to its promise.

*Cross-refer:* For detailed discussion of this topic, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 6; and Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 6.

[19:1011-1014] *Reserved.*

## N. EVIDENCE ISSUES

### 1. Attorney-Client Privilege Issues

- a. [19:1015] **Legal vs. business advice:** Corporate counsel (particularly house counsel) often wear “two hats”—i.e., acting both as an attorney for the corporation and as a business executive with nonlegal duties. The attorney-client privilege attaches only to confidential communications for the purpose of legal representation, consultation or advice. Therefore, communications by or with house counsel acting in a nonlegal capacity are not protected by the privilege. [*In re Sealed Case* (DC Cir. 1984) 737 F2d 94, 99]

In determining the existence of a privilege, no distinction is made between “inside” (house counsel) and “outside” counsel. [*United States v. Rowe* (9th Cir. 1996) 96 F3d 1294, 1296]

That business advice was given or solicited does not automatically bar application of the attorney-client privilege. If the advice was *predominantly* legal as opposed to business, the communications remain privileged. [See *United States v. Davis* (SD NY 1990) 132 FRD 12, 16]

- b. [19:1016] **Investigations:** Fact-finding that pertains to legal advice may be part of an attorney's professional services to a client and the results are therefore privileged. [*In re Allen* (4th Cir. 1997) 106 F3d 582, 602; *United States v. Rowe*, supra, 96 F3d at 1296-1297—by choosing to hand investigations over to lawyers, employer “is justified in expecting that communications with these lawyers will be privileged”]

(1) [19:1017] **Compare—attorney disqualified as witness:** An attorney who conducts such investigation, however, may be disqualified as a witness at trial; see 12:290.

- c. [19:1018] **Communications between corporate counsel and corporate employees:** Where the client is a business entity, attorney-client communications necessarily are through individuals acting for the entity. The attorney-client privilege therefore may extend to the attorney's communications with *any employee on matters within the scope of his or her employment* when that employee is aware that he or she is being questioned in confidence in order for his or her employer to obtain legal advice. [See *Upjohn Co. v. United States* (1981) 449 US 383, 394, 101 S.Ct. 677, 685;

(1) [19:1019] **Employee need not be officer or manager:** The communication need not be with a member of the entity client's "control group" (e.g., a managing officer or director). Such a limitation would largely destroy the ability of corporate counsel to freely communicate with corporate clients in the giving of legal advice and thereby defeat a fundamental purpose of the privilege. [See *Upjohn Co. v. United States*, supra, 449 US at 390-393, 101 S.Ct. at 683-684—corporate counsel often must gather information from mid-level or lower-level employees in order to provide meaningful advice to the client; *D. I. Chadbourne, Inc. v. Sup.Ct. (Smith)*, supra, 60 C2d at 737, 36 CR at 477]

- [19:1020] Company Counsel conducted an internal investigation of "questionable payments" that Company's subsidiaries made to foreign governments. As part of this investigation, Company Counsel asked certain employees to complete a questionnaire seeking detailed information concerning such payments and interviewed those and other employees. The privilege protected the questionnaires and the attorney-investigator's notes of his interviews with Company employees. [*Upjohn Co. v. United States*, supra, 449 US at 390, 101 S.Ct. at 683]
- [19:1021] House counsel's communications with *employees of a subsidiary corporation* are privileged if they possess "information critical to the representation of the parent company and the communications concern matters within the scope of employment." [*Admiral Ins. Co. v. United States Dist. Ct. for Dist. of Arizona* (9th Cir. 1989) 881 F2d 1486, 1493, fn. 6]

(2) [19:1022] **Former employees:** Former as well as current employees may possess relevant information that corporate counsel needs to advise the client. [See *In re Allen* (4th Cir. 1997) 106 F3d 582, 606]

Courts disagree, however, over the extent to which the attorney-client privilege protects counsel's communications with a corporate client's former employees:

- [19:1023] Some courts state the privilege extends to communications concerning either:
  - *knowledge obtained or conduct* occurring during the course of the former employee's employment; or

- *privileged communications* during the former employee's employment (*privileged communications that occur during the period of employment do not lose their protection when the employee leaves the client corporation*). [*Peralta v. Cendant Corp.* (D CT 1999) 190 FRD 38, 41]
  - [19:1024] Other courts limit the privilege to communications made at the *direction of management* and concerning confidential matters *uniquely within the former employee's knowledge* "such that counsel's communications with this former employee *must* be cloaked with the privilege in order for meaningful fact-gathering to occur." [*Infosystems, Inc. v. Ceridian Corp.* (ED MI 2000) 197 FRD 303, 306 (emphasis added)—privilege extends only to communications themselves, not the facts communicated]
- (3) [19:1025] **Compare—employee as client:** A corporate employee may assert a personal privilege with respect to conversations with corporate counsel if the employee demonstrates that:
- he or she approached counsel for the purpose of seeking legal advice;
  - it was clear that he or she was seeking legal advice in an individual rather than a representative capacity;
  - counsel saw fit to communicate with the employee in an individual capacity (despite the possible conflict of interests with the corporation; see ¶2:77);
  - the conversations with counsel were confidential; and
  - the substance of the conversations with counsel did not concern "matters within the company or the general affairs of the company." [*United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* (2nd Cir. 1997) 119 F3d 210, 215-216]
- [19:1026-1029] *Reserved.*
- d. [19:1030] **Waiver of corporation's privilege:** The power to waive the corporate attorney-client privilege belongs to the corporation itself and is normally exercised by its officers and directors. [*Commodity Futures Trading Comm'n v. Weintraub* (1985) 471 US 343, 348-349, 105 S.Ct. 1986, 1991—managers must exercise privilege consistently with their fiduciary duty to act in best interests of corporation and not of themselves as individuals]

- (1) [19:1031] **Employees cannot waive:** A corporate employee cannot waive the corporation's attorney-client privilege. [See *Commodity Futures Trading Comm'n v. Weintraub*, supra, 471 US at 348-349, 105 S.Ct. at 1991—power to waive rests with management]

Since a corporate employee cannot waive the corporation's privilege, *neither can an ex-employee*. [*United States v. Chen* (9th Cir. 1996) 99 F3d 1495, 1502—former employee's communications to government regarding discussions between corporation and corporate counsel did not waive corporation's attorney-client privilege]

- (2) [19:1031.1] **Ex-officers and ex-directors cannot waive:** Whether or not still employed by the corporation, ex-officers and ex-directors have no authority to waive the corporation's attorney-client privilege. [See *Commodity Futures Trading Comm'n v. Weintraub*, supra, 471 US at 348-349, 105 S.Ct. at 1991]

[19:1031.2-1031.9] *Reserved.*

- e. [19:1031.10] **Communications between EEOC counsel and employees represented by EEOC:** The attorney-client privilege can cover communications between EEOC counsel and the employees upon whose behalf it sues. [*EEOC v. International Profit Assocs., Inc.* (ND IL 2002) 206 FRD 215, 218—interview notes between EEOC counsel and prospective class members protected from disclosure]

*Cross-refer:* For further discussion of the attorney-client privilege, see:

- (state court) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8G.
- (federal court) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8H.

2. [19:1032] **Relevance and Exclusion Issues:** Basically, all relevant evidence is admissible unless subject to an exclusionary rule, or its probative value is *outweighed* by probative risks (highly prejudicial, confuses jury, takes too much time, etc.). [FRE 402, 403; Ev.C. §§351, 352]

The relevancy of particular testimony, records or other evidence depends, of course, on the claim or defense asserted:

- a. [19:1033] **Sexual harassment claims:** The following relevancy and discretionary exclusion issues frequently arise in litigating harassment claims:

- (1) [19:1033.1] **Plaintiff's conduct or appearance:** An employer may seek to introduce evidence of plaintiff's

own conduct, either in the workplace or outside of work, to show that the sexual advances toward plaintiff were *not unwelcome*, or that plaintiff was *not offended* by sexual comments or conduct despite his or her claims to the contrary.

In California, a special statutory procedure must be followed in offering evidence of plaintiff's sexual conduct. [See Ev.C. §783]

(a) [19:1033.2] **Provocative speech or dress:** Evidence of a complainant's *sexually provocative speech or dress* is "obviously relevant" to the issue whether plaintiff found particular sexual advances to be unwelcome. [*Meritor Sav. Bank, FSB v. Vinson* (1986) 477 US 57, 69, 106 S.Ct. 2399, 2406—plaintiff worked on daily basis with alleged harasser]

1) [19:1033.3] **Discretionary exclusion:** Plaintiff may argue that the probative value of such evidence is outweighed by its potential for unfair prejudice and therefore the evidence should be excluded under Rule 403 of the Federal Rules of Evidence (or its California counterpart, Ev.C. §352). It is the trial court's duty to "carefully weigh the applicable considerations" before deciding whether to admit evidence of this kind. [*Meritor Sav. Bank, FSB v. Vinson*, supra, 477 US at 69, 108 S.Ct. at 2406]

[19:1033.4-1033.14] *Reserved.*

2) [19:1033.15] **No excuse for unwelcome harassment:** However, a plaintiff's use of vulgar language does not necessarily mean that he or she invited or welcomed what would otherwise be considered sexual harassment, particularly where he or she *had told the harassers to stop or complained* to his or her supervisors to no avail. [*Carr v. Allison Gas Turbine Div., General Motors Corp.* (7th Cir. 1994) 32 F3d 1007, 1010-1011; *Swentek v. USAIR Inc.* (4th Cir. 1987) 830 F2d 552, 557]

- [19:1033.16] Coworkers' sexually explicit graffiti and vulgar comments directed at plaintiff could be considered "unwelcome" sexual harassment even if she herself used foul language and engaged in graffiti writing. [*Danna v. New York Tel. Co.* (SD NY 1990) 752 F.Supp. 594, 612]

[19:1033.17-1033.19] *Reserved.*

(b) [19:1033.20] **Plaintiff's conduct with alleged harasser:** Evidence of plaintiff's prior sexual conduct with the alleged harasser, whether consensual or nonconsensual, will always be relevant and admissible, since it is central to the issue of welcome-ness of the sexual conduct or comments at issue. [See Ev.C. §1106(b)]

- [19:1033.21] A sexual harassment claim was rejected based on evidence that plaintiff had behaved "in a very flirtatious and provocative manner" with the alleged harasser and invited him to have dinner at her house several times despite his repeated refusals. [*Reichman v. Bureau of Affirmative Action* (MD PA 1982) 536 F.Supp. 1149, 1172]

[19:1033.22-1033.24] Reserved.

(c) [19:1033.25] **Plaintiff's conduct with other individuals:** Both federal and state law limit the admission of evidence of the alleged victim's sexual conduct with individuals other than the alleged harasser, either at the workplace or elsewhere:

- 1) [19:1033.26] **Federal law:** In civil cases involving alleged "sexual misconduct," evidence of the alleged victim's "*sexual behavior*" or "*sexual predisposition*" is *admissible only if* it is otherwise admissible under the Federal Rules of Evidence and "its probative value *substantially outweighs* the danger of harm to any victim and of unfair prejudice to any party." [FRE 412(b)]

Evidence of the alleged victim's *reputation* is *in-admissible* unless it has been placed in controversy by the alleged victim (e.g., by calling a witness to testify as to her reputation). [FRE 412(b)]

- a) [19:1033.27] **Compare—discretionary exclusion under FRE 403:** This test differs from the general rule governing exclusion of relevant evidence (FRE 403) in that it *shifts the burden to the proponent* to demonstrate admissibility rather than making opponent justify exclusion of the evidence. It also requires the court to consider "harm to the victim" in balancing prejudice versus probative value. [See FRE 412, Adv. Comm. Notes to 1994 Amendments]

- b) [19:1033.28] **"Sexual misconduct" includes harassment:** The rule limiting

- such evidence in cases of alleged “sexual misconduct” includes claims of sexual harassment. [*Wolak v. Spucci* (2nd Cir. 2000) 217 F3d 157, 159; see also *B.K.B. v. Maui Police Dept.* (9th Cir. 2002) 276 F3d 1091, 1104-1105]
- c) [19:1033.29] **“Sexual behavior”:** “Sexual behavior” includes activities of the mind such as watching pornographic videos or other sexual fantasies. [*Wolak v. Spucci*, supra, 217 F3d at 159]
  - d) [19:1033.30] **“Otherwise admissible”:** Sexual behavior and predisposition evidence is admissible only if “otherwise admissible” under the Federal Rules of Evidence. [FRE 412(b)]

1/ [19:1033.31] **Relevant to whether sexual advances welcome?** Plaintiff’s conduct outside the workplace with persons other than the alleged harasser is generally *irrelevant* to whether she welcomed sexual advances at the

(Text cont'd on p. 19-123)

workplace. [*Burns v. McGregor Electronic Industries, Inc.* (8th Cir. 1993) 989 F2d 959, 963; *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 CA4th 397, 411, 27 CR2d 457, 463]

- 2/ [19:1033.32] **Relevant to whether victim offended?** Moreover, such evidence is of "marginal relevance" on whether the alleged victim was offended, and thus damaged, by sexual harassment at work: "(W)hether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication." [*Wolak v. Spucci*, *supra*, 217 F3d at 160]

[19:1033.33-1033.34] Reserved.

e) Application

- [19:1033.35] Plaintiff (female police officer) complained of a hostile environment based on pornographic posters and displays at the workplace. The fact that she viewed pornography outside the workplace was inadmissible: "Even if a woman's out-of-work sexual experiences were such that she could perhaps be expected to suffer less harm from viewing run-of-the-mill pornographic images displayed in the office, *pornography might still alter her status in the workplace*, causing injury, regardless of the trauma inflicted by the pornographic images alone." [*Wolak v. Spucci*, *supra*, 217 F3d at 160-161 (emphasis added)]
- [19:1033.36] Evidence that plaintiff posed nude for two sexually-explicit motorcycle magazines was inadmissible in a Title VII sexual harassment case: "The plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive. This is not a

case where Burns posed in provocative and suggestive ways at work. Her private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer.” [Burns v. McGregor Electronic Industries, Inc., supra, 989 F2d at 963]

- [19:1033.37] Evidence concerning plaintiff’s fantasies and autoerotic sexual practices should not have been admitted at trial of her sexual harassment claims because it was not probative of whether she welcomed the alleged harassment. The court’s instruction to the jury to disregard the evidence failed to cure the prejudice and plaintiff was entitled to a new trial. [B.K.B. v. Maui Police Dept. (9th Cir. 2002) 276 F3d 1091, 1105-1106]

[19:1033.38-1033.44] Reserved.

- f) [19:1033.45] **Procedure:** Unless the court specifies otherwise, a party seeking to introduce evidence covered by Rule 412 must:
  - file a motion at least 14 days before the start of trial, giving notice of the evidence, specifically describing the evidence, and stating its purpose; and
  - serve the motion on all parties and notify the alleged victim (or guardian or representative). [FRE 412(c)(1)]

Before admitting such evidence, the court “must conduct a hearing in camera and afford the victim and parties a right to attend and be heard.” The motion and record must be sealed unless the court orders otherwise. [FRE 412(c)(2); see S.M. v. J.K. (9th Cir. 2001) 262 F3d 914, 917-918—evidence of housekeeper’s prior sexual history properly excluded as sanction for employer’s failure to file motion to introduce the evidence under seal]

[19:1033.46-1033.49] Reserved.

- 2) [19:1033.50] **California law:** Inquiry into a sexual harassment plaintiff’s sexual conduct

with individuals other than the alleged harasser is *prohibited* both by California statute and case law. (The statutory protections are similar to “rape shield” laws, which protect against discovery or admissibility of a rape victim’s sexual experiences.) [See CCP §2017.220 (protecting such evidence from discovery); Ev.C. §1106(a) (precluding admission of such evidence at trial); see also *Mendez v. Sup.Ct. (Peery)* (1988) 206 CA3d 557, 570, 253 CR 731, 738; and *Knoetgen v. Sup.Ct. (Transit Mixed Concrete Co.)* (1990) 224 CA3d 11, 14, 273 CR 636, 638]

- a) [19:1033.51] **“Sexual conduct”:** This term is construed beyond sexual activity itself to include conduct that reflects a *willingness to engage* in sexual activity. Thus, testimony about plaintiff’s racy banter, sexual horseplay, and statements concerning sexual exploits are “sexual conduct” within the prohibition of Ev.C. §1106(a). [*Rieger v. Arnold* (2002) 104 CA4th 451, 462, 128 CR2d 295, 303]
- b) [19:1033.52] **Not applicable to conduct with “perpetrator”:** The prohibition on “sexual conduct” evidence does not apply to evidence of plaintiff’s sexual conduct with the alleged perpetrator. [Ev.C. §1106 (b)]

Conduct with a “perpetrator” may be relevant to show *consent*. [*Rieger v. Arnold*, supra, 104 CA4th at 464, 128 CR2d at 304]

“Perpetrator” includes not only named defendants but also any other actor whose *conduct plaintiff seeks to ascribe to the employer*. [*Rieger v. Arnold*, supra, 104 CA4th at 464, 128 CR2d at 305]

- [19:1033.53] Thus, where *hostile environment harassment* is charged, “sexual conduct” with the individual supervisors or coworkers whose conduct allegedly created the “hostile environment” (ascribed to the employer) may be admissible to prove that plaintiff did not in fact find the environment hostile. [*Rieger v. Arnold*, supra, 104 CA4th at 467, 128 CR2d at 307]

- c) [19:1033.54] **Compare—as rebuttal evidence:** If plaintiff “opens the door” on

the issue of his or her sexual conduct (by testifying or calling a witness to testify on the subject), evidence of plaintiff's past sexual activities may be introduced in rebuttal or to challenge plaintiff's credibility. [Ev.C. §1106(c),(d); see *Rieger v. Arnold*, *supra*, 104 CA4th at 461, 128 CR2d at 302]

- d) [19:1033.55] **Procedural requirements (motion in limine):** If evidence of plaintiff's sexual conduct is offered as rebuttal evidence or to attack his or her credibility as a witness at trial in a California state court, the following tightly controlled procedures must be followed:
  - Defendant must file a *written motion* (usually a motion in limine) stating that it has an offer of proof of the *relevancy* of particular evidence of plaintiff's sexual conduct;
  - The motion must be supported by an *affidavit* (declaration) stating the offer of proof;
  - If the court finds the offer of proof sufficient, a *hearing* must be held (out of the jury's presence) in which *plaintiff may be questioned* regarding the offer of proof;
  - If the court finds the evidence relevant and not unduly prejudicial (see Ev.C. §352), it may make an order stating what evidence may be introduced and the nature of questioning permitted. [Ev.C. §783]

*Cross-refer:* See further discussion of this procedure in Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8E.

[19:1033.56-1033.59] *Reserved.*

- (2) [19:1033.60] **Harasser's conduct with other employees:** While plaintiff's sexual conduct with individuals other than the alleged harasser is generally inadmissible, the alleged harasser's prior (or subsequent) sexual conduct with other persons at the workplace may be relevant on several grounds:

- (a) [19:1033.61] **As proof of hostile environment:** Past conduct and remarks by coworkers and supervisors toward other employees may prove plaintiff's allegations of a hostile environment, if he or she either *witnessed* such incidents or *knew of* them. [*Jackson v. Quanex Corp.* (6th Cir. 1999) 191 F3d 647, 691—evidence that plaintiff learned of racial remarks demonstrated that, as an African American, she subjectively perceived her work environment was hostile; *Miller v. Department of Corrections* (2005) 36 C4th 446, 462-465, 30 CR3d 797, 811-812—widespread sexual favoritism of warden's paramours conveyed message to other employees that he viewed women as "sexual playthings"; see ¶10:247 ff.]

1) **Application**

- [19:1033.62] Remarks demeaning to women in general, while not aimed at plaintiff in particular, may show a sexually hostile workplace environment. [*Abeita v. TransAmerica Mailings, Inc.* (6th Cir. 1998) 159 F3d 246, 251-252]

[19:1033.63-1033.64] *Reserved.*

- 2) [19:1033.65] **Hearsay admissible:** Plaintiff need not witness the harassment personally. It is immaterial that plaintiff's knowledge of the prior conduct is based on hearsay. [*Carter v. Chrysler Corp.* (8th Cir. 1999) 173 F3d 693, 701, fn. 7—female plaintiff learned that someone had written obscenities about her in men's restroom]

- [19:1033.66] Plaintiff, who was herself the victim of sexual harassment by her employer, could introduce evidence that he had harassed other women at work to show a "hostile and offensive" working environment: "(A) reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct." [*Beyda v. City of Los Angeles* (1998) 65 CA4th 511, 519, 76 CR2d 547, 551 (emphasis added)]

[19:1033.67-1033.69] *Reserved.*

- (b) [19:1033.70] **As proof of employer's knowledge:** The harasser's conduct with others may

show a pattern of conduct that should have *put the employer on notice* of the potential harassment. [Smith v. Sheahan (7th Cir. 1999) 189 F3d 529, 533—alleged harasser's assaultive outbursts against other female employees were reported to superiors; Bihun v. AT & T Information Systems, Inc. (1993) 13 CA4th 976, 991, 16 CR2d 787, 794 (disapproved on other grounds in Lakin v. Watkins Associated Industries (1993) 6 C4th 644, 25 CR2d 109)—harasser's conduct with other female employees was admissible to prove employer's knowledge or opportunity to learn of harasser's misconduct]

- 1) [19:1033.71] **Creating duty to prevent harassment:** California employers are required “*to take all reasonable steps to prevent discrimination or harassment from occurring*” (Gov.C. §12940(k) (emphasis added)); and are subject to statutory tort liability if they fail to do so. See discussion at ¶10:349 ff.

 [19:1033.72] **PRACTICE POINTER:** Plaintiffs should consider including a claim for breach of such duty wherever possible because it may make relevant evidence of the harassment of other employees (see above).

- 2) [19:1033.73] **Rebutting Ellerth/Faragher defense:** Proof that the employer knew of the harasser's prior misconduct and failed to remedy it should be admissible to rebut an *Ellerth/Faragher* defense in Title VII cases; see ¶10:335 ff.
- 3) [19:1033.74] **Creating potential liability for punitive damages:** An employer may be liable for punitive damages based on harassment of plaintiff by a supervisor or other employee where the employer “had *advance knowledge* of the unfitness of the employee and *employed him or her with a conscious disregard of* the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice.” [Civ.C. §3294(b) (emphasis added); see Weeks v. Baker & McKenzie (1998) 63 CA4th 1128, 1151, 74 CR2d 510, 524]

*Cross-refer:* Punitive damages liability is discussed in Ch. 17, Remedies.

