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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has California got? Are there any rules that govern civil procedure in California?

California is a common law jurisdiction. Decisions by the Supreme Court of California and the California Courts of Appeal develop California case law. The California State Legislature promulgates the California Code of Civil Procedure, the primary source of civil procedure in California courts. The Judicial Council of California adopts California Rules of Court, which are an important secondary source of civil procedure in California courts.

1.2 How is the civil court system in California structured? What are the various levels of appeal and are there any specialist courts?

Courts in California hear both civil and criminal matters, and are divided into three levels.

Trial courts, known as "Superior Courts", are courts of first instance. California has 58 Superior Courts, with one court located in each of the state's 58 counties. Each of the 58 Superior Courts may have several different courthouse locations throughout the county, as well as separate divisions responsible for different types of cases and controversies, such as family law, juvenile offences, and small claims.

Superior Court decisions may be appealed to the next level of judicial authority – intermediate courts known as the "Courts of Appeal". The California Legislature has divided the state into six appellate districts, each with its own Court of Appeal.

The highest court in California is the Supreme Court, which has the power to review decisions of the Courts of Appeal. With respect to matters of California State law, decisions of the California Supreme Court are binding on both California courts and federal courts hearing cases concerning California law.

1.3 What are the main stages in civil proceedings in California? What is their underlying timeframe?

The main stages of civil proceedings in California include:

- Pleading. This includes the filing and service of a complaint by the plaintiff and the filing and service of an answer, demurrer, or other challenge to the complaint by the defendant.
- Discovery. This includes collecting and exchanging information about the case in preparation for trial, including fact investigation and witness depositions.
- Trial. This includes hearing witness testimony and applying the law to the facts, concluding with the case being decided by a judge or jury.
- Judgment. This document conveys the decision of the court, which may be based on a jury verdict, and resolves the case.
- Appeal. Post-judgment, the non-prevailing party may seek review of the trial court's decision based on legally significant errors made by the trial court.

The pretrial stages of litigation are often lengthy and costly. Discovery, particularly in light of recent developments in electronic discovery (exchanging information in electronic format), along with pretrial motions and advocacy, often requires a significant investment of time and resources. Standard 2.2 of the California Rules of Court encourages Superior Courts to dispose of 75% of civil cases within 12 months of filing and all civil cases within 24 months of filing.

1.4 What is California's local judiciary's approach to exclusive jurisdiction clauses?

Generally, California courts adhere to the modern trend of enforcing exclusive jurisdiction clauses, which are more commonly known as "forum selection clauses". California courts distinguish between mandatory forum selection clauses, which require litigation to occur in a specific forum, and permissive forum selection clauses, which confer jurisdiction on a specific forum, but do not deny the plaintiff his choice of an otherwise appropriate forum. Mandatory forum selection clauses are examined for "reasonableness", and permissive forum selection clauses are examined under a traditional *forum non conveniens* analysis. *Trident Labs, Inc. v. Merrill Lynch Commercial Fin. Corp.*, 200 Cal. App. 4th 147 (2011). While generally accepting of such clauses, California courts have not hesitated to reject forum selection clauses contained in contracts between parties of unequal bargaining power.

1.5 What are the costs of civil court proceedings in California? Who bears these costs?

The length and complexity of each case drives the overall cost of civil litigation in California, creating a large degree of variance. The initial cost to file a civil case in California Superior Court is 435 USD, but other costs, such as attorneys' fees and discovery costs, typically dwarf administrative costs. Generally, parties are

expected to bear their own costs and attorneys' fees. By statute, contract, or under the equitable powers of the court, winning parties are often able to recover court costs and are occasionally able to recover reasonable attorneys' fees. Notably, when a contract provides for recovery of attorneys' fees and costs incurred to enforce that contract, "the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs". Cal. Civ. Code § 1717.

1.6 Are there any particular rules about funding litigation in California? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Under Rule 4-210 of the California Rules of Professional Conduct, during litigation an attorney may advance litigation costs with repayment contingent on the outcome of the litigation. After employment, the attorney may also make a personal or business loan to a client.

Contingency and conditional fee arrangements are generally permitted, and frequently utilised, in civil cases in California. In some cases, reverse contingency fees, in which a victorious defence attorney will collect a percentage of predicted damages avoided, are permitted. Security for fees and costs agreements is permitted, but costs must be included in a written fee agreement between the client and attorney. Under such arrangements, the attorney will often take a security interest in any judgment or settlement obtained in connection with the client's cause of action. It is also permissible, however, to take a security interest in real or personal property. In addition to the statutory requirements regarding fees, lawyers in California should consult the California Rules of Professional Conduct for ethical guidelines.

