

PART IV

Pretrial, Trial, and Posttrial

CHAPTER 14

Settlements, Dismissals, and Alternative Dispute Resolution

KEY POINTS

- Either party can make a statutory offer to settle a case under CCP § 998.
- When a case settles, a dismissal with prejudice should be filed.
- If a summons and complaint are not served within three years of the commencement of the action the case can be dismissed.
- If a case is not brought to trial within five years of the commencement of the action, the case can be dismissed.
- Attempts to resolve cases usually include the various methods of ADR.

THE SETTLEMENT

In an action for money damages, a case usually settles when the defendant agrees to pay the plaintiff a set amount of money. Most often, this agreement requires that the money be paid in a lump sum. However, two other types of settlement agreements can also occur, the structured settlement and the sliding scale settlement.

A *structured settlement*, which sometimes occurs in cases with extensive damages and ongoing medical expenses, involves installment payments over a period of years (often the lifetime of the plaintiff) in addition to a lump sum paid at the time of settlement. Commonly, an annuity is purchased to guarantee that payment is made. Settlement agreements involving this type of settlement are obviously very complex and must be very carefully drafted and reviewed.

A second type of settlement is the *sliding scale recovery agreement*, which is defined in CCP § 877.5. A sliding scale recovery agreement involves tort cases where there are multiple defendants and the plaintiff has reached a settlement with some, but not all, of the defendants. The agreement sets forth the maximum amount of money that the settling defendant will have to pay, but also provides that this amount may be reduced depending on the amount of recovery from the defendants who are not a party to the agreement. If a sliding scale agreement is reached, certain procedural steps must be taken. The parties entering must promptly inform the court of the existence and terms of the agreement. Furthermore, seventy-two hours prior to entering into the agreement, a notice of intent to enter into the agreement must be served on all defendants who are not a party to the agreement.

SETTLEMENT OFFERS

CCP § 998 OFFER TO COMPROMISE

In California, settlement offers can be communicated formally under CCP § 998. This section not only describes

the method of making the offer, but also establishes consequences when a party rejects the offer and fails to get a more favorable result at trial. At any time, not less than ten

days prior to trial or arbitration, any party may serve an offer in writing on any other party to allow judgment to be taken in accordance with terms and conditions stated in the offer. If accepted, the offer and acceptance are filed in court and judgment is entered according to the terms and conditions stated. The offer is considered withdrawn if not accepted within thirty days or the commencement of trial, whichever occurs first. If an offer has been made and rejected and the party making the offer obtains a more favorable judgment at trial, sanctions will usually follow. If a plaintiff rejects a 998 offer and recovers less than the offer, the plaintiff is denied postoffer costs of suit (even if they are the prevailing party at trial) and is required to pay

defendant's costs from the date of the offer. The trial court judge has the discretion to order plaintiff to pay defendant's expert fees. If the defendant rejects a 998 offer and plaintiff recovers more than the offer, the defendant can be compelled to pay plaintiff's expert witness fees that are normally not recoverable as a cost. CCP § 998 does not apply in an eminent domain action.

FORMAT

A CCP § 998 offer to compromise is prepared in the same general format as any paper which might be filed in court. It is filed in court only if the offer is accepted.

SETTLEMENT AGREEMENTS AND RELEASES

SETTLEMENTS FOR MINORS OR INCOMPETENTS

If one of the parties to the lawsuit is a minor or incompetent, court approval of the settlement agreement and attorney fees is usually required. This is referred to as a *minor's compromise*. Sections 3500–3612 of the Probate Code and Rules 7.950–7.955 and 378 of the California Rules of Court set forth the procedures to be followed. The parent or guardian files a petition for a minor's compromise in court. A court hearing is held and the judge reviews the terms and fairness of the settlement. The rules also require that the person compromising the claim as well as the minor or incompetent be present at the hearing. The court also makes orders concerning the disposition of any money awarded to a minor plaintiff.

GENERAL RELEASE

In California, a general release does not release claims which the creditor does not know or suspect to exist at the time of executing the release, if those claims would have materially affected the settlement (Civil Code § 1542).

DUTY TO NOTIFY COURT OF SETTLEMENT

Rule 225 of the California Rules of Court requires the parties to notify the court immediately of any settlement and to file the request for dismissal within forty-five days of the settlement.

DISMISSALS, CONSENT DECREES, AND DISTRIBUTION OF FUNDS

DISMISSALS

The primary statute dealing with dismissals in California is CCP § 581. This section provides for dismissals of cases by the parties or by order of the court. If the dismissal is by act of the parties, a Judicial Council form requesting the dismissal must be used (see Exhibit 14-1).

STIPULATED DISMISSALS

Parties to a lawsuit may stipulate to a dismissal at any time, on any terms. In such case, if a lawsuit has been filed, a request to dismiss the case with prejudice should be filed.

A particular problem occurs, however, in cases involving multiple defendants, when some but not all defendants settle. The plaintiff is allowed to dismiss the settling defendants from liability on the complaint, but a problem remains with liability of the settling defendants for potential claims of contribution or indemnity should a large judgment be awarded against the nonsettling defendants. In order to encourage settlement, California law allows a defendant to settle a case and be released from all liability

on cross-complaints if the settlement is made in good faith. The determination of whether a settlement is in good faith may require a court hearing. See CCP § 877.6 for a description of this procedure.

VOLUNTARY DISMISSAL ON NOTICE

California law allows plaintiffs or complainants to dismiss their complaints or cross-complaints, or any part of it, at any time prior to trial, by filing the request for dismissal. Unlike the federal rule, the California code does not require a motion or notice. However, plaintiffs should serve a copy of the request for dismissal on all parties.