- (c) [19:1033.75] **As proof of reasonableness of plaintiff's failure to complain:** Proof of the harasser's misconduct with others may show the *reasonableness of plaintiff's state of mind* in believing his or her acquiescence or refusal to the harasser's demands would result in the grant or denial of employment benefits. [*Bihun v. AT & T Information Systems, Inc.*, supra, 13 CA4th at 988, 16 CR2d at 792]
- [19:1033.76-1033.79] *Reserved.*
- (d) [19:1033.80] **As proof of employer's failure to take appropriate action:** Evidence of improper conduct by the supervisor or personnel officer handling harassment complaints *may* be admissible to show the employer failed to take appropriate action to prevent workplace harassment. [See *Lewis v. Triborough Bridge & Tunnel Auth.* (SD NY 1999) 77 F.Supp.2d 376, 384—evidence that supervisor designated by employer to receive harassment complaints was the “porno king” of the workplace was admissible to show employer did not handle plaintiff's complaints properly]
- [19:1033.81-1033.84] *Reserved.*
- (e) [19:1033.85] **Limitation—court discretion to exclude:** Although evidence of a harasser's prior conduct may be admissible for any of the purposes stated above, the court has discretion to exclude such evidence where its probative value is outweighed by potential prejudice; e.g., prolonging the trial, jury confusion of issues, etc. [*Tennison v. Circus Circus Enterprises, Inc.* (9th Cir. 2001) 244 F3d 684, 690—*harassment of plaintiff's coworkers excluded as unduly prejudicial under FRE 403*]
- [19:1033.86-1033.89] *Reserved.*
- (3) [19:1033.90] **Harasser's conduct outside workplace:** Evidence of the alleged harasser's sexual conduct outside the workplace is generally held inadmissible; it is usually deemed both irrelevant and unduly prejudicial in both federal and state courts. [*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 CA4th 397, 411, 27 CR2d 457, 463]
- (a) [19:1033.91] **Compare—physical assaults (federal rule):** Evidence of a defendant's previous commission of a *sexual assault*—at work or elsewhere—is admissible in federal court civil cases

where plaintiff's claim is based on an alleged sexual assault. [FRE 415 (applicable only to physical assaults); see *Cleveland v. KFC National Management Co.* (ND GA 1996) 948 F.Supp. 62, 65—harasser need not be party to action]

A criminal conviction is not required; it is enough that the jury could reasonably find the defendant committed the prior assault. [*Johnson v. Elk Lake School Dist.* (3rd Cir. 2002) 283 F3d 138, 152]

- 1) [19:1033.92] **Pretrial disclosure required:** A party who intends to offer evidence under Rule 415 must disclose it to the party against whom it will be offered, including witness statements or a summary of the substance of any testimony to be offered, at least 15 days before trial or at such later time as the court may allow for good cause. [FRE 415(b)]
- 2) [19:1033.93] **Discretionary exclusion:** The trial court still has discretion, however, to exclude such evidence where its probative value is *outweighed* by potential prejudice from admission. [FRE 403; see *Johnson v. Elk Lake School Dist.*, *supra*, 283 F3d at 155]

[19:1033.94] *Reserved.*

*Cross-refer:* For further discussion of Rule 415, see Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8E.

- (4) [19:1033.95] **Harassment of other women at work by different harassers:** Evidence that women other than plaintiff were harassed at work by persons other than those who harassed plaintiff may be challenged as irrelevant (FRE 401) and on the ground that its probative value is substantially outweighed by danger of unfair prejudice, risk of jury confusion and undue consumption of time. [FRE 403; see also Ev.C. §352]

Nevertheless, plaintiffs may argue that such evidence should be admitted in appropriate cases:

- (a) [19:1033.96] **To show impact on plaintiff:** Evidence that plaintiff *witnessed harassment* of other women at work may show that the workplace was hostile to women in general, thus altering the terms and conditions of her employment. [See *Hurley v. Atlantic City Police Dept.* (3rd Cir. 1999) 174 F3d 95, 110]

(b) [19:1033.97] **To show employer's reasons were pretextual:** Evidence of pervasively sexist attitudes and harassment of other women is also admissible to show that the employer's reasons for its actions against plaintiff were a "pretext for discrimination." *[Hurley v. Atlantic City Police Dept., supra, 174 F3d at 110]*

1) [19:1033.98] **Application:** Where the employer claims plaintiff was discharged because of poor performance evaluations, evidence of past discrimination and harassment of other women may *explain* the negative evaluations. *[See Hurley v. Atlantic City Police Dept., supra, 174 F3d at 110]*

[19:1033.99] *Reserved.*

2) [19:1033.100] **Plaintiff's knowledge not required:** Plaintiff need not have been aware that other women had been or were being harassed at work. Evidence of such harassment goes to the *motive* behind whatever action was taken against plaintiff. *[Hurley v. Atlantic City Police Dept., supra, 174 F3d at 111]*

[19:1033.101-1033.104] *Reserved.*

(c) [19:1033.105] **To show employer's anti-harassment policy ineffective:** Evidence that other women were being harassed by other men at work infers that the employer's anti-harassment policy was generally ineffective; i.e., that male workers did not respect it and that female workers were not protected by it. *[Hurley v. Atlantic City Police Dept., supra, 174 F3d at 111]*

[19:1033.106-1033.109] *Reserved.*

(d) [19:1033.110] **To support retaliation, disparate treatment claims:** Evidence of pervasive sexual harassment makes retaliation claims more credible "because harassers may be expected to resent attempts to curb their male prerogatives." *[Hurley v. Atlantic City Police Dept., supra, 174 F3d at 111]*

Such evidence makes disparate treatment claims more credible as well "since such discriminatory acts stem from similar motives." *[Hurley v. Atlantic City Police Dept., supra, 174 F3d at 111]*

[19:1034] *Reserved.*

b. [19:1035] **Discriminatory remarks or conduct:** Testimony regarding discriminatory remarks or conduct by the

employer may be relevant to show that plaintiff's age, race, gender, etc. was a motivating factor in the employer's decisions to take adverse action against plaintiff or similarly situated employees. [*Cummings v. Standard Register Co.* (1st Cir. 2001) 265 F3d 56, 63—age discrimination case]

- (1) [19:1035.1] **Admissions:** Testimony that an employer expressed bias or prejudice against a protected group may be an *admission* of discriminatory intent.

In California, admissions are hearsay but admissible under an exception to the hearsay rule (Ev.C. §1220). Under the Federal Rules of Evidence, admissions are nonhearsay (FRE 801(d)(2)).

- (a) [19:1035.2] **Remarks by decisionmakers:** A decisionmaker's negative remarks about plaintiff's race, age or gender may be *direct evidence* of discriminatory intent. [See *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 US 133, 148, 120 S.Ct. 2097, 2109—testimony that decisionmaker had on a *single* occasion called plaintiff “too damn old to do the job” was admissible in age discrimination case to show decisionmaker was motivated by age-based animus; see also *Ash v. Tyson Foods, Inc.* (2006) 546 US 454, 456, 126 S.Ct. 1195, 1197—evidence that plant manager sometimes referred to plaintiffs (African-Americans) as “boy,” potentially probative of discriminatory animus; and discussion at ¶7:360 ff.]

[19:1035.3-1035.7] *Reserved.*

- 1) [19:1035.8] **Compare—“stray remarks” by decisionmakers:** A supervisor's isolated remark made at a *remote* point in time and *unrelated* to the employment action at issue may be excluded as proof of discriminatory intent by the employer; see ¶7:370 ff.

The admissibility of “stray remarks” is governed by Federal Rule of Evidence 403, “which establishes a standard . . . that *tilts in favor of admissibility*; the probative value of the evidence must not merely be outweighed, it must be substantially outweighed, by its negative consequences, to be excludable.” [*Mattenson v. Baxter Healthcare Corp.* (7th Cir. 2006) 438 F3d 763, 771 (emphasis added)]

- a) [19:1035.9] **In California courts?** It is presently unclear whether California law recognizes the “stray remarks” doctrine.

**Caution:** This issue is presently before the California Supreme Court in *Reid v. Google, Inc.*, Case No. S158965 (rev.grntd. 1/30/08).

(b) [19:1036] **Remarks by non-decisionmakers generally not admissions:** Negative comments regarding plaintiff's employment by persons *not* involved in the decisionmaking process are not direct evidence of discrimination by the employer. [*Carter v. University of Toledo* (6th Cir. 2003) 349 F3d 269, 272; *DeHorney v. Bank of America Nat'l Trust & Sav. Ass'n* (9th Cir. 1989) 879 F2d 459, 468—alleged racial slur by coworker held irrelevant because plaintiff was terminated by branch manager who had no knowledge of her race]

1) [19:1036.1] **Compare—remarks within scope of employment as vicarious admissions:** But comments made *within a person's course and scope of employment* may be circumstantial evidence of an employer's discriminatory intent, even if the person who made the comment was not the decisionmaker. [*Carter v. University of Toledo*, supra, 349 F3d at 274]

a) [19:1036.2] **Rationale:** Under the Federal Rules, a statement is *not hearsay* "if offered against a party and is . . . a statement by the party's agent or servant *concerning a matter within the scope* of the agency or employment, made during the existence of the relationship." [FRE 801(d)(2)(D) (emphasis added)]

This Rule does *not* require firsthand knowledge or personal involvement. Thus, the "scope of employment" criterion *extends beyond direct decisionmakers*. [*Carter v. University of Toledo*, supra, 349 F3d at 275]

b) **Application**

- [19:1036.3] Professor who had been denied tenure testified Provost had told him University's decisionmakers were racially biased. Professor's testimony was admissible because Provost was in charge of ensuring compliance with affirmative action requirements and thus his statements were *within the*

scope of his authority. [Carter v. University of Toledo, supra, 349 F3d at 274]

- [19:1036.4] In an age discrimination action, plaintiff testified that Supervisor had warned him that “some of the guys in New York” (the head office) were bent on replacing older salesmen with younger salesmen. Supervisor was an agent of the company in dealing with plaintiff, and his statements regarding the intentions of higher-ups in management were admissible as vicarious admissions by the employer. [*Hybert v. Hearst Corp.* (7th Cir. 1990) 900 F2d 1050, 1053]

[19:1036.5-1036.9] Reserved.

- 2) [19:1036.10] **Compare—remarks as proof of pervasive company bias:** Remarks by nondecisionmakers may be admissible, however, as proof of a “pervasive firm or divisional culture of prejudice” against a protected group. Although testimony about workplace “culture” is too vague to be admissible, “testimony based on the personal knowledge of the testifying employees can provide a basis for an inference that discriminatory attitudes permeate a firm’s employment policies and practices.” [*Mattenson v. Baxter Healthcare Corp.*, supra, 438 F3d at 770—testimony about ageist and sexist remarks made by nondecisionmakers at one meeting]

- (2) [19:1037] **Adverse treatment of other employees in protected class (“me too” evidence):** The employer’s treatment of similarly situated employees may be relevant to show a “discriminatory atmosphere” or corporate mindset against persons in a protected category. [*Hawkins v. Hennepin Technical Ctr.* (8th Cir. 1990) 900 F2d 153, 155—employer’s hostile treatment of other women admissible to prove plaintiff’s claims of gender discrimination and retaliatory discharge; *Josephs v. Pacific Bell* (9th Cir. 2006) 443 F3d 1050, 1064-1065—earlier grievance proceedings involving similarly situated employees admissible in disability discrimination action; *Johnson v. United Cerebral Palsy/Spastic Children’s Found. of L.A. & Ventura Counties* (2009) 173 CA4th 740, 759, 93 CR3d 198, 212—in pregnancy discrimination action, declarations by other women em-

ployees that they had been fired due to their pregnancies were relevant to show employer's reason for plaintiff's termination was pretextual]

That the other employees worked in different offices or under different supervisors does not render their testimony inadmissible per se; nor is such evidence automatically admissible. [*Sprint/United Mgmt. Co. v. Mendelsohn* (2008) US , , 128 S.Ct. 1140, 1143]

"Rather, the trial court must consider the evidence in the light of the entire case and determine whether it provides a basis for reasonable inferences related to the plaintiff's claim." [*Cummings v. Standard Register Co.* (1st Cir. 2001) 265 F3d 56, 63]

[19:1037.1-1037.4] Reserved.

- (3) [19:1037.5] **More favorable treatment of employees outside protected class:** Similarly, evidence that the employer treated "similarly situated" employees outside plaintiff's protected class more favorably than it treated plaintiff may be probative of the employer's discriminatory bias or motivation. [*Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F3d 634, 641]
  - (a) [19:1037.6] **"Similarly situated":** To prove discrimination by evidence that other employees were treated more favorably (less harshly), plaintiff must prove that the other employees were similarly situated to plaintiff *in all relevant aspects*; i.e., same position or job duties, same department, *same supervisor*, and (where discharge or discipline is involved) accused of similar misconduct. [See *Gates v. Caterpillar, Inc.* (7th Cir. 2008) 513 F3d 680, 690-691; *Harris v. Chand* (8th Cir. 2007) 506 F3d 1135, 1140-1141; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 369, 100 CR2d 352, 389]
- (4) [19:1038] **Compare—favorable treatment of other members of protected class to show no discriminatory intent:** Conversely, the employer may offer evidence it treated other members of a protected class *favorably* to rebut claims of intentional discrimination against plaintiff: "While not conclusive, an employer's favorable treatment of other members of a protected class can create an inference that the employer *lacks* discriminatory intent." [*Ansell v. Green Acres Contracting Co., Inc.* (3rd Cir. 2003) 347 F3d 515, 524 (emphasis added)]

For example:

- [19:1038.1] Proof that an employee over age 40 was *hired to replace* plaintiff may rebut claims he was fired as part of a plan to get rid of older workers in violation of the ADEA. [*Ansell v. Green Acres Contracting Co., Inc.*, supra, 347 F3d at 524]
  - [19:1038.2] Proof that a workforce was racially balanced or that it contained a disproportionately high percentage of minority employees may be relevant to whether the employer intentionally discriminated against a minority employee. [See *Connecticut v. Teal* (1982) 457 US 440, 454, 102 S.Ct. 2525, 2534]
  - [19:1038.3] Proof that a female plaintiff claiming gender discrimination was replaced by another woman “might have some evidentiary force, and it would be prudent for a plaintiff in this situation to counter (or explain) such evidence.” [*Pivirotto v. Innovative Systems, Inc.* (3rd Cir. 1999) 191 F3d 344, 354 (parentheses in original)]
- c. [19:1039] **Other hearsay vs. nonhearsay issues:** Testimony regarding statements or conduct outside the courtroom is generally inadmissible *to prove the truth* of the statement (hearsay), but may be admissible to prove *the intent or belief* of the person making the statement (nonhearsay). For example:

- [19:1039.1] *Hearsay*: Plaintiff sued for hostile environment sexual harassment based on her belief that women in other parts of the plant were being sexually harassed and that Employer did nothing to stop the harassment. But Plaintiff had no personal knowledge of the harassment and *based her claims entirely on what she had heard from others*. Plaintiff cannot prove discrimination based on hearsay. [*Leibovitz v. New York City Transit Auth.* (2nd Cir. 2001) 252 F3d 179, 189]

[19:1039.2-1039.4] Reserved.

- [19:1039.5] *Nonhearsay*: Plaintiff claimed she was denied a promotion in retaliation for her settlement demands on a pregnancy discrimination claim. Employer claimed another worker was more qualified. Supervisor’s statement that plaintiff would not be promoted if she demanded too much to settle her pregnancy discrimination claim was admissible nonhearsay. It was not offered for its truth but rather to show that Employer’s reason for not promoting plaintiff was a pretext. [*Bergene v. Salt River Project Agr. Improvement & Power Dist.* (9th Cir. 2001) 272 F3d 1136, 1141-1142]

- [19:1039.6] **Nonhearsay:** Coworker's testimony that Shipyard's decisionmakers said Asian-Pacific Islanders (a protected class) "were not good enough" and "can't do a good job" was admissible to show the decision-makers' discriminatory state of mind. [*Obrey v. Johnson* (9th Cir. 2005) 400 F3d 691, 697]
- [19:1039.7] **Nonhearsay:** Plaintiff claimed he was denied reinstatement following an FMLA leave. At trial, Employer testified the company's physician who examined Plaintiff said he could not return to his former job because he had to wear a respirator. The physician's statement was admissible nonhearsay. It was not offered to prove Plaintiff had to wear a respirator but only to prove Employer's reasons for refusing to reinstate him. [*Rinehimer v. Cemcolift, Inc.* (3rd Cir. 2002) 292 F3d 375, 382]
- [19:1039.8] **Nonhearsay:** In a retaliatory discharge action, Employer was allowed to introduce an investigator's report indicating that Plaintiff had misappropriated funds. The report was admissible because it was not offered for its truth but rather to demonstrate that Employer terminated plaintiff because of an honest belief that Plaintiff had committed the misappropriation. [*Pugh v. City of Attica, Indiana* (7th Cir. 2001) 259 F3d 619, 627, fn. 7]

[19:1039.9-1039.19] *Reserved.*

- d. [19:1039.20] **"Habit" vs. "character" evidence:** Evidence of a person's "habit" (semi-automatic behavior in a specific situation) may be admissible under Federal Rule of Evidence 406.

Evidence of conduct that falls short of "habit" is generally excluded unless it falls within one of the "character" exceptions in FRE 404(b): i.e., to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Even if otherwise admissible, "habit" or "character" evidence may be excluded under FRE 403 if the court determines its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or undue delay.

- [19:1039.21] Employee's alleged *poor performance at a prior job* is *inadmissible* as either "habit" or "character" evidence in a discrimination case. [*Neuren v. Adduci, Mastriani, Meeks & Schill* (DC Cir. 1995) 43 F3d 1507, 1511; *Zubulake v. UBS Warburg LLC* (SD NY 2005) 382 F.Supp.2d 536, 540—alleged insubordination and lack of teamwork at former job inadmissible]

- [19:1039.22] Employer's discriminatory treatment of other employees in plaintiff's protected group may be admissible under Rule 404(b) as proof of discriminatory *motive*: "Other-acts evidence may be relevant and admissible in a discrimination case to prove, for example, intent or pretext." [*Manuel v. City of Chicago* (7th Cir. 2003) 335 F3d 592, 596; *Heyne v. Caruso* (9th Cir. 1995) 69 F3d 1475, 1479-1480; see ¶19:1037]
- [19:1039.23] Compare: Employer's hiring of other persons in the same protected group as the plaintiff may be admissible to show *lack of discriminatory intent*: "(O)ther acts are admissible under Rule 404(b) in the employment discrimination context for the proper purpose of establishing *or negating* discriminatory intent." [*Ansell v. Green Acres Contracting Co., Inc.* (3rd Cir. 2003) 347 F3d 515, 521 (emphasis added)]
- [19:1039.24] Evidence that plaintiff participated in a prior class action against her employer claiming race discrimination was admissible in her present action claiming retaliation by failure to promote. Evidence of the employer's "prior bad acts speaks directly to the (employer's) motive or intent to retaliate." [*Buckley v. Mukasey* (4th Cir. 2008) 538 F3d 306, 319 (parentheses added)]

*Cross-refer:* For detailed discussion of the hearsay rule and its exceptions, see:

- (state court) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8D.
- (federal court) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8G.

- e. [19:1040] **Settlement offers excluded:** Offers in compromise of a disputed claim are inadmissible to prove the offeror's liability, or the invalidity or amount of the claim. [Ev.C. §1152; FRE 408]

- (1) [19:1041] **Includes statements and conduct:** Evidence of conduct or statements made in settlement negotiations is likewise inadmissible. [FRE 408; *Reynolds v. Roberts* (11th Cir. 2000) 202 F3d 1303, 1317-1318]

- [19:1042] To interpret ambiguous contractual provisions, a court normally may consider statements made in negotiating the contract. But Rule 408 bars consideration of statements relating to liability made by the parties or their attorneys during settlement discussions. [*Reynolds v. Roberts*, supra, 202 F3d at 1317-1318—in construing ambiguous provision of consent decree, court could not consider repre-

sentations by Title VII plaintiffs' counsel as to what employer's attorneys said in course of negotiating consent decree about legality of employer's practices]

- (2) [19:1043] **Offer to settle *existing* dispute:** The timing of the settlement offer may determine its admissibility:

- (a) [19:1044] **Offer made *after* termination of employment:** Offers made by the employer *after* termination of employment or other adverse employment action against the employee are generally inadmissible to prove the employer's liability for unlawful discrimination. [See *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1342]

No lawsuit or discrimination charges need be filed against the employer at the time of the offer. [*Mundy v. Household Finance Corp.* (9th Cir. 1989) 885 F2d 542, 546-547]

- [19:1045] After Employee filed an age discrimination charge with the EEOC, Employer offered him additional medical benefits in exchange for a release of claims. The offer was inadmissible under Rule 408 to prove Employer's liability. [*Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F3d 1271, 1291]
- [19:1046] Three weeks after discharging Employee, Employer offered money for "outplacement services" in exchange for a release of claims. Employer's offer was inadmissible under Rule 408 although Employee had not yet filed any claim against Employer (but had retained counsel). [*Mundy v. Household Finance Corp.*, supra, 885 F2d at 546-547]

- (b) [19:1047] **Compare—offer *contemporaneous* with termination:** The protections of Rule 408 were designed to encourage compromise and settlement of *existing* disputes. Plaintiffs will argue that Rule 408 does not apply to offers made concurrently with termination of employment and before any claim has been asserted against the employer, and therefore such offers may be admissible to show the employer's *awareness* of discrimination. [*Cassino v. Reichhold Chemicals, Inc.*, supra, 817 F2d at 1342-1343]

- [19:1048] Contemporaneously with terminating Employee, Employer offered an enhanced

severance pay package in exchange for a release of all claims, including claims for discriminatory acts that may have occurred at or before the termination. Employer's offer was *admissible* because it was "relevant to the circumstances surrounding the alleged discriminatory discharge itself . . . (and) probative on the issue of discrimination." [Cassino v. Reichhold Chemicals, Inc., *supra*, 817 F2d at 1343 (parentheses added)]

[19:1048.1-1048.4] Reserved.

- (3) [19:1048.5] **Offer of reinstatement admissible to show employee's failure to mitigate damages?** Courts disagree whether FRE 408 bars evidence of the employer's offer to reinstate the employee in exchange for a dismissal of the suit to prove the employee's *failure to mitigate damages* (see ¶17:490 ff.):

- [19:1048.6] Some courts admit evidence of a reinstatement offer on the rationale that FRE 408 expressly does not apply where a settlement offer is offered for *another purpose*; and proving or disproving mitigation is another purpose. [Vulcan Hart Corp. (St. Louis Div.) v. NLRB (8th Cir. 1983) 718 F2d 269, 277]
- [19:1048.7] Other courts hold an offer of reinstatement inadmissible: "Evidence that demonstrates a failure to mitigate damages goes to the 'amount' of the claim and thus . . . is barred under the plain language of Rule 408." [Stockman v. Oakcrest Dental Ctr., P.C. (6th Cir. 2007) 480 F3d 791, 797-798 (emphasis added; internal quotes omitted); Pierce v. F.R. Tripler & Co. (2nd Cir. 1992) 955 F2d 820, 826-827]

- f. [19:1049] **EEOC findings on discrimination claims:** Findings made in the administrative process are generally *not determinative* of the merits in subsequent civil proceedings. [See University of Tennessee v. Elliott (1986) 478 US 788, 795, 106 S.Ct. 3220, 3224—unreviewed state agency's findings not determinative in Title VII action; Scott v. Johanns (DC Cir. 2005) 409 F3d 466, 469—unreviewed EEOC findings not determinative in Title VII action]

Although not determinative, EEOC or state agency findings of "reasonable cause" (or "no cause") for employment discrimination charges may nevertheless be offered as evidence under the "public records" exception to the hearsay rule (FRE 803(8)(C); Ev.C. §1208).