1.7 Are there any constraints to assigning a claim or cause of action in California? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims are generally assignable in California, and once assigned, the assignee need not join the assignor. Certain claims, such as legal malpractice and personal injury claims, are not assignable. Third party litigation funding is a relatively new phenomenon in California and the United States, although several well-funded commercial litigation investment funds have been formed in recent years. Early indications suggest that California is relatively permissive with respect to third party financing, but little precedent exists in this area.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

With few exceptions, there are no specific formalities to which a plaintiff must adhere before filing a lawsuit. One such exception pertains to claims against government entities, which require a formal claim to be presented to the government entity before a lawsuit may be filed in court. Certain other claims, including claims against a decedent's estate, claims against a healthcare provider for medical malpractice, and claims against certain homebuilders, also require some form of pre-filing claim presentation to the appropriate party. While pre-filing investigation of the merits is a requirement of all suits, certain professional negligence actions also require pre-filing consultation with an expert in order to file a "certificate of merit". Certain actions also may require the exhaustion of administrative or alternative non-court remedies before resorting to litigation. Such requirements may be statutory or contractual.

Finally, verification by a party of the truth of the matters alleged in a pleading, under penalty of perjury, is always permissible and occasionally required by statute in certain actions (e.g., unlawful detainer, quiet title). If a plaintiff files a verified complaint and the defendant fails to file a verified answer, the unverified answer may be treated as an admission by the defendant of the allegations contained in the verified complaint.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Time limits on claims are known as "statutes of limitations". The statute of limitations varies depending on the type of legal claim. For example, breach of contract claims must be brought within 4 years of breach for written contracts, and within 2 years of breach for oral contracts. Cal. Civ. Proc. Code §§ 337, 339. Personal injury claims must be brought within 2 years of the injury. Cal. Civ. Proc. § 335.1. Claims against government entities that require a prelitigation "special claim" to the government entity in question must be made within 6 months or 1 year, depending on the type of claim. Cal. Gov't Code § 911.2.

Under some circumstances, the statute of limitations may be suspended or "tolled" for a period of time, which will affect how the limitations period is calculated. Examples include disability of the plaintiff or attorney, death of a party, and contractual or legislative change in the limitations period. In some cases, it is not reasonably possible for a person to discover that an injury has occurred until after the ordinary statute of limitations has expired. Contemplating this, the "discovery rule" may permit a suit to be filed within a certain period of time after the injury has been discovered or should have been discovered rather than after the injury has occurred. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103 (1988).

Finally, California courts may apply the statute of limitations of another jurisdiction if the cause of action arose in that jurisdiction. Cal. Civ. Proc. Code § 361. This so-called "borrowing" statute can result in an action being time-barred in California under the borrowed statute even if it was brought within an acceptable time period under California's statute of limitations.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in California? What various means of service are there? What is the deemed date of service? How is service effected outside California? Is there a preferred method of service of foreign proceedings in California?

A plaintiff commences a civil action by filing a complaint with the Superior Court. A summons is a form of court process issued to notify a defendant that a lawsuit has been filed against him or her. Service of the summons and complaint must be effected by the plaintiff. Rules for service of summons to an individual or to an entity within California may vary, but service generally may be made in one of four ways:

1. Personal service of the summons and complaint on the defendant. Service is deemed effective upon delivery. Cal. Civ. Proc. Code § 415.10.
2. In some circumstances, substitute service may be made to a competent individual if the defendant cannot be found. Service can be made at the defendant's dwelling, usual place of business, or usual mailing address and must be coupled with mailing the summons and complaint to the place where the copies were left. Service is considered complete on the 10th day after the mailing. Cal. Civ. Proc. Code § 415.20.
3. Service by mail and "notice and acknowledgment of receipt" permits a defendant to accept service by mail or refuse service by mail and assume liability for the cost of alternative service methods. Service is complete on the date the defendant signs the acknowledgment, and the defendant has 20 days to sign and post the acknowledgment from the date it is mailed by the plaintiff and 30 days from the date of the signing to respond to the complaint. Cal. Civ. Proc. Code § 415.30.
4. Service by publication may be allowed only by court order, and is complete on the 28th day of publication. Cal. Civ. Proc. Code § 415.50.

Out-of-state defendants and foreign defendants (subject to any limitation under international treaty) may be served by any of the four methods listed above or by certified mail. Cal. Civ. Proc. Code § 415.10.

3.2 Are any pre-action interim remedies available in California? How do you apply for them? What are the main criteria for obtaining these?