COURT-ORDERED INVOLUNTARY DISMISSAL

In California, a court has the power to dismiss a case for any number of reasons. One reason is that a party has failed to comply with a discovery order and the case is dismissed as a terminating sanction (CCP § 2023). Another reason is that there has been a delay in the prosecution of the case. Sections 583.110–430 of the Code of Civil Procedure regulate dismissals for lack of prosecution. These

Exhibit 14-1 Judicial Council Form Request for Dismissal

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name and Address</i>):	TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR (<i>Name</i>):		
Insert name of court and name of judicial district and branch court, if any:		
PLAINTIFF/PETITIONER:		
DEFENDANT/RESPONDENT:		
<p style="text-align: center;">REQUEST FOR DISMISSAL</p> <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Other (<i>specify</i>):		CASE NUMBER:

— A conformed copy will not be returned by the clerk unless a method of return is provided with the document. —

1. **TO THE CLERK:** Please **dismiss** this action as follows:

a. (1) With prejudice (2) Without prejudice

b. (1) Complaint (2) Petition

(3) Cross-complaint filed by (*name*):

on (*date*):

(4) Cross-complaint filed by (*name*):

on (*date*):

(5) Entire action of all parties and all causes of action

(6) Other (*specify*):*

Date:

.....
(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

* If dismissal requested is of specified parties only, of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

.....
(SIGNATURE)

Attorney or party without attorney for:

Plaintiff/Petitioner Defendant/Respondent

Cross-complainant

2. **TO THE CLERK:** Consent to the above dismissal is hereby given.**

Date:

.....
(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

** If a cross-complaint—or Response (Family Law) seeking affirmative relief—is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

.....
(SIGNATURE)

Attorney or party without attorney for:

Plaintiff/Petitioner Defendant/Respondent

Cross-complainant

(To be completed by clerk)

3. Dismissal entered as requested on (*date*):

4. Dismissal entered on (*date*): as to only (*name*):

5. Dismissal **not entered** as requested for the following reasons (*specify*):

6. a. Attorney or party without attorney notified on (*date*):

b. Attorney or party without attorney not notified. Filing party failed to provide

a copy to conform means to return conformed copy

Date:

Clerk, by _____, Deputy

sections often result in mandatory dismissal of cases if the complaint and summons have not been served within three years of the commencement of the action (CCP §§ 583.210–250), or if the case has not been brought to trial within five years of the commencement of the action (CCP §§ 583.310–360)). Other time limits control the trial date where a new trial has been granted after a motion or appeal (CCP § 583.320)).

In addition to the mandatory dismissal sections, other code provisions give the court discretion to dismiss a case. Under CCP § 583.420, if service is not made within two years, or the action is not brought to trial within three years after the action is commenced, the court may dismiss the case. The dismissal of actions for delay of prosecution may be done by the court on its own motion or on motion of the defendant.

TRIAL DELAY REDUCTION RULES (FAST TRACK)

If a case comes under fast track rules, as most cases do, different time limits apply for serving the summons and complaint, and for getting the case to trial. Precise times for service are controlled by local rules of court, which must be set in conformity with Govt. Code § 68616. This

ALTERNATIVE DISPUTE RESOLUTION (ADR)

The necessity of ADR in the California legal system is well recognized. Parties to most civil disputes are free to follow any out-of-court method of dispute resolution that is agreeable. These include use of arbitration, mediation, early neutral evaluation, and even hiring private judges. Numerous organizations have been established that provide ADR services to parties for a fee. The providers are often retired judges or very experienced attorneys. Court-related ADR is also common. Court-related ADR involves the use of ADR in a pending civil case. It is not a complete substitute for the court action, but rather a way of trying to dispose of the action without the necessity of trial. These

section allows local courts to reduce the time for service of the complaint to no sooner than sixty days after filing. Violating these rules might result in sanctions, although it is doubtful that dismissal would be the first sanction.

CONSENT DECREE

A consent decree is usually called a stipulated judgment or consent judgment in California. Section 664.6 of the Code of Civil Procedure provides that if parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, the court may enter judgment pursuant to the terms of the settlement.

CCP § 1132 also describes another procedure, *confession of judgment*. A judgment by confession can be entered with no prior action having been filed. The defendant must sign, under oath, a statement authorizing the entry of judgment for a specified sum and stating facts that support the judgment.

CCP § 664.7 contains special provisions relating to construction defect cases. This section allows the stipulation for judgment to be made through respective counsel where a party's contribution is paid through an insurance contract.

methods, which commonly include judicial arbitration and mediation, are not binding on the parties. Judicial arbitration is court-ordered arbitration. The courts have the power to order parties to submit to arbitration in many cases. While the arbitration award is not binding, any party who does not want to accept it must act to reject it by filing a request for a trial de novo with the court within thirty days. Failure to file this request may result in the arbitration award becoming binding. Rules 1580–1640 of the California Rules of Court and CCP §§ 1775–1775.15 contain rules regarding alternative dispute resolution.

CHAPTER 15

Trial Techniques

KEY POINTS

- Attorneys handling civil cases may be required to attend case management conferences and mandatory settlement conferences.
- Written statements must be prepared for these conferences.

PRELIMINARY PREPARATION FOR TRIAL

PRETRIAL CONFERENCES

Attorneys in California civil cases are generally required to attend two types of pretrial conferences case management conferences and mandatory settlement conferences. This requirement can be waived by the court in “short cause” matters. Short cause matters are cases that can be tried in less than a day.

CASE MANAGEMENT CONFERENCES

In order to assure that civil cases proceed to trial without unnecessary delay, California has enacted several code sections and rules of court that dictate required procedures. One such procedure is a mandatory case management conference, regulated by Rule 212 of the California Rules of Court. A case management conference must be held within 180 days after the filing of the initial complaint.

At a case management conference, the court may do any of the following: establish a discovery schedule, order the case to arbitration, determine if the case is a limited civil case, dismiss, or sever fictitious or other unserved defendants, schedule a date for exchange of expert witnesses, and set a date for future conferences. Parties attending a case management conference are required to complete case management statement, which is a Judicial Council form (Exhibit 15-1). Rule 212 also allows requires that parties meet and confer, prior to the conference, to discuss the case.

SETTLEMENT CONFERENCES

In addition to the case management conferences, in long cause matters (cases taking more than one day to try), settlement conferences are also mandated. The attorneys for all parties and the judge try to work out a settlement in the case to avoid the upcoming trial. Written settlement conference statements are required. Rule 222 requires that no later than five days before the date set for the settlement conference, each party shall file and serve on each party a statement containing a good faith settlement demand, and an itemization of special and general damages. The statement must also discuss in detail all facts and law pertinent

to the issues in the case. Local rules can impose additional requirements for the statement. Local rules may require copies of medical reports or police reports in addition to other information.