The issue is whether they may be excluded as *unduly prejudicial*, at least in jury trials:

- (1) [19:1049.1] **Federal courts:** Federal courts are split on the admissibility of EEOC or state agency findings in discrimination cases:
  - (a) [19:1049.2] **View that findings per se admissible:** Some courts (including the Ninth Circuit) hold an EEOC "reasonable cause" determination—finding "reasonable cause" for or against a discrimination claim—is per se admissible in related civil proceedings. The determination's probative value is deemed to *outweigh* any prejudicial effect it might have on the jury. [*Plummer v. Western Int'l Hotels Co., Inc.* (9th Cir. 1981) 656 F2d 502, 504-505—plaintiff has the right to introduce an EEOC probable cause determination in Title VII lawsuit, "regardless of what other claims are asserted, or whether the case is tried before a judge or jury"; *Smith v. Universal Services, Inc.* (5th Cir. 1972) 454 F2d 154, 157 (en banc)]
    - 1) [19:1049.3] **Not applicable to dismissals:** An administrative agency's dismissal of discrimination charges for "lack of sufficient evidence to continue investigation" is *not* per se admissible. [See *Beachy v. Boise Cascade Corp.* (9th Cir. 1999) 191 F3d 1010, 1015—jury might find it difficult to evaluate evidence of discrimination independently after being informed that agency could not find sufficient evidence of violation]
  - (b) [19:1049.4] **View that court has discretion to exclude:** Other courts recognize the trial court's power to exclude such findings under FRE 403 where their admission would be unfairly prejudicial to a party or confusing to the trier of fact. [*Coleman v. Home Depot, Inc.* (3rd Cir. 2002) 306 F3d 1333, 1344; *Paolitto v. John Brown E. & C., Inc.* (2nd Cir. 1998) 151 F3d 60, 65; *Johnson v. Yellow Freight System, Inc.* (8th Cir. 1984) 734 F2d 1304, 1309; *Barfield v. Orange County* (11th Cir. 1990) 911 F2d 644, 651—discretion to exclude in *jury trials* but not bench trials]
- (2) [19:1049.10] **California courts:** California courts have discretion under Ev.C. §352 to exclude EEOC or state agency findings of "reasonable cause," at least in

*jury trials* where the prejudicial effect of the findings may outweigh their probative value. [See *Michail v. Fluor Mining & Metals, Inc.* (1986) 180 CA3d 284, 286-287, 225 CR 403, 404 (jury trial)]

- g. [19:1050] **Immigration status:** A job applicant's or employee's immigration status is "irrelevant to the issue of liability" under California's labor and employment laws. [Lab.C. §1171.5; see further discussion at ¶11:1224 ff.]

In federal cases, a district court may issue a protective order deeming plaintiff's immigration status irrelevant or limiting discovery until the damages phase of a bifurcated trial. [See *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F3d 1057, 1072-1073; and discussion at ¶19:685.5 ff.]

[19:1051-1054] Reserved.

- h. [19:1055] **Discretionary exclusion:** The court has discretion to exclude evidence if its probative value is substantially *outweighed* by the danger of unfair prejudice, confusion of issues, misleading the jury, or undue time consumption. [Ev.C. §352; FRE 403]

(1) [19:1056] **Unfairly prejudicial:** Evidence that places a party or witness in an unsavory light and that has only limited probative value may be excluded as "unfairly prejudicial."

- [19:1056.1] Evidence that plaintiff had been fired from a previous job for stealing cigarettes was properly excluded in a wrongful discharge action (plaintiff allegedly fired for taking expired meat from a waste barrel). The evidence was more prejudicial than probative because the jury could have concluded plaintiff was a person of bad character. [*Janes v. Wal-Mart Stores Inc.* (9th Cir. 2002) 279 F3d 883, 886]
- [19:1057] In a sexual harassment action in which plaintiff claimed emotional distress, evidence that plaintiff had undergone an abortion, although it was against her religion, had "very little" probative value as to her claimed emotional distress because it was remote in time and unrelated to her employment. Therefore, the evidence should have been excluded under Rule 403 because it "presented the danger of provoking the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner . . . (and) increased the likelihood that the jury would view her as immoral and not worthy of trust and reach its

verdict on such basis.” [*Nichols v. American Nat'l Ins. Co.* (8th Cir. 1998) 154 F3d 875, 885 (parentheses added)]

- [19:1058] Where Employer *admitted* Employee had been sexually harassed by Supervisor but claimed she was discharged for cause, the court had discretion to exclude a blow-by-blow account of Supervisor's misconduct: “The proffered evidence had little probative value . . . The serious nature of the harassment, however, created a risk of unfair prejudice against (Employer), despite the company's prompt investigation of (Employee's) complaint and termination of (Supervisor's) employment. Such testimony also would encourage the jury to grant the plaintiff relief on the grounds she had suffered from (Supervisor's) conduct, not because she had shown her discharge was (improper).” [*Easley v. American Greetings Corp.* (8th Cir. 1998) 158 F3d 974, 976 (parentheses added)]

[19:1058.1-1058.4] *Reserved.*

- [19:1058.5] Evidence that plaintiff has filed *frivolous claims of discrimination in the past* may have probative value because it may give rise to an inference that the present claim is also frivolous. But the court has discretion to exclude such evidence if its probative value is *outweighed* by the substantial danger of jury bias against chronic litigants. [*Mathis v. Phillips Chevrolet, Inc.* (7th Cir. 2001) 269 F3d 771, 776—in age discrimination suit against Car Dealer for failure to hire Applicant, court had discretion to exclude evidence that Applicant had filed similar lawsuits against other car dealers]

(2) [19:1059] **Undue time consumption:** The rules of evidence permit exclusion of relevant evidence when its probative value is outweighed by considerations of time.

- [19:1060] Employee claimed she was terminated for racially discriminatory reasons. Employer claimed she was discharged for “unprofessional behavior.” The court properly exercised its discretion under Rule 403 to exclude evidence that white co-workers were disciplined but not discharged for similar behavior. Although relevant, allowing such evidence “would have in effect generated a mini-trial on collateral issues which would not have related to the racial discrimination alleged in (Employee's) claim.” [*Anderson v. WBMG-42* (11th Cir. 2001) 253 F3d 561, 567 (parentheses added)]

- [19:1060.1] On the other hand, in a “pattern or practice” discrimination case, it was error to exclude testimony of plaintiff’s coworkers who also believed they had suffered discrimination. The clear probative value of their “anecdotal” testimony *outweighed* concerns about the prospect of “mini-trials” on the coworkers’ discrimination claims. [*Obrey v. Johnson* (9th Cir. 2005) 400 F3d 691, 698-699]
- i. [19:1061] **Determinations on entitlement to unemployment benefits:** The employer in a wrongful termination action may want to introduce evidence that plaintiff was denied unemployment insurance benefits on the ground he or she was *terminated for misconduct*. But the findings made by the California Unemployment Insurance Appeals Board (CUIAB) regarding an employee’s eligibility for unemployment benefits are *inadmissible* in “any separate or subsequent action or proceeding . . . before a judge of this state or the United States . . .” [Unemp.Ins.C. §1960]
  - (1) [19:1061.1] **Admissibility in federal court?** It is not clear that this California statute should govern admissibility of evidence in federal proceedings based on federal claims (e.g., Title VII violations). [See *Baldwin v. Rice* (ED CA 1992) 144 FRD 102, 105-107—such evidence *held admissible* by magistrate judge; and *Bradshaw v. Golden Road Motor Inn* (D NV 1995) 885 F.Supp. 1370, 1373-1375 & fn. 4—Nevada agency’s decision regarding Nevada employee’s eligibility for unemployment benefits in that State held not admissible in federal discrimination suits, and questioning reasoning in *Baldwin*, *supra*]

[19:1061.2] *Comment:* It seems clear, however, that findings by the CUIAB are *not preclusive* on issues litigated in a federal action. [See *Mack v. South Bay Beer Distrib.* (9th Cir.1986) 798 F2d 1279, 1281]

[19:1061.3] Moreover, any sworn statements made by the parties in proceedings before the CUIAB probably are *admissible* in a federal action, so long as they are not inadmissible under some other rule, statute or privilege. [FRE 801(d)]
- j. [19:1062] **After-acquired evidence of employee wrongdoing:** Evidence first discovered after the employer has terminated or disciplined an employee, *of such severity* that it would have resulted in the action taken had the employer known the facts, is admissible in subsequent litigation charging the employer with wrongful termination or discrimination. The after-acquired evidence does *not excuse* the employer from discrimination liability. But it may *limit the*

*type and extent of relief recovered by the employee.*  
[*McKennon v. Nashville Banner Pub. Co.* (1995) 513 US 352,  
362-363, 115 S.Ct. 879, 886]

➡ [19:1062.1] **PRACTICE POINTER FOR PLAINTIFFS:**

When after-acquired evidence of an employee-plaintiff's wrongdoing is admitted, the plaintiff should be sure to *request a jury instruction* that such evidence may *not* be considered for purposes of eliminating li-

(Text cont'd on p. 19-129)

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ability, but only for reducing damages. [See *Harris v. Chand* (8th Cir. 2007) 506 F3d 1135, 1139]

*Cross-refer:* See detailed discussion of the “after-acquired evidence doctrine” at ¶17:470 ff.

[19:1063-1064] *Reserved.*

*Cross-refer:* For further discussion of relevancy and exclusion issues, see:

- (state court) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Chs. 8B, 8F.
- (federal court) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Chs. 8B, 8I.

3. [19:1065] **Presumptions:** Presumptions and inferences applicable to civil cases generally apply in employment discrimination cases.

[19:1065.1-1065.4] *Reserved.*

- a. [19:1065.5] **Presumption of discrimination:** Because the employer's motive for taking a particular adverse action is difficult for the employee to prove, courts have fashioned a special presumption shifting the *burden of production* (but not persuasion) to the employer upon a prescribed showing by the plaintiff. [*Mamou v. Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 713-714, 81 CR3d 406, 429]

Specifically, the employee may raise a presumption of discrimination by presenting evidence of a *prima facie* case (the components of which vary with the nature of the claim; see ¶19:320.5 ff.). Doing so gives rise to a presumption of discrimination which, *if unanswered* by the employer, requires judgment for the plaintiff. [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 355, 100 CR2d 352, 379]

However, the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action. At that point, the presumption of discrimination *disappears*. [*Guz v. Bechtel Nat'l, Inc.*, supra, 24 C4th at 356, 100 CR2d at 379]

- b. [19:1066] **Willful destruction of relevant records (“spoliation of evidence”):** If a party has *willfully* destroyed or suppressed evidence, an inference may be drawn that the evidence would be adverse to that party. [Ev.C. §413; see *Cedars-Sinai Med. Ctr. v. Sup.Ct. (Bowyer)* (1998) 18 C4th 1, 11, 74 CR2d 248, 254]

Similar rules apply in federal court. [See *Unigard Security Ins. Co. v. Lakewood Eng. & Mfg. Corp.* (9th Cir. 1992) 982 F2d 363, 368]

(1) [19:1067] **Relevant records:** The employer is required to maintain and preserve records relevant to claims of discrimination for *one year* after an employment action. [See 42 USC §2000e-8(c); 29 CFR §1602.14]

(a) [19:1068] **Not rough drafts:** Employers are not required to keep every single piece of scrap paper that may be created during a selection or termination process. The employer need retain only the actual employment record itself, not the rough drafts or memos or notes leading up to it. [*Rummery v. Illinois Bell Tel. Co.* (7th Cir. 2001) 250 F3d 553, 558]

(2) [19:1069] **Mens rea required:** Some courts recognize an adverse inference only where it can be inferred from the evidence that the documents were destroyed in "bad faith"—i.e., for the purpose of hiding adverse information. [*Rummery v. Illinois Bell Tel. Co.*, supra, 250 F3d at 558—employer's intentional destruction of notes used in selecting employees for layoff during reduction in force did not establish pretext in age discrimination suit absent evidence the documents were destroyed in bad faith to hide discriminatory information]

Other courts hold that where the employer is required by law to retain relevant employment records (above), bad faith need not be shown. Intentional destruction of such records satisfies the mens rea requirement. [*Zimmermann v. Associates First Capital Corp.* (2nd Cir. 2001) 251 F3d 376, 384]

- [19:1070] Where the employer has voluntarily destroyed relevant employment records, it may be presumed that the records were adverse to the employer's position: "Employers have been on notice since the earliest days of Title VII's enforcement of the critical importance of the maintenance of employment records . . ." [*EEOC v. American Nat'l Bank* (4th Cir. 1981) 652 F2d 1176, 1195-1196]

[19:1071-1074] *Reserved.*

(3) [19:1075] **Compare—effect of not seeking available discovery sanctions:** Where despite a discovery request for relevant documents, the employer throws them away, the plaintiff employee may obtain discovery sanctions under FRCP 37 (which may include entering judgment in favor of the employee). Some courts hold that failure to seek sanctions under Rule 37 "forecloses access to the substantial weaponry in the district court's arsenal." [*Mathis v. John Morden Buick, Inc.* (7th Cir. 1998) 136 F3d 1153, 1155]

(4) [19:1076] **Compare—*incomplete* records of small employer:** An adverse inference is *not* proper where the employer is a small business entity and its personnel records are *incomplete* (not destroyed) “due to the admittedly informal nature of the company’s policy rather than willful destruction of existing records.” [Soria v. Ozinga Bros., Inc. (7th Cir. 1983) 704 F2d 990, 995, fn. 7]

(5) [19:1077] **Jury instruction:** Where the evidence supports an adverse inference, the following jury instruction may be proper:

“You have heard testimony about records which have not been produced. Counsel for the plaintiff has argued that this evidence was in the defendant’s control and would have proven facts material to the matter in controversy.

“If you find that the defendant could have produced these records, and that the records were within their control, and that these records would have been material in deciding facts in dispute in this case, then you are permitted, but not required, to infer that this evidence would have been unfavorable to the defendant.

“In deciding whether to draw this inference you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether the defendant had a reason for not producing this evidence, which was explained to your satisfaction.” [See Zimmermann v. Associates First Capital Corp. (2nd Cir. 2001) 251 F3d 376, 383]

(6) [19:1078] **“Clear and convincing” evidence required to rebut?** According to some courts, the adverse inference created by spoliation can be refuted only by clear and convincing evidence that the documents were inconsequential:

— “Without the imposition of a heavy burden such as the ‘clear and convincing’ standard, spoliators would almost certainly benefit from having destroyed the documents, since the opposing party could probably muster little evidence concerning the value of papers it never saw.” [Anderson v. Cryovac, Inc. (1st Cir. 1988) 862 F2d 910, 925]

*Cross-refer:* For further discussion of evidentiary presumptions, see:

- (state court) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8G.
  - (federal court) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8K.
4. [19:1079] **Lay Opinion Testimony:** Lay opinion testimony is admissible in civil trials where based on the witness' perception of relevant facts and helpful to a clear understanding of the witness' testimony or to a determination of facts in issue. [Ev.C. §800; FRE 701]

In discrimination cases, lay opinion testimony may be admissible under FRE 701 "when given by a person whose position with the defendant entity provides the opportunity to personally observe and experience the defendant's policies and practices." [*Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.* (10th Cir. 2001) 245 F3d 1172, 1179]

- a. [19:1080] **Limitation—no legal conclusions:** A lay opinion that expresses a legal conclusion is not "helpful" to the jury's determination of the *facts* and is therefore inadmissible. [*Torres v. County of Oakland* (6th Cir. 1985) 758 F2d 147, 150—lay witness' opinion that plaintiff was discriminated against *because of* her national origin held inadmissible]

Moreover, such conclusions often convey unexpressed (and perhaps erroneous) legal standards to the jury. [*Torres v. County of Oakland*, supra, 758 F2d at 150]

[19:1080.1-1080.4] Reserved.

b. **Application—testimony held admissible**

- [19:1080.5] In an age discrimination action, plaintiff's former Supervisor testified that Employer was "deliberately phasing-out older workers." The opinion was admissible because based on Supervisor's testimony that he had been told in the past to "build a case" against an older worker; remarks had been made about his own age by superiors; and Employer "aggressively pushed older employees into early retirement." [*Haun v. Ideal Industries, Inc.* (5th Cir. 1996) 81 F3d 541, 548]

[19:1080.6-1080.9] Reserved.

- [19:1080.10] In an age discrimination action, plaintiff's former Supervisor testified that he participated in the meeting that resulted in plaintiff's termination. He testified that he believed age discrimination had been involved, pointing to three factors: (1) a decline in the average age of plaintiff's group and of all of Employer's business directors after the reorganization; (2) the de-

cision to terminate plaintiff rather than a similarly ranked younger employee; and (3) a decline in the average age of Employer's highest paid employees. [*Lightfoot v. Union Carbide Corp.* (2nd Cir. 1997) 110 F3d 898, 912]

c. **Application—testimony held inadmissible**

- [19:1081] Coworker's testimony that Employee's Supervisor treated her condescendingly and offered her less guidance than white workers *because of her race* was inadmissible opinion testimony in Title VII action: "(I)n an employment discrimination action, Rule 701(b) bars lay opinion testimony that amounts to a naked speculation concerning the motivation for a defendant's adverse employment decision." [*Hester v. BIC Corp.* (2nd Cir. 2000) 225 F3d 178, 185]
- [19:1082] In a sexual harassment case, coworker's testimony that Supervisor (accused of sexual harassment) had "a problem with women who were not between the ages of 19 and 25 and who weighed more than 115 pounds" was inadmissible lay opinion. [*Gross v. Burggraf Const. Co.* (10th Cir. 1995) 53 F3d 1531, 1544]
- [19:1083] In an age discrimination case against employer Bank, a former bank officer's testimony that Bank was "determined to eliminate . . . senior employees" was inadmissible without a foundation for this assertion (e.g., evidence that he was part of the decisionmaking process or had overheard remarks by decisionmakers). [*Connell v. Bank of Boston* (1st Cir. 1991) 924 F2d 1169, 1177]

*Cross-refer:* For further discussion of the admissibility of lay opinion testimony, see:

- (state court) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Chs. 8C & 11.
- (federal court) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Chs. 8F & 11.

[19:1084-1089] Reserved.

5. [19:1090] **Expert Testimony:** Expert witness testimony has become increasingly important in employment litigation. Psychiatrists, physicians, economists and other experts may be offered as witnesses in both plaintiff's and defendant's presentations at trial.

Moreover, certain issues in employment cases may *require* expert testimony. For example, qualified economists or accoun-

tants may be necessary to provide earning capacity projections, and statistical experts may be necessary to provide statistical evidence in discrimination cases.

But in most cases, expert testimony, although instructive, is *not* essential. [See *Duncan v. Washington Metropolitan Area Transit Auth.* (DC Cir. 2001) 240 F3d 1110, 1116 (en banc)—in disability discrimination cases, expert testimony not necessary to establish that a person is “substantially limited” in the major life activity of working; plaintiffs can testify from their own extensive job search whether other jobs are available that they can perform]

→ [19:1090.1] **PRACTICE POINTERS:** Jurors often give less weight to credible expert testimony in employment cases than in other cases. This may be because jurors place great stock on their own work experience and view themselves as experts in employment cases. Also, some jurors are skeptical about expert testimony and believe experts will say whatever they are paid to say.

If you are going to use expert witnesses, make every effort to streamline their testimony because the jurors’ attention is best during the first 20 to 30 minutes of testimony. Here are some suggestions:

- *Address the expert’s compensation up front.*
  - Spend a minimum amount of time qualifying the expert; instead, have the *witness’ résumé* admitted as evidence so that you can refer to it during closing if necessary (if the résumé is objected to as hearsay, have the expert testify as to its contents).
  - Have the expert structure his or her answers by first expressing an opinion, followed by the reasoning behind it; jurors may see experts as evasive and become frustrated when the experts do not give up-front conclusions.
  - Avoid the use of expert jargon (e.g., say “human resources” instead of “HR”).
  - Use only clear demonstrative aids; avoid overwhelming the jury with number tables; do not overdo PowerPoint presentations.
- a. [19:1091] **Requirements for admissibility:** Expert witnesses may give testimony in the form of an opinion if:
- the witness is *qualified* to testify as an expert;
  - the testimony is related to a subject matter that is *sufficiently beyond common experience*;
  - the opinion would *assist the trier of fact*;
  - the testimony is *based on matters perceived by or made known to the expert* (either before or at the hearing);
  - the expert witness’ testimony is *based on matters reasonably relied upon* by experts in forming opinions or

inferences upon the subject. [Ev.C. §801; see FRE 703—facts or data relied upon need not be admissible in evidence]

[19:1091.1-1091.4] Reserved.

b. **Application**

(1) [19:1091.5] **Harassment cases:** Expert testimony may be utilized in harassment cases on the issue whether the employer acted "reasonably" to prevent harassment and to respond to reports of alleged harassment (i.e., to establish or challenge the *Ellerth/Faragher* defense; see ¶10:335 ff.).

(a) [19:1091.6] **Relevancy:** Expert opinion testimony may be proper to show:

- [19:1091.7] An effective sexual harassment program could reasonably include each of six components not offered by Employer (such as peer review of supervisors and mandatory sexual harassment training for employee) and that a sexual harassment policy could reasonably be communicated by each of nine means not used by Employer (including role-playing sessions and training videos). [*Holly D. v. California Inst. of Tech.* (9th Cir. 2003) 339 F3d 1158, 1177]
- [19:1091.8] Employer had not trained its employees adequately regarding investigation of sexual harassment complaints. [*Kimzey v. Wal-Mart Stores, Inc.* (8th Cir. 1997) 107 F3d 568, 571]

[19:1091.9] Reserved.

(b) [19:1091.10] **Compare—not on ultimate issue:** Expert testimony is not admissible, however, on the ultimate issue whether harassment occurred; e.g., whether a workplace was a "hostile" environment. Such legal conclusions are within the province of the jury; see ¶19:1092.

(c) [19:1091.11] **Discretionary exclusion:** Even where expert opinion testimony is relevant, its admissibility rests in the trial court's sound discretion. The court may properly exclude expert opinion testimony where the facts are capable of being understood and evaluated by the jury without the aid of an expert. [*Wilson v. Muckala* (10th Cir. 2002) 303 F3d 1207, 1219; see *Kotla v. Regents of Univ. of Calif.*

(2004) 115 CA4th 283, 293, 8 CR3d 898, 905—error to allow human resources expert to testify certain facts were “indicators” of retaliation because jury could determine significance of facts and employer’s motive on its own]

[19:1091.12-1091.14] Reserved.

- (2) [19:1091.15] **Backpay, front pay:** Proving backpay claims generally does not require expert testimony; the employee may testify what is owed. Expert testimony may be required, however, where complex computations are required to determine lost earnings or accrual of pension benefits. [See *Donlin v. Philips Lighting North America Corp.* (3rd Cir. 2009) 581 F3d 73, 83-84—court erred in allowing temporary employee to provide opinion testimony regarding estimated lost earnings and pension benefits based on employer’s allegedly discriminatory failure to offer her full-time job]

Lay testimony is not generally sufficient to prove front pay claims. Expert testimony is required to establish the present value of the claim based on estimates of longevity of employment, future pay raises and pension benefits. [*Donlin v. Philips Lighting North America Corp.*, supra, 581 F3d at 83]

- c. [19:1092] **Compare—legal conclusions inadmissible:** Opinions consisting solely of *legal conclusions* do not assist the jury in understanding the evidence or determining a fact in issue. [*Burkhart v. Washington Metropolitan Area Transit Authority* (DC Cir. 1997) 112 F3d 1207, 1212-1213; *Kotla v. Regents of Univ. of Calif.* (2004) 115 CA4th 283, 294, 8 CR3d 898, 905, fn. 6]

- (1) [19:1093] **Test:** The distinction between an ultimate fact issue and a legal conclusion is whether the terms used by the expert have a *specialized meaning* in the law, different from that used by lay persons. If they do, exclusion is appropriate. [*Torres v. County of Oakland* (6th Cir. 1985) 758 F2d 147, 151]

(2) **Application**

- [19:1094] In a Title VII employment discrimination action, it was improper to permit an expert to testify that plaintiff “had been discriminated against because of her national origin.” The term “discrimination” has a *specialized meaning in the law* different from the lay understanding of this term. [*Torres v. County of Oakland*, supra, 758 F2d at 150-151]

[19:1095] *Compare*: The legal conclusion could have been avoided by a more carefully phrased question. E.g., the expert could have been asked whether she believed plaintiff's national origin "motivated" the employer's decision: "This type of question would directly address the *factual* issue of (the employer's) intent without implicating any legal terminology." [Torres v. County of Oakland, *supra*, 758 F2d at 151 (emphasis and parentheses added)]

[19:1096] Other examples of impermissible legal conclusions: whether conduct was "unlawful" or "deliberately indifferent"; whether warnings were "adequate"; whether a "fiduciary" relationship existed. [See Torres v. County of Oakland, *supra*, 758 F2d at 151 (collecting cases); Woods v. Lecureux (6th Cir. 1997) 110 F3d 1215, 1220—"deliberately indifferent" carries "considerable amount of legal baggage"]

- [19:1096.1] In a disability discrimination action, Rehabilitation Specialist's opinion that Employee was "substantially limited in the major life activity of working" due to her carpal tunnel syndrome (CTS) was held inadmissible because:
  - it did not compare the jobs Employee could do before and after the onset of her CTS in the relevant time periods;
  - Rehabilitation Specialist's calculations were based on job restrictions *not supported by the evidence*; and
  - it stated a legal conclusion by reciting the language of an ADA regulation. [Broussard v. University of Calif., at Berkeley (9th Cir. 1999) 192 F3d 1252, 1257]
- [19:1096.2] It was prejudicial error to allow a human resources expert to testify certain facts were "indicators" of the employer's retaliatory motive, as it usurped the jury's role. [Kotla v. Regents of Univ. of Calif., *supra*, 115 CA4th at 294, 8 CR3d at 905—"jurors are capable of deciding a party's motive for themselves without being told by an expert which finding on that issue the evidence supports"]
- [19:1096.3] *Compare*: Proper expert testimony in such cases could include evidence that an employee's discharge was "grossly disproportionate to punishments meted out to similarly situated employees, or that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case." [Kotla v. Regents of

*Univ. of Calif.*, *supra*, 115 CA4th at 294, 8 CR3d at 905, fn. 6]

*Cross-refer:* For further discussion of expert opinion testimony, see:

- (state court) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Chs. 8C & 11.
- (federal court) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Chs. 8F & 11.