After filing a complaint, a plaintiff may seek a temporary restraining order ("TRO") and/or a preliminary injunction ("PI") to preserve the *status quo* pending trial. Unless exempt, the opposing party should be notified regarding an upcoming TRO or PI hearing. To obtain a TRO or a PI, a plaintiff generally must show imminent irreparable harm and the absence of an adequate legal remedy.

3.3 What are the main elements of the claimant's pleadings?

The California Code of Civil Procedure provides that a complaint must contain "(1) [a] statement of the facts constituting the cause of action, in ordinary and concise language", and "(2) a demand for judgment for the relief to which the pleader claims to be entitled". Cal. Civ. Proc. Code § 425.10(a).

3.4 Can the pleadings be amended? If so, are there any restrictions?

The California Code of Civil Procedure provides that any pleading may be amended once, without leave of court, "at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party". Cal. Civ. Proc. Code § 472. After an answer or demurrer has been filed, or at "any time before or after the commencement of trial", the court may in its discretion allow amendments "in the furtherance of justice". Cal. Civ. Proc. Code § 473(a)(1); Cal. Civ. Proc. Code § 576.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

Responsive pleadings in California may take the form of either a demurrer or an answer. A demurrer raises an issue of law and challenges the legal sufficiency of a claim. An answer raises issues of fact in response to the complaint. A demurrer must "distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken". Cal. Civ. Proc. Code § 430.60. An answer must contain "[t]he general or specific denial of the material allegations of the complaint controverted by the defendant" and a "statement of any new matter constituting a defense". Cal. Civ. Proc. Code § 431.30(b). A general denial denies the whole of the complaint. In contrast, a specific denial denies specific parts of the complaint and leaves those not controverted to be taken as true. Cal. Civ. Proc. Code § 431.20. Additionally, certain defences contained in an answer may be affirmative defences, a designation that places the burden of proof on the defendant, and must be specifically pleaded in the answer.

The "counterclaim" has been abolished and replaced by the "cross-complaint", which may be asserted by the defendant against an existing party or a new party. A cross-complaint against an existing party must be filed "at the same time as the answer to the complaint or cross-complaint", while a cross-complaint against a new party may be filed "any time before the court has set a date for trial". Cal. Civ. Proc. Code § 428.50. Set-off may be available where cross-demands for money exist between persons, and may be asserted in the answer. Cal. Civ. Proc. Code § 431.70.

4.2 What is the time limit within which the statement of defence has to be served?

A response to a complaint or cross-complaint generally must be filed within 30 days after service of the complaint or cross-complaint. Cal. Civ. Proc. Code § 412(a)(3) and Cal. Civ. Proc. Code § 430.40(a). A defendant may gain as many as 20 additional days to respond by agreeing to service by mail.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

California Code of Civil Procedure section 428.10 states that "a party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth . . . any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action". The cause of action asserted in his cross-complaint must either "arise out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him" or assert "a claim, right, or interest in the property or controversy which is the subject of the cause brought against him". Alternatively, a defendant may prefer to initiate a separate action against a potentially liable third party after the present action has concluded.

4.4 What happens if the defendant does not defend the claim?

California Code of Civil Procedure § 585 provides that when a defendant fails to file a responsive pleading within the time allowed by the court, the court may enter default judgment against the defendant. In most actions, the court will not enter a default judgment automatically. Instead, the court will require the plaintiff to file a request for entry of default judgment in order to obtain a default judgment from the court. A default judgment may be appealed or challenged by the defendant.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant may challenge the court's personal or subject matter jurisdiction. Personal jurisdiction may be challenged only by filing a timely motion to quash service of summons under California Code of Civil Procedure section 418.10. Critically, a defendant waives bringing a challenge to personal jurisdiction if it files a demurrer or motion to strike prior to filing a § 418.10 motion to quash. In contrast, lack of subject matter jurisdiction may be raised by demurrer, but is not waived for failure to do so, and may be raised at any time before or during trial, or on appeal. Cal. Civ. Proc. Code § 430.10(a).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties may join ongoing proceedings. Depending on the circumstances, their joinder may be either compulsory or permissive.

Compulsory joinder occurs when the court determines that an adequate disposition of the case cannot be made in the absence of a party. This situation arises when the party is so central to the matter that (1) "complete relief cannot be accorded among those already parties" without his presence, or (2) disposition of the action without him would impair his ability to protect an interest or leave the existing parties subject to multiple or conflicting obligations. Cal. Civ. Proc. Code § 389(a). The court may order joinder of the party in such circumstances if the party is subject to service of process and his joinder will not deprive the court of jurisdiction over the subject matter of the action. *Id*. In addition, a defendant who believes that a third party may be liable to him for some or all of the claims against him may bring that third party into the suit via a cross-complaint. Cal. Civ. Proc. Code § 428.10.