JURY REQUEST AND DEPOSIT OF JURY FEES

A demand for jury is usually made at the time of the case management conference. A party requesting a jury must deposit a fee with the clerk of the court at least twenty-five days prior to trial. Failure to deposit the jury fees constitutes a waiver of the right to the jury. (CCP § 631). Parties should also be aware that they might be charged a per diem fee for the court reporter.

JURY INSTRUCTIONS

Section 607(a) of the Code of Civil Procedure regulates the preparation of proposed jury instructions. Although jury instructions are the ultimate responsibility of the judge, California law requires that each of the parties submit proposed instructions to the judge, with copies to the other attorneys. The code section requires that proposed instructions be given to the judge and served on other counsel before the first witness is sworn in. Thereafter, additional instructions may be submitted. (In practice, many judges do not ask for any proposed instructions until the trial nears completion.) All proposed instructions must be typewritten, each on a separate sheet of paper. Usually the instructions contain a cover sheet containing the caption and identifying the party submitting the instructions. For many years in drafting the actual instructions, California attorneys relied on a book known as BAJI (Book of Approved Jury Instructions), which contains numerous jury instructions that were accepted by the courts. Recently, the Judicial Council officially adopted a new set of civil jury instructions. Under Rule of Court 855 use of these instructions is strongly encouraged. Exhibit 15-2 is an example of one instruction. However, an attorney might want to augment these instructions with specially drafted ones. In such a case, the proposed instruction should contain a reference to the legal authority supporting the instruction. Proposed verdict forms should be submitted with the proposed jury instructions.

PREPARATION OF WITNESSES

SUBPOENA OF WITNESSES

Trial subpoenas and subpoenas duces tecum are regulated by CCP § 1985, and are different from deposition subpoenas described in Chapter 9 of this supplement. A subpoena compelling attendance of a witness is a Judicial Council

form. It can be issued by a court clerk, a judge, or by the attorney of record in the proceeding. A subpoena duces tecum can be likewise issued. However, a subpoena duces tecum is required to be accompanied by an affidavit showing good cause for the production of the matters and things described in the subpoena. The declaration must specify

Exhibit 15-1 Judicial Council Form Case Management Statement

CM-110

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, state bar number, and address</i>): _____ TELEPHONE NO. : _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
<p style="text-align: center;">CASE MANAGEMENT STATEMENT</p> (Check one): <input type="checkbox"/> UNLIMITED CASE (Amount demanded exceeds \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded is \$25,000 or less)	CASE NUMBER: _____

A CASE MANAGEMENT CONFERENCE is scheduled as follows:

Date: _____ Time: _____ Dept.: _____ Div.: _____ Room: _____

Address of court (if different from the address above): _____

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

1. **Party or parties** (*answer one*):
 - a. This statement is submitted by party (*name*):
 - b. This statement is submitted **jointly** by parties (*names*):

2. **Complaint and cross-complaint** (*to be answered by plaintiffs and cross-complainants only*)
 - a. The complaint was filed on (*date*): _____
 - b. The cross-complaint, if any, was filed on (*date*): _____

3. **Service** (*to be answered by plaintiffs and cross-complainants only*)
 - a. All parties named in the complaint and cross-complaint have been served, or have appeared, or have been dismissed.
 - b. The following parties named in the complaint or cross-complaint
 - (1) have not been served (*specify names and explain why not*):
 - (2) have been served but have not appeared and have not been dismissed (*specify names*):
 - (3) have had a default entered against them (*specify names*):
 - c. The following additional parties may be added (*specify names, nature of involvement in case, and the date by which they may be served*):

4. **Description of case**
 - a. Type of case in complaint cross-complaint (*describe, including causes of action*):

Exhibit 15-1 Judicial Council Form Case Management Statement (*continued*)

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:
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4. b. Provide a brief statement of the case, including any damages. (*If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.*)

(*If more space is needed, check this box and attach a page designated as Attachment 4b.*)

5. **Jury or nonjury trial**

The party or parties request a jury trial a nonjury trial (*if more than one party, provide the name of each party requesting a jury trial*):

6. **Trial date**

- a. The trial has been set for (*date*):
 b. No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint (*if not, explain*):

c. Dates on which parties or attorneys will not be available for trial (*specify dates and explain reasons for unavailability*):

7. **Estimated length of trial**

The party or parties estimate that the trial will take (*check one*):

- a. days (*specify number*):
 b. hours (short causes) (*specify*):

8. **Trial representation** (*to be answered for each party*)

The party or parties will be represented at trial by the attorney or party listed in the caption by the following:

- a. Attorney:
 b. Firm:
 c. Address:
 d. Telephone number:
 e. Fax number:
 f. E-mail address:
 g. Party represented:

Additional representation is described in Attachment 8.

9. **Preference**

This case is entitled to preference (*specify code section*):

10. **Alternative Dispute Resolution (ADR)**

- a. Counsel has has not provided the ADR information package identified in rule 201.9 to the client and has reviewed ADR options with the client.
 b. All parties have agreed to a form of ADR. ADR will be completed by (*date*):
 c. The case has gone to an ADR process (*indicate status*):

Exhibit 15-1 Judicial Council Form Case Management Statement (*continued*)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

10. d. The party or parties are willing to participate in (*check all that apply*):

- (1) Mediation
 (2) Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, rule 1612)
 (3) Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to remain open until 30 days before trial; order required under Cal. Rules of Court, rule 1612)
 (4) Binding judicial arbitration
 (5) Binding private arbitration
 (6) Neutral case evaluation
 (7) Other (*specify*):

- e. This matter is subject to mandatory judicial arbitration because the amount in controversy does not exceed the statutory limit.
 f. Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.
 g. This case is exempt from judicial arbitration under rule 1600.5 of the California Rules of Court (*specify exemption*):

11. Settlement conference

- The party or parties are willing to participate in an early settlement conference (*specify when*):

12. Insurance

- a. Insurance carrier, if any, for party filing this statement (*name*):
 b. Reservation of rights: Yes No
 c. Coverage issues will significantly affect resolution of this case (*explain*):

13. Jurisdiction

Indicate any matters that may affect the court's jurisdiction or processing of this case, and describe the status.

