

Chapter 1

INTRODUCTION TO CALIFORNIA CIVIL PROCEDURE

“[U]ndoubtedly, a state may regulate at pleasure the modes of proceeding in its courts * * *.”

—Bronson v. Kinzie, 1 How. (42 U.S.) 311, 315, 11 L.Ed. 143 (1843).

Analysis

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A. COURSE PERSPECTIVE

Your federal civil procedure course came early in the law school curriculum for a good reason. From the outset, you gained an understanding of how the cases you studied in other courses actually moved through the legal system.

Taking an upper-division course in state civil procedure introduces you to considerations that affect the decision to file a case in state or federal court. There is little time in the first federal course to explore procedural distinctions between the two court systems. Those distinctions constitute a prominent part of the subject matter of this book.

A course focusing on state procedure is particularly appropriate in California where the state judicial system is significantly larger than the entire federal system. There are over 1,600 judges in the California state

trial and appellate courts, compared to approximately 870 authorized appellate and Article III judgeships in the entire federal system. There were more than 1,400,000 Superior Court civil filings in 2005–2006, whereas the number of civil filings in California’s federal district courts amounted to approximately 26,000 during that period. Given the likelihood that a California attorney will appear with some regularity in a state court, a thorough understanding of California procedure is essential to navigating the strategic and tactical considerations that are peculiar to state court litigation.

There are other practical reasons unrelated to notions of federalism for studying state civil procedure. You must be aware of procedural innovations that drive the processing of civil suits in the California courts. One example is that cases filed in California courts are resolved through judicial arbitration or mediation more often than in the federal courts. But there was little or no time to explore the importance of state alternative dispute resolution mechanisms in the federal course.

Taking an advanced course in state procedure will deepen your understanding of the federal rules as you compare different approaches to the same problems in California. You will not leave law school with a false impression that state practice is virtually identical to the federal model you examined in the earlier procedure course. You will acquire a better sense of how to conduct civil litigation by analyzing the procedural systems in California courts. You will have a stronger foundation for commencing practice and for influencing future procedural reform. For additional perspectives on the benefits of including state procedure in the law school curriculum, see William R. Slomanson, *State Civil Procedure Plea*, 54 *J. Legal Educ.* 235 (2004).

B. SOURCES OF PROCEDURAL LAW

The federal civil procedure course traced the varied “sources” of federal law. These sources—the legislative, judicial and executive branches of the federal government—are all empowered to make binding law. The law produced by these sources is called primary authority. Federal primary authority includes the Constitution of the United States, federal statutes, Federal Rules of Civil Procedure (FRCP), and federal judicial opinions.

California’s Legislature, courts, and executive-branch administrative agencies generate binding state procedural law. The primary authorities upon which California judges, attorneys and litigants rely include:

- Constitutions of California and the United States;
- Statutes enacted by the California Legislature;
- California Rules of Court promulgated by the Judicial Council of California;
- California case law;
- Local rules of the trial and appellate courts;

- Local court policies and practices; and
- California Code of Regulations.

In addition to these primary authorities, many useful secondary authorities that interpret California procedural law exist. These secondary authorities are not the law itself. They provide commentary on or analysis of the content and meaning of primary authority. A hornbook, for example, serves as a secondary authority because it sets forth the author's summary and interpretation of the rules of law contained in primary authorities. Secondary authorities are often highly respected and persuasive. They are regularly quoted in judicial opinions. But they do not attain the status of primary authority. Frequently-used secondary authorities include:

- Legislative histories;
- Opinions of the California Attorney General;
- Scholarly publications (including legal treatises and law reviews); and
- Practice guides.

California statutes express an alternate (and rather quaint) way of categorizing these primary and secondary authorities. They divide California authorities into "written" and "unwritten" law. CCP § 1895. The written law comes from the state and federal constitutions, and state and federal statutes. CCP § 1897. Unwritten law "is observed and administrated in the courts of the country. It * * * is collected from the reports of the decisions of the courts, and the treatises of learned men." CCP § 1899.

An awareness of the utility of primary and secondary authorities is necessary for several reasons. First, the distinction between primary and secondary authorities is relevant to appreciating the difference between binding and persuasive authority. See Chapter 9(A)(1). Second, despite the impression fostered by the case method of law study, one cannot fully comprehend California's complex intertwined procedural foundations by relying only upon cases. Third, California's primary and secondary authorities are essential resources for conducting research and formulating legal arguments at all stages of the litigation process. Each authority is discussed below.

1. PRIMARY AUTHORITIES

Constitutions. The state and federal constitutions set the parameters for governmental action by allocating power among the various branches of government. The vote of the people or of their elected representatives creates and amends constitutional provisions.

The state and federal constitutions impact California civil procedure in several significant ways. For example, article VI of the state Constitution vests California's judicial power in a hierarchy of courts. It man-

dates the establishment of a Superior Court (trial court) in each of California's 58 counties. Article VI also directs the Legislature to divide the state into six appellate districts containing an intermediate Court of Appeal, with one or more divisions in each district. It also creates the California Supreme Court. (See chart at p. 7.) The state Constitution establishes the general nature of the judges' powers and the specific guidelines for their conduct of business within the hierarchy of the state's trial and appellate courts. Specific procedural matters governed by the California Constitution include the standard for appellate reversal of trial court decisions and the rights and requirements related to jury trials.

The federal Constitution can also impact state procedure because California procedural law cannot violate those portions of the United States Constitution that apply to the states. This intersystem relationship is sometimes quite explicit. In matters of personal jurisdiction, for instance, CCP § 410.10 provides that a "court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." A state cannot exercise personal jurisdiction if to do so would violate the federal Constitution's Due Process Clause. (See Chapter 2(B)(1).) Therefore, California's trial and appellate court judges must apply United States Supreme Court rulings to such jurisdictional issues as a matter of state law.