Permissive joinder arises when a party wishes to be, but does not need be, joined to an action. The party may be joined as a plaintiff if he "asserts any right to relief jointly, severally, or in the alternative" arising out of the same transaction that forms the basis of the ongoing case, and if there is a question of law or fact that is common to the other plaintiffs. A party also may join as a plaintiff if he has a claim that is adverse to the defendant in the subject of the action. Cal. Civ. Proc. Code § 378. A party may join as a defendant if the same stipulations are met: the plaintiff(s) claim a right to relief jointly, severally, or in the alternative against the new and existing defendants; or the joining defendant has an interest adverse to the plaintiff(s) in the subject of the action. Cal. Civ. Proc. Code § 379. A party also may "intervene" in an ongoing litigation (without necessarily joining either the plaintiff or defendant), so long as that individual "claims an interest in the property or transaction that is the subject of the action" and the disposition of the action without his participation would prevent him from protecting that interest. Cal. Civ. Proc. Code § 387. Additionally, an "interpleader" action allows a party or non-party to force other parties to litigate over disputed property or money that the party holds, but in which the party does not have an interest. Cal. Civ. Proc. Code § 386.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

California Code of Civil Procedure section 1048 states that when multiple actions involving a "common question of law or fact" are pending before it, a court may order a joint hearing or trial of any of the matters at issue in the actions, consolidate the actions, or make any related orders that would avoid unnecessary cost or delay. If several "non-complex" actions are pending in different counties, they may all be transferred to one county by a judicial order and consolidated (under section 403 of the Code of Civil Procedure) if they meet the above-mentioned "common question" requirement. However, if the cases in different counties are "complex", then the consolidation process is called "coordination" and it is governed by section 404. A "complex" case is defined as one that will require special management in order not to monopolise excessive court resources or place an unnecessary burden on the parties. Cal. R. Ct. 3.400. Examples of "complex" cases include class actions and antitrust suits.

Courts have broad case management discretion in order to facilitate the disposition of the coordinated cases. Cal. Civ. Proc. Code § 404. One example of the powers of the coordinating court is the ability to conduct hearings throughout the state, allowing witnesses and counsel to participate with fewer disturbances than might otherwise be necessitated.

5.3 Do you have split trials/bifurcation of proceedings?

A Superior Court may order the separation of one trial into two or more proceedings. California Code of Civil Procedure section 1048(b) permits the separation of causes of action or issues if doing so would prevent prejudice and further convenience, or be "conducive to expedition and economy". There are several situations in which a court would be prompted to bifurcate a trial. For instance, if a trial contains both legal and equitable issues, the two must be severed and the court must try the equitable issues before the legal issues are determined by the jury. *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal. 3d 665 (1974). Other reasons to sever include (but are not limited to) raising a *res judicata* defence and seeking declaratory relief.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in California? How are cases allocated?

Superior Courts are courts of general jurisdiction and have the power to hear any matter that is not specifically designated for another tribunal. Assignment of cases depends on the county. Some use a "direct calendar" system, under which one judge is

assigned (at random) to oversee a case from the date of the initial filing. Others use a "master calendar" system, under which cases are assigned on the trial date to a trial court from one general calendar. The California Rules of Court state that courts may decide which method to use. Cal. R. Ct. 3.711.

6.2 Do the courts in California have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

California courts are imbued with case management powers in order to minimise the amount of state resources expended on each case. While parties and their counsel may propose schedules and deadlines to the court, the Trial Court Delay Reduction Act ("TCDRA") (Cal. Gov't Code § 68600) places the responsibility for swift disposition of cases on the court itself, compelling judges to "actively manage" their caseload. This active management can take several forms: early identification and correct assignment of complicated cases and cases likely to settle; setting firm trial dates; and holding all parties to a pre-determined schedule and avoiding continuances.

Perhaps the most crucial aspect of the TCDRA is the standard for timely case disposition to which courts are held. Civil cases in California are divided into "limited" cases, in which the amount in controversy is less than 25,000 USD, and "unlimited" cases, which may address any dispute over that amount. The court's goal is to dispose of 90% of limited cases within 12 months (versus 75% of unlimited cases) and 98% within 18 months (versus 85%). Cal. Gov't Code § 68603. Under the California Rules of Court, 100% of both unlimited and limited cases should be resolved within 2 years after filing. Cal. R. Ct. 3.714(b). Cases designated as "complex" (explained above in question 5.2) are frequently exempt from these fast-track deadlines, but should be finished within 3 years after filing. The judge overseeing a complex case will determine specific time standards for each phase of the proceeding. Cal. R. Ct. 3.10.