[19:1097-1099] *Reserved.*

6. [19:1100] **Statistics:** Statistical evidence is usually essential in disparate impact cases (see ¶7:545) and may also be admissible in disparate treatment cases where a “pattern or practice” of discrimination is claimed (see ¶7:510).

A *prima facie* case of intentional discrimination may be established by statistical data showing an employer’s pattern of conduct toward a protected class. Such statistics may create an *inference* that the employer discriminated against individual members of the class. [*Fallis v. Kerr-McGee Corp.* (10th Cir. 1991) 944 F2d 743, 746; see ¶7:475]

On the other hand, statistical evidence *by itself* rarely establishes *pretext* (i.e., to counter employer’s evidence of nondiscriminatory reasons for actions taken). To create an inference of pretext, plaintiff’s statistical evidence *must eliminate nondiscriminatory explanations* for the disparate treatment by showing disparate treatment between *comparable* individuals. [*Timmerman v. U.S. Bank, N.A.* (10th Cir. 2007) 483 F3d 1106, 1114-1115]

In any case, the statistical data must be *relevant* (FRCP 401): “(D)ata showing a small increase in the probability of discrimination cannot by itself get a plaintiff over the more-likely-than-not threshold; it must be coupled with other evidence, which does most of the work.” [*Baylie v. Federal Reserve Bank of Chicago* (7th Cir. 2007) 476 F3d 522, 524]

The weight or admissibility of statistical evidence may be affected by the following:

- a. [19:1100.1] **Size of study:** Considerations such as small sample size may detract from the weight of statistical evidence, as would evidence that the sample studied does not reflect the general population. [See *International Brotherhood of Teamsters v. United States* (1977) 431 US 324, 340, 97 S.Ct. 1843, 1857, fn. 20]

[19:1100.2-1100.4] *Reserved.*

- b. [19:1100.5] **Completeness:** A statistical study may be admissible although it omits some variables relevant to the

issue studied (e.g., education, experience, seniority, etc.). Such omissions go to the *weight*, not admissibility, of the evidence: "(I)t is for the finder of fact to consider the variables that have been left out of an analysis, and the reasons given for the omissions, and then to determine the weight to accord the study's results." [Obrey v. Johnson (9th Cir. 2005) 400 F3d 691, 695-696 (internal quotes omitted)]

[19:1100.6-1100.9] Reserved.

- c. [19:1100.10] **Methodology:** Statistical evidence that suffers from serious methodological flaws, however, may be excluded by the court under its "gatekeeping" power (FRE 702). Factors that may bear on the court's decision include:
- whether the scientific knowledge can be and has been tested;
  - whether the theory or technique has been subjected to peer review and publication;
  - the known or potential rate of error; and
  - general knowledge. [See *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 US 579, 589-590, 113 S.Ct. 2786, 2797; *Obrey v. Johnson*, supra, 400 F3d at 696]
- (1) [19:1100.11] **Standard deviation analysis required:** Raw percentages are not determinative. A standard deviation analysis—involving calculation of the standard deviation as a measure of predicted fluctuations—is necessary to establish statistical significance in discrimination cases. A fluctuation of more than two or three standard deviations would undercut the hypothesis that employment decisions were being made randomly with respect to the protected group. [See *Hazelwood School Dist. v. United States* (1977) 433 US 299, 311-312, 97 S.Ct. 2736, 2744, fn. 17]

[19:1101-1104] Reserved.

## O. BURDENS AND STANDARDS OF PROOF

1. [19:1105] **Burden of Proof:** The term "burden of proof" may refer to either of two separate and distinct evidentiary burdens at trial:
  - **Burden of persuasion:** Each party bears the ultimate burden to persuade the trier of fact on its claims or defenses. This ultimate burden never shifts during trial; i.e., a party either has met its burden (and won the case) or has not (and has lost).
  - **Burden of production:** Each party also has the burden to produce evidence on particular issues. The initial burden rests with the party bearing the burden of persuasion (above) on the particular issue. But the burden of production *shifts* as the evidence comes in:

- Plaintiff usually has the *initial burden* of introducing evidence on each element of its *prima facie* case (if plaintiff fails, a nonsuit is proper);
- The burden of *going forward* then *shifts* to defendant to produce evidence rebutting plaintiff's evidence (if defendant fails, a directed verdict is proper);
- After which, the burden of going forward shifts back to plaintiff to produce more evidence (to impeach or rebut defendant's evidence, etc.).

Although the burden of producing evidence may shift from one party to another during trial, the ultimate burden of persuasion remains at all times with the party who originally had that burden. [St. Mary's Honor Center v. Hicks (1993) 509 US 502, 503, 113 S.Ct. 2742, 2745—plaintiff at all times bears ultimate burden of persuasion in Title VII discrimination suit]

*The bottom line difference is this:* Whether a party has met its burden of production is something the judge decides (e.g., on a motion for nonsuit or directed verdict). Whether a party has met its burden of persuasion is something the jury decides.

In practical terms, these shifting burdens do not swing back and forth during the course of the trial. Rather, the court makes its decision either after the plaintiff's case-in-chief or after both sides rest, and the jury makes its decision only after it adjourns to deliberate.

- a. [19:1106] **Federal vs. state rules:** Which facts are “essential” to a party’s claim or defense for burden of proof purposes is determined by the applicable *substantive law*. Thus, the burden of proof on federal claims—Title VII, ADEA, ADA, etc.—is governed by federal law in both federal and state court. Similarly, on state law claims, the burden of proof is governed by state law even if the claim is brought in a federal court diversity action (i.e., burden of proof rules are “substantive” for *Erie* doctrine purposes; see ¶19:35).

- (1) [19:1107] **Application:** In most cases, federal and state burden of proof rules are similar. But there are some situations in which they differ significantly:

- (a) [19:1108] **Defendant’s financial condition where punitive damages claimed:** Where punitive damages are sought on a *federal claim* (e.g., for violation of federal civil rights laws), defendant has the burden of producing evidence of its financial condition, if such evidence is to be considered in fixing the amount of punitive damages. [See *Mason v. Oklahoma Turnpike Auth.* (10th Cir. 1999) 182 F3d 1212, 1214; *Chavez v. Keat* (1995) 34 CA4th 1406, 1416, 41 CR2d 72, 79—federal burden of proof

applies where suit on federal claim is filed in state court]

But where punitive damages are sought on a *state law (California) claim*, plaintiff has the burden of producing evidence on each element required for an award of punitive damages, including evidence to fix the amount of the award. Thus, plaintiff bears the burden of producing evidence on defendant's financial condition. [Adams v. Murakami (1991) 54 C3d 105, 110, 284 CR 318, 321; see Barnes v. Logan (9th Cir. 1997) 122 F3d 820, 821-822—in diversity action on state law claim, federal court must apply state law burden of proof rule]

[9:1109-1114] Reserved.

- b. [19:1115] **Employment discrimination claims:** Plaintiff has the initial burden of establishing a *prima facie* case of discrimination. The burden of going forward with the evidence then shifts to defendant to produce evidence of a legitimate nondiscriminatory reason for the action taken against plaintiff. The burden of going forward with the evidence then shifts back to plaintiff to produce evidence showing the employer's reason is false and a pretext for unlawful discrimination. [See *McDonnell Douglas Corp. v. Green* (1973) 411 US 792, 802, 93 S.Ct. 1817, 1824; *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 US 133, 142, 120 S.Ct. 2097, 2106—assuming *McDonnell Douglas* framework applicable in age discrimination cases; and detailed discussion at ¶7:390 ff.]

California has adopted the *McDonnell Douglas* burden-shifting test for trying claims of discrimination. [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 354, 100 CR2d 352, 378]

- (1) [19:1116] **Evidence showing *prima facie* case:** Plaintiff must introduce sufficient evidence to create an *inference* of intentional discrimination. Otherwise, a nonsuit or directed verdict is required. [*Guz v. Bechtel Nat'l, Inc.*, supra, 24 C4th at 354-355, 100 CR2d at 379; *Quinn v. City of Los Angeles* (2000) 84 CA4th 472, 480, 100 CR2d 914, 918]

However, the evidence necessary to satisfy plaintiff's initial burden of showing a *prima facie* case is "minimal." [See *Zimmermann v. Associates First Capital Corp.* (2nd Cir. 2001) 251 F3d 376, 380]

- [19:1117] The mere fact that plaintiff was *replaced by someone outside the protected class* satisfies plaintiff's burden at the *prima facie* stage to produce

evidence creating an inference of discrimination.  
[*Zimmermann v. Associates First Capital Corp.*, supra, 251 F3d at 380]

- (2) [19:1118] **Coupled with pretext:** Evidence establishing a *prima facie* case coupled with evidence showing the falsity of the employer's explanation for its action against plaintiff *may* satisfy plaintiff's burden of persuasion and support a finding of discrimination. [See *Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 US at 148, 120 S.Ct. at 2109]
- (a) [19:1119] **Sufficiency of evidence:** A case-specific assessment is required, however. *No inference of discrimination arises* where the record conclusively reveals some other, nondiscriminatory reason for the employer's decision, or the evidence of pretext is weak and there is "abundant and uncontested independent evidence that no discrimination had occurred." [See *Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 US at 148, 120 S.Ct. at 2109]
- (3) [19:1120] **Ultimate burden of persuasion remains with plaintiff:** Regardless of the *McDonnell Douglas* shifting burdens approach, "(t)he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." [*Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 US at 143, 120 S.Ct. at 2106 (internal quotes omitted); see also *Guz v. Betchel Nat'l, Inc.*, supra, 24 C4th at 355, 100 CR2d at 380—ultimate burden of persuasion on issue of actual discrimination remains with plaintiff]
- Plaintiff may succeed in this "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." [*Texas Dept. of Community Affairs v. Burdine* (1981) 450 US 248, 256, 101 S.Ct. 1089, 1095]
- (4) [19:1121] **Comment:** The shifting burden approach is an analytical method for evaluating circumstantial evidence bearing on the question whether defendant intentionally discriminated against plaintiff. The shifting burden analysis is utilized by the court in determining whether substantial evidence has been proffered on all necessary elements, and whether the evidence is in material conflict and therefore should be decided by a jury.

Once this determination is made, the shifting-burden analysis is not repeated. The shifting burden will be essential to the court and to trial counsel but will not directly govern jury deliberations. The jury will be instructed simply to consider whether plaintiff has carried his or her ultimate burden of proving that intentional discrimination occurred.

*Cross-refer:* See further discussion of this topic in Ch. 7, *Employment Discrimination—In General*.

- c. [19:1122] **Equal pay claims:** Plaintiff can establish a *prima facie* case under the Equal Pay Act simply by showing that the employer paid different wages to employees of different sexes for jobs performed under similar working conditions and that require equal skill, effort and responsibility. [*Corning Glass Works v. Brennan* (1974) 417 US 188, 195, 94 S.Ct. 2223, 2228]

Unlike the *McDonnell Douglas* approach (above), that showing suffices to shift the *burden of persuasion*—not merely the burden of production—to the employer. From that point forward, the employer may escape liability only by establishing that the wage disparity resulted from one of the recognized exceptions to the Equal Pay Act:

- a seniority system,
- a merit system,
- a system that measures earnings by quantity or quality of production, or
- “a differential based on any other factor *other than sex*.” [29 USC §206(d)(1); *Corning Glass Works v. Brennan*, *supra*, 417 US at 196, 94 S.Ct. at 2229; see ¶11:997 ff.]

- (1) [19:1122.1] **Compare—unequal pay challenged as Title VII violation:** Federal courts are divided on whether to use the *McDonnell Douglas* burden-shifting framework or the Equal Pay Act framework when unequal pay claims are raised under Title VII. [See *Rathbun v. Autozone, Inc.* (1st Cir. 2004) 361 F3d 62, 72 (collecting cases)]

- d. [19:1123] **Americans with Disabilities Act (ADA) claims:** Under the Americans with Disabilities Act (ADA), plaintiff has the burden of proving that:

- He or she has a “disability” within the meaning of the statute;
- Defendant was covered by the statute and had notice of plaintiff’s disability;
- Plaintiff could, with or without reasonable accommodation, perform the “essential functions” of the position held or sought; and

- Defendant has refused to make such accommodations. [See *EEOC v. Amego, Inc.* (1st Cir. 1997) 110 F3d 135, 141; *Monette v. Electronic Data Systems Corp.* (6th Cir. 1996) 90 F3d 1173, 1178]

Defendant (employer) has the burden of proving, by way of defense, that the accommodations requested by plaintiff are unreasonable, or would cause an undue hardship. [*Lyons v. Legal Aid Society* (2nd Cir. 1995) 68 F3d 1512, 1515; *Smith v. Ameritech* (6th Cir. 1997) 129 F3d 857, 866]

- [19:1123.1] **Burden of proof re “qualified”:** Plaintiff bears the initial burden of proving he or she is “qualified”—i.e., that he or she is able to perform the “essential functions” of the position with or without reasonable accommodation (see above). [*EEOC v. Amego, Inc.*, supra, 110 F3d at 144; see further discussion at ¶9:735]
- [19:1123.2] **Burden of proof re “essential” job function?** Courts disagree on allocation of the burden of proof where a disabled employee challenges whether a particular job requirement is “essential”:
  - [19:1123.3] **View employee bears burden:** Some courts hold the burden on this issue rests with the plaintiff employee as part of establishing his or her *prima facie* case. [See *Laurin v. Providence Hosp.* (1st Cir. 1998) 150 F3d 52, 58—since ADA plaintiff ultimately must shoulder burden of proving he or she is able to perform “all essential functions” of job, burden of proof on essential function issue is on plaintiff]
  - [19:1123.4] **View burden shifts to employer:** Other courts hold the defendant employer bears the burden of proving a challenged job requirement is an “essential function” of the position. [See *Monette v. Electronic Data Systems Corp.*, supra, 90 F3d at 1178; *Rehrs v. Iams Co.* (8th Cir. 2007) 486 F3d 353, 356; and *Hamlin v. Charter Township of Flint* (6th Cir. 1999) 165 F3d 426, 431—fire department had burden of proving whether front-line firefighting was essential function of Assistant Fire Chief’s position]

*Cross-refer: See further discussion at ¶9:736 ff.*

[19:1123.5-1123.9] *Reserved.*

- [19:1123.10] **Burden of proof re “direct risk” to health or safety:** Under the ADA, an employer may defend a charge of discrimination by showing the employee would “pose a direct threat to the health or safety of other individuals in the workplace.” [42 USC §12113(b); see ¶9:1380 ff.]

However, it is unclear from the statutory scheme who has the burden of proof on this issue, and courts disagree:

- (a) [19:1123.11] **View employer bears burden:** Some courts hold that because it is in the nature of an affirmative defense, defendant (employer) bears the burden of proving the employee would pose a direct threat to the health or safety of others. [*Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F3d 1243, 1247]
- (b) [19:1123.12] **View employee bears burden:** Other courts hold the employee bears the burden of proof as part of his or her prima facie case that he or she is "qualified" to perform the "essential functions" of the position (without posing a "direct threat" to the health or safety of himself or herself or others). [*EEOC v. Amego, Inc.* (1st Cir. 1997) 110 F3d 135, 144; *LaChance v. Duffy's Draft House, Inc.* (11th Cir. 1998) 146 F3d 832, 836]
- (c) [19:1123.13] **View burden depends on type of job:** Still other courts suggest that allocation of the burden of proof depends on whether the essential job duties implicate the safety of others (e.g., a bus driver). In such cases, plaintiff should bear the burden of showing he or she can perform those functions without endangering others. [*Borgialli v. Thunder Basin Coal Co.* (10th Cir. 2000) 235 F3d 1284, 1292]

*Cross-refer: See further discussion at ¶9:736 ff.*

- e. [19:1124] **Unpaid overtime:** An employee claiming unpaid overtime wages, whether under the Fair Labor Standards Act (see ¶11:20 ff.) or the California wage and hours laws (see ¶11:110 ff.), has the burden of proving he or she *performed overtime work and was not compensated at the proper rate*. [*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 CA4th 1363, 1377, 61 CR3d 114, 122; *McLaughlin v. Ho Fat Seto* (9th Cir. 1988) 850 F2d 586, 589]
  - (1) [19:1124.1] **Where employer's records inaccurate or incomplete:** Where the employer's pay or time records are inaccurate or incomplete and the employee cannot offer "convincing substitutes," the employee satisfies his or her burden (above) by producing evidence sufficient to permit a *just and reasonable inference* regarding the extent of the overtime work. [*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 US 680, 687, 66 S.Ct. 1187, 1192; *Eicher v. Advanced Business Integrators, Inc.*, supra, 151 CA4th at 1377, 61 CR3d at 122]

The burden of production then shifts to the employer to present evidence of the *exact amount* of work performed or, alternatively, evidence showing the inference is *unreasonable*. If the employer fails to do so, the court may award the employee damages even though the calculation is only approximate. [*Eicher v. Advanced Business Integrators*, *supra*, 151 CA4th at 1377, 61 CR3d at 122-123; *McLaughlin v. Ho Fat Seto*, *supra*, 850 F2d at 589]

- (2) [19:1124.2] **Compare—employer's burden to prove plaintiff exempt from overtime compensation:** Plaintiff's status as an administrative or executive employee exempt from overtime compensation (Lab.C. §515(a)) is an *affirmative defense* for the employer to prove. [*Eicher v. Advanced Business Integrators*, *supra*, 151 CA4th at 1369-1375, 61 CR3d at 116-121; *Hodge v. Sup. Ct. (AON Ins. Services)* 145 CA4th 278, 281, 51 CR3d 519, 521; *Abshire v. County of Kern* (9th Cir. 1990) 908 F2d 483, 485-486; see ¶11:165 ff., 11:345 ff.]
2. [19:1125] **Requisite Degree of Proof (Standard of Proof):** The “standard of proof” may require a party to establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. In civil cases, the *preponderance of the evidence* standard generally applies.
- a. [19:1126] **State vs. federal law:** Except as otherwise provided by law, the standard of proof in a civil case in California requires proof by a “*preponderance of the evidence*.” [Ev.C. §115] (A higher standard is required in certain cases; see below.)
- Federal courts follow the same rule when jurisdiction is based on a federal claim (e.g., civil rights violations); i.e., except where otherwise required by law, each claim or defense must be proved by a *preponderance* of evidence (see below). [*Grogan v. Garner* (1991) 498 US 279, 291, 111 S.Ct. 654, 661—ordinary preponderance standard applicable where statute failed to specify degree of proof for punitive damages (no need to apply state law standard); *White v. Burlington Northern & Santa Fe Ry. Co.* (6th Cir. 2004) 364 F3d 789, 805 (en banc)—preponderance standard governs punitive damages in Title VII cases]

- (1) [19:1127] **Compare—diversity actions:** When a federal court's subject matter jurisdiction is based on diversity of citizenship, the federal court must apply the same burden of proof rules that a state court would apply in a trial of state law claims: “The burden of persuasion is tied to the definition of the right, so state law determines whether the plaintiff must prove the case by

a preponderance, by clear and convincing evidence, or by some other standard." [Mayer v. Gary Partners & Co., Ltd. (7th Cir. 1994) 29 F3d 330, 333]

- (a) [19:1128] **Federal and state claims in same action?** The apparent result is that where federal and state claims are tried together (e.g., a Title VII claim joined with a common law fraud claim), the federal court in a diversity action must apply state burden of proof rules on the state law claims and federal burden of proof rules on the federal claims.
- b. [19:1129] **"Preponderance of evidence" standard:** In civil cases, the "requisite degree" of proof is generally a "preponderance" of the evidence: "Preponderance" means evidence that has *more convincing force* than that opposed to it; i.e., that the matter is *more probably true than not true*. [BAJI 2.60; see *Bazemore v. Friday* (1986) 478 US 385, 400, 106 S.Ct. 3000, 3009 (J. Brennan concur.opn.)—"more likely than not"]

If the evidence is so evenly balanced that the jury is unable to say that the evidence on either side preponderates, the jury must find on that issue against the party who had the burden of proving it. [BAJI 2.60]

The vast majority of issues in civil actions need only be established by a preponderance of the evidence. For example:

- [19:1130] *Title VII claims*: A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence: "As long as the court may fairly conclude, in light of all the evidence, that it is *more likely than not* that impermissible discrimination exists, the plaintiff is entitled to prevail." [*Bazemore v. Friday*, supra, 478 US at 400-401, 106 S.Ct. at 3009 (emphasis added)]
- [19:1131] *Ellerth/Faragher defense*: The *Ellerth/Faragher* affirmative defense to vicarious liability in hostile environment sexual harassment cases (where no adverse employment action has been taken against the plaintiff employee) "is subject to proof by a preponderance of the evidence." [*Burlington Industries, Inc. v. Ellerth* (1998) 524 US 742, 765, 118 S.Ct. 2257, 2270; *Faragher v. City of Boca Raton* (1998) 524 US 775, 807-808, 118 S.Ct. 2275, 2293; see discussion at ¶10:337]

[19:1132-1134] Reserved.

- c. [19:1135] **"Clear and convincing evidence" standard:** Although the "preponderance of evidence" standard is the

general rule in civil cases, some issues must be established by "clear and convincing" evidence. This means evidence so clear as to leave no room for substantial doubt. [See BAJI 2.62—"evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof"; *In re Angelia P.*(1981) 28 C3d 908, 919, 171 CR 637, 643—

*(Text cont'd on p. 19-137)*

"sufficiently strong to command the unhesitating assent of every reasonable mind"; and *Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1165, 74 CR2d 510, 533-534]

The following are issues in employment cases in which this higher degree of proof may be required:

- [19:1136] *"Oppression, fraud or malice" for punitive damages in state court:* Punitive damages may be awarded by a California court only where it is proven by "clear and convincing evidence" that defendant is guilty of "oppression, fraud or malice." [Civ.C. §3294(a)]
- [19:1137] *Compare—other elements of punitive damages claim:* This higher standard of proof apparently does *not* apply to other elements of a punitive damage claim; e.g., defendant's financial condition as relevant to the *amount* of punitive damages (see ¶19:1108); or an employer's *knowledge* of an employee's dangerous propensity for vicarious liability purposes (see ¶17:365). A mere preponderance of the evidence on these factors is apparently sufficient.
- [19:1138] *Compare—punitive damages on federal claims:* Proof of punitive damages on a Title VII claim is subject to the *preponderance* of evidence standard. [*Karnes v. SCI Colorado Funeral Services, Inc.* (10th Cir. 1998) 162 F3d 1077, 1081]
- [19:1139] *Compare—diversity claims in federal court:* Presumably, the clear and convincing standard of proof for "malice, fraud or oppression" under California law applies in federal diversity cases where punitive damages are sought under California law. I.e., the standard of proof is regarded as "substantive" for *Erie* purposes. [See *Mayer v. Gary Partners & Co., Ltd.* (7th Cir. 1994) 29 F3d 330, 333—in diversity cases, "state law determines whether the plaintiff must prove the case by a preponderance, by clear and convincing evidence, or by some other standard"]

[19:1139.1-1139.4] *Reserved.*

- [19:1139.5] *Whistleblowers:* If an employee proves by a preponderance of the evidence that the employer retaliated against the employee for "whistleblowing" (or for refusing to engage in unlawful activities), the employer must prove by "clear and convincing evidence" that it had lawful reasons for whatever action was taken against the employee. [Lab.C. §1102.6 (added 2003)]
- [19:1139.6] *Employee's immigration status:* An employer may not inquire or seek discovery as to an

employee's immigration status unless it shows by "clear and convincing evidence" that the inquiry is necessary in order to comply with federal immigration law. [Lab.C. §1171.5; CCP §3339(a); Gov.C. §7285(a); see ¶11:1224.4]

*Cross-refer:* Burdens and standards of proof are discussed in detail in:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 8G.
- (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 8K.