Not every federal constitutional provision applies to state procedural law. For example, the right to a civil jury trial contained in the Seventh Amendment of the United States Constitution does not apply to the states. In California, that right stems only from the state Constitution and state statutory law. California is free to reject—and has expressly rejected—many of the basic right to civil jury trial cases you studied in your federal course. See Chapter 6(A)(1).

Statutes. The California Code of Civil Procedure (CCP) is the predominant and most comprehensive compilation of California's procedural law. It contains the bulk of the basic procedural requirements, many of which are highlighted throughout this book. Unlike the comparatively condensed FRCP, the CCP expansively addresses many more procedural contingencies.

Other California legislation also contains important procedural requirements. For example, California Government Code §§ 68600–68620 set forth the provisions of the Trial Court Delay Reduction Act (often referred to as "Fast Track"), a special case management statutory scheme for streamlining the disposition of civil cases filed in California's superior courts. See Chapter 5(C)(1). California Civil Code § 3295 contains requirements for obtaining discovery of a civil defendant's financial condition for the purpose of seeking punitive damages. See Chapter 4(E)(5). California Evidence Code § 450 et seq. authorizes courts to take

judicial notice of particular matters in connection with trial and appellate court proceedings. See, e.g., Chapter 3(B) on demurrers.

Case Law. Like legislation, case law plays a prominent role in both the state and federal legal systems. In your first civil procedure course, you probably learned that the federal courts often must apply state substantive law and, in some situations, even state procedural law, derived from state case law. You might have been exposed to the interplay of state case law with state and federal legislation.

Scholarly works and practice guides address the judicial integration of case and statutory law, as well as the resulting impact on the evolution of the common law:

American legislatures today pass thousands of laws each year touching on any subject they please, and the myth of a perfect overarching common law has been abandoned for decades. But the holdover of the common law heritage is that American judges can make law when necessary. In fact, although most judicial opinions today interpret statutes or administrative rules, American judges still have great power.

Robert C. Berring & Elizabeth A. Edinger, *Finding the Law* 10 (12th ed.2005). To elaborate on this concept:

The United States is a “common law” country. Briefly this means that the law of the land is viewed as an evolving body of doctrine determined by judges on the basis of cases which they must decide, rather than a group of principles expressly articulated and codified. The law grows as established principles are tested and adapted to meet new situations. * * *

At the same time there is also a dramatic increase in the activity of both state and federal legislatures in enacting statutes, which have come to govern an ever greater variety of human activity. * * * An essential tension in the nature of legal research arises from the conflict and interplay between common and statutory law. The ruling principles in some areas are determined wholly by case law; other areas are governed partly by statute, or by statutes as construed and interpreted by the courts.

Morris L. Cohen, Robert C. Berring & Kent C. Olsen, *How to Find the Law* 2 (9th ed.1989). See also Peter M. Tiersma, *The Textualization of Precedent*, 82 *Notre Dame L.Rev.* 1187 (2007).

The common law of California is defined as “[t]he common law of England, so far as it is not repugnant to or inconsistent with” the constitutions and statutes of California and the United States. Cal.Civ. Code § 22.2. As a California practitioner, you will need to recognize when a court is merely interpreting the law or arguably writing it on a clean slate. Judges routinely interpret what the Legislature intended

when it drafted a statutory provision, or what a higher court intended when its opinion did not clearly answer the issue raised in a subsequent case. In certain instances, however, judges can make the law where there is no existing authority, or they can fill legislative gaps. Examples of judicially-created procedural law include the collateral order doctrine in the context of appeals (see Chapter 8(B)(1)(c)), and the principles of claim and issue preclusion (see Chapter 9(B)).

California's case law is generated by three levels of state courts. You should now examine the chart of California's court system below, illustrating the hierarchy of decisional law. (For additional information about the California court system and the Judicial Council, consult the California courts' website at <www.courtinfo.ca.gov>.)

CALIFORNIA COURT SYSTEM**CALIFORNIA SUPREME COURT**

1 Chief Justice and 6 Associate Justices

Jurisdiction

Discretion to hear appeals from Courts of Appeal.

Must hear appeals directly from Superior Courts on death penalty matters.

Also hears appeals directly from decisions of Public Utilities Commission, recommendations of State Bar on attorney admission and disciplinary proceedings, and recommendations from Commission on Judicial Performance on discipline of judges.

CALIFORNIA COURT OF APPEAL

105 Justices in 6 Districts (19 Divisions)

First District: San Francisco

Second District: Los Angeles, Ventura

Third District: Sacramento

Fourth District: San Diego, Riverside, Santa Ana

Fifth District: Fresno

Sixth District: San Jose

Jurisdiction

Hears appeals and writ petitions from decisions of Superior Courts within District.

Hears appeals and writ proceedings from decisions of Workers' Compensation Appeals Board, Agricultural Relations Appeals Board, and Public Employment Relations Board.

CALIFORNIA SUPERIOR COURT

1,500 Judges, 440 Commissioners and Referees

58 Counties, 450 court locations

Jurisdiction

Trial Department: conducts trial proceedings in criminal (felony and misdemeanor) and civil (unlimited and limited) cases.

Small Claims Division: conducts civil proceedings.

Appellate Division: hears appeals from limited civil cases and criminal misdemeanor cases.