6.3 What sanctions are the courts in California empowered to impose on a party that disobeys the court's orders or directions?

California Code of Civil Procedure section 128.7 permits California courts to impose sanctions on parties or their attorneys who submit papers to the court that are (1) intended to harass, (2) not warranted by existing law or submitted in a frivolous effort to change existing law, (3) without evidentiary support and unlikely to be so supported in the future, or (4) that contain denials which are not warranted on the evidence or based on reasonable belief. Cal. Civ. Proc. Code § 128.7(b). Under this section, a party may serve a motion for sanctions on the opposing party, but may not submit it to the court until 21 days have passed without the removal or correction of the challenged paper.

Sanctions imposed by the court for violation of this section are limited to "what is sufficient to deter" further conduct of the same manner in the future. Cal. Civ. Proc. Code § 128.7(d). Such sanctions may include financial payment to the court or payment of the opposing party's legal fees in bringing the motion.

Sanctions also may be imposed for other improper behaviour, such as violations of discovery orders. Courts are empowered to use increasing levels of sanctions to compel cooperation; monetary sanctions are imposed first, but parties who do not amend their behaviour may then face special (detrimental) jury instructions or, in unusual cases, terminating sanctions (dismissal or default). *Doppes v. Bentley Motors, Inc.*, 174 Cal. App.4th 967 (2009).

6.4 Do the courts in California have the power to strike out part of a statement of case? If so, in what circumstances?

A California court may – either on its own motion or the motion of a party – strike all or part of a complaint that is (1) irrelevant, false, or improper, or (2) not written or filed according to the rules of the court. Cal. Civ. Proc. Code § 436. In determining whether the document contains improper material, however, the court may consider only the "face of the pleading" and matters subject to judicial notice. Extrinsic evidence is not permitted. *Garcia v. Sterling*, 176 Cal. App. 3d 17 (1985).

6.5 Can the civil courts in California enter summary judgment?

Yes. California Code of Civil Procedure § 437c provides that summary judgment may be granted in any proceeding in which it is clear that either (a) there is no merit to the action, or (b) there is no defence to the action. The standard employed by the court in making this determination is whether the evidence submitted in support of the motion for summary judgment establishes that there is no triable issue of material fact, and that the moving party is entitled to judgment as a matter of law. Cal. Civ. Proc. Code § 437c.

Courts also may enter judgment on "one or more causes of action within an action" through the process of "summary adjudication". Cal. Civ. Proc. Code § 437c(f). Under this rule, a party may prevail on one sub-part of their action without the determination of the action in its entirety. The standard for granting summary adjudication is the same as that for summary judgment.

6.6 Do the courts in California have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A California court may stay proceedings on its own motion or on the motion of any party. Under the California Rules of Court, a judge must consider whether a stay will "promote the ends of justice", and must take into account the effect a stay would have on any related proceedings. Cal. R. Ct. 3.515(f). Some stays are mandatory, such as a stay on the execution of a judgment in the trial court when an appeal on that matter is pending in the appellate court. Cal. Civ. Proc. Code § 916.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in California? Are there any classes of documents that do not require disclosure?

While Federal Rule of Civil Procedure 26 mandates certain initial disclosures in federal cases, there is no analogue to this rule in the California Code of Civil Procedure and therefore no information that must automatically be volunteered. Parties in California state court must gather their discovery information via depositions, interrogatories, requests for production of documents, requests for admission, subpoenas, and other forms of discovery.

7.2 What are the rules on privilege in civil proceedings in California?

A party may prevent information from being disclosed to the other party or in court if it is protected by a valid privilege or immunity. Privileges are governed by the California Evidence Code. Those recognised in California include: (1) attorney-client (including protection of the attorney's work-product); (2) spousal communication; (3) physician-patient; (4) psychotherapist-patient and educational psychologist-patient; (5) clergy-penitent; (6) sexual assault victim-counsellor; (7) domestic violence victim-counsellor; (8) trade secrets; (9) secrecy of political ballot; and (10) official records. Cal. Evid. Code §§ 930-1063. The California Constitution also guarantees a right to privacy, which may only be abridged if a compelling state interest so dictates. Cal. Const. Art. 1 § 1.