[19:1140-1144] Reserved.

## P. MOTIONS DURING TRIAL

[19:1145] A wide variety of motions can be made during trial. Generally, the most commonly encountered in jury trials of employment litigation are motions for:

- mistrial;
- nonsuit (state courts);
- directed verdict (state courts);
- judgment as a matter of law (federal courts).

*Cross-refer:* Motions during trial are discussed in detail in:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 12.
- (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 13.

1. [19:1146] **Nonsuit and Directed Verdict (State Courts):** After plaintiff has made an opening statement or at the close of plaintiff's case, defendant may move for a nonsuit. [See CCP §581c(a)]

Either party may move for a directed verdict after both sides rest in a jury trial. [CCP §630(a)]

Both motions challenge the *legal sufficiency* of the evidence supporting the opposing party's claim or defenses.

2. [19:1147] **Judgment as a Matter of Law (Federal Courts):** A motion for judgment as a matter of law (JMOL) serves the same purpose in federal court as nonsuit and directed verdict motions in state court. A JMOL motion can be made after opening statements or at the close of plaintiff's case, or after both sides have rested. [FRCP 50(a)]

As with nonsuit and directed verdict motions, a JMOL motion tests the *legal sufficiency* of the evidence supporting the opposing party's claims or defenses.

There is one important distinction, however: A federal litigant *must make a preverdict JMOL motion* to preserve the right to

renew the motion after an adverse jury verdict. (In state court, the losing party may move for judgment notwithstanding the verdict without first having made a motion for nonsuit or directed verdict; see ¶19:1191.)

*Cross-refer: See further discussion of JMOL motions at ¶19:1205.*

[19:1148-1154] Reserved.

## Q. CLOSING ARGUMENT

1. [19:1155] **Function:** The more complicated the case, the more important closing argument becomes in persuading the jury. A well-crafted closing argument serves the following purposes:
  - *Focus on key issues:* Counsel may have spelled out the key issues in opening statement. But after a long trial, many jurors may be confused on what they are to decide. A clear restatement of the key issues in their simplest possible form is essential for jurors to start in the right direction as they begin deliberations.
  - *Focus on critical facts:* The crucial nuggets of information extracted from witnesses or documents may be obvious to counsel but are often lost to lay jurors among a sea of trivia and conflicting testimony. Closing argument must highlight those critical facts in a logical and persuasive manner.
  - *Construct logical arguments:* Build a logical chain of argument connecting the evidence to the conclusions you want the jurors to draw. Where the evidence is in conflict, you need logical reasons why your evidence should be accepted and conflicting evidence rejected.
  - *"Sell" case theme:* Finally, this is the time to help the jurors "see the forest for the trees" by showing them how the facts establish your claims and theories.

►[19:1156] **PRACTICE POINTERS:** *Keep it short and simple!* Do not attempt to recount all the evidence. Focus on only what is truly essential to your claim or defense.

With the court's permission, *use graphics* (charts, overhead projection of documents, etc.) to highlight your arguments.

*Rehearse* your argument before a mock jury (your office staff, if necessary).

2. [19:1157] **Plaintiff's Closing Argument:** Plaintiff's counsel should consider making the following points in closing argument:
  - *Open with the case theme!*

- *Standard of proof in civil cases:* Plaintiffs are entitled to a verdict if the jury finds plaintiffs' evidence more convincing than defendant's evidence. Even slightly more convincing ("a feather's weight") is enough. (Many jurors may be confused by their awareness of the "beyond a reasonable doubt standard" in criminal trials.)
- *Burden of proof:* Plaintiffs have met their burden of proof on each of the claims asserted—detailing the elements of the *prima facie* case and the evidence supporting each element.  
Defendant has failed to meet its burden of proof on the defenses asserted. (Remind jurors of failed promises made by defense counsel in opening argument.)
- *Deal with any weakness:* With the right to argue first, plaintiffs' counsel should deal with any weakness in plaintiffs' case by explaining it or minimizing its importance. This avoids letting defense counsel be the first to mention it and may take the "steam" out of the issue.
- *Compensatory damages:* Plaintiffs' counsel should explain to the jury what each item of damage is, why they should award it, and how much to award.

 **PRACTICE POINTER:** List on a chart or blackboard each type of injury or damage proved, and then during argument write in the amount being sought. Make sure your entries are large, clear and legible so that every juror can follow your computations!

*Remove your chart* when you are finished. Otherwise, opposing counsel is likely to mark it up or use it to discredit your argument.

It is imperative that a plaintiff's attorney tell the jury the amount of damages it should award. Studies have shown that jury awards (where two mock juries hear the same evidence) are much higher where plaintiff's attorney gave the jury a general damages figure. Don't leave it up to the jury to come up with an amount!

- *Punitive damages:* Plaintiff's counsel should emphasize:
  - the wrongfulness of defendant's conduct;
  - the need for a punitive damages award (public interest in punishing this type of conduct);
  - that the "clear and convincing" standard of proof on "malice, fraud or oppression" is not all that different (e.g., "All that is required is evidence sufficiently clear and strong to convince *you*, as a reasonable person . . . and nothing could be more clear and convincing than defendant's reckless disregard of plaintiff's rights, etc.");

- the *amount* to award (a significant “sting” to make defendant take notice).
- *Verdict forms:* Tell the jury how to fill out the verdict forms and what amounts to enter.
- *Close with the case theme . . .* and appeal to the jurors’ sense of equity and justice.

[19:1158-1164] Reserved.

3. [19:1165] **Defendant’s Closing Argument:** Defense counsel usually cover the following topics in closing argument in employment litigation (remember to refer to defendant by name, not as “the defendant”):

- *Burden of proof:* Point out the essential elements of each claim on which plaintiffs have the burden of proof. Argue that plaintiffs would have proved these matters if they could. Their failure to produce the evidence means *there is no such evidence* and the employer is therefore entitled to a verdict.
- *Quote the jury instructions* on burden of proof.

Conversely, on matters on which the employer has the burden of proof, point out that the employer has produced credible evidence of specific facts proving these matters (detailing them).

 **PRACTICE POINTER:** Be careful about arguing a *mixed-motive defense* in your closing argument. Jurors may misperceive your position as conceding the existence of an unlawful motive. Some attorneys think it safer to maintain that defendant did not harbor *any* discriminatory animus, and leave the mixed-motive defense to the jury instructions; see ¶19:1186.5.

- *Credibility of witnesses:* Where credibility of witnesses is at issue, point out matters that tend to undermine the credibility of plaintiff’s witnesses and support the credibility of the employer’s witnesses.

 **PRACTICE POINTER:** Graphics may be helpful: Prepare a chart for each plaintiff’s witness, *listing each fact* that tends to undermine his or her credibility; and a separate chart for the employer’s witnesses, listing each fact supporting credibility.

Be sure to *remove your chart* when you are finished. Otherwise, plaintiff’s counsel is likely to mark it up or use it to discredit your argument.

- *Focus on key evidence:* Focus the jury’s attention on key facts appearing in records, depositions and interrogatory responses.

Dramatize key admissions or inconsistencies in plaintiff's testimony: "Do you remember me asking Plaintiff on cross-examination . . . ? And, do you remember Plaintiff answering . . . ?"

► **PRACTICE POINTER:** Even better, get a reporter's transcript of the exact question and answer and read it to the jury. Alternatively, have the key testimony blown up and put on a chart that is displayed to the jury.

- *Damages*: Jurors have no way of knowing whether the amount demanded by plaintiffs is reasonable or excessive. Give them some perspective on plaintiffs' damage claims.

A light touch is often the best way of handling large damage claims. For example:

"That's incredible! If plaintiffs were to recover even 10% of that amount, it would be far in excess of the actual damages they really suffered!"

"Plaintiffs are asking for more in wages and benefits than they ever would have earned. That's like telling you they have no chance of ever obtaining another job like this one. How absurd!"

- *Punitive damages*: Defense counsel should focus on:
  - No wrongful state of mind (whatever the employer did, it did for a legitimate business reason);
  - No "clear and convincing" evidence of malice, fraud or oppression (burden not satisfied where there is any reasonable doubt as to defendant's motive);
  - No need to punish defendant (its conduct is unlikely to recur);
  - No reason for a windfall to plaintiffs.
- *Discuss jury instructions and special verdict forms*.
- *Remind jurors of their promises*: Remind the jurors of their promises to be fair and impartial to the employer (no anticorporate bias), to require plaintiffs to prove every element of their claims, and to decide the case on the basis of the facts and the law not on the basis of sympathy or compassion for plaintiffs.
- *Prepare jurors for plaintiffs' "parting shot"*: Point out that plaintiffs get the last argument to the jury, but are not supposed to "sandbag" you (employer's counsel) and raise new arguments. If plaintiffs do raise anything new, the jurors should hold it against plaintiffs. Plaintiffs are trying to prevent the employer from responding.
- *Case theme*: Close with your case theme and appeal to the jurors common sense and fairness.

*Cross-refer:* Rules governing closing argument are discussed in detail in:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 13.
- (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 14.

[19:1166-1174] Reserved.

## R. JURY INSTRUCTIONS

1. [19:1175] **Parties' Right to Jury Instructions:** In civil *jury* trials, parties have the *right* to have the jury instructed on all theories of their case *supported by the pleadings and evidence*. [See CCP §§607a, 608; and FRCP 51—"any party may file written requests that the court instruct the jury on the law"]
  - a. [19:1176] **Counsel's responsibility to submit proper instructions:** It is the duty of counsel for the respective parties to propose *reasonable and proper* jury instructions on all legal theories advanced in the case. Failure to propose an instruction on a particular issue *waives* the right to have the jury instructed on that issue. [See CCP §607a; FRCP 51(d)]
  - b. [19:1177] **Proposed instructions must be supported by pleadings and evidence:** The parties have the right to have the jury instructed on all legal theories *supported by* the pleadings and evidence. [See CCP §607a]
    - (1) [19:1178] **Supporting evidence need not preponderate:** The evidence necessary to justify the giving of an instruction need not preponderate on the issue involved. Even slight or contradicted evidence may be sufficient for this purpose. [*Bernal v. Richard Wolf Med. Instruments Corp.* (1990) 221 CA3d 1326, 1338, 272 CR 41, 49]
- c. [19:1179] **Right to instructions on each theory advanced:** Parties are entitled to have the jury instructed on every theory advanced by them that finds support in the evidence. [*Hasson v. Ford Motor Co.* (1977) 19 C3d 530, 543-544, 138 CR 705, 714]
- d. [19:1179.1-1179.4] Reserved.
- e. [19:1179.5] **Necessity for objection:** In federal court, in order to preserve the issue for appellate review, any objection to a jury instruction that is unwarranted or misleading must be made on the record or in writing. [FRCP 51; *Ayuyu v. Tagabuel* (9th Cir. 2002) 284 F3d 1023, 1026]

In California courts, a party may challenge a jury instruction on appeal as incorrect or misleading although no objection

was made in the trial court. (Even so, it is still a good idea to argue against instructions you believe are unsuitable.) [CCP §647 (jury instructions deemed excepted to); and *Lund v. San Joaquin Valley R.R.* (2003) 31 C4th 1, 7-8, 1 CR3d 412, 416]

→ [19:1180] **PRACTICE POINTERS:** Be careful what you ask for in the way of jury instructions. You're liable to get it . . . and build in grounds for reversal of a favorable judgment (or upholding an unfavorable one)!

To reduce the risk of reversal or an unwanted new trial, consider these suggestions:

- Stick to official instructions (e.g., CACI, ¶19:1181) wherever possible.

Keep in mind, however, that CACI instructions often need *modification* to fit the facts of particular cases.

- When drafting special instructions, *quote verbatim* from statutes or case law wherever possible. Also, stick to one statute or case at a time; patching "snippets" from several cases multiplies the risk of error.
- *Request only the instructions you need.* Avoid duplication. A large volume of instructions may irritate and/or confuse the jury.
- To avoid jury confusion, request instructions only on your *strongest* claims or defenses. Instructing the jury on weak claims or defenses may *detract* from your strongest positions. (This is also the reason to *clean up your pleadings in advance of trial* so that unnecessary claims and defenses are not presented to the jury.)

*Cross-refer:* For detailed discussion of rules governing jury instructions, see:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 14.
  - (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 15.
2. [19:1181] **Standard Jury Instructions in Employment Litigation:** The use of standard jury instructions is recommended wherever possible.

Several federal circuits have model jury instructions for employment cases. The Ninth Circuit Manual of Model Civil Jury Instructions is available at [www.ce9.uscourts.gov](http://www.ce9.uscourts.gov).

In California, the Judicial Council has approved jury instructions for civil cases and California courts are “strongly encouraged” to use them wherever possible. [CRC 2.1050(e)]

The “California Judicial Council Civil Jury Instructions”—referred to as “CACI”—are available online ([www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf](http://www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf)).

**FORM:** The CACI instructions that relate particularly to employment litigation are listed in *Form 19:D*.

[19:1182-1184] Reserved.

3. [19:1185] ***McDonnell Douglas Burden-Shifting as Instruction?*** Most courts hold it is inappropriate to instruct the jury on the *McDonnell Douglas* analysis because it “adds little to the juror’s understanding of the case and . . . may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms (e.g., *prima facie* case) to decide the ultimate question of discrimination.” [*Loeb v. Textron, Inc.* (1st Cir. 1979) 600 F2d 1003, 1016 (parentheses added); *Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F3d 838, 855 (en banc), aff’d (2003) 539 US 90, 123 S.Ct. 2148—“it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury”]

Even so, giving such an instruction is not reversible error as long as the instruction accurately summarizes the law. [*Brown v. Packaging Corp. of America* (6th Cir. 2003) 338 F3d 586, 593]

4. [19:1186] **Pretext Instruction:** A pretext instruction basically states that if the jury does not believe the employer’s preferred explanation for an adverse employment decision, it may *infer* that the employer’s real motive was discriminatory.

Such an instruction is certainly proper, if requested, where supported by the evidence. [*Golomb v. Prudential Ins. Co. of America* (7th Cir. 1982) 688 F2d 547, 551-552]

Indeed, some cases hold it is reversible error to *refuse* a pretext instruction that is supported by the evidence. [*Townsend v. Lumbermens Mut. Cas. Co.* (10th Cir. 2002) 294 F3d 1232, 1241; see *Cabrera v. Jakabovitz* (2nd Cir. 1994) 24 F3d 372, 382-382—jury needs to be told it may infer plaintiff’s burden has been met if it finds a *prima facie* case has been established and it disbelieves defendant’s explanation]

Other courts disagree, holding the employer’s credibility should be left to counsel’s argument and failure to give a requested pretext instruction is not reversible error. [*Gehring v. Case Corp.* (7th Cir. 1994) 43 F3d 340, 343; *Conroy v. Abraham Chevrolet-Tampa, Inc.* (11th Cir. 2004) 375 F3d 1228, 1234]

[19:1186.1-1186.4] Reserved.

5. [19:1186.5] **Mixed-Motive Instruction:** In Title VII discrimination cases, where unlawful discrimination was *one* (but *not the sole*) motivating factor for the challenged employment action, plaintiff's remedies may be limited to declaratory or injunctive relief, attorney fees and costs, if the employer shows that it would have made the same decision even absent a discriminatory motive; see discussion at ¶17:485 ff.

Accordingly, where the employer has presented such evidence, an instruction on this topic may reduce its exposure to monetary damages. Such an instruction is warranted where the evidence reasonably supports an *inference* of a mixed motive (even if there is *no direct evidence* of discrimination). [Desert Palace, Inc. v. Costa (2003) 539 US 90, 98-101, 123 S.Ct. 2148, 2153-2155]

*Limitation—claims based on wrongful motive:* A mixed-motive jury instruction is not proper where liability would not exist “but for” the employer’s wrongful motive. In such cases, the employer’s mixed motives is a *defense* and completely bars liability. [See Gross v. FBL Fin’l Services, Inc. (2009) US , , 129 S.Ct. 2343, 2346—mixed-motives instruction “never proper” in ADEA cases (¶8:106.5); Metoyer v. Chassman (9th Cir. 2007) 504 F3d 919, 934—mixed-motive defense bars liability for retaliation claims under Title VII and 42 USC §1981]

- a. [19:1186.6] **Sample instruction:** “You have heard evidence that defendant’s treatment of plaintiff was motivated by plaintiff’s sex and also by other, lawful reasons. If you find that plaintiff’s sex was a motivating factor in defendant’s treatment of plaintiff, plaintiff is entitled to your verdict, even if you find that defendant’s conduct was also motivated by a lawful reason . . . However, if you find that defendant’s treatment of plaintiff was motivated by both gender and lawful reasons, you must decide whether plaintiff is entitled to damages. Plaintiff is entitled to damages unless defendant proves by a preponderance of the evidence that defendant would have treated plaintiff similarly even if plaintiff’s sex had played no role in the employment decision.” [See Desert Palace, Inc. v. Costa, supra, 539 US at 96-97, 123 S.Ct. at 2152 (internal quotes omitted)]

⇨ [19:1186.7] **PRACTICE POINTER:** Although it may be prudent to seek such an instruction, defense counsel should be careful in deciding whether and how to address mixed motives in closing argument; see ¶19:1165.

6. [19:1187] **Punitive Damages Instructions:** Presently approved jury instructions do not appear to satisfy the federal due process standards set forth in *State Farm Mut. Auto. Ins. Co. v. Campbell* (see ¶17:450 ff.):

- CACI 3940 instructs the jury to consider “in view of (name of defendant)’s financial condition, what amount is necessary to punish (him/her) and discourage future wrongful conduct?”
- BAJI 14.71 instructs the jury to consider the amount of punitive damages “which will have a deterrent effect on the defendant in light of the defendant’s financial condition.”

These instructions fail to restrict the jury to punishment and deterrence based *solely on the harm to the plaintiffs*, as required by federal due process standards. [See *Romo v. Ford Motor Co.* (2003) 113 CA4th 738, 752, 6 CR3d 793, 804-805]

[19:1188-1189] *Reserved.*

## S. POST-TRIAL MOTIONS

[19:1190] The post-trial motions most commonly encountered in employment discrimination cases are:

- (state court) motion for judgment notwithstanding the verdict (JNOV) (CCP §629);
- (federal court) motion for judgment as a matter of law (JMOL) (FRCP 50); and
- motion for new trial (CCP §656; FRCP 59).

*Cross-refer:* For discussion of post-trial motions generally, see:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 18.
- (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 20.

1. [19:1191] **Judgment Notwithstanding the Verdict (State Court):** In California courts, a losing party may move for judgment notwithstanding the verdict (JNOV) if the evidence admitted is legally insufficient to support the verdict so that a motion for directed verdict (if made) should have been granted before the matter was submitted to the jury. [CCP §629]

A JNOV motion lies regardless of whether the losing party made a motion for nonsuit or directed verdict.

Where only certain portions of the verdict are challenged, the court may grant a “partial” JNOV. [*Cloud v. Casey* (1999) 76 CA4th 895, 911, 90 CR2d 757, 767—challenge to punitive damages only]

- a. [19:1192] **Timeliness:** A party’s JNOV motion must be made within 15 days after the clerk’s mailing of notice of entry of judgment or service of written notice of such entry, or within 180 days, whichever comes first; or within 15 days after any other party moves for a new trial. [See CCP §629]
- b. [19:1193] **Grounds:** The sole ground is that the evidence admitted at trial is legally insufficient to support the

verdict. For purposes of a JNOV motion, all evidence supporting the verdict is presumed to be true; the judge *cannot weigh credibility* of witnesses (as on a motion for new trial).

- c. [19:1194] **Application:** A JNOV is proper where a verdict is supported *only* by *inferences* that are contrary to clear, positive evidence that cannot rationally be disbelieved.

- [19:1195] A jury returned a special verdict finding Employer violated the Fair Employment and Housing Act (FEHA) by failing to take reasonable steps necessary to prevent discrimination and harassment at its workplace. But the jury also found Employer did not discriminate or racially harass the particular employee plaintiffs. Therefore, they had no right of action under the FEHA, and a JNOV in favor of Employer was proper. [*Trujillo v. North County Transit Dist.* (1998) 63 CA4th 280, 289, 73 CR2d 596, 602]
- [19:1196] A jury returned a verdict for Employer in an age discrimination action. Employee moved for JNOV on the ground that Employer admitted making statements from which the jury could infer Employee was fired because of his age. But Employee's JNOV motion was properly denied because Employer had presented legitimate job-related reasons for terminating Employee, and therefore the verdict was supported by substantial evidence. [*Caldwell v. Paramount Unified School Dist.* (1995) 41 CA4th 189, 207, 48 CR2d 448, 460]
- [19:1197] A jury returned a verdict against Employer in a gender discrimination action, awarding both compensatory and punitive damages. The trial court granted a partial JNOV as to the punitive damages award on the ground that there was no evidence Employer acted with malice and oppression. This was error because the evidence of discriminatory intent and pretext that supported the finding of liability also provided a sufficient basis for the jury to find malice or oppression. [*Cloud v. Casey* (1999) 76 CA4th 895, 911, 90 CR2d 757, 767]
- [19:1198] A JNOV for Employer was proper where the jury verdict in favor of Employee was based on claims completely preempted by federal law. [*Abreu v. Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1453, 257 CR 26, 29—union member's wrongful discharge claims preempted by federal labor law]
- [19:1199] In ruling on a JNOV motion, the trial or appellate court may strike the portion of a punitive damage award that is constitutionally excessive. [*Gober v.*

[19:1200-1204] Reserved.