- Bankruptcy Other (*specify*):

Status:

14. Related cases, consolidation, and coordination

- a. There are companion, underlying, or related cases.
 (1) Name of case:
 (2) Name of court:
 (3) Case number:
 (4) Status:
 Additional cases are described in Attachment 14a.
 b. A motion to consolidate coordinate will be filed by (*name party*):

15. Bifurcation

- The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action (*specify moving party, type of motion, and reasons*):

16. Other motions

- The party or parties expect to file the following motions before trial (*specify moving party, type of motion, and issues*):

Exhibit 15-1 Judicial Council Form Case Management Statement (continued)

PLAINTIFF/PETITIONER: _____	CASE NUMBER: _____
DEFENDANT/RESPONDENT: _____	

17. Discovery

- a. The party or parties have completed all discovery.
- b. The following discovery will be completed by the date specified (describe all anticipated discovery):

<u>Party</u>	<u>Description</u>	<u>Date</u>
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- c. The following discovery issues are anticipated (specify):

18. Economic Litigation

- a. This is a limited civil case (i.e., the amount demanded is \$25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90 through 98 will apply to this case.
- b. This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed (if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case):

19. Other issues

- The party or parties request that the following additional matters be considered or determined at the case management conference (specify):

20. Meet and confer

- a. The party or parties have met and conferred with all parties on all subjects required by rule 212 of the California Rules of Court (if not, explain):
- b. After meeting and conferring as required by rule 212 of the California Rules of Court, the parties agree on the following (specify):

21. Case management orders

Previous case management orders in this case are (check one): none attached as Attachment 21.

22. Total number of pages attached (if any): _____

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and ADR, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date:

(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Additional signatures are attached

Exhibit 15-2 Sample Jury Instruction

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[Name of plaintiff] claims that *[name of defendant]* wrongfully discriminated against *[him/her]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was **[an employer/[other covered entity]]**;
2. That *[name of plaintiff]* **[was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]]**;
3. That *[name of defendant]* **[discharged/refused to hire/[other adverse employment action]]** *[name of plaintiff]*;
4. That *[name of plaintiff]*'s **[protected status—for example, race, gender, or age] was a motivating reason for the [discharge/refusal to hire/[other adverse employment action]]**;
5. That *[name of plaintiff]* **was harmed; and**
6. That the **[discharge/refusal to hire/[other adverse employment action]] was a substantial factor in causing [name of plaintiff]'s harm.**

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see Instruction 2502, *Disparate Impact—Essential Factual Elements (Gov. Code § 12940(a))*.

Elements that are uncontested should be deleted from this instruction.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful, employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."
- Government Code section 12926(m) provides: "'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

Exhibit 15-2 Sample Jury Instruction (continued)

- “[C]onceptually the theory of ‘disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- “[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]], and whether or not the defendant has rebutted the plaintiff’s prima facie showing, are questions of law for the trial court, not questions of fact for the jury.” (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)
- “[I]f the case is submitted to the trier of fact, the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the fact finder will have only to decide the ultimate issue of whether the employer’s discriminatory intent was a motivating factor in the adverse employment decision.” (*Caldwell, supra*, 41 Cal.App.4th at p. 205.)
- “The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)
- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)
- “We have held ‘that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA. . . .” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 756–757, pp. 252–254; *id.* (2002 supp.) at §§ 756–757, pp. 131–134

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.61, 2.63, 2.66, pp. 50–51, 53, 55

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 43.01, 43.01[2][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

Bancroft-Whitney’s California Civil Practice: Employment Litigation (2000 supp.) Discrimination in Employment, §§ 2.2, 2.20, pp. 20–21, 39–40

Exhibit 15-3 Civil Subpoena (Duces Tecum)

982(a)(15.1)

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, state bar number, and address):</i> TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT:	
CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents and Things at Trial or Hearing AND DECLARATION	CASE NUMBER: _____

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known):*

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS** in this action at the date, time, and place shown in the box below **UNLESS** your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.

a. Date:	Time:	<input type="checkbox"/>	Dept.:	<input type="checkbox"/>	Div.:	<input type="checkbox"/>	Room:
b. Address:							

2. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

3. **YOU ARE** *(item a or b must be checked):*
- a. Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
- b. Not required to appear in person if you produce (i) the records described in the declaration on page two or the attached declaration or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.

4. **IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**

- a. Name of subpoenaing party or attorney: _____ b. Telephone number: _____
5. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: _____

..... (TYPE OR PRINT NAME)

_____ (SIGNATURE OF PERSON ISSUING SUBPOENA)

_____ (TITLE)

Exhibit 15-3 Civil Subpoena (Duces Tecum) (continued)

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:
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The production of the documents or the other things sought by the subpoena on page one is supported by (check one):
 the attached affidavit or declaration the following declaration:

DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING
(Code Civ. Proc., §§ 1985, 1987.5)

- I, the undersigned, declare I am the plaintiff defendant petitioner respondent
 attorney for (specify): _____
 other (specify): _____
in the above-entitled action.
- The witness has possession or control of the following documents or other things and shall produce them at the time and place specified in the *Civil Subpoena for Personal Appearance and Production of Documents and Things at Trial or Hearing* on page one of this form (specify the exact documents or other things to be produced):

Continued on Attachment 2.

- Good cause exists for the production of the documents or other things described in paragraph 2 for the following reasons:

Continued on Attachment 3.

- These documents or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:

Continued on Attachment 4.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
(TYPE OR PRINT NAME)

.....
(SIGNATURE OF SUBPOENAING PARTY ATTORNEY FOR SUBPOENAING PARTY)

(Proof of service on page three)

(continued)

Exhibit 15-3 Civil Subpoena (Duces Tecum) (continued)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION

1. I served this Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration by personally delivering a copy to the person served as follows:

- a. Person served (name):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees (check one):
 - (1) were offered or demanded and paid. Amount: \$ _____
 - (2) were not demanded or paid.
- f. Fee for service: \$ _____

2. I received this subpoena for service on (date):

3. Person serving:

- a. Not a registered California process server.
- b. California sheriff or marshal.
- c. Registered California process server.
- d. Employee or independent contractor of a registered California process server.
- e. Exempt from registration under Business and Professions Code section 22350(b).
- f. Registered professional photocopier.
- g. Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only) I certify that the foregoing is true and correct.

Date:

Date:

Signature line with arrow pointing right and (SIGNATURE) label below.