7.3 What are the rules in California with respect to disclosure by third parties?

A non-party may be subpoenaed to testify under California Code of Civil Procedure § 2020.010. Individual testimony may be sought through an oral or written deposition, or a deposition for the production of business records or things.

7.4 What is the court's role in disclosure in civil proceedings in California?

Discovery proceedings in California state court are conducted by the parties. However, the court is available to ensure that the parties adhere to the discovery rules. If one party has difficulty obtaining the necessary discovery materials from the other party, it may file a motion with the court to compel the party to produce the requested information. Similarly, a party resisting a discovery request may move for a "protective order" to avoid production.

A party to a proceeding or another individual affected by the desired disclosure may also bring a motion to limit the scope of discovery. The court may grant the motion if it determines that the "burden, expense or intrusiveness . . . clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence". Cal. Civ. Proc. Code § 2017.020(a). The court may not limit discovery *sua sponte* (absent motion by a party or affected individual).

7.5 Are there any restrictions on the use of documents obtained by disclosure in California?

California Code of Civil Procedure § 2033.080(b) allows a court to grant a "protective order" to restrict one party's ability to obtain or use certain kinds of information from the other party. This order, which the court grants "for good cause", may be sought by either party to avoid undue embarrassment, expense, or disclosure of highly confidential information. Among other things, a protective order may provide that trade secrets or other confidential research, development, or commercial information not be admitted or be admitted only in certain ways. Additionally, parties frequently agree to a "stipulated protective order" (which is then entered by the court), which governs the treatment of confidential information in the lawsuit.

8 Evidence

8.1 What are the basic rules of evidence in California?

The rules of evidence in California state court proceedings are contained in the California Evidence Code, first adopted in 1965. The California rules are similar to the Federal Rules of Evidence, although there are certain differences.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

To be admissible in Superior Court, evidence must be relevant. Relevant evidence is any information that is likely to prove or disprove any fact that is at issue in the proceeding. In addition to being relevant, evidence must not fall into any exclusionary rule (such as the rule against hearsay). Even if evidence clears these hurdles, a court may still exclude it. For example, California Evidence Code § 352 allows a court to exclude evidence if it determines that the probative value of admitting that evidence is substantially outweighed by the probability that it will result in (a) an undue consumption of time, (b) unfair prejudice, (c) confusion of the issues, or (d) misleading the jury.

With respect to expert testimony, California Evidence Code §§ 800-802 states that expert witness testimony must be: (1) delivered by a qualified expert; (2) on a subject that is sufficiently beyond common experience; (3) reasonably calculated to assist the trier of fact; (4) based on the expert's personal knowledge; and (5) based on matters that experts reasonably rely upon in forming such opinions.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The California Evidence Code requires that a sufficient "foundation" be laid for a witness's testimony to be admissible. The witness must be competent, meaning that he understands that he has a duty to tell the truth, and has a medium of communication through which to do so. A fact witness must have personal knowledge of the matters about which he testifies, meaning that he can presently recall information that he previously experienced with one of his five senses. Cal. Evid. Code §§ 701-702.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in Court? Does the expert owe his/her duties to the client or to the Court?

Once the date for trial has been set, any party may demand from the opposing party a simultaneous exchange of information about all individuals whom that party intends to present as expert witnesses at trial. This information must include the witnesses' names, addresses, and all discoverable reports and writings made by the expert in the course of preparing his opinion. This demand must be made no later than 70 days before the trial date, and must set a date for the mutual exchange that is no later than 50 days before the initial trial date (or 20 days after service of the demand, whichever is closer). Cal. Civ. Proc. Code § 2034.210.

Expert witnesses are usually selected by party counsel because their expert opinion provides support to the hiring party's theory

of the case, though on occasion, experts may be appointed by the court. It is expected that the experts' testimony will be favourable to the employing party, though, as with any other witness, they must provide only truthful testimony.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in California?

The court supervises the parties' provision of evidence to ensure that it complies with the California Evidence Code. The court is tasked with ensuring all parties adhere to the Code, and that, in the case of a jury trial, inadmissible evidence is not presented to the jury. Parties may move *in limine* to exclude evidence before the inception of a jury trial, and the court will make a preliminary ruling on the admissibility of such evidence. Notably, *in limine* rulings are provisional, and during trial parties can attempt, with the permission of the court, to introduce evidence that the court excluded *in limine*.

Finally, as stated, a court may exclude otherwise admissible evidence if it raises the danger of unfair prejudice, undue delay, confusion of the issues, or misleading the jury.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in California empowered to issue and in what circumstances?