Case law is integral to presenting procedural legal arguments before the court, but only if practitioners can properly rely on it as binding or persuasive authority. Not every opinion rendered by a California court is published and available for citation. For example, unlike the federal system, where selected district court opinions are published, California trial court decisions are not published. They are available primarily only upon request from the Superior Court that issued them. While all California Supreme Court decisions are published, California Rules of Court (CRC) 8.1100–8.1125 contain restrictive criteria governing the publication of opinions from the courts of appeal and the appellate divisions of the superior courts. (Compare the similarities and differences in the publication criteria in Ninth Circuit Rule 36–2.) Only about seven percent of California Court of Appeal opinions are certified for publication. The impact of this statistic is striking, since an unpublished Court of Appeal opinion (or portion of an opinion) cannot be cited or relied upon by California litigants or courts, except in very limited circumstances usually involving the immediate parties.

The following case against the California Supreme Court challenged the enforcement of the California Rules of Court governing publication and citation of appellate opinions:

SCHMIER v. SUPREME COURT OF CALIFORNIA

California Court of Appeal, First District, 2000.
78 Cal.App.4th 703, 93 Cal.Rptr.2d 580,
cert. denied, 531 U.S. 958, 121 S.Ct. 382, 148 L.Ed.2d 294.

HANING, ASSOCIATE JUSTICE.

Michael Schmier (appellant) appeals the dismissal of his complaint for injunctive relief and writ of mandate after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks to enjoin respondents from enforcing the rules governing publication of opinions (California Rules of Court, rules 8.1100–8.1125), contending they are unconstitutional and conflict with statutory law.

BACKGROUND

Rule 8.1105(c)^a provides that no opinion of the Court of Appeal may be published in the Official Reports unless it “(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; [¶] (2) resolves or creates an apparent conflict in the law; [¶] (3) involves a legal issue of continuing public interest; or [¶] (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.” Rule 8.1105(b) provides that a Court of Appeal opinion

a. An April 2007 amendment made substantive changes to CRC 8.1105(c). See Note 3 at p. 12.

shall not be published unless a majority of the court rendering the opinion certifies that it meets one of the standards of rule 8.1105(c).
* * *

An opinion that is not certified for publication cannot subsequently be cited as legal authority or precedent, except as relevant to the doctrines of law of the case, *res judicata*, or collateral estoppel, or as relevant to a criminal or disciplinary action because the opinion states reasons for a decision that affects the same defendant or respondent in another action. (Rule 8.1115.)

Rule 8.1120 sets forth the procedure for requesting publication of a Court of Appeal opinion not certified for publication by that court. If the Court of Appeal does not honor the request, rule 8.1120 obligates the Supreme Court to then rule on the request. Rule 8.1125 sets forth a similar scheme pertinent to depublication.

Appellant, individually and purportedly on behalf of all persons similarly situated, filed an action for injunctive relief and writ of mandate to compel respondents to publish all Court of Appeal opinions and to permanently enjoin them from enforcing the rules governing publication. He contends the rules violate the federal and state constitutional doctrine of separation of powers and the constitutional rights to petition the government for redress of grievances, freedom of speech, due process and equal protection. He further contends that the rules violate Civil Code section 22.2, which states that the common law of England is the rule of decision of all California state courts unless inconsistent with the federal constitution or the state constitution or statutes and the doctrine of *stare decisis*.

Respondents demurred primarily on the ground the trial court lacked subject matter jurisdiction because the Supreme Court alone is vested with the responsibility to regulate the publication of Court of Appeal opinions.

The trial court sustained the demurrer without leave to amend and ordered the case dismissed.

DISCUSSION

* * *

II

The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. The consistency of a rule is tested against the statutory scheme the rule was intended to implement.

California Constitution, article VI, section 14 requires the Legislature to provide for the prompt publication of such opinions of the Courts of Appeal "as the Supreme Court deems appropriate." Government Code section 68902 states: "Such opinions . . . of the courts of appeal . . . as the Supreme Court may deem expedient shall be published in the official reports [which] shall be published under the general supervision of the Supreme Court." The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a

policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) "the expense, unfairness to many litigants, and chaos in precedent research," if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions. By providing the mechanism for realizing this policy, the rules are consistent with the statutory scheme they were intended to implement.

Contrary to appellant's assertion, the rules do not conflict with Civil Code section 22.2 * * *. As used in this statute, "common law of England" refers to "the whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted." Common law is now largely codified in California, and statutes are presumed to codify common law rules, absent clear language disclosing an intent to depart therefrom.

However, neither the Legislature nor the courts are precluded from modifying or departing from the common law, and frequently do. A well-known departure, for example, is the community property system, whereby the Legislature incorporated Spanish law rather than the English common law rules pertinent to the marital estate. Similarly, the Legislature enacted a system of discovery in civil cases by substantially adopting the federal rules of discovery, which in turn established a pretrial fact-finding mechanism with a breadth not contemplated at common law.

Appellant has not cited and we are unaware, of any common law rule governing the publication or citation of opinions. To the extent appellant suggests that the common law of England requires that all appellate decisions will be published and may be cited as authority, such a rule is inconsistent with the constitution and laws of this state, including the rules of court, which have the force of positive law. "As a rule of conduct, [common law] may be changed at the will of the [L]egislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state's decisional law.

Nor do the rules contravene the doctrine of stare decisis, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. Although the doctrine embodies an important social policy by representing an element of continuity in law and serving the psychological need to satisfy expectations, it is a principle of judicial policy, not a rule of constitutional or statutory dimension. Therefore, the Supreme Court—California's highest court—is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the stare decisis doctrine.