Signature line with arrow pointing right and (SIGNATURE) label below.

the exact matters or things desired to be produced, setting forth in full detail the materiality to the issues in the case and stating that the witness has the desired matters or things in his or her possession or under his or her control (CCP § 1985(b)). Because of the uncertainty of the actual time of trial, the law allows a subpoenaed witness to be on standby rather than having to come down to the court and wait for hours or even days (CCP § 1985.1)).

Under the code, subpoenas can be served by any person (CCP § 1987), and no set time for service is mandated, other than that reasonable time to travel or produce records must be given (CCP § 1987(a)). However, if consumers' personal records or employment records are subpoenaed, timing of the issuance and service of the subpoena become important. CCP §§ 1985.3 and 1985.6 should be consulted. Subpoenaed witnesses are entitled to a fee and

mileage, if demanded (CCP § 1987(a)). See Exhibit 15-3 for an example of a civil subpoena duces tecum.

COMPELLING ATTENDANCE OF PARTIES

Parties to the action are not obligated to be present at trial, even though they usually are. If you want to guarantee the presence of another party, or if you want to compel that party to produce documents at the trial, California law provides a method for doing this. CCP § 1987(b) allows an attorney to send written notice to the attorney for the party requiring attendance of that party. The notice must be served at least ten days prior to trial. A party can be required to produce documents within the same notice, but in such a case, twenty days notice is required. For trials in limited civil cases, CCP §§ 96–98 should be consulted.

CHAPTER 16

Posttrial Practice

KEY POINTS

- Posttrial motions in state court closely resemble motions in federal court.
- A party has sixty days from the mailing of notice of entry of judgment to file a notice of appeal but only thirty days if the action is a limited civil case.
- After judgment, a defendant's financial situation can be discovered through the use of an order of examination.
- The following websites may provide helpful information regarding a judgment debtor's assets:
www.knowx.com *www.ussearch.com*

TRIAL AND POSTTRIAL MOTIONS

Trial and posttrial motions made in state actions are similar to those made in federal cases. The types of motions made usually depend on whether the case is tried before a jury or whether it is a court trial. In a jury trial, motions might include motions for nonsuit motions for a directed verdict, motions for a judgment notwithstanding the verdict, motions for a new trial, motions to vacate, and motions to tax costs. In a court trial, motions might include motions for judgment, motions for a new trial, motions to vacate, and motions to tax costs.

ENTRY OF JUDGMENT

The timing for most posttrial motions is often dependent on when judgment was entered, and when and if notice of entry of judgment was given to all parties. Entry of judgment occurs when the clerk of the court "enters" the judgment in the court records (CCP §§ 664, 668, and 668.5). Once a judgment is entered, notice of the entry should be given to all parties (CCP § 664.5). The notice of entry of

judgment is sometimes prepared by the prevailing party and sometimes prepared by the clerk of the court. The original notice of entry, together with the proof of service, is filed with the court.

MOTION FOR NONSUIT

CCP § 581c allows the defendant to make a motion for nonsuit after the plaintiff has completed an opening statement or after the presentation of evidence in a trial by jury. The basis for such a motion is that it appears that the plaintiff has no case. The granting of such a motion is the same as a judgment in favor of the defendant.

MOTION FOR A DIRECTED VERDICT

A motion for a directed verdict is regulated by CCP § 630. Unless the court specifies an earlier time, this motion is made after all the parties have presented their evidence, but before the case goes to the jury. The motion might be

made in relationship to the entire case or only as to issues within a case. In federal court, the motion is now referred to as a *motion for judgment as a matter of law*.

MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT

CCF § 629 allows a party to raise a motion for a judgment notwithstanding the verdict in a jury case tried in state court. It is not necessary to make a motion for a directed verdict first. The motion allows a judge to overturn a jury's finding and enter a different judgment. In federal court, this motion is also referred to as a motion for judgment as a matter of law.

MOTION FOR A NEW TRIAL

CCP §§ 656–662.5 regulate motions for new trial in state proceedings. The grounds for such a motion, found in CCP § 657, are basically the same as in federal court. Under CCP § 659, this motion must be filed within fifteen days of the date of mailing of notice of entry of judgment by the clerk or within 180 days of the entry of judgment, whichever is earliest. CCP §662.5 contains special provisions where a court feels that the amount of the jury's award is either excessive or insufficient. In such cases, the court can order a *conditional new trial*. The court either reduces or increases the damage award, with the proviso that if the affected party does not agree to the decrease or increase, a new trial will be ordered.

THE PRELIMINARY STEPS IN THE APPEAL

Appellate practice in state courts is regulated by the Code of Civil Procedure, sections 901–936.1 and California Rules of Court, rules 1–80 (appeals in general jurisdiction cases) and rules 100–191 (appeals in limited civil cases).

Although the appeal process for cases of general jurisdiction and cases of limited jurisdiction is similar, some important differences do exist. Appeals from cases within the general jurisdiction of superior court are appealed to the court of appeals. Appeals in limited civil cases are heard in the appellate division of the superior court. Another important difference is the various time requirements. For limited civil cases time requirements for filing the notice of appeal and for filing the various briefs is much shorter than for cases of general jurisdiction.

STATEMENT OF DECISION

In a nonjury case prior to the commencement of any appeal, the losing party has the right to demand a *statement of decision* from the trial court (CCP § 632)). In this statement the court is required to explain the factual and legal basis for its decision as to each of the principal controverted issues. Unless the case is tried in less than 8 hours, it must be requested within ten days after the court announces its tentative decision. (Note that this is not the

MOTION TO VACATE

When a judgment is inconsistent with factual findings or special verdict of a jury CCP § 663 allows the court to set aside or vacate the judgment. Service of the motion must be made within fifteen days of the date of mailing of notice of entry of judgment, or within 180 days of the date of entry of judgment, whichever is earliest.

MOTION FOR JUDGMENT

CCP § 631.8 allows a party in a nonjury case to make a motion for judgment after the other party has completed his presentation of the evidence.