2. [19:1205] **Judgment as a Matter of Law (Federal Court):** The federal counterpart to a state court JNOV motion is a *renewed* motion for judgment as a matter of law (JMOL). But the rules are somewhat different: In federal practice, a party must have made a JMOL motion *before* the case was submitted to the jury in order to *renew* the motion after an adverse verdict. [FRCP 50(b); see *EEOC v. Southwestern Bell Tel., L.P.* (8th Cir. 2008) 550 F3d 704, 708—failure to renew JMOL motion after judgment entered waived right to challenge on appeal]

(Text cont'd on p. 19-147)

**RESERVED**

The party moving for JMOL after an adverse verdict may—and almost always does—join an *alternative motion for new trial* (¶19:1220). Even if the renewed JMOL motion is granted, the court must also determine whether the new trial motion should be granted in the event the JMOL is thereafter vacated or reversed on appeal. (A new trial may be appropriate even where JMOL is not.) [FRCP 50(c)(1)]

- a. [19:1206] **Timeliness:** A postverdict JMOL motion must be filed within 10 days after entry of judgment. [FRCP 50(b)]
  - (1) [19:1207] **Effect of delay:** The court cannot grant JMOL where the motion is untimely. But if the JMOL motion was accompanied by an alternative motion for new trial, the court may still order a new trial. [See FRCP 50(b)(1); *Neely v. Martin K. Eby Const. Co.* (1967) 386 US 317, 325, 87 S.Ct. 1072, 1078]
- b. [19:1208] **Grounds:** A postverdict JMOL motion challenges the legal sufficiency of the evidence to support the verdict: “Rule 50 requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is *no legally sufficient evidentiary basis* for a reasonable jury to find for that party on that issue.” [*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 US 133, 149, 120 S.Ct. 2097, 2109 (emphasis added)]
- c. [19:1209] **Evidence considered in ruling on motion:** The court must draw all reasonable inferences in favor of the nonmoving party and may *not* make credibility determinations or weigh the evidence. [*Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 US at 149, 120 S.Ct. at 2109]

The court must *disregard* evidence favorable to the moving party *unless the jury is required to believe it*: “That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is *uncontradicted and unimpeached*, at least to the extent that that evidence comes from disinterested witnesses.” [*Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 US at 151, 120 S.Ct. at 2110 (emphasis added)]

- d. **Application**
  - [19:1210] A JMOL is proper where Employee claims hostile environment sexual harassment but the behavior shown is insufficient as a *matter of law* to constitute a hostile environment (see ¶10:110): “Motions for judgment as a matter of law can *police the baseline* for hostile environment claims.” [*Indest v. Freeman Decorating, Inc.* (5th Cir. 1999) 164 F3d 258, 264, fn. 8 (emphasis added)]

- [19:1211] A JMOL is proper in an action for tortious discharge in violation of public policy where the evidence fails to show any constitutional provision, statute or case law supporting the public policy claimed by plaintiffs. [*Shaw v. AAA Engineering & Drafting, Inc.* (10th Cir. 2000) 213 F3d 519, 536 (applying Oklahoma law)]
  - [19:1212] *Compare:* It was error to grant JMOL in favor of Employer in an age discrimination case where Employee introduced evidence establishing a prima facie case of discrimination and creating a jury issue as to the falsity of Employer's explanation, plus additional evidence indicating Employer was motivated by age-based animus. [*Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 US at 151, 120 S.Ct. at 2110]
  - [19:1213] It was error to grant JMOL in favor of Employer in an ADA case where the evidence supported an inference that Employer "regarded" Employee as disabled within the meaning of the ADA (see ¶9:520). The court should not have drawn inferences to the contrary nor made credibility determinations in ruling on the JMOL motion. [*Johnson v. Paradise Valley Unified School Dist.* (9th Cir. 2001) 251 F3d 1222, 1228-1229]
  - [19:1214] A JMOL motion was properly denied in a Title VII retaliation action despite Employer's evidence that it had numerous grounds upon which to terminate Employee. The jury was *not obliged to believe* Employer's evidence: "Given . . . the direct evidence of retaliatory animus, disbelief of defendant's proffered justifications is not unreasonable." [*Medlock v. Ortho Biotech, Inc.* (10th Cir. 1999) 164 F3d 545, 551]
  - [19:1215] The trial court erred in granting Employer's motion for JMOL on the issue of punitive damages in a Title VII hostile-environment suit. Sufficient evidence supported the jury's conclusions that (i) the failure of Employer's human resources manager to adequately investigate Employee's many complaints of sexual harassment showed "malice" or "reckless indifference" toward Employee's federally protected rights (¶17:395), and (ii) Employer's "good faith" efforts to comply with Title VII were superficial. [*Parker v. General Extrusions, Inc.* (6th Cir. 2007) 491 F3d 596, 603-605]
- [19:1216-1219] *Reserved.*
3. [19:1220] **New Trial:** A motion for new trial asks the trial court to *retry* one or more issues of fact or law after a trial by judge or jury. [CCP §§656-657; FRCP 59(a)]

The rules governing new trial motions in federal and state court are somewhat different (see below), but the function is the same.

**Cross-refer:** For detailed discussion of rules governing new trials, see:

- (state practice) Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 18.
  - (federal practice) Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 20.
- a. [19:1221] **Timing:** Under California law, a new trial motion must be made *within 15 days* after the clerk's *mailing* of notice of entry of judgment or service of written notice of such entry by any party, or within 180 days after entry of judgment, whichever comes first; or within 15 days after any other party serves a motion for new trial. [CCP §659]

Under federal rules, a new trial motion must be filed within *10 days* after *entry* of judgment. [FRCP 59(b)]

- b. [19:1222] **Grounds:** The grounds for new trial motions in a California state court are entirely statutory, including such matters as "irregularity in the proceedings," jury misconduct, accident or surprise, newly discovered evidence, excessive or inadequate damages, and error of law. [See CCP §657]

Federal courts are empowered to grant a new trial "for any of the reasons for which new trials have heretofore been granted . . ." (FRCP 59(a)). Generally, a new trial is warranted under Rule 59(a) when a jury has reached a seriously erroneous result as evidenced by (1) the verdict being against the weight of the evidence, (2) the damages being excessive, or (3) the trial being unfair to the moving party. [*Holmes v. City of Massillon, Ohio* (6th Cir. 1996) 78 F3d 1041, 1045-1046]

c. **Application**

- (1) [19:1223] **Insufficiency of evidence:** One of the most common grounds for a new trial motion is that the evidence was insufficient to justify the verdict. [See CCP §657(6)]

- (a) [19:1224] **Court reweights evidence:** The trial court may grant a new trial if it believes the verdict is contrary to the weight of the evidence. Although a trial judge cannot weigh the evidence on a motion for JNOV or JMOL, in ruling on a motion for a new trial the judge is free to reweigh the evidence and

disagree with the jury's findings. [*King v. Exxon Co., U.S.A.* (5th Cir. 1980) 618 F2d 1111, 1115-1116]

Nonetheless, a "stringent standard" applies: A motion for new trial based on insufficiency of the evidence may be granted "only if the verdict is against the great weight of the evidence or it is quite clear that the jury has reached a seriously erroneous result." [*Johnson v. Paradise Valley Unified School Dist.* (9th Cir. 2001) 251 F3d 1222, 1228-1229 (internal quotes omitted)]

(2) [19:1225] **Improper, prejudicial jury instructions:**

The grant of a new trial or reversal on appeal is the proper remedy for the giving of an erroneous instruction when the improper instruction "materially affected the substantial rights of the aggrieved party." [See CCP §657; *Caldwell v. Paramount Unified School Dist.* (1995) 41 CA4th 189, 205, 48 CR2d 448, 459]

(a) [19:1226] **Effect of failure to object to instruction?** A party who has failed to object to jury instructions before they are given normally may not challenge them in a post-trial motion. [See FRCP 51]

Some courts hold that where an error in instructions to the jury is "fundamental or may cause a miscarriage of justice," a new trial may be granted even if no objection was made before the jury was instructed. [*Wagner by Wagner v. Fair Acres Geriatric Center* (3rd Cir. 1995) 49 F3d 1002, 1018, fn. 17 (emphasis added); see also *Rodgers v. Fisher Body Div., General Motors Corp.* (6th Cir. 1984) 739 F2d 1102, 1106-1107]

Other courts allow a post-trial challenge to jury instructions not objected to at trial only where the court "fails entirely to give an instruction on an issue central to the trial and where it is possible that the issue in question was not considered at all by the jury." [*Voorhries-Larson v. Cessna Aircraft Co.* (9th Cir. 2001) 241 F3d 707, 718 (emphasis added)]

(b) [19:1227] **Effect of accurate instruction unsupported by evidence:** When a jury instruction *accurately* states the law but is not supported by any evidence, the error in giving the instruction is *harmless as a matter of law*. The jury will conclude for itself that there is insufficient evidence to support an application of the instruction and thus reject it as mere surplusage. [See *Griffin v. United States* (1991) 502 US 46, 59, 112 S.Ct. 466, 474—jurors

are well equipped to analyze the evidence; *United States v. Mari* (6th Cir. 1995) 47 F3d 782, 786]

[19:1228-1234] Reserved.

- (3) [19:1235] **Jury misconduct:** Misconduct in jury deliberations is another ground for new trial. [CCP §657(2)]

- [19:1236] Employer's new trial motion was properly granted in an employment discrimination action where deliberating jurors made unauthorized use of dictionary definitions of "discriminate" and "prejudice." The misconduct was prejudicial because these terms were of crucial importance to the case, the dictionary definitions did not accurately reflect applicable law set forth in the jury instructions, and the jury had difficulty reaching a verdict prior to introduction of the dictionary definitions. [*Mayhue v. St. Francis Hosp. of Wichita, Inc.* (10th Cir. 1992) 969 F2d 919, 922]

- (4) [19:1237] **Excessive damages:** A motion for new trial may be made on the ground that the jury awarded "excessive damages." [CCP §657(5)]

The size of the award must be so large as to be "inherently indicative of passion or prejudice." [See *Auster Oil & Gas, Inc. v. Stream* (5th Cir. 1988) 835 F2d 597, 603]

The motion usually seeks a retrial *limited* to the issue of damages (no retrial of liability).

- (a) [19:1238] **Constitutional limits on punitive damages awards:** A *punitive damages* award may be set aside on motion for new trial where it is so "grossly excessive" as to violate Fourteenth Amendment due process standards. *See discussion at ¶17:450 ff.*

- (b) [19:1239] **Remittitur and conditional new trial:** If the trial court determines that a jury's verdict is excessive, it *cannot* simply reduce the award. It may, however, deny the new trial motion *on condition* that plaintiff *remit* a portion of the verdict. If plaintiff does not consent to the remittitur, the court has no alternative but to order a new trial. [CCP §662.5(b); *Hetzel v. Prince William County, Va.* (1998) 523 US 208, 210, 118 S.Ct. 1210, 1211]

- (c) **Application**

- [19:1240] Damage awards of \$50,000 each for emotional distress suffered by five plaintiffs

in an employment discrimination case were excessive *in light of awards in similar cases*, warranting the grant of a new trial on damages unless plaintiffs accepted remittiturs in varying amounts. [*Hiller v. County of Suffolk* (ED NY 2001) 199 FRD 101, 107]

[19:1241-1244] Reserved

- (5) [19:1245] **Inadequate damages:** Plaintiff may move for a new trial on the ground that the jury's verdict was grossly inadequate. [CCP §657(5)]

Again, the motion usually seeks retrial limited to the issue of damages.

- (a) [19:1246] **Additur and conditional new trial (state court only):** Under California law, if the court finds the damages inadequate, it may order a new trial *on condition* that the motion will be denied if defendant consents to payment of additional damages. [See CCP §662.5(a); *Jehl v. Southern Pac. Co.* (1967) 66 C2d 821, 832-833, 59 CR 276, 283]

Additur is not allowed in federal courts; it is considered an unconstitutional invasion of plaintiff's Seventh Amendment right to jury trial on damage issues. [*Dimick v. Schiedt* (1935) 293 US 474, 486, 55 S.Ct. 296, 301]

(b) **Application**

- [19:1247] Former Employee alleged he was discharged in retaliation for assisting other employees with their claims against Employer for race discrimination. Although Employee proved over \$40,000 in damages, the jury returned a verdict of less than \$4,000. Employee moved for a new trial on the ground the verdict was "grossly inadequate" and the result of compromise. Given the facts of the case, it was error to deny the motion. [*Skinner v. Total Petroleum, Inc.* (10th Cir. 1988) 859 F2d 1439, 1445-1446]

[19:1248-1259] Reserved.

## T. APPEALS

[19:1260] While the substantive issues will vary, the procedural requirements on appeals in employment cases are the same as those in most other civil actions in state and federal court.

Whenever an appeal is desired or taken, the starting point usually is to determine whether the order or judgment that you wish to challenge or defend is appealable or reviewable by way of a writ petition,

and when the deadline for filing a notice of appeal or a writ petition expires. The following discussion provides a general overview of these points, but is not an exhaustive treatment of relevant considerations, limitations, deadlines or exceptions.

*Cross-refer:* For a thorough and detailed discussion of appellate or writ procedures and requirements, see:

- (state practice) Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (TRG).
- (federal practice) Goelz & Watts, *Rutter Group Prac. Guide: Ninth Circuit Civil Appellate Practice* (TRG).

1. [19:1261] **Appealable Orders and Judgments:** Whether an action is in federal or state court, appeals are typically restricted to final judgments that resolve all issues as to all parties, with some exceptions. This rule is premised on the notion that multiple appeals foster piecemeal litigation, which is both uneconomical and undesirable.

a. [19:1262] **Federal court:** A district court's final disposition of either all issues or a collateral issue is generally regarded as a final, appealable judgment under the so-called "final judgment rule." [See 28 USC §1291]

Interlocutory or nonfinal orders may be appealable immediately if they fall within an exception to the "final judgment rule." [See 28 USC §1292; *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F3d 1057, 1063—discussing standard of review]

In some instances, a party may appeal such interlocutory orders by obtaining permission from the court to do so. [See FRAP 5]

For example, orders granting or denying remand to state court of class actions or "mass actions" are subject to appellate review at the discretion of the appellate court. [28 USC §1453(c)]

*Cross-refer:* For detailed discussion of appealable judgments and orders in federal court, see Goelz & Watts, *Rutter Group Prac. Guide: Ninth Circuit Civil Appellate Practice* (TRG), Ch. 2.

[19:1263-1264] *Reserved.*

b. [19:1265] **State court:** Under California law, and with certain statutory exceptions, there is ordinarily only one final judgment from which an appeal may be taken in a given case. [See CCP §904.1; *Kinoshita v. Horio* (1986) 186 CA3d 959, 967-68, 231 CR 241, 246—strictly construing "one final judgment rule"]

*Cross-refer:* For a comprehensive discussion of appealable judgments and orders in state court, see Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (TRG), Ch. 2.

- (1) [19:1266] **Exception where judgment is final as to one party:** One of the more common exceptions exists when a judgment is final as to one of multiple parties. [See *Nguyen v. Calhoun* (2003) 105 CA4th 428, 437, 129 CR2d 436, 444]
- (2) [19:1267] **Exception for collateral judgments or orders:** Another more typical exception to the “one final judgment rule” lies where three conditions are met: “1. The order is collateral to the subject matter of the litigation, 2. The order is final as to the collateral matter, and 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant.” [Marsh v. Mountain Zephyr, Inc. (1996) 43 CA4th 289, 297-298, 50 CR2d 493, 498]
- (3) [19:1268] **Exception where another action pending on same cause:** Where a separate case is pending on the same cause of action and a trial court sustains a defense (CCP §597) or a demurrer (CCP §430.10(c)) on that ground, the interlocutory judgment for the defendant is directly appealable. [CCP §597]

[19:1269] Reserved.

## 2. Timely Notice of Appeal

- a. [19:1270] **Federal court:** Failing to file a timely notice of appeal with the district court in a civil case is a jurisdictional flaw that negates review by way of direct appeal. [See *Miller v. Marriott Int'l, Inc.* (9th Cir. 2002) 300 F3d 1061, 1063]

The deadline for filing a notice of appeal depends on whether the United States is a party in the action. If the United States is *not* a party, the deadline ordinarily is 30 days after entry of the appealed judgment or order; if the United States *is* a party, the deadline is 60 days after entry. [FRAP 4(a)(1)]

- (1) [19:1271] **Possible extension:** Where a party's failure to meet the deadlines set forth in FRAP 4(a)(1) is attributable to “excusable neglect or good cause,” a district court may extend the deadline so long as the party seeking to appeal requests the extension no more than 30 days after the deadline in FRAP 4(a)(1) has expired. [FRAP 4(a)(5)]

*Cross-refer:* For detailed discussion of appeal deadlines in federal court, see Goelz & Watts, *Rutter Group Prac. Guide: Ninth Circuit Civil Appellate Practice* (TRG), Ch. 3.

[19:1272-1274] Reserved.

- b. [19:1275] **State court:** In California courts, a notice of appeal must be filed by one of the three deadlines set forth

in CRC 8.104(a). Which of these three deadlines applies depends on whether the superior court clerk or a party gives notice of the entry of the appealable judgment or order. If both the clerk and a party give notice of entry of the judgment or order, the earliest deadline applies. [*Filipescu v. California Housing Finance Agency* (1995) 41 CA4th 738, 742, 48 CR2d 736, 739] The denial of certain postjudgment motions may extend the deadlines. [CRC 8.108]

- (1) [19:1276] **Most common deadline:** Under CCP §664.5, the party who seeks entry of an order or judgment is required, with certain exceptions, to mail a notice of entry to all other parties. Thus, the most common deadline to file a notice of appeal is 60 days after the appealing party serves or is served with a file-stamped copy of the judgment, accompanied by a proof of service, or a document entitled "Notice of Entry of Judgment." [CRC 8.104(a)(2)]
- (2) [19:1277] **Other possible deadline:** Where the clerk of the superior court mails the appealing party a document entitled "Notice of Entry" regarding the judgment or order, or a file-stamped copy of the judgment or order, along with an indication as to the date that either was mailed, the deadline is 60 days after the mailing. [CRC 8.104(a)(1)]

Because superior court clerks are only required to mail such materials in nonemployment cases, unless the court orders as much (see CCP §664.5(a),(b),(d)), this deadline is not common in employment cases.

- (3) [19:1278] **Outermost deadline:** In situations where no notice of entry is mailed by any party or the clerk, the deadline is 180 days after judgment was entered. [CRC 8.104(a)(3)]

No authorized extension (e.g., denial of a post-trial motion) may extend the deadline beyond the 180-day limit; but the 180-day limit will not terminate an otherwise timely notice of cross-appeal. [CRC 8.104(b)]

➡[19:1279] **PRACTICE POINTER:** File a notice of appeal as soon as possible after the judgment or order is entered. There is no advantage in waiting until the last minute to do so because filing the notice of appeal on the eve of the deadline *extends the time for your opponent to file a cross-appeal*, rather than thwarting your opponent's efforts to file a timely notice of appeal. [CRC 8.108(e)]

[19:1280-1284] Reserved.

*Cross-refer:* For detailed discussion of state court appeal deadlines, see Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (TRG), Ch. 3.

3. [19:1285] **Writs:** Where a direct appeal is not available, relief may be found by petitioning for writ review, which is available in both federal and state courts but rarely successful in either.

*Cross-refer:* For a thorough and detailed discussion of procedures and requirements for writ petitions see:

- (state practice) Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (TRG), Ch. 15.
  - (federal practice) Goelz & Watts, *Rutter Group Prac. Guide: Ninth Circuit Civil Appellate Practice* (TRG), Ch. 13.
- a. [19:1286] **Federal court:** Writ review in federal court is authorized by statute. [See 28 USC §1651]

The most common writs are for “mandamus” and “prohibition.” [FRAP 21]

In deciding whether to grant a writ petition, the Ninth Circuit considers five factors:

- the availability of other means, such as a direct appeal, by which the petitioner may obtain the relief sought;
- the degree to which the petitioner will be irreparably harmed otherwise;
- whether the district court’s order is clearly erroneous;
- the extent to which the district court’s order reflects a repeated error or displays a continuing disregard for federal rules; and
- whether the district court’s order raises *legal issues of first impression or novel yet important problems.* [McElmurry v. U.S. Bank Nat’l Ass’n (9th Cir. 2007) 495 F3d 1136, 1142]

[19:1287-1289] Reserved.

- b. [19:1290] **State court:** In California state court practice, there are two general types of writs—common law writs and statutory writs.

- (1) [19:1291] **Statutory writs:** Some statutes expressly confer on appellate courts authority to review a lower court’s decision by way of a writ. The statutory writs most commonly sought in employment cases probably stem from venue decisions (CCP §400), the denial of a motion for summary judgment or summary adjudication (CCP §437c(m)(1)), orders refusing to quash service of summons or declining to dismiss or stay an action on the inconvenient-forum grounds (CCP §418.10(c)), determinations concerning the disqualification of a judge (CCP §170.3(d)), and decisions regarding coor-

dination of actions pending in different courts (CCP §404.6; CRC 3.505).

- (2) [19:1292] **Common law writs:** Where no statutory authority is provided for writ review, common law writs may be sought for immediate appellate court review of a lower court's rulings. Typical examples:
- to review rulings on demurrers;
  - to review rulings on discovery motions (particularly where the court has ordered discovery of material claimed to be *privileged*).
- (a) [19:1293] **Types of common law writs:** Traditionally, there have been three different types of common law writs:
- *mandate* to compel a ministerial duty or to correct an abuse of discretion on the part of a lower court (CCP §1085);
  - *prohibition* to thwart a threatened judicial act for which there is no jurisdiction (CCP §1102);
  - *certiorari* to correct a completed jurisdictional act that exceeds jurisdictional boundaries (CCP §1068).
- (b) [19:1294] **Application—employment cases:** In employment cases, writs of mandate are usually sought to secure review of some problematic discovery order. [See *American Airlines, Inc. v. Sup.Ct. (DiMareo)* (2003) 114 CA4th 881, 884, 8 CR3d 146, 148]

It is also not uncommon for defendants to seek a writ of prohibition when a trial court fails to dismiss a case based on plaintiff's failure to exhaust administrative remedies. [See *Keiffer v. Bechtel Corp.* (1998) 65 CA4th 893, 897-898, 76 CR2d 827, 829]

► [19:1295] **PRACTICE POINTER:** Regardless of which type of writ you may seek, keep in mind that such relief is extraordinary. A writ will issue only where the challenged decision is both clearly erroneous and prejudicial, and where the party challenging the decision cannot obtain an adequate remedy by way of any other means, such as a regular appeal. [See *Omaha Indem. Co. v. Sup.Ct. (Greinke)* (1989) 209 CA3d 1266, 1271-1274, 258 CR 66, 68-70]

Arguing that extraordinary relief is warranted to avoid the expense of going to trial generally is not likely to result in writ review being granted absent unusual circumstances, because the parties have an adequate legal remedy (i.e., to appeal an adverse judgment).

- c. [19:1296] **Time requirements:** The deadlines for filing a writ petition vary between the state and federal forums, and even within California depending on the type of writ sought and the nature of the challenged order. Thus, deadlines for writ petitions are beyond the scope of this Practice Guide.

*Cross-refer:* For a detailed discussion of deadlines for writ petitions see:

- (state practice) Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (TRG), Ch. 15.
- (federal practice) Goelz & Watts, *Rutter Group Prac. Guide: Ninth Circuit Civil Appellate Practice* (TRG), Ch. 13.

**COMPLAINT FOR DAMAGES FOR SEXUAL HARASSMENT,  
RETALIATION, BREACH OF CONTRACT, WRONGFUL  
DISCHARGE IN VIOLATION OF PUBLIC POLICY**

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9

10 SUPERIOR COURT OF STATE OF CALIFORNIA, COUNTY OF LOS ANGELES  
11 COUNTY COURTHOUSE, 111 N. Hill Street, Los Angeles, California

12 MARY SMITH, )  
13 vs. ) No. C-388904  
14 WCS, INC., JOHN CLARK and Doe 1 )  
through Doe 10, ) COMPLAINT FOR DAMAGES  
15 ) 1. Sexual Harassment  
Defendants. ) 2. Retaliation  
 ) 3. Breach of Contract  
 ) 4. Wrongful Termination in Violation  
 ) of Public Policy  
16 )  
17 Plaintiff MARY SMITH alleges as follows:

18 GENERAL ALLEGATIONS

19 1. Plaintiff is, and at all relevant times was, an adult  
female residing in Los Angeles County, California.

20 2. Plaintiff was employed by defendants in Los Angeles  
County, California, and the defendants' conduct hereinafter alleged  
21 occurred in said County and State.

22 3. Plaintiff is informed and believes and on that basis  
23 alleges that defendant WCS, INC., is and at all relevant times was, a  
24 corporation organized and existing under the laws of the State of  
25 California, that its principal place of business was in Los Angeles, County  
26 California, and that it employed more than 50 persons and was an employer  
27 as defined in the California Fair Employment and Housing Act (FEHA).