Relying principally on *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481, appellant claims the rules violate the constitutional guarantees of due process and equal protection by creating a system of selective prospectivity that allows courts to create a new rule of law applicable to a single case. As articulated in *Beam*, selective prospectivity occurs when a court expressly overrules a decisional precedent, but applies the new rule only to the case in which the new rule is announced, returning to the old rule with respect to all other cases arising on facts predating the pronouncement of the new rule. *Beam* held that in civil as well as criminal cases, when the court applies a new rule of law to litigants in one case, “it must do so with respect to all others not barred by procedural requirements or *res judicata*.” As *Beam* also observed, opinions that overrule precedent are rare. “In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.”

The rules protect against selective prospectivity by providing a uniform and reasonable procedure to assure that actual changes to existing precedential decisions are applicable to all litigants. They require that *all* opinions of the state’s highest court be published. (Rule 8.1105(a).) They establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published. (Rule 8.1105(c).) They permit any member of the public to request the Court of Appeal to publish an opinion and, if the request is denied, require the Supreme Court to rule thereon. (Rule 8.1120.) In short, the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in *Beam* that most opinions do not change the law. If appellant’s view prevailed, the Supreme Court would be unable to decertify opinions for publication, which would seriously compromise its ability to control the direction of appellate precedent.

* * *

Finally, in closing, we address appellant’s erroneous notion that nonpublication equates with secrecy. It hardly needs mentioning that opinions, rulings and orders of the Court of Appeal are public records, open to all. Indeed, the nonpublished opinions are not only available to the public, but frequently become the subject of media broadcasts and publications. One can now track the progress of cases in the First District through the internet, and the other appellate districts will soon be online as well. The fact that opinions are not published in the Official Reports means nothing more than that they cannot be cited as precedent

by other litigants who are not parties thereto. But they are certainly available to any interested party.

* * *

DISPOSITION

The judgment of dismissal is affirmed.

Notes and Questions

1. The Court of Appeal rejected *Schmier*'s arguments and upheld the validity of the CRC publication rules. Do you think the court's opinion effectively responded to *Schmier*'s concern that enforcement of the state's publication and citation rules removes valuable appellate authority from the public's reach?

2. *Schmier* has subsequently made use of the legal literature and the press to advocate for a change in California law which would permit citation to unpublished opinions. See Kenneth J. *Schmier* and Michael K. *Schmier*, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 *J.L. & Soc. Challenges* 233 (2005); Kenneth J. *Schmier* and Michael K. *Schmier*, *Justices Carve Exception to the No-Citation Rule*, *San Francisco Recorder* at 4 (Nov. 4, 2005); and Mike *Schmier*, *People Deserve the Right to Cite from Unpublished Decisions*, *San Francisco Daily Journal* at 4 (May 10, 2004). For additional perspectives on California's publication and citation rules, see Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 *Cal.L.Rev.* 514 (1984) (former justice of California Supreme Court); Stephen Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 *J.App.Prac. & Process* 473 (2003); and J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 *Ariz. L.Rev.* 419 (2005).

3. CRC 8.1105 has been amended since *Schmier* to clarify and expand the criteria used by the courts of appeal in deciding whether to certify an opinion for publication. The amended rule, effective as of April 2007, replaces the former presumption against publication with a presumption in favor of publication if the opinion meets one or more of the criteria specified in CRC 8.1105(c). Besides the criteria mentioned in *Schmier*, the revised rule permits a Court of Appeal opinion to be certified for publication on several additional grounds, such as when the opinion "[i]nvokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision;" or when it "[a]dvances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule." CRC 8.1105(c). The certifying court may not consider factors such as workload of the court or potential embarrassment in determining whether to order publication. CRC 8.1105(d). What impact do you think the current version of the rule might have on the percentage of Court of Appeal decisions certified for publication?

4. Does (or should) CRC 8.1105—California’s “no-citation” rule—prohibit citation to unpublished federal opinions? See *Harris v. Investor’s Business Daily, Inc.*, 138 Cal.App.4th 28, 41 Cal.Rptr.3d 108 (2006). What about citations to unpublished decisions from other states? See *Lebrilla v. Farmers Group, Inc.*, 119 Cal.App.4th 1070, 16 Cal.Rptr.3d 25 (2004).

5. Federal Rule of Appellate Procedure (FRAP) 32.1 permits citation in all federal circuits of federal opinions, orders, judgments and other written dispositions issued after January 1, 2007, even if they have been designated as unpublished or non-precedential. FRAP 32.1 continues to be the source of controversy among some judges and practitioners (including several within the Ninth Circuit) who believe that unpublished opinions have less substantive value than those decisions selected for publication and therefore should not be citable. Ninth Circuit Rule 36–3 has been revised to achieve consistency with FRAP 32.1 while continuing (with limited exceptions) to prohibit citation of pre-2007 unpublished Ninth Circuit opinions. Several commentators have grappled with the impact of FRAP 32.1 on the federal courts. See, e.g., Bryan Wright, *But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit’s Massive Caseload Post F.R.A.P. 32.1*, 7 Nev.L.J. 239 (2006); and Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and the New Federal Rule of Appellate Procedure 32.1*, 47 B.C.L.Rev. 705 (2006). Which approach to dealing with citation of unpublished opinions—California or federal—do you believe is more sound?

Rules of Court. While the FRCP and FRAP have nationwide application, each state is free to adopt its own set of court rules. See Glenn Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-making Process*, 58 Vanderbilt L.Rev. 1167 (2005). The CRC are California’s statewide rules of court. They work in tandem with the CCP in addressing procedural matters.

The CCP provides the statutory authority for the CRC. CCP § 575 states that the “Judicial Council may promulgate rules governing pre-trial conferences, and the time, manner and nature thereof, in civil cases at issue * * * in the superior courts.” At the appellate level, CCP § 901 provides that the “Judicial Council shall prescribe rules for the practice and procedure on appeal.”