MOTION TO TAX COSTS

Within fifteen days after mailing of notice of entry or judgment (or 180 days after entry of judgment, whichever is first), the prevailing party must submit a written statement of costs to the court, known as a memorandum of costs. In this document, the prevailing party details each item claimed as a cost. If the other party disagrees with any of the costs that are claimed, that party must file a motion to strike or tax those costs. This motion must be filed within fifteen days of the service of the memorandum of costs. Rule 870 of the California Rules of Court and CCP §§ 1032–1038 control.

same date as entry of judgment.) If the case is tried in less than 8 hours the statement of decision must be requested before the matter is submitted to the court. In such a case, the statement of decision can be oral rather than written. The statement of decision can sometimes narrow the issues on appeal. The court may direct that the statement of decision be prepared by the prevailing party and submitted to the judge for signature and approval.

STEPS IN APPEAL FROM SUPERIOR COURT ACTION

The following is an overview of the appellate process in the court of appeals.

1. File notice of appeal in superior court within sixty days from the mailing of notice of entry of judgment (or file-stamped copy of judgment), or 180 days of judgment if notice of entry not given (Rule 2).
2. Request reporters transcript and clerks transcript within ten days of filing notice of appeal (Rules 4 and 5).
3. Clerk and reporter give cost estimate for transcripts (Rules 4 and 5).
4. Pay transcript costs within ten days of receipt of estimate (Rules 4(b) and 5(c)).

5. Clerk and reporter prepare and file transcripts within thirty days of receipt of cost (Rules 4 and 5).
6. File opening brief within thirty days of filing of transcript in court of appeals (Rule 15).
7. File respondent (appellee) brief within thirty days of opening brief (Rule 15).
8. File reply brief (if desired) within twenty days of respondent's brief (Rule 15).

Although most appeals are based on transcripts provided by the court clerk and the court reporter, at times, the parties prepare their own records of the lower court proceedings. The Rules of Court allow parties to prepare an Appendix in Lieu of the Clerk's Transcript, an Agreed Statement, or a Settled Statement. An Appendix in Lieu of Clerk's Transcript (Rule 5.1) allows parties to create an appendix containing copies of court documents necessary to the appeal. Also in lieu of the clerk's transcript, if local rule permits, parties can submit the superior court file. (Rule 5.2). An Agreed Statement (Rule 6) is a statement signed by the parties showing the nature of the controversy, the basis for appellate court jurisdiction, and how questions arose in and were decided by the superior court. It must also contain various documents including a copy of the judgment and a copy of the notice of appeal. A Settled Statement (Rule 7) can be prepared when the appellant cannot afford a reporter's transcript. It is a narrative statement of the oral proceedings in court.

LIMITED CIVIL CASES

Although the appellate procedures are basically the same for limited civil cases, some of the time requirements are

shorter. In particular, the notice of appeal must be filed within thirty days of the notice of entry of judgment, or ninety days from judgment, if no notice is given (Rule 122). Rules 124 and 125 should be consulted regarding the transcripts. Timing for briefs is described in Rule 105. A shorter time is allowed for briefs in an appeal in a limited civil case. Opening briefs are due twenty days after the filing of the transcript. Respondent briefs are due twenty days after the filing of the opening brief, and reply briefs are due ten days thereafter.

Another important distinction is that appeals in limited civil cases are not heard in the court of appeals. They are heard in the appellate division of the superior court.

THE APPEAL BOND

In California, whether or not an appeal stays execution of a judgment depends on the nature of the judgment. Judgments for payment of money and for such equitable remedies as specific performance of real estate contracts are not stayed unless an undertaking or bond is posted. (CCP §§ 916–917.9 describe all cases in which execution is normally not stayed.)

EXTENSIONS OF TIME

The appellate courts have wide discretion to grant or deny extensions of time in the appellate process. However, certain time requirements that cannot be changed. Included in those are the times for filing a notice of appeal, a petition for Supreme Court review, or the granting or denial of a rehearing in the court of appeal. (Rules 2 and 45)

THE APPELLATE BRIEF

DRAFTING THE APPELLATE BRIEF

The format for a brief filed in the court of appeals is described in Rule 15, which describes the technical requirements for the brief in great detail. It provides that the brief should be printed or typed and unless permission from the court is obtained, should be no more than 14,000 words or, if produced by a typewriter, no more than fifty pages. It should be prepared on $8\frac{1}{2} \times 11$ inch paper, Rule 15 contains several other technical requirements and must be consulted when preparing a brief. It must be securely bound, and if stapled, the bound edge covered with tape.

The format for briefs filed in the appellate division of the superior court is controlled by Rule 105, which incorporates the technical requirements of Rule 15. The only distinction is the length of the brief, which should not exceed fifteen pages without court permission.

APPELLATE BRIEF COLORS

The color requirements for appellate brief covers are found in Rule 44 and include: Appellant's opening brief: green; Respondent's brief: yellow; Appellant's reply brief: tan.

CONTENT OF BRIEFS

Rules 13, 14, and 15 regulate the content of briefs filed in the court of appeals. Rule 105 controls for briefs filed in the appellate division of the superior court. The briefs do not differ substantially from those filed in federal court.

FILING AND SERVICE OF THE APPELLATE BRIEFS

The number of briefs required to be filed in the court of appeal is described in Rule 44. In a civil appeal, an original and four copies of each brief must be submitted to the court of appeal. In addition, five copies of the briefs must be delivered to the California Supreme Court and one copy must be deposited with the clerk of the superior court for delivery to the trial judge. (Rule 16(b)) Copies must also be served on all other attorneys in the case.

Filing and service of briefs in the appellate division of the superior court is governed by Rule 105. Unless changed by local rule, the original brief is filed with the clerk of the superior court and copies served on all other attorneys and the trial judge (Rule 105(e) and (f)).

FINAL PROCEDURES

FURTHER APPEAL PROCEDURES

Under Rule 27, a party may file a petition for rehearing in the court of appeals within fifteen days after filing the court's decision. Parties also have the right to request a hearing in the California Supreme Court. This request is made in a *petition for review* (Rule 28), which must be filed with ten days of the decision of the court of appeal becoming final. The decision is usually final thirty days after it is filed (Rule 24(a)). Finally, if federal constitutional issues are involved, the parties can request a hearing in the United States Supreme Court, by filing a petition for writ of certiorari.

POSTTRIAL JUDGMENT PROCEDURES

Enforcement of judgments in California is regulated by Title 9 of the Code of Civil Procedure, beginning with section 680.010, which provide methods for discovering the financial condition of the judgment debtor, as well as describing the procedures for satisfying the judgment from the property or earnings of the debtor.