4. Plaintiff is informed and believes and on that basis alleges that defendant JOHN CLARK is, and at all relevant times was, an individual residing in Los Angeles County, California, and the president and sole shareholder of defendant WCS, INC.

5. The true names and capacities of defendants named as Doe 1 through Doe 10, inclusive, are presently unknown to plaintiff. Plaintiff will amend this complaint, setting forth the true names and capacities of these fictitious defendants when they are ascertained. Plaintiff is informed and believes and on that basis alleges that each of the fictitious defendants has participated in the acts alleged in this complaint to have been done by the named defendants.

6. Plaintiff is informed and believes and on that basis alleges that, at all relevant times, each of defendants, whether named or fictitious, was the agent or employee of each of the other defendants, and in doing the things alleged to have been done in the complaint, acted within the scope of such agency or employment, or ratified the acts of the other.

FIRST CAUSE OF ACTION

**(Sexual Harassment)**

7. Plaintiff incorporates each allegation set forth in paragraphs 1 through 6.

8. In January 1996, defendants hired plaintiff to work in the position of marketing associate. During the next five years of her employment, plaintiff performed her job duties in an exemplary manner.

9. During the course of plaintiff's employment, defendant CLARK regularly touched plaintiff's buttocks, hugged and kissed her, talked about his sexual exploits and made sexually suggestive comments. Defendant CLARK's conduct was unwelcome, and plaintiff rejected his sexual advances.

1 Plaintiff also observed on a regular basis throughout her employment  
2 sexually offensive behavior on the part of defendant CLARK directed at  
3 other female employees.

4       10. Plaintiff complained of defendant CLARK's sexual advances  
5 and the sexually offensive and hostile working environment to her immediate  
6 supervisor. Plaintiff's supervisor instructed her to keep her objections to  
7 herself or she would be terminated. As a result of her complaint against  
8 defendant CLARK, plaintiff was placed on 14 days' probation for allegedly  
9 criticizing another employee. Plaintiff continued to complain about  
10 defendant CLARK's offensive conduct to defendant WCS, INC.'s office  
11 manager, to no avail.

12       11. On December 29, 2000, defendants terminated plaintiff's  
13 employment for alleged "unprofessional behavior." Defendant CLARK  
14 subsequently stated to plaintiff that had she not rejected his advances she  
15 would still have her job.

16       12. The conduct of defendants constitutes unlawful  
17 discrimination based on plaintiff's sex, including sexual harassment, in  
18 violation of the FEHA.

19       13. On January 5, 2001, plaintiff filed with the California  
20 Department of Fair Employment and Housing (DFEH) a complaint charging  
21 defendants with discrimination in violation of the California Fair  
22 Employment and Housing Act (FEHA). On February 1, 2001, DFEH issued to  
23 plaintiff a right-to-sue letter.

24       14. As a result of defendants' discriminatory actions against  
25 her, plaintiff has suffered and continues to suffer damages, in the form of  
26 lost wages and other employment benefits, and severe emotional and physical  
27 distress, the exact amount of which will be proven at trial.

28       15. Defendants and each of them acted for the purpose of

causing plaintiff to suffer financial loss and severe emotional distress and physical distress and are guilty of oppression and malice, justifying an award of exemplary and punitive damages.

SECOND CAUSE OF ACTION

(Retaliation)

6                   16. Plaintiff incorporates each allegation set forth in  
7 paragraphs 1 through 15.

8           17. Plaintiff opposed defendants' discriminatory acts by  
9 directly rejecting the offensive touchings and statements from defendant  
10 CLARK and by complaining to her immediate supervisor and defendant WCS,  
11 INC.'s office manager concerning such conduct.

12           18. Defendants terminated plaintiff's employment in  
13 retaliation for her rejection of unwanted sexual behavior and complaints  
14 regarding such behavior.

15           19.       As a result of defendants' retaliation against her,  
16 plaintiff has suffered and continues to suffer damages, in the form of lost  
17 wages and other employment benefits, and severe emotional and physical  
18 distress, the exact amount of which will be proven at trial.

19           20. Defendants and each of them acted for the purpose of  
20 causing plaintiff to suffer financial loss and severe emotional distress  
21 and physical distress and are guilty of oppression and malice, justifying  
22 an award of exemplary and punitive damages.

THIRD CAUSE OF ACTION

**(Breach of Contract)**

21. Plaintiff incorporates each allegation set forth in  
22 paragraphs 1 through 20.

27                   22. In January 1996, plaintiff entered into an oral  
28 employment agreement with defendants whereby defendants agreed that (a)

1 plaintiff would not be demoted, discharged or otherwise disciplined except  
2 for good cause and with notice and an opportunity to be heard; and (b)  
3 plaintiff would be evaluated in a fair and objective manner and afforded  
4 progressive discipline.

5       23. This oral employment agreement was evidenced in various  
6 written documents, including but not limited to defendant WCS, INC.'s  
7 employee handbook and personnel policies and procedures.

8       24. Plaintiff duly performed all conditions, covenants and  
9 promises under the agreement to be performed on her part. Plaintiff has at  
10 all times been ready, willing and able to perform all of the conditions of  
11 the agreement to be performed by her.

12       25. As a result of the above-described conduct, defendants  
13 breached their agreement with plaintiff by subjecting plaintiff to  
14 arbitrary and unfair evaluations and wrongfully terminating her without  
15 good cause and an opportunity to be heard.

16       26. As a result of defendants' breach of contract, plaintiff  
17 has suffered and continues to suffer damages, in the form of lost wages and  
18 other employment benefits, the exact amount of which will be proven at  
19 trial.

20                          FOURTH CAUSE OF ACTION

21                          (Wrongful Termination in Violation of Public Policy)

22       27. Plaintiff incorporates each allegation set forth in  
23 paragraphs 1 through 26.

24       28. The above-described conduct of defendants constitutes sex  
25 discrimination, sexual harassment and retaliation, and wrongful termination  
26 of plaintiff in violation of public policy embodied in the FEHA.

27       29. As a result of defendants' wrongful termination of her,  
28 plaintiff has suffered and continues to suffer damages, in the form of lost

wages and other employment benefits, and severe emotional and physical distress, the exact amount of which will be proven at trial.

3               30.         Defendants and each of them acted for the purpose of  
4 causing plaintiff to suffer financial loss and severe emotional distress  
5 and physical distress and are guilty of oppression and malice, justifying  
6 an award of exemplary and punitive damages.

7 WHEREFORE, plaintiff prays:

1. For compensatory damages according to proof and prejudgment interest thereon to the extent allowable by law;
  2. For exemplary and punitive damages according to proof;
  3. For attorney fees on the first and second causes of action;
  4. For costs of suit; and
  5. For such other and further relief as the court may deem proper.

DATED: . . . . .

PRINCE, POTTS & KING

By

HAROLD J. POTTS  
Attorneys for Plaintiff  
MARY SMITH

**ANSWER TO COMPLAINT FOR DAMAGES FOR SEXUAL  
HARASSMENT, RETALIATION, BREACH OF CONTRACT,  
WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY**

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6

8 SUPERIOR COURT OF STATE OF CALIFORNIA, COUNTY OF LOS ANGELES  
COUNTY COURTHOUSE, 111 N. Hill Street, Los Angeles, California

MARY SMITH, ) No. C-388904  
vs. Plaintiff,) ANSWER TO COMPLAINT FOR DAMAGES  
WCS, INC., JOHN CLARK, and Doe 1 )  
through Doe 10, ) 1. Sexual Harassment  
Defendants.) ) 2. Retaliation  
 ) 3. Breach of Contract  
 ) 4. Wrongful Termination in  
 ) Violation of Public Policy

Defendants WCS, INC. and JOHN CLARK answer plaintiff's complaint as follows:

## GENERAL DENIAL

Pursuant to Code of Civil Procedure section 431.30, these answering defendants deny, generally and specifically, each and every allegation of the complaint.

## FIRST AFFIRMATIVE DEFENSE

24 The complaint and each of its causes of action fail to state facts  
25 sufficient to constitute a cause or causes of action.

**SECOND AFFIRMATIVE DEFENSE**

27 The complaint and each of its causes of action are barred because,  
28 at all relevant times, plaintiff was an at-will employee, subject to

1 termination, with or without cause, and with or without notice.

2                   THIRD AFFIRMATIVE DEFENSE

3                   The complaint and each of its causes of action are barred by the  
4 doctrines of waiver, estoppel and consent.

5                   FOURTH AFFIRMATIVE DEFENSE

6                   The complaint and each of its causes of action are barred by the  
7 doctrine of laches.

8                   FIFTH AFFIRMATIVE DEFENSE

9                   The complaint and each of its causes of action are barred because  
10 all acts of defendants affecting the terms and/or conditions of  
11 plaintiff's employment were done in good faith and motivated by  
12 legitimate, non-retaliatory and non-discriminatory reasons and/or as a  
13 result of business necessity.

14                  SIXTH AFFIRMATIVE DEFENSE

15                  The complaint and each of its causes of action are barred because  
16 all acts of defendants affecting the terms and/or conditions of  
17 plaintiff's employment were privileged and done with good cause.

18                  SEVENTH AFFIRMATIVE DEFENSE

19                  The complaint and each of its causes of action are barred because  
20 defendants' actions were gender-neutral and were based on bona fide  
21 factors other than sex.

22                  EIGHTH AFFIRMATIVE DEFENSE

23                  The complaint and each of its causes of action are barred by  
24 plaintiff's willful misconduct.

25                  NINTH AFFIRMATIVE DEFENSE

26                  The complaint and each of its causes of action are barred, or  
27 recovery reduced, by plaintiff's carelessness, recklessness and/or  
28 negligence in the matters complained of in the complaint.

1                   TENTH AFFIRMATIVE DEFENSE

2         The complaint and each of its causes of action are barred by  
3 plaintiff's failure to exhaust her administrative remedies.

4                   ELEVENTH AFFIRMATIVE DEFENSE

5         The complaint and each of its causes of action are barred by the  
6 applicable statute of limitations, including, without limitation, those  
7 provided for in California Government Code section 12960 and California  
8 Code of Civil Procedure sections 339 and 340.

9                   TWELFTH AFFIRMATIVE DEFENSE

10       The complaint and each of its causes of action are barred either  
11 in whole or in part by the doctrine of after-acquired evidence.

12                  THIRTEENTH AFFIRMATIVE DEFENSE

13       The complaint and each of its causes of action are barred either  
14 in whole or in part by plaintiff's failure to mitigate her alleged  
15 damages.

16                  FOURTEENTH AFFIRMATIVE DEFENSE

17       Any award of punitive damages as sought by plaintiff would violate  
18 the due process and excessive fine clauses of the Fifth, Eighth and  
19 Fourteenth Amendments of the United States Constitution, as well as the  
20 Constitution of the State of California.

21       WHEREFORE, defendants pray:

22       1.      That the complaint be dismissed with prejudice and that  
23 plaintiff take nothing thereby;

24       2.      For their costs of suit;

25       3.      For their attorney fees; and

26       ///

27       ///

28       ///

4. For such other and further relief as the court may deem proper.

DATED: . . . . .

SMITH & TAYLOR LLP

By MICHAEL G. SMITH  
Attorney for Defendants  
WCS, INC. and JOHN CLARK

# FORM INTERROGATORIES—EMPLOYMENT LAW

DISC-002

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address)	
TELEPHONE NO.: _____ FAX NO. (Optional): _____	
E-MAIL ADDRESS (Optional): _____	
ATTORNEY FOR (Name): _____	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____	
SHORT TITLE: _____	
<b>FORM INTERROGATORIES – EMPLOYMENT LAW</b>	
Asking Party: Answering Party: Scri No.:	CASE NUMBER

**Sec. 1. Instructions to All Parties**

- (a) Interrogatories are written questions prepared by a party to an action that are sent to any other party in the action to be answered under oath. The interrogatories below are form interrogatories approved for use in employment cases.
- (b) For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure sections 2030.010–2030.410 and the cases construing those sections.
- (c) These form interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or make any objection.

**Sec. 2. Instructions to the Asking Party**

- (a) These form interrogatories are designed for optional use by parties in employment cases. (Separate sets of interrogatories, *Form Interrogatories—General* (form DISC-001) and *Form Interrogatories—Limited Civil Cases (Economic Litigation)* (form DISC-004) may also be used where applicable in employment cases.)
- (b) Insert the names of the **EMPLOYEE** and **EMPLOYER** to whom these interrogatories apply in the definitions in sections 4(d) and (e) below.
- (c) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case.
- (d) The interrogatories in section 211.0, Loss of Income Interrogatories to Employer, should not be used until the employer has had a reasonable opportunity to conduct an investigation or discovery of the employee's injuries and damages.
- (e) Additional interrogatories may be attached.

**Sec. 3. Instructions to the Answering Party**

- (a) You must answer or provide another appropriate response to each interrogatory that has been checked below.
- (b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See Code of Civil Procedure sections 2030.260–2030.270 for details.

Form Approved for Optional Use  
Judicial Council of California  
DISC-002 (Rev. January 1, 2007)

**FORM INTERROGATORIES—EMPLOYMENT LAW**

(DATE)

(SIGNATURE)

**Sec. 4. Definitions**

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

- (a) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, limited liability company, corporation, or public entity.

Page 1 of 8

Code of Civil Procedure  
§§ 2030.010–2030.410, 2033.740  
[www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)

American LegalNet, Inc.  
[www.FormsOnDemand.com](http://www.FormsOnDemand.com)

(b) **YOU OR ANYONE ACTING ON YOUR BEHALF** includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(c) **EMPLOYMENT** means a relationship in which an **EMPLOYEE** provides services requested by or on behalf of an **EMPLOYER**, other than an independent contractor relationship.

(d) **EMPLOYEE** means a **PERSON** who provides services in an **EMPLOYMENT** relationship and who is a party to this lawsuit. For purposes of these interrogatories, **EMPLOYEE** refers to (insert name):

*(If no name is inserted, **EMPLOYEE** means all such **PERSONS**.)*

(e) **EMPLOYER** means a **PERSON** who employs an **EMPLOYEE** to provide services in an **EMPLOYMENT** relationship and who is a party to this lawsuit. For purposes of these interrogatories, **EMPLOYER** refers to (insert name):

*(If no name is inserted, **EMPLOYER** means all such **PERSONS**.)*

(f) **ADVERSE EMPLOYMENT ACTION** means any **TERMINATION**, suspension, demotion, reprimand, loss of pay, failure or refusal to hire, failure or refusal to promote, or other action or failure to act that adversely affects the **EMPLOYEE's** rights or interests and which is alleged in the **PLEADINGS**.

(g) **TERMINATION** means the actual or constructive termination of employment and includes a discharge, firing, layoff, resignation, or completion of the term of the employment agreement.

(h) **PUBLISH** means to communicate orally or in writing to anyone other than the plaintiff. This includes communications by one of the defendant's employees to others. (*Kelly v. General Telephone Co.* (1982) 136 Cal App 3d 278, 284.)

(i) **PLEADINGS** means the original or most recent amended version of any complaint, answer, cross-complaint, or answer to cross-complaint.

(j) **BENEFIT** means any benefit from an **EMPLOYER**, including an "employee welfare benefit plan" or employee pension benefit plan" within the meaning of Title 29 United States Code section 1002(1) or (2) or ERISA.

(k) **HEALTH CARE PROVIDER** includes any **PERSON** referred to in Code of Civil Procedure section 667.7(e)(3).

(l) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostats, photographs, electronically stored information, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(m) **ADDRESS** means the street address, including the city, state, and zip code.

## Sec. 5. Interrogatories

The following Interrogatories for employment law cases have been approved by the Judicial Council under Code of Civil Procedure section 2033.710:

### CONTENTS

- 200.0 Contract Formation
- 201.0 Adverse Employment Action
- 202.0 Discrimination Interrogatories to Employee
- 203.0 Harassment Interrogatories to Employee
- 204.0 Disability Discrimination
- 205.0 Discharge in Violation of Public Policy
- 206.0 Defamation
- 207.0 Internal Complaints
- 208.0 Governmental Complaints
- 209.0 Other Employment Claims by Employee or Against Employer
- 210.0 Loss of income Interrogatories to Employee
- 211.0 Loss of income Interrogatories to Employer
- 212.0 Physical, Mental, or Emotional Injuries—Interrogatories to Employee
- 213.0 Other Damages Interrogatories to Employee
- 214.0 Insurance
- 215.0 Investigation
- 216.0 Denials and Special or Affirmative Defenses
- 217.0 Response to Request for Admissions

### 200.0 Contract Formation

- 200.1 Do you contend that the **EMPLOYMENT** relationship was at "at will"? If so:
  - (a) state all facts upon which you base this contention;
  - (b) state the name, **ADDRESS**, and telephone number of each **PERSON** who has knowledge of those facts; and
  - (c) identify all **DOCUMENTS** that support your contention.
- 200.2 Do you contend that the **EMPLOYMENT** relationship was not "at will"? If so:
  - (a) state all facts upon which you base this contention;
  - (b) state the name, **ADDRESS**, and telephone number of each **PERSON** who has knowledge of those facts; and
  - (c) identify all **DOCUMENTS** that support your contention.
- 200.3 Do you contend that the **EMPLOYMENT** relationship was governed by any agreement—written, oral, or implied? If so:
  - (a) state all facts upon which you base this contention;
  - (b) state the name, **ADDRESS**, and telephone number of each **PERSON** who has knowledge of those facts; and
  - (c) identify all **DOCUMENTS** that support your contention.

- 200.4 Was any part of the parties' **EMPLOYMENT** relationship governed in whole or in part by any written rules, guidelines, policies, or procedures established by the **EMPLOYER**? If so, for each **DOCUMENT** containing the written rules, guidelines, policies, or procedures:
- (a) state the date and title of the **DOCUMENT** and a general description of its contents;
  - (b) state the manner in which the **DOCUMENT** was communicated to employees; and
  - (c) state the manner, if any, in which employees acknowledged either receipt of the **DOCUMENT** or knowledge of its contents.
- 200.5 Was any part of the parties' **EMPLOYMENT** relationship covered by one or more collective bargaining agreements or memorandums of understanding between the **EMPLOYER** (or an association of employers) and any labor union or employee association? If so, for each collective bargaining agreement or memorandum of understanding, state:
- (a) the names and **ADDRESSES** of the parties to the collective bargaining agreement or memorandum of understanding;
  - (b) the beginning and ending dates, if applicable, of the collective bargaining agreement or memorandum of understanding; and
  - (c) which parts of the collective bargaining agreement or memorandum of understanding, if any, govern (1) any dispute or claim referred to in the **PLEADINGS** and (2) the rules or procedures for resolving any dispute or claim referred to in the **PLEADINGS**.
- 200.6 Do you contend that the **EMPLOYEE** and the **EMPLOYER** were in a business relationship other than an **EMPLOYMENT** relationship? If so, for each relationship:
- (a) state the names of the parties to the relationship;
  - (b) identify the relationship; and
  - (c) state all facts upon which you base your contention that the parties were in a relationship other than an **EMPLOYMENT** relationship.
- 201.0 Adverse Employment Action**
- 201.1 Was the **EMPLOYEE** involved in a **TERMINATION**? If so:
- (a) state all reasons for the **EMPLOYEE'S TERMINATION**;
  - (b) state the name, **ADDRESS**, and telephone number of each **PERSON** who participated in the **TERMINATION** decision;
  - (c) state the name, **ADDRESS**, and telephone number of each **PERSON** who provided any information relied upon in the **TERMINATION** decision, and identify all **DOCUMENTS** relied upon in the **TERMINATION** decision.
- 201.2 Are there any facts that would support the **EMPLOYEE'S TERMINATION** that were first discovered after the **TERMINATION**? If so:
- (a) state the specific facts;
  - (b) state when and how **EMPLOYER** first learned of each specific fact;
  - (c) state the name, **ADDRESS**, and telephone number of each **PERSON** who has knowledge of the specific facts; and
  - (d) identify all **DOCUMENTS** that evidence these specific facts.
- 201.3 Were there any other **ADVERSE EMPLOYMENT ACTIONS**, including (*the asking party should list the ADVERSE EMPLOYMENT ACTIONS*):
- If so, for each action, provide the following:
- (a) all reasons for each **ADVERSE EMPLOYMENT ACTION**;
  - (b) the name, **ADDRESS**, and telephone number of each **PERSON** who participated in making each **ADVERSE EMPLOYMENT ACTION** decision;
  - (c) the name, **ADDRESS**, and telephone number of each **PERSON** who provided any information relied upon in making each **ADVERSE EMPLOYMENT ACTION** decision; and
  - (d) the identity of all **DOCUMENTS** relied upon in making each **ADVERSE EMPLOYMENT ACTION** decision.
- 201.4 Was the **TERMINATION** or any other **ADVERSE EMPLOYMENT ACTIONS** referred to in Interrogatories 201.1 through 201.3 based in whole or in part on the **EMPLOYEE'S** job performance? If so, for each action:
- (a) identify the **ADVERSE EMPLOYMENT ACTION**;
  - (b) identify the **EMPLOYEE'S** specific job performance that played a role in that **ADVERSE EMPLOYMENT ACTION**;
  - (c) identify any rules, guidelines, policies, or procedures that were used to evaluate the **EMPLOYEE'S** specific job performance;
  - (d) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who had responsibility for evaluating the specific job performance of the **EMPLOYEE**;
  - (e) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the **EMPLOYEE'S** specific job performance that played a role in that **ADVERSE EMPLOYMENT ACTION**; and
  - (f) describe all warnings given with respect to the **EMPLOYEE'S** specific job performance.

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- 201.5 Was any **PERSON** hired to replace the **EMPLOYEE** after the **EMPLOYEE'S TERMINATION** or demotion? If so, state the **PERSON'S name, job title, qualifications, ADDRESS and telephone number, and the date the PERSON was hired.**
- 201.6 Has any **PERSON** performed any of the **EMPLOYEE'S former job duties after the EMPLOYEE'S TERMINATION** or demotion? If so:
- (a) state the **PERSON'S name, job title, ADDRESS, and telephone number;**
  - (b) identify the duties; and
  - (c) state the date on which the **PERSON** started to perform the duties.
- 201.7 If the **ADVERSE EMPLOYMENT ACTION** involved the failure or refusal to select the **EMPLOYEE** (for example, for hire, promotion, transfer, or training), was any other **PERSON** selected instead? If so, for each **ADVERSE EMPLOYMENT ACTION**, state the name, **ADDRESS**, and telephone number of each **PERSON** selected; the date the **PERSON** was selected; and the reason the **PERSON** was selected instead of the **EMPLOYEE**.
- 202.0 Discrimination—Interrogatories to Employee**
- 202.1 Do you contend that any **ADVERSE EMPLOYMENT ACTIONS** against you were discriminatory? If so:
- (a) identify each **ADVERSE EMPLOYMENT ACTION** that involved unlawful discrimination;
  - (b) identify each characteristic (for example, gender, race, age, etc.) on which you base your claim or claims of discrimination;
  - (c) state all facts upon which you base each claim of discrimination;
  - (d) state the name, **ADDRESS**, and telephone number of each **PERSON** with knowledge of those facts; and
  - (e) identify all **DOCUMENTS** evidencing those facts.
- 202.2 State all facts upon which you base your contention that you were qualified to perform any job which you contend was denied to you on account of unlawful discrimination.
- 203.0 Harassment—Interrogatories to Employee**
- 203.1 Do you contend that you were unlawfully harassed in your employment? If so:
- (a) state the name, **ADDRESS**, telephone number, and employment position of each **PERSON** whom you contend harassed you;
  - (b) for each **PERSON** whom you contend harassed you, describe the harassment;
- (c) identify each characteristic (for example, gender, race, age, etc.) on which you base your claim of harassment;**
- (d) state all facts upon which you base your contention that you were unlawfully harassed;**
- (e) state the name, **ADDRESS**, and telephone number of each **PERSON** with knowledge of those facts; and**
- (f) identify all **DOCUMENTS** evidencing those facts.**
- 204.0 Disability Discrimination**
- 204.1 Name and describe each disability alleged in the **PLEADINGS**.
- 204.2 Does the **EMPLOYEE** allege any injury or illness that arose out of or in the course of **EMPLOYMENT**? If so, state:
- (a) the nature of such injury or illness;
  - (b) how such injury or illness occurred;
  - (c) the date on which such injury or illness occurred;
  - (d) whether **EMPLOYEE** has filed a workers' compensation claim. If so, state the date and outcome of the claim, and
  - (e) whether **EMPLOYEE** has filed or applied for disability benefits of any type. If so, state the date, identify the nature of the benefits applied for, and the outcome of any such application.
- 204.3 Were there any communications between the **EMPLOYEE** (or the **EMPLOYEE'S HEALTH CARE PROVIDER**) and the **EMPLOYER** about the type or extent of any disability of **EMPLOYEE**? If so:
- (a) state the name, **ADDRESS**, and telephone number of each person who made or received the communications;
  - (b) state the name, **ADDRESS**, and telephone number of each **PERSON** who witnessed the communications;
  - (c) describe the date and substance of the communications; and
  - (d) identify each **DOCUMENT** that refers to the communications.
- 204.4 Did the **EMPLOYER** have any information about the type, existence, or extent of any disability of **EMPLOYEE** other than from communications with the **EMPLOYEE** or the **EMPLOYEE'S HEALTH CARE PROVIDER**? If so, state the sources and substance of that information and the name, **ADDRESS**, and telephone number of each **PERSON** who provided or received the information.
- 204.5 Did the **EMPLOYEE** need any accommodation to perform any function of the **EMPLOYEE'S job position or need a transfer to another position as an accommodation?** If so, describe the accommodations needed.