Article VI, section 6 of the California Constitution authorizes the existence and spells out the authority of the Judicial Council. To satisfy its constitutional mandate “[t]o improve the administration of justice,” the Judicial Council is authorized to “adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.” Under

this authority, the Judicial Council drafts and frequently amends the CRC.

The 29-member Judicial Council, chaired by the Chief Justice of the California Supreme Court, includes 14 trial and appellate judges appointed by the Chief Justice, two legislators, four attorneys appointed by the State Bar, and eight advisory members from the California Judges Association and state court administrative agencies. The work of the Judicial Council and its administrative organ is described in CRC 10.1–10.101.

The role of the Judicial Council is similar to that of the various federal rules committees and the Judicial Conference of the United States. These institutions make new procedural rules and amend the old ones, after an opportunity for public comment. As you may have studied in your first civil procedure course, the Standing Committee on Rules of Practice and Procedure proposes amendments to the FRCP and the other federal rules to the Judicial Conference. These proposals are published for comment from practitioners, judges and professors. The final version of a new FRCP is ultimately submitted to the United States Supreme Court for its approval. Amendments to the FRCP become valid several months after the Court forwards the proposed rules to the Congress for legislative acquiescence or rejection. See FRCP 86; 28 USC § 2074. For example, the United States Judicial Conference and the Supreme Court approved extensive stylistic changes to the FRCP, effective December 2007, for the purpose of improving clarity and consistency. The process of amending the FRCP is discussed in Richard L. Marcus, *Reform Through Rulemaking?*, 80 Wash.U.L.Q. 901 (2002).

California's statewide court rules are divided into ten titles: (1) Rules Applicable to All Courts; (2) Trial Court Rules; (3) Civil Rules; (4) Criminal Rules; (5) Family and Juvenile Rules; (6) Reserved (for future use); (7) Probate Rules; (8) Appellate Rules; (9) Rules on Law Practice, Attorneys, and Judges; and (10) Judicial Administration Rules. Additional CRC provisions contain Standards of Judicial Administration and a Code of Judicial Ethics.

The principal purpose of the CRC is to clarify and augment the more general provisions of the Code of Civil Procedure and other California codes. For example, CCP § 284 authorizes a court to order that the attorney in an action or special proceeding may be changed at any time. Attorneys rely on this rule to terminate the attorney-client relationship for a variety of reasons, including conflicts of interest. The CCP is silent, however, about the specific procedural requirements. CRC 3.1362 provides important details, such as to whom to direct the motion, upon whom notice must be served, and how to state the attorney's reasons for seeking a substitution.

California's constitutional mandate that the California Rules of Court not be inconsistent with statute has been the source of some confusion. The following case illustrates how one rule of court ran afoul of the constitutional requirement:

**TRANS-ACTION COMMERCIAL INVESTORS,
LTD. v. JELINEK**

California Court of Appeal, First District, 1997.
60 Cal.App.4th 352, 70 Cal.Rptr.2d 449.

PARRILLI, ASSOCIATE JUSTICE.

In this case we must decide whether a lawyer can be ordered to pay an opposing party \$50,000 in counsel fees and costs under California Rules of Court, rule 2.30, as a sanction for causing a mistrial.¹ Rule 2.30 [at the time this case was decided] provide[d] that a court “may order the person at fault” for failure to comply with a court order “to pay the opposing party’s reasonable expenses and counsel fees . . . in addition to any other sanction permitted by law.” We recognize the rule was intended to consolidate existing statutory authority. However, the plain terms of rule 2.30 purport to confer on trial courts a broad sanctioning power inconsistent with the more limited judicial authority to impose sanctions provided by the Legislature. (Code Civ. Proc., §§ 128.5, 128.7, 177.5, 1218).² We conclude rule 2.30 is invalid to the extent it fails to conform with the statutory conditions for an award of attorney’s fees as sanctions. The sanctions order before us does not meet the conditions of any statute, and therefore must be reversed.

BACKGROUND

1. Pretrial Proceedings

Appellant Donald A. Jelinek represented Firmaterr, Inc., and Firmaterr’s sole owner, Jerry A. Sulliger (collectively, Firmaterr) in defending an unlawful detainer action brought by Firmaterr’s landlords, Trans-Action Commercial Investors, Ltd. and Trans-Action Commercial Mortgage Investors, Ltd. (collectively, Trans-Action). Firmaterr operated the Shattuck Hotel, a large, historic structure in downtown Berkeley * * *. Trans-Action’s amended complaint alleged Firmaterr had violated a lease provision * * *.

[Before the trial commenced, the trial court struck Firmaterr’s affirmative defenses. It also granted several motions in limine that precluded the presentation of evidence or argument on a variety of subjects.]

2. Proceedings at Trial

* * *

[The Court of Appeal described how Jelinek disregarded the trial court’s in limine orders and its numerous warnings during his opening statement and the examination of witnesses over two days of trial.]

1. Further references to rules are to the California Rules of Court unless otherwise specified. * * *

2. Further statutory references are to the Code of Civil Procedure unless otherwise specified.

At the end of the second day of testimony, the judge considered a motion by Trans–Action seeking a curative statement to the jury, an order imposing “Prospective Sanctions” against Jelinek for “Each Successive Violation of Court Orders,” and sanctions for prior violations of court orders. * * * The judge rejected Trans–Action’s request for automatic sanctions on each sustained objection. However, the judge warned Jelinek that “what you’re doing is contemptuous and that you are inviting all of the sanctions of contempt orders against you.” The judge said he was not as concerned with the “affront to me” as with “a repeated attempt to get in material which the Court has ruled is not relevant or not proper for various reasons.”