California state courts may issue several types of orders and judgments in civil proceedings. The first, an order authorising an award of money damages, involves financial transfers for varying purposes, such as compensation for injury. Second, a court may award "specific performance". This is a less commonly used remedy, and includes equitable orders such as injunctions or orders to undertake an affirmative act such as the transfer of land or custody of a child. Finally, a court may also issue a "declaratory judgment", an order that settles the involved parties' various rights and duties, such as when the parties dispute the meaning of a contract. Normally, at the conclusion of a case, the court will enter a final judgment, which officially concludes the case at the trial court level and triggers the deadline for the losing party to file a notice of appeal.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

California courts have the ability to award several kinds of damages, depending on the circumstances of the case. For example, compensatory damages are intended to return the prevailing party to the state it occupied before the injury, while punitive damages are imposed to punish the defendant and prevent similar behaviour in the future. Courts also may award interest payments to the prevailing party, which begin to accrue on the date that the party's right to recover becomes vested. California Civil Code § 3287(a). Several statutes regulate the court's ability to award costs and attorneys' fees, depending on the subject matter and outcome of the case.

9.3 How can a domestic/foreign judgment be enforced?

Article IV of the U.S. Constitution states that a final judgment in any state is entitled to the same "Full Faith and Credit" in California as it would be in the state where the judgment originated. This means that the judgment can be enforced in California to the extent that it could be enforced in the original state, regardless of whether California has conflicting law or public policy on the subject. However, California law controls as to the manner in which the judgment is enforced. The "Full Faith and Credit" clause does not extend to the judgments of foreign countries. If an individual seeks to enforce the judgment of a foreign country, the presiding California court will decide whether to enforce it based on principles of comity. In doing so, the court may refuse to enforce judgments that contravene California law or public policy.

Traditionally, an out of state judgment was enforced when the judgment holder filed a complaint requesting the judgment be established as a California judgment. This is still the method of enforcement for non-money judgments. The process is simpler for money judgments. A money judgment from another state may be registered as a California judgment by filing the judgment with a California state court, pursuant to the Sister State Money Judgment Act ("SSMJA", Cal. Civ. Proc. Code § 1710.10 *et seq*.). Upon the filing, a California judgment is immediately entered and is enforceable 30 days later (the interim stay is measured from the service of Notice of Entry on the debtor).

Finally, all civil judgments in California are enforceable under the Enforcement of Judgments Law ("EJL"), adopted in 1982. The EJL is a detailed compilation of the many statutes governing the technical methods for enforcing California judgments.

9.4 What are the rules of appeal against a judgment of a civil court of California?

A judgment in a limited civil case (one in which less than 25,000 USD is at issue) may be appealed to the appellate division of the Superior Court within 30 days of the mailing of the Notice of Entry of Judgment. A judgment in an unlimited civil case (in which more than 25,000 USD is at issue) may be appealed to the Court of Appeal within 60 days of the Notice of Entry of Judgment. Appeal from a judgment of the Court of Appeal is made to the California Supreme Court, although such appeals are discretionary. Rules governing the appellate procedure of the Court of Appeal and the California Supreme Court are collected in the California Rules of Court, Title 8.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in California? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Alternative dispute resolution ("ADR") in California takes the form of both private, voluntary procedures and compulsory programmes ordered by a court. Private, voluntary procedures include arbitration, negotiation, mediation and expert determination. Court-ordered procedures include judicial arbitration, mandatory settlement conferences, and court-mandated mediation programmes. Of these ADR procedures, arbitration and mediation are the most frequently used in California. Both methods are often attractive to parties (and to the court system) because they tend to

resolve disputes more quickly than traditional litigation and use fewer private and public resources.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Depending on the type of ADR at issue, the laws and rules governing the proceedings may differ. The California Arbitration Act (Cal. Civ. Proc. Code § 1280 *et seq*.) sets out the statutory framework governing contractual arbitration. For contractual arbitration governing contracts that deal with interstate, foreign, or maritime commerce, the Federal Arbitration Act (9 U.S.C. §1 *et. seq*.) is the prevailing law. Mediation, on the other hand, is voluntary and non-binding, and as such is not governed by a statutory scheme (though some ADR agreements may require that the parties attempt mediation before they commence arbitration, and there are provisions in the California Evidence Code relating to specific aspects of mediation).

1.3 Are there any areas of law in California that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

ADR is available for use in most civil proceedings in California and is highly encouraged. However, arbitrators and mediators are not required to issue decisions that conform to California law; the focus is on reaching an agreement decided either by an arbitrator or by the parties with the aid of a facilitator. Rights that are protected by the California Constitution or the United States Constitution, therefore, cannot be submitted to ADR proceedings. As such, arbitration and mediation are not available in California criminal proceedings.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court - pre or post the constitution of an arbitral tribunal - issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to California in this context?