DISCOVERING JUDGMENT DEBTOR'S ASSETS

CCP § 708.020 permits the use of written interrogatories to request information to aid in the enforcement of a money judgment. However, the more common method of discovering assets is the use of the *order of examination*. Under CCP § 708.110, the judgment creditor can get a court order requiring the judgment debtor to appear before the court and to answer questions regarding his financial situation. A Judicial Council form is used for this purpose (see Exhibit 16-1). The order is served personally on the judgment debtor not less than ten days from the date of the hearing. If the judgment debtor fails to appear, he may be held in contempt of court and a bench warrant issued for his arrest.

SATISFYING A JUDGMENT FROM JUDGMENT DEBTOR'S PROPERTY

Once a judgment creditor has located and identified any property belonging to the judgment debtor, the judgment creditor may apply to the court for a writ of execution (see Exhibit 16-2). This is done any time after the judgment (CCP § 699.510). The writ of execution, also a Judicial Council form, is then taken to a levying officer (a sheriff or licensed process server, CCP §§ 680.260 and 699.080). Along with the writ, the levying officer must be given written instructions from the judgment creditor, describ-

ing the property to be seized, and its location (CCP § 687.010).

The property is seized and sold at auction, and the proceeds are used to satisfy the judgment (CCP §§ 701.51–830). The code details the procedures that must be followed and the notices that must be given.

SATISFYING A JUDGMENT FROM DEBTOR'S EARNINGS

In California a separate procedure is established for satisfying a judgment from the judgment debtor's earnings (wage garnishment). Rather than a writ of execution, the judgment creditor obtains an earnings *withholding order*, also a Judicial Council form (see CCP §§ 706.010 et seq.). The amount of earnings that can be withheld is generally limited.

EXEMPT PROPERTY AND EARNINGS

Not all property or earnings of the judgment debtor are subject to execution or garnishment. The numerous exemptions and procedures for claiming the exemptions are set forth in the code (see CCP §§ 703.010–704.995 and §§ 706.050–052)).

ACTION AGAINST THIRD PERSON

If a third person has possession or control of property in which judgment debtor has an interest the judgment creditor may bring an action against the third person (CCP § 708.210)). This is known as a *creditor's suit*.

ABSTRACT OF JUDGMENT

Where judgment creditors cannot locate assets of a judgment debtor, they can record an abstract of judgment with any county recorder. Should the judgment debtor acquire any real property, a lien is immediately created. An abstract of judgment is a Judicial Council form containing essential information from the judgment (CCP § 674)). A judgment is enforceable for a period of ten years, and can be renewed thereafter (CCP § 683.020–220)).

SATISFACTION OF JUDGMENT

If a money judgment has been paid, the judgment creditor must file with the court an acknowledgment of satisfaction of judgment. If the judgment had been recorded, the satisfaction should also be served on the judgment debtor (CCP § 724.030). This is not required if the debt was satisfied in full, pursuant to a writ.

Exhibit 16-1 Judicial Council Form Application and order for Appearance and Examination

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, state bar number, and address)</i> : TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR <i>(Name)</i> : _____	AT-138, EJ-125 FOR COURT USE ONLY
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
<p align="center">APPLICATION AND ORDER FOR APPEARANCE AND EXAMINATION</p> <input type="checkbox"/> ENFORCEMENT OF JUDGMENT <input type="checkbox"/> ATTACHMENT (Third Person) <input type="checkbox"/> Judgment Debtor <input type="checkbox"/> Third Person	CASE NUMBER: _____

ORDER TO APPEAR FOR EXAMINATION

1. TO *(name)*:
2. YOU ARE ORDERED TO APPEAR personally before this court, or before a referee appointed by the court, to
 - a. furnish information to aid in enforcement of a money judgment against you.
 - b. answer concerning property of the judgment debtor in your possession or control or concerning a debt you owe the judgment debtor.
 - c. answer concerning property of the defendant in your possession or control or concerning a debt you owe the defendant that is subject to attachment.

Date:	Time:	Dept. or Div.:	Rm.:
Address of court <input type="checkbox"/> shown above <input type="checkbox"/> is:			

3. This order may be served by a sheriff, marshal, registered process server, or the following specially appointed person *(name)*:

Date: _____ JUDGE OR REFEREE

This order must be served not less than 10 days before the date set for the examination.
IMPORTANT NOTICES ON REVERSE

APPLICATION FOR ORDER TO APPEAR FOR EXAMINATION

4. Judgment creditor Assignee of record Plaintiff who has a right to attach order
 applies for an order requiring *(name)*: _____ to appear and furnish information
 to aid in enforcement of the money judgment or to answer concerning property or debt.
5. The person to be examined is
 - a. the judgment debtor.
 - b. a third person (1) who has possession or control of property belonging to the judgment debtor or the defendant or (2) who owes the judgment debtor or the defendant more than \$250. An affidavit supporting this application under Code of Civil Procedure section 491.110 or 708.120 is attached.
6. The person to be examined resides or has a place of business in this county or within 150 miles of the place of examination.
7. This court is **not** the court in which the money judgment is entered or *(attachment only)* the court that issued the writ of attachment. An affidavit supporting an application under Code of Civil Procedure section 491.150 or 708.160 is attached.
8. The judgment debtor has been examined within the past 120 days. An affidavit showing good cause for another examination is attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ _____
 (TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

(Continued on reverse)

(continued)

Exhibit 16-1 Judicial Council Form Application and order for Appearance and Examination (*continued*)

APPEARANCE OF JUDGMENT DEBTOR (ENFORCEMENT OF JUDGMENT)

NOTICE TO JUDGMENT DEBTOR If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

**APPEARANCE OF A THIRD PERSON
(ENFORCEMENT OF JUDGMENT)**

(1) NOTICE TO PERSON SERVED If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

(2) NOTICE TO JUDGMENT DEBTOR The person in whose favor the judgment was entered in this action claims that the person to be examined pursuant to this order has possession or control of property which is yours or owes you a debt. This property or debt is as follows (*Describe the property or debt using typewritten capital letters*):

If you claim that all or any portion of this property or debt is exempt from enforcement of the money judgment, you must file your exemption claim in writing with the court and have a copy personally served on the judgment creditor not later than three days before the date set for the examination. You must appear at the time and place set for the examination to establish your claim of exemption or your exemption may be waived.