* * * The judge told Jelinek * * * “I don’t like to hold attorneys in contempt, and I seldom do it. But here there’s an issue of trying to get things in front of the jury after the Court, after rather lengthy arguments, has made its rulings. * * * ”

Jelinek said he found it “incomprehensible” that his questions violated the in limine orders * * *. Myron Moskovitz, co-counsel * * *, also argued at some length that Jelinek had not violated the in limine orders, contending “Mr. Jelinek is bound by the words, not by some general flavor of them.” The judge insisted Jelinek had violated the in limine orders, and asked if Jelinek wanted to wait until the end of trial for a contempt hearing with his counsel present. Jelinek said that was fine. The judge then proceeded, over Jelinek’s objection, to find him in contempt and rule that an appropriate sanction under section 177.5 was a \$1,500 fine payable to the county, “but the imposition of that fine is deferred until such time as Mr. Jelinek has counsel. And at that time if there is a motion to reconsider I’ll consider it.” * * *

During a break during Jelinek’s closing argument, Trans–Action moved for a mistrial based on his references to irrelevant matters and violations of the in limine orders * * *. The judge denied the motion without prejudice. * * * Trans–Action renewed its motion for a mistrial. The judge granted the motion, citing Jelinek’s “repeated and flagrant violations” of the in limine orders.

3. *The Sanctions Proceedings*

About six weeks after ordering the mistrial, the trial judge granted Jelinek’s motion for reconsideration of the contempt sanction imposed during trial, vacating the contempt order and the \$1,500 fine “upon the ground that asking questions may constitute advocacy.”⁵ Meanwhile, however, Trans–Action had filed a post-trial motion for \$153,938.53 in attorney’s fees and costs as sanctions under rule 2.30, attaching a compendium of 146 alleged violations of the in limine orders by Jelinek. In response, Jelinek argued (1) rule 2.30 is not a legal basis for attorney fee awards as sanctions without independent statutory authority, and

5. The reference to advocacy relates to the restriction stated in section 177.5, that the power to impose monetary sanctions

shall not apply to advocacy of counsel before the court.

does not provide adequate procedural safeguards; (2) he did not violate any in limine orders; (3) if he did violate any orders, he had good cause for doing so; and (4) the fees requested by Trans–Action were excessive.

* * *

At the hearing on the sanctions motion, the judge rejected Jelinek’s excuses, saying “I don’t believe that’s reasonable or a fair interpretation of what happened.” * * *

Finally, the judge indicated he would impose sanctions, but not in the amount requested by Trans–Action. The judge added, “this is something I do with heavy heart. I do not like imposing [an] attorney’s fees award of this magnitude on an attorney, but at some point the court has to say, Wait a minute, we have rules, and those rules have to be complied with. And there is a large element of unfairness to the other side to be forced to gear up and start the whole process all over again and go through a retrial which was totally unnecessary if the Court’s rules have been complied with in the first place.”

The judge subsequently ordered Jelinek to pay \$50,000 in sanctions to compensate Trans–Action for its reasonable costs and fees incurred as a result of Jelinek’s misconduct during trial.

DISCUSSION

1. *Rule 2.30*

Among other contentions, Jelinek argues the trial judge had no power to sanction him under rule 2.30, because when it adopted the rule the Judicial Council meant only to consolidate existing statutory authority, not to provide independent authority for sanctions. Jelinek claims no statute authorizes the fee award against him. Certainly, no statutory authority was invoked either in Trans–Action’s post-trial sanctions motion or in the order imposing sanctions. Jelinek refers us to a 1984 Judicial Council staff report from the Advisory Committee on Calendar and Case Flow Management, which states: “The proposed rule attempts to consolidate, for all areas of case management, the sanction enforcing authority of the court for noncompliance with both statewide and local rules * * *.” We find the rule’s plain meaning inconsistent with this stated purpose, which raises a fundamental constitutional issue regarding the Council’s rulemaking authority.

As adopted effective January 1, 1985, rule 2.30 provided: “The failure of any person to comply with these rules, local rules, or order of the court, unless good cause is shown, or failure to participate in good faith in any conference those rules or an order of the court may require, is an unlawful interference with the proceedings of the court. The court may order the person at fault to pay the opposing party’s reasonable expenses and counsel fees and to reimburse or make payment to the county, may order an appropriate change in the calendar status of the action, in addition to any other sanction permitted by law.”

We agree with Jelinek's view of the intent behind the rule. A November 1993 report from the Civil and Small Claims Standing Advisory Committee also reflects the committee's belief that rule 2.30 simply incorporates the sanctions authority conferred by statute. * * *

Nevertheless, rule 2.30 as written is not limited to sanctions authorized by statute. The specification that rule 2.30 sanctions apply *in addition* to any other authorized sanctions clearly indicates no independent statutory authority is required. Sanctions statutes are mentioned only in the limited context of local rule violations. Altering rule 2.30 to conform with the Judicial Council's unexpressed intent, as Jelinek urges us to do, would violate the first rule of statutory construction. If there is no ambiguity in the language of a provision, we must presume the provision means what it says; we will not resort to more remote indicia of underlying intent. * * *

The broad sweep of rule 2.30 brings into question the Judicial Council's rulemaking authority, which is especially limited in areas where the Legislature has been active. Jelinek briefly raised this line of argument in his points and authorities below, but did not renew it in his appellate briefs. Whether rule 2.30 is inconsistent with statute is a question of law involving no disputed facts, and raises important policy issues concerning trial courts' authority to impose sanctions.⁹ * * *

2. *The Constitutional Requirement of Consistency with Statute*

The Judicial Council is empowered to "adopt rules for court administration, practice, and procedure, not inconsistent with statute." (Cal. Const., Art. VI, § 6 * * *.) It is settled that in order to comply with the constitutional requirement of consistency with statutory law, a rule of court must not conflict with the statutory intent.