California courts have the authority to stay proceedings in favour of ongoing arbitration or mediation, and they frequently do so. There is increasing pressure from courts for litigants to use ADR options before (or, instead of) traditional litigation. To this end, the Judicial Council has developed several rules regarding the role of ADR in civil cases. These include mandatory "meet and confer" meetings at least 30 days before trial and distribution of ADR materials to the parties at the inception of the case. There are also several statutes in California mandating that certain types of civil cases (for example, state administrative proceedings) be submitted to ADR before a lawsuit may be filed. If a party files a lawsuit that is subject to mandatory arbitration, the court may stay the case and enter an order compelling arbitration at the request of the other party.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to California in this context?

While an agreement to arbitrate a dispute is binding, the question of whether the parties have agreed to arbitrate is determined by the court rather than the arbitrator. California contract law determines the validity of the original agreement.

Arbitration awards cannot be "appealed" in the same way that a court judgment may be reviewed. The California Code of Civil Procedure outlines the reasons for which an arbitrator's award may be vacated (corruption, fraud, or late notice that an arbitrator should have been disqualified) or corrected (evident miscalculation of figures or descriptions, as long as these corrections are a matter of form). *See* Cal. Civ. Proc. Code §§ 1286.2, 1286.8. Beyond this, however, judicial review generally is unavailable. Since an arbitrator's award is not state action, parties do not have a due process right to review.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in California?

There are several prominent institutions in California that deal with ADR. The California judicial system refers potential litigants to different entities depending on the county in which they reside. One influential institution is the California Dispute Resolution Council, founded in 1992 and based in Glendora, California. The CDRC provides resources for California ADR systems by lobbying the California government for ADR-friendly legislation. In addition, JAMS, one of the premier ADR institutions in the world, is headquartered in Irvine, California.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

As previously mentioned, contractual arbitration is recognised in California as judicially binding. Once an arbitration award has been handed down (assuming none of the above-named reasons for vacating or correcting the award are discovered), the award cannot be overturned by appeal to a California court. While at common law, courts could set aside arbitration awards if they posed an obvious "substantial injustice", it is now clear that the statutory grounds for overturning an award are exclusive and do not include a provision for avoiding miscarriages of justice. *See Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992).

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

Overall, the use of ADR methods in California has risen markedly in recent years. Arbitration and mediation have become increasingly prevalent methods by which the judicial

system seeks to conserve its resources and private parties seek to safeguard their confidentiality. In arbitration, particularly, parties can stipulate (before any issue arises) the terms under which a dispute will be handled and who will determine the result. Arbitration is generally viewed as providing faster case resolution than the courts, especially in light of recent budget cuts to California's judiciary, which have depleted resources and made litigating a lengthier process than in the past. For these reasons, and because it promises a final, largely non-reviewable award, contractual arbitration is often the preferred method of dispute resolution for California's private sector.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in California.

ADR in California is constantly developing. One heavily debated topic is whether attorneys licensed in states other than California should be permitted to represent parties in California ADR proceedings. In the United States, attorneys who wish to practise in a given state must become licensed there by passing that state's Bar exam. Currently, attorneys who are not licensed to practise in California may nevertheless represent an individual in an ADR proceeding taking place in California (provided that they meet certain basic requirements). However, some groups wish to limit ADR representation to attorneys licensed by the state.

Finally, there has been some disagreement between the United States Supreme Court and the California Supreme Court regarding the extent to which California's state arbitration laws are pre-empted by federal law (pursuant to the U.S. Constitution's Supremacy Clause). In 2011, the United States Supreme Court issued an arbitration-friendly decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). The Court stated that the California contract law at issue (which deemed class-action waivers in arbitration agreements unenforceable under some circumstances) frustrated Congress' objectives in the Federal Arbitration Act, and therefore was pre-empted. However, in *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475, --- Cal.4th --- (Oct. 17, 2013), the California Supreme Court held that the Federal Arbitration Act, as applied in *Concepcion*, does not pre-empt state unconscionability rules so long as those rules do not interfere with the fundamental attributes of arbitration. In *Sonic-Calabasas A*, the California Supreme Court noted that the federal act pre-empts any state rule categorically prohibiting arbitration in a particular context, but affirmed that traditional defences to contracts, including unconscionability, can be raised to challenge the enforceability of an arbitration agreement.

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