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- 204.6 Were there any communications between the EMPLOYER (or the EMPLOYEE'S HEALTH CARE PROVIDER) and the EMPLOYER about any possible accommodation of EMPLOYEE? If so, for each communication:
- (a) state the name, ADDRESS, and telephone number of each PERSON who made or received the communication;
  - (b) state the name, ADDRESS, and telephone number of each PERSON who witnessed the communication;
  - (c) describe the date and substance of the communication; and
  - (d) identify each DOCUMENT that refers to the communication.
- 204.7 What did the EMPLOYER consider doing to accommodate the EMPLOYEE? For each accommodation considered:
- (a) describe the accommodation considered;
  - (b) state whether the accommodation was offered to the EMPLOYEE;
  - (c) state the EMPLOYEE'S response; or
  - (d) if the accommodation was not offered, state all the reasons why this decision was made;
  - (e) state the name, ADDRESS, and telephone number of each PERSON who on behalf of EMPLOYER made any decision about what accommodations, if any, to make for the EMPLOYEE; and
  - (f) state the name, ADDRESS, and telephone number of each PERSON who on behalf of the EMPLOYER made or received any communications about what accommodations, if any, to make for the EMPLOYEE.
- 205.0 Discharge in Violation of Public Policy**
- 205.1 Do you contend that the EMPLOYER took any ADVERSE EMPLOYMENT ACTION against you in violation of public policy? If so:
- (a) identify the constitutional provision, statute, regulation, or other source of the public policy that you contend was violated; and
  - (b) state all facts upon which you base your contention that the EMPLOYER violated public policy.
- 206.0 Defamation**
- 206.1 Did the EMPLOYER'S agents or employees PUBLISH any of the allegedly defamatory statements identified in the PLEADINGS? If so, for each statement:
- (a) identify the PUBLISHED statement;
  - (b) state the name, ADDRESS, telephone number, and job title of each person who PUBLISHED the statement;
  - (c) state the name, ADDRESS, and telephone number of each person to whom the statement was PUBLISHED;
- (d) state whether, at the time the statement was PUBLISHED, the PERSON who PUBLISHED the statement believed it to be true; and
- (e) state all facts upon which the PERSON who published the statement based the belief that it was true.
- 206.2 State the name and ADDRESS of each agent or employee of the EMPLOYER who responded to any inquiries regarding the EMPLOYEE after the EMPLOYEE'S TERMINATION.
- 206.3 State the name and ADDRESS of the recipient and the substance of each post-TERMINATION statement PUBLISHED about EMPLOYEE by any agent or employee of EMPLOYER.
- 207.0 Internal Complaints**
- 207.1 Were there any internal written policies or regulations of the EMPLOYER that apply to the making of a complaint of the type that is the subject matter of this lawsuit? If so:
- (a) state the title and date of each DOCUMENT containing the policies or regulations and a general description of the DOCUMENT'S contents;
  - (b) state the manner in which the DOCUMENT was communicated to EMPLOYEES;
  - (c) state the manner, if any, in which EMPLOYEES acknowledged receipt of the DOCUMENT or knowledge of its contents, or both;
  - (d) state, if you contend that the EMPLOYEE failed to use any available internal complaint procedures, all facts that support that contention; and
  - (e) state, if you contend that the EMPLOYEE'S failure to use internal complaint procedures was excused, all facts why the EMPLOYEE'S use of the procedures was excused.
- 207.2 Did the EMPLOYEE complain to the EMPLOYER about any of the unlawful conduct alleged in the PLEADINGS? If so, for each complaint:
- (a) state the date of the complaint;
  - (b) state the nature of the complaint;
  - (c) state the name and ADDRESS of each PERSON to whom the complaint was made;
  - (d) state the name, ADDRESS, telephone number, and job title of each PERSON who investigated the complaint;
  - (e) state the name, ADDRESS, telephone number, and job title of each PERSON who participated in making decisions about how to conduct the investigation;

(f) state the name, ADDRESS, telephone number, and job title of each PERSON who was interviewed or who provided an oral or written statement as part of the investigation of the complaint;

(g) state the nature and date of any action taken in response to the complaint;

(h) state whether the EMPLOYEE who made the complaint was made aware of the actions taken by the EMPLOYER in response to the complaint, and, if so, state how and when;

(i) identify all DOCUMENTS relating to the complaint, the investigation, and any action taken in response to the complaint; and

(j) state the name, ADDRESS, and telephone number of each PERSON who has knowledge of the EMPLOYEE'S complaint or the EMPLOYER'S response to the complaint.

#### 208.0 Governmental Complaints

208.1 Did the EMPLOYEE file a claim, complaint, or charge with any governmental agency that involved any of the material allegations made in the PLEADINGS? If so, for each claim, complaint, or charge:

(a) state the date on which it was filed;

(b) state the name and ADDRESS of the agency with which it was filed;

(c) state the number assigned to the claim, complaint, or charge by the agency;

(d) state the nature of each claim, complaint, or charge made;

(e) state the date on which the EMPLOYER was notified of the claim, complaint, or charge;

(f) state the name, ADDRESS, and telephone number of all PERSONS within the governmental agency with whom the EMPLOYER has had any contact or communication regarding the claim, complaint, or charge;

(g) state whether a right to sue notice was issued and, if so, when; and

(h) state whether any findings or conclusions regarding the complaint or charge have been made, and, if so, the date and description of the agency's findings or conclusions.

208.2 Did the EMPLOYER respond to any claim, complaint, or charge identified in Interrogatory 208.1? If so, for each claim, complaint, or charge:

(a) state the nature and date of any investigation done or any other action taken by the EMPLOYER in response to the claim, complaint, or charge;

(b) state the name, ADDRESS, telephone number, and job title of each person who investigated the claim, complaint, or charge;

(c) state the name, ADDRESS, telephone number, and job title of each PERSON who participated in making decisions about how to conduct the investigation; and

(d) state the name, ADDRESS, telephone number, and job title of each PERSON who was interviewed or who provided an oral or written statement as part of the investigation.

#### 209.0 Other Employment Claims by Employee or Against Employer

209.1 Except for this action, in the past 10 years has the EMPLOYEE filed a civil action against any employer regarding the EMPLOYEE'S employment? If so, for each civil action:

(a) state the name, ADDRESS, and telephone number of each employer against whom the action was filed;

(b) state the court, names of the parties, and case number of the civil action;

(c) state the name, ADDRESS, and telephone number of any attorney representing the EMPLOYEE; and

(d) state whether the action has been resolved or is pending.

209.2 Except for this action, in the past 10 years has any employee filed a civil action against the EMPLOYER regarding his or her employment?

If so, for each civil action:

(a) state the name, ADDRESS, and telephone number of each employee who filed the action;

(b) state the court, names of the parties, and case number of the civil action;

(c) state the name, ADDRESS, and telephone number of any attorney representing the EMPLOYER; and

(d) state whether the action has been resolved or is pending.

#### 210.0 Loss of Income—Interrogatories to Employer

210.1 Do you attribute any loss of income, benefits, or earning capacity to any ADVERSE EMPLOYMENT ACTION? (If your answer is "no," do not answer Interrogatories 210.2 through 210.6.)

210.2 State the total amount of income, benefits, or earning capacity you have lost to date and how the amount was calculated.

210.3 Will you lose income, benefits, or earning capacity in the future as a result of any ADVERSE EMPLOYMENT ACTION? If so, state the total amount of income, benefits, or earning capacity you expect to lose, and how the amount was calculated.

210.4 Have you attempted to minimize the amount of your lost income? If so, describe how; if not, explain why not.

- 210.5 Have you purchased any benefits to replace any benefits to which you would have been entitled if the **ADVERSE EMPLOYMENT ACTION** had not occurred? If so, state the cost for each benefit purchased.
- 210.6 Have you obtained other employment since any **ADVERSE EMPLOYMENT ACTION**? If so, for each new employment:
- (a) state when the new employment commenced;
  - (b) state the hourly rate or monthly salary for the new employment; and
  - (c) state the benefits available from the new employment.
- 211.0 **Loss of Income—Interrogatories to Employer** *[See instruction 2(c).]*
- 211.1 Identify each type of **BENEFIT** to which the **EMPLOYEE** would have been entitled, from the date of the **ADVERSE EMPLOYMENT ACTION** to the present, if the **ADVERSE EMPLOYMENT ACTION** had not happened and the **EMPLOYEE** had remained in the same job position. For each type of benefit, state the amount the **EMPLOYER** would have paid to provide the benefit for the **EMPLOYEE** during this time period and the value of the **BENEFIT** to the **EMPLOYEE**.
- 211.2 Do you contend that the **EMPLOYEE** has not made reasonable efforts to minimize the amount of the **EMPLOYEE'S** lost income? If so:
- (a) describe what more **EMPLOYEE** should have done;
  - (b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts that support your contention; and
  - (c) identify all **DOCUMENTS** that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.
- 211.3 Do you contend that any of the lost income claimed by the **EMPLOYEE**, as disclosed in discovery thus far in this case, is unreasonable or was not caused by the **ADVERSE EMPLOYMENT ACTION**? If so:
- (a) state the amount of claimed lost income that you dispute;
  - (b) state all facts upon which you base your contention;
  - (c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts; and
  - (d) identify all **DOCUMENTS** that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.
- 212.0 **Physical, Mental, or Emotional Injuries—Interrogatories to Employee**
- 212.1 Do you attribute any physical, mental, or emotional injuries to the **ADVERSE EMPLOYMENT ACTION**? If your answer is "no," do not answer *Interrogatory 212.2 through 212.7.*
- 212.2 Identify each physical, mental, or emotional injury that you attribute to the **ADVERSE EMPLOYMENT ACTION** and the area of your body affected.
- 212.3 Do you still have any complaints of physical, mental, or emotional injuries that you attribute to the **ADVERSE EMPLOYMENT ACTION**? If so, for each complaint state:
- (a) a description of the injury;
  - (b) whether the complaint is subsiding, remaining the same, or becoming worse; and
  - (c) the frequency and duration.
- 212.4 Did you receive any consultation or examination (except from expert witnesses covered by Code of Civil Procedure section 2034) or treatment from a **HEALTH CARE PROVIDER** for any injury you attribute to the **ADVERSE EMPLOYMENT ACTION**? If so, for each **HEALTH CARE PROVIDER** state:
- (a) the name, **ADDRESS**, and telephone number;
  - (b) the type of consultation, examination, or treatment provided;
  - (c) the dates you received consultation, examination, or treatment; and
  - (d) the charges to date.
- 212.5 Have you taken any medication, prescribed or not, as a result of injuries that you attribute to the **ADVERSE EMPLOYMENT ACTION**? If so, for each medication state:
- (a) the name of the medication;
  - (b) the name, **ADDRESS** and telephone number of the **PERSON** who prescribed or furnished it;
  - (c) the date prescribed or furnished;
  - (d) the dates you began and stopped taking it; and
  - (e) the cost to date.
- 212.6 Are there any other medical services not previously listed in response to interrogatory 212.4 (for example, ambulance, nursing, prosthetics) that you received for injuries attributed to the **ADVERSE EMPLOYMENT ACTION**? If so, for each service state:
- (a) the nature;
  - (b) the date;
  - (c) the cost; and
  - (d) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER**.

- 212.7 Has any **HEALTH CARE PROVIDER** advised that you may require future or additional treatment for any injuries that you attribute to the **ADVERSE EMPLOYMENT ACTION**? If so, for each injury state:
- (a) the name and **ADDRESS** of each **HEALTH CARE PROVIDER**;
  - (b) the complaints for which the treatment was advised; and
  - (c) the nature, duration, and estimated cost of the treatment.

#### 213.0 Other Damages—Interrogatories to Employee

- 213.1 Are there any other damages that you attribute to the **ADVERSE EMPLOYMENT ACTION**? If so, for each item of damage state:
- (a) the nature;
  - (b) the date it occurred;
  - (c) the amount; and
  - (d) the name, **ADDRESS**, and telephone number of each **PERSON** who has knowledge of the nature or amount of the damage.
- 213.2 Do any **DOCUMENTS** support the existence or amount of any item of damages claimed in Interrogatory 213.1? If so, identify the **DOCUMENTS** and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

#### 214.0 Insurance

- 214.1 At the time of the **ADVERSE EMPLOYMENT ACTION**, was there in effect any policy of insurance through which you were or might be insured in any manner for the damages, claims, or actions that have arisen out of the **ADVERSE EMPLOYMENT ACTION**? If so, for each policy state:
- (a) the kind of coverage;
  - (b) the name and **ADDRESS** of the insurance company;
  - (c) the name, **ADDRESS**, and telephone number of each named insured;
  - (d) the policy number;
  - (e) the limits of coverage for each type of coverage contained in the policy;
  - (f) whether any reservation of rights or controversy or coverage dispute exists between you and the insurance company; and
  - (g) the name, **ADDRESS**, and telephone number of the custodian of the policy.
- 214.2 Are you self-insured under any statute for the damages, claims, or actions that have arisen out of the **ADVERSE EMPLOYMENT ACTION**? If so, specify the statute.

#### 215.0 Investigation

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- 215.1 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** interviewed any individual concerning the **ADVERSE EMPLOYMENT ACTION**? If so, for each individual state:
- (a) the name, **ADDRESS**, and telephone number of the individual interviewed;
  - (b) the date of the interview; and
  - (c) the name, **ADDRESS**, and telephone number of the **PERSON** who conducted the interview.
- 215.2 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** obtained a written or recorded statement from any individual concerning the **ADVERSE EMPLOYMENT ACTION**? If so, for each statement state:
- (a) the name, **ADDRESS**, and telephone number of the individual from whom the statement was obtained;
  - (b) the name, **ADDRESS**, and telephone number of the individual who obtained the statement;
  - (c) the date the statement was obtained; and
  - (d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original statement or a copy.

#### 216.0 Denials and Special or Affirmative Defenses

- 216.1 Identify each denial of a material allegation and each special or affirmative defense in your **PLEADINGS** and for each:
- (a) state all facts upon which you base the denial or special or affirmative defense;
  - (b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of those facts; and
  - (c) identify all **DOCUMENTS** and all other tangible things, that support your denial or special or affirmative defense, and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

#### 217.0 Response to Request for Admissions

- 217.1 Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission
- (a) state the number of the request;
  - (b) state all facts upon which you base your response;
  - (c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of those facts; and
  - (d) identify all **DOCUMENTS** and other tangible things that support your response and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

## **LIST OF JUDICIAL COUNCIL JURY INSTRUCTIONS**

The California Judicial Council Civil Jury Instructions ("CACI") and verdict forms are available for use in civil cases. California courts are "strongly encouraged" to use these instructions wherever applicable. [CRC 2.1050(e)]

The following CACI instructions relate particularly to employment litigation. Copies are available online ([www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf](http://www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf)).

### **WRONGFUL TERMINATION SERIES**

- 2400. Breach of Employment Contract—Unspecified Term  
"At-Will" Presumption
- 2401. Breach of Employment Contract—Unspecified Term—  
Essential Factual Elements
- 2402. Breach of Employment Contract—Unspecified Term—  
Constructive Discharge—Essential Factual Elements
- 2403. Breach of Employment Contract—Unspecified Term—  
Implied-in-Fact Promise Not to Discharge Without Good  
Cause
- 2404. Breach of Employment Contract—Unspecified Term—  
"Good Cause" Defined
- 2405. Breach of Employment Contract—Unspecified Term—  
"Good Cause" Defined—Misconduct
- 2406. Breach of Employment Contract—Unspecified Term—  
Damages
- 2407. Employee's Duty to Mitigate Damages
- 2408-2419. Reserved for Future Use
- 2420. Breach of Employment Contract—Specified Term—  
Essential Factual Elements
- 2421. Breach of Employment Contract—Specified Term—Good  
Cause Defense
- 2422. Breach of Employment Contract—Specified Term—  
Damages
- 2423. Breach of the Implied Covenant of Good Faith and Fair  
Dealing—Essential Factual Elements
- 2424. Breach of the Implied Covenant of Good Faith and Fair  
Dealing—Good Faith Mistaken Belief Defense
- 2425-2429. Reserved for Future Use
- 2430. Wrongful Discharge/Demotion in Violation of Public  
Policy—Essential Factual Elements
- 2431. Constructive Discharge in Violation of Public Policy—  
Plaintiff Required to Violate Public Policy

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy
2433. Wrongful Discharge in Violation of Public Policy—Damages
- 2434-2499. Reserved for Future Use

*Verdict Forms*

- VF-2400. Breach of Employment Contract—Unspecified Term
- VF-2401. Breach of Employment Contract—Unspecified Term—Constructive Discharge
- VF-2402. Breach of Employment Contract—Specified Term
- VF-2403. Breach of Employment Contract—Specified Term—Good Cause Defense
- VF-2404. Employment—Breach of the Implied Covenant of Good Faith and Fair Dealing
- VF-2405. Breach of the Implied Covenant of Good Faith and Fair Dealing—Affirmative Defense—Good Faith Mistaken Belief
- VF-2406. Wrongful Discharge/Demotion in Violation of Public Policy
- VF-2407. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy
- VF-2408. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions For Improper Purpose that Violates Public Policy
- VF-2409-2499. Reserved for Future Use

**FAIR EMPLOYMENT AND HOUSING ACT SERIES**

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, §12940(a))
2501. Affirmative Defense—Bona fide Occupational Qualification
2502. Disparate Impact—Essential Factual Elements (Gov. Code, §12940(a))
2503. Affirmative Defense—Business Necessity/Job Relatedness
2504. Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense
2505. Retaliation (Gov. Code, §12940(h))
2506. Affirmative Defense—After-Acquired Evidence
- 2507-2519. Reserved for Future Use
2520. Quid pro quo Sexual Harassment—Essential Factual Elements
2521. Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §12940(j))
2522. Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant (Gov. Code, §12940(j))

2523. "Harassing Conduct" Explained  
2524. "Hostile Work Environment" Explained  
2525. Harassment—"Supervisor" Defined  
2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)  
2527. Failure to Prevent Harassment or Discrimination—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §12940(k))  
2528-2539. Reserved for Future Use  
2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements  
2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, §12940(m))  
2542. Disability Discrimination—"Reasonable Accommodation" Explained  
2543. Disability Discrimination—Affirmative Defense—Inability to Perform Essential Job Duties  
2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk  
2545. Disability Discrimination—Affirmative Defense—Undue Hardship  
2546-2559. Reserved for Future Use  
2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, §12940(l))  
2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship  
2562-2599. Reserved for Future Use

#### *Verdict Forms*

- VF-2500. Disparate Treatment (Gov. Code, §12940(a))  
VF-2501. Disparate Treatment (Gov. Code, §12940(a))—Affirmative Defense—Bona fide Occupational Qualification  
VF-2502. Disparate Impact (Gov. Code, §12940(a))  
VF-2503. Disparate Impact (Gov. Code, §12940(a))—Affirmative Defense—Business Necessity/Job Relatedness—Rebuttal to Business Necessity/Job Relatedness Defense  
VF-2504. Retaliation (Gov. Code, §12940(h))  
VF-2505. Quid pro quo Sexual Harassment  
VF-2506. Hostile Work Environment Harassment—Employer or Entity Defendant (Gov. Code, §12940(j))  
VF-2507. Hostile Work Environment Harassment—Individual Defendant (Gov. Code, §12940(j))  
VF-2508. Disability Discrimination—Disparate Treatment  
VF-2509. Disability Discrimination—Reasonable Accommodation (Gov. Code, §12940(m))  
VF-2510. Disability Discrimination—Reasonable Accommodation (Gov. Code, §12940(m))—Affirmative Defense—Undue Hardship

- VF-2511. Religious Creed Discrimination—Failure to Accommodate (Gov. Code, §12940(l))
- VF-2512. Religious Creed Discrimination—Failure to Accommodate (Gov. Code, §12940(l))—Affirmative Defense—Undue Hardship
- VF-2513-2599. Reserved for Future Use

## CALIFORNIA FAMILY RIGHTS ACT SERIES

2600. Violation of CFRA Rights—Essential Factual Information
2601. Eligibility
2602. California Family Rights Act—Reasonable Notice of CFRA Leave
2603. California Family Rights Act—“Comparable Job” Explained
- 2604-2609. Reserved for Future Use
2610. California Family Rights Act—Affirmative Defense—No Certification from Health-Care Provider
2611. California Family Rights Act—Affirmative Defense—Fitness for Duty Statement
2612. California Family Rights Act—Affirmative Defense—Employment Would Have Ceased
2613. California Family Rights Act—Affirmative Defense—Key Employee
- 2614-2619. Reserved for Future Use
2620. CFRA Rights Retaliation—Essential Factual Elements
- 2621-2699. Reserved for Future Use

### *Verdict Forms*

- VF-2600. Violation of CFRA Rights
- VF-2601. Violation of CFRA Rights—Affirmative Defense—Employment Would Have Ceased
- VF-2602. CFRA Rights Retaliation
- VF-2603-2699. Reserved for Future Use

## LABOR CODE ACTIONS SERIES

2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§201, 202, 218)
2701. Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, §1194)
2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, §1194)
2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked
2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§203, 218)
- 2705-2709. Reserved for Future Use
2710. Solicitation of Employee by Misrepresentation—Essential Factual Elements (Lab. Code, §970)

2711. Preventing Subsequent Employment by  
Misrepresentation—Essential Factual Elements (Lab.  
Code, §1050)

2712-2799. Reserved for Future Use

*Verdict Forms*

- VF-2700. Nonpayment of Wages (Lab. Code, §§201, 202, 218)
- VF-2701. Nonpayment of Minimum Wage (Lab. Code, §1194)
- VF-2702. Nonpayment of Overtime Compensation (Lab. Code,  
§1194)
- VF-2703. Waiting-Time Penalty for Nonpayment of Wages (Lab.  
Code, §§203, 218)
- VF-2704. Solicitation of Employee by Misrepresentation (Lab.  
Code, §970)
- VF-2705. Preventing Subsequent Employment by  
Misrepresentation (Lab. Code, §1050)
- VF-2706-2799. Reserved for Future Use

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