* * *

Jelinek's conduct was potentially sanctionable under a number of statutes. We must examine those statutes to determine whether Jelinek's sanction under rule 2.30 is consistent with the Legislature's intent regarding fee awards as penalties for disobedience of a court order. First, however, we consider the California Supreme Court decision that spurred legislative activity on the subject of sanctions for attorney misconduct.

9. We realize there is little practical difference in this case between a holding that rule 2.30 is invalid to the extent it conflicts with the sanctions statutes, and a holding that the rule must be construed according to the Judicial Council's intent to consolidate statutory sanctioning authority. Either way, those interested in determining the rule's reach must pursue their research beyond its plain terms. However, there is a significant difference in principle between

divining an intent that deviates from the terms of an unambiguous rule and examining the scope of Judicial Council rulemaking authority in a particular area. The former is not a proper appellate court function and the latter is. In any event, the optimal solution to the problems caused by rule 2.30's overbreadth is amendment of the rule by the Judicial Council to incorporate the statutory terms and conditions for sanctions awards.

3. *Bauguess v. Paine*

In *Bauguess v. Paine* (1978) 22 Cal.3d 626, 150 Cal.Rptr. 461, 586 P.2d 942, the trial court imposed a fee award against counsel as a sanction for causing a mistrial, as did the judge in our case. * * *

[T]he *Bauguess* court decided the award could not be sustained under the trial court's inherent supervisory power. "It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute. If an attorney's conduct is disruptive of court processes or disrespectful of the court itself, there is ample power to punish the misconduct as contempt. Moreover, unlike the power advocated by respondent, a court's inherent power to punish contempt has been tempered by legislative enactment to provide procedural safeguards. . . . Absent such safeguards, serious due process problems would result were trial courts to use their inherent power, in lieu of the contempt power, to punish misconduct by awarding attorney's fees to an opposing party or counsel."

* * *

The Legislature enacted a variety of provisions governing sanctions in the wake of the *Bauguess* decision. The terms of the sanctions statutes clearly reflect the Legislature's intent to impose "procedural safeguards" on judicial sanctioning authority, consistent with the cautious approach taken in *Bauguess*. Rule 2.30 fails to conform with that legislative intent.

4. *Sections 128.5 and 128.7*

In 1981 the Legislature enacted section 128.5, declaring its intent was "to broaden the powers of trial courts to manage their calendars and provide for the expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized by the interpretation of the law in [*Bauguess*]." * * *

In 1985, the same year rule 2.30 took effect, [the] Legislature amended subdivision (a) of section 128.5 to read: "Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." * * * Subdivision [(e)] * * * provided: "The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section."

In 1994 the Legislature reconsidered section 128.5 and decided to adopt the approach of rule 11 of the Federal Rules of Civil Procedure. California's counterpart to federal rule 11 is section 128.7, under which sanctions are tied to pleadings and other filings, which must be signed. (§ 128.7, subd. (a).) * * * The court may impose sanctions for violations of section 128.7, subdivision (b) after notice and an opportunity to respond * * * . (§ 128.7, subd. (c).)

The party sought to be sanctioned has a 30-day grace period after service of the sanctions motion to withdraw the challenged filing.^a “If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney’s fees incurred in presenting or opposing the motion.” (§ 128.7, subd. (c)(1) * * *.) “A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated.” * * * (§ 128.7, subd. (d).)

Section 128.7 is clearly more restrictive than section 128.5 in certain respects. Its focus is on deterring the offending party, not compensating the offended party. Whereas section 128.5 broadly authorizes the recovery of attorney’s fees incurred as a result of an opponent’s bad-faith misconduct, section 128.7 directs judges to limit a fee award to “some or all” of the fees “incurred as a direct result of the violation,” and then only if the award is “warranted for effective deterrence.” The grace period provided by section 128.7 has no counterpart in section 128.5. Nor does section 128.7 specify that the sanctions it authorizes apply in addition to any other liability imposed by law, as does section 128.5.
* * *

* * *

5. *Section 177.5*

In 1982, a year after enacting section 128.5, the Legislature added section 177.5, which grants judicial officers the power to impose sanctions of up to \$1,500 for violation of lawful court orders without substantial justification, but specifies that “[t]his power does not apply to advocacy of counsel before the court.” * * * As noted above, the judge in this case first considered fining Jelinek under section 177.5, but changed his mind because Jelinek’s improper questioning of witnesses might have been considered “advocacy of counsel before the court.”

6. *Section 1218*

Section 1218, subdivision (a) provides that a person found guilty of contempt may be fined or imprisoned for up to five days, or both. * * * In 1994, the Legislature amended section 1218, subdivision (a) to provide: “In addition, a person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney’s fees and costs incurred by this party in connection with the contempt proceeding.” * * * In its supplemental brief, Trans-Action fails to address this provision of section 1218, subdivision (a), but it is crucial to our analysis, because it clearly reflects the Legislature’s intent regarding the award of attorney’s fees as sanctions for violating a court order.

^a. In 2002, this period was reduced from 30 to 21 days, consistent with FRCP 11.