APPEARANCE OF A THIRD PERSON (ATTACHMENT)

NOTICE TO PERSON SERVED If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the plaintiff in this proceeding.

**APPEARANCE OF A CORPORATION, PARTNERSHIP,
ASSOCIATION, TRUST, OR OTHER ORGANIZATION**

It is your duty to designate one or more of the following to appear and be examined: officers, directors, managing agents, or other persons who are familiar with your property and debts.

Exhibit 16-2 Judicial Council Form Writ of Execution

EJ-130

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, state bar number and address</i>): TELEPHONE NO. : _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): <input type="checkbox"/> ATTORNEY FOR <input type="checkbox"/> JUDGMENT CREDITOR <input type="checkbox"/> ASSIGNEE OF RECORD	FOR COURT USE ONLY															
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:																
PLAINTIFF: DEFENDANT:																
<table style="width:100%;"> <tr> <td style="width:15%;">WRIT OF</td> <td style="width:15%;"><input type="checkbox"/> EXECUTION (Money Judgment)</td> <td style="width:15%;"><input type="checkbox"/> POSSESSION OF</td> <td style="width:15%;"><input type="checkbox"/> Personal Property</td> <td style="width:15%;"></td> </tr> <tr> <td></td> <td></td> <td></td> <td><input type="checkbox"/> Real Property</td> <td></td> </tr> <tr> <td></td> <td><input type="checkbox"/> SALE</td> <td></td> <td></td> <td></td> </tr> </table>	WRIT OF	<input type="checkbox"/> EXECUTION (Money Judgment)	<input type="checkbox"/> POSSESSION OF	<input type="checkbox"/> Personal Property					<input type="checkbox"/> Real Property			<input type="checkbox"/> SALE				CASE NUMBER:
WRIT OF	<input type="checkbox"/> EXECUTION (Money Judgment)	<input type="checkbox"/> POSSESSION OF	<input type="checkbox"/> Personal Property													
			<input type="checkbox"/> Real Property													
	<input type="checkbox"/> SALE															

1. To the Sheriff or any Marshal or Constable of the County of:

You are directed to enforce the judgment described below with daily interest and your costs as provided by law.

2. To any registered process server: You are authorized to serve this writ only in accord with CCP 699.080 or CCP 715.040.

3. (Name):
 is the judgment creditor assignee of record whose address is shown on this form above the court's name.

4. Judgment debtor (name and last known address):

additional judgment debtors on next page

5. Judgment entered on (date):

Judgment renewed on (dates):

7. Notice of sale under this writ

- a. has not been requested.
- b. has been requested (*see next page*).

8. Joint debtor information on next page.

[SEAL]

- 9. See next page for information on real or personal property to be delivered under a writ of possession or sold under a writ of sale.
- 10. This writ is issued on a sister-state judgment.
- 11. Total judgment \$ _____
- 12. Costs after judgment (per filed order or memo CCP 685.090) \$ _____
- 13. Subtotal (*add 11 and 12*) \$ _____
- 14. Credits \$ _____
- 15. Subtotal (*subtract 14 from 13*) \$ _____
- 16. Interest after judgment (per filed affidavit CCP 685.050) \$ _____
- 17. Fee for issuance of writ \$ _____
- 18. **Total** (*add 15, 16, and 17*) \$ _____
- 19. Levying officer:
 - (a) Add daily interest from date of writ (*at the legal rate on 15*) of. \$ _____
 - (b) Pay directly to court costs included in 11 and 17 (GC 6103.5, 68511.3; CCP 699.520(i)) \$ _____
- 20. The amounts called for in items 11-19 are different for each debtor. These amounts are stated for each debtor on Attachment 20.

Issued on (date): _____ Clerk, by _____, Deputy

NOTICE TO PERSON SERVED: SEE NEXT PAGE FOR IMPORTANT INFORMATION.

(continued)

Exhibit 16-2 Judicial Council Form Writ of Execution (*continued*)

SHORT TITLE: _____	CASE NUMBER: _____
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— Items continued from the first page —

4. **Additional judgment debtor** (*name and last known address*):

7. **Notice of sale** has been requested by (*name and address*):

8. **Joint debtor** was declared bound by the judgment (CCP 989-994)
 a. on (*date*): _____ a. on (*date*): _____
 b. name and address of joint debtor: _____ b. name and address of joint debtor: _____

c. additional costs against certain joint debtors (*itemize*):

9. (*Writ of Possession or Writ of Sale*) **Judgment** was entered for the following:
 a. Possession of real property: The complaint was filed on (*date*): _____ **(Check (1) or (2)):**
 (1) The Prejudgment Claim of Right to Possession was served in compliance with CCP 415.46.
 The judgment includes all tenants, subtenants, named claimants, and other occupants of the premises.
 (2) The Prejudgment Claim of Right to Possession was NOT served in compliance with CCP 415.46.
 (a) \$ _____ was the daily rental value on the date the complaint was filed.
 (b) The court will hear objections to enforcement of the judgment under CCP 1174.3 on the following
 dates (*specify*): _____
 b. Possession of personal property
 If delivery cannot be had, then for the value (*itemize in 9e*) specified in the judgment or supplemental order.
 c. Sale of personal property
 d. Sale of real property
 e. Description of property: _____

— NOTICE TO PERSON SERVED —

WRIT OF EXECUTION OR SALE. Your rights and duties are indicated on the accompanying Notice of Levy.
 WRIT OF POSSESSION OF PERSONAL PROPERTY. If the levying officer is not able to take custody of the property, the levying officer will make a demand upon you for the property. If custody is not obtained following demand, the judgment may be enforced as a money judgment for the value of the property specified in the judgment or in a supplemental order.
 WRIT OF POSSESSION OF REAL PROPERTY. If the premises are not vacated within five days after the date of service on the occupant or, if service is by posting, within five days after service on you, the levying officer will remove the occupants from the real property and place the judgment creditor in possession of the property. Except for a mobile home, personal property remaining on the premises will be sold or otherwise disposed of in accordance with CCP 1174 unless you or the owner of the property pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the premises.
 ► *A Claim of Right to Possession form accompanies this writ (unless the Summons was served in compliance with CCP 415.46).*