7. *Rule 2.30 is Invalid Insofar as It Permits
Fee Awards Not Authorized by Statute*

Our review of the statutory authority governing sanctions, and particularly attorney's fees as sanctions, demonstrates the Legislature's care in establishing limits or conditions on judicial sanctioning authority. When the Legislature broadly authorized courts to award fees expended as a result of an adversary's tactics, it required findings that the tactics were in bad faith and were either frivolous or intended to cause unnecessary delay. (§ 128.5.) Section 128.7, governing frivolous filings, pointedly limits fee awards as sanctions to the amount necessary for effective deterrence, and provides a grace period to allow a party to avoid sanctions. (§ 128.7, subds. (c) and (d).) When the Legislature permitted courts to impose sanctions payable to the county for violating court orders, it limited the amount to \$1,500, required the violation to have been without good cause or substantial justification, and specified that sanctions could not be imposed for counsel's advocacy in court. (§ 177.5.) Furthermore, when the Legislature enacted fee sanctions as additional punishment for contemptuous violation of a court order, it did not allow the recovery of all fees resulting from the violation, but only those incurred in connection with the contempt proceeding itself. (§ 1218, subd. (a).) Rule 2.30 includes no such restrictions, except that the violation of a court order must have been without good cause. It broadly authorizes unlimited monetary sanctions, including fee awards, "in addition to any other sanction permitted by law." We conclude rule 2.30 conflicts with the legislative intent manifested in the sanctions statutes, to the extent the rule purports to allow sanctions inconsistent with the limits and conditions provided in an applicable statute.

The judge in this case did not lack statutory authority to curb Jelinek's trial tactics. Contempt is the primary and long-established remedy available to judges for punishing those who violate court orders. * * * [C]ase law abundantly confirms the courts' power to hold attorneys in contempt for the kind of misconduct displayed in this case—repeatedly and deliberately attempting to introduce matters ruled irrelevant in an attempt to gain an unfair advantage at trial. * * * The judge need not have waited until after trial to impose sanctions on Jelinek. Because the misconduct occurred in the judge's presence, summary punishment would have been proper under section 1211, after appropriate warnings.

Furthermore, counsel who violate court orders may face discipline beyond judicial sanctions. Wilful disobedience of a court order pertaining to counsel's professional duties is cause for disbarment or suspension. A judge may notify the State Bar if it appears a final contempt order involves grounds warranting disciplinary proceedings. And a judge must notify the State Bar any time counsel is ordered to pay sanctions of \$1,000 or more, except sanctions for failure to make discovery. * * * We are confident our holding will not result in any dearth of authority for punishing attorneys who violate court orders.

DISPOSITION

The sanctions order is reversed. The parties shall bear their own costs on appeal.

Notes and Questions

1. CRC 2.30 was amended in several respects following the *Trans-Action* decision. For example, CRC 2.30(b) now permits a court to impose monetary sanctions only after notice and an opportunity to be heard. Moreover, under CRC 2.30(e), the judge issuing sanctions must now provide a written order that includes details of the “conduct or circumstances justifying the order.” However, CRC 2.30(b) still provides that the monetary sanctions permitted under CRC 2.30 are “[i]n addition to any other sanctions permitted by law,” the very language that the *Trans-Action* court found troubling. Do the post-*Trans-Action* revisions to CRC 2.30 successfully address the concerns raised by the *Trans-Action* court?

2. Not every court has experienced the discomfort expressed in *Trans-Action* about the perceived inconsistency between CRC 2.30 and statutory enactments. See *Datig v. Dove Books, Inc.*, 73 Cal.App.4th 964, 982 n.17, 87 Cal.Rptr.2d 719, 732–733 n.17 (1999):

“Under [the] constitutional grant of power, it is well settled that the rules of practice and procedure adopted by the Judicial Council, including such rules as have been adopted under specific statutory mandate, and which do not transcend legislative enactments, have the force of positive law.” We are unaware of any legislative enactments which are contrary to rule 2.30’s provision for an award of attorney fees as a sanction for violation of the rules of court or local rules. Thus, the trial court here has the power, pursuant to rule 2.30 (as well as under Code Civ. Proc., § 575.2), to award plaintiff her attorney fees as sanctions for defense counsel’s violations of state-wide and/or local court rules.

How might *Datig* and *Trans-Action* be reconciled?

3. The California Supreme Court addressed the power of the Judicial Council to adopt rules pursuant to statutory authority in *Jevne v. Superior Court*, 35 Cal.4th 935, 28 Cal.Rptr.3d 685, 111 P.3d 954 (2005). Citing *Trans-Action*, the Court upheld the validity of rules governing ethics standards for neutral arbitrators in contractual arbitration proceedings because they “effectuate the enacting body’s intent.” See Chapter 5(A)(4). Although the rules were somewhat broader than the literal terms of the statute, they did not run afoul of the statutory authority because they reasonably implemented the statutory purpose. What criteria might a court use to determine whether a rule has strayed from the original statutory authority?

Local Rules. California's Constitution, Code of Civil Procedure, Rules of Court, and case law generally apply statewide. While these are the most comprehensive sources of California's procedural laws, they do not cover every conceivable situation. In a state as vast and diverse as California, some procedural matters may pose persistent problems in the superior courts of certain counties, but not in others. They may occur with enough frequency to warrant development of a local rule. See *Mann v. Cracchiolo*, 38 Cal.3d 18, 29, 210 Cal.Rptr. 762, 767, 694 P.2d 1134 (1985). Local rules provide written guidance to court officers and the litigants in a particular court.

Attorneys must familiarize themselves with the local rules of the courts in which they practice. The rules can have the same force of law as statutes and statewide Rules of Court. The foundation for California's local rules is Cal. Gov't Code § 68070(a), which states: "Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." CCP § 575.1(a) provides further authorization and a process by which a court may adopt local rules:

The presiding judge of each superior court may prepare, with the assistance of appropriate committees of the court, proposed local rules designed to facilitate the business of the court. * * * Rules prepared pursuant to this section shall be submitted for consideration to the judges of the court, and upon approval by a majority of the judges, the judges shall have the proposed rules published and submitted to the local bar for consideration and recommendations.

After receipt of the local bar's comments on proposed rules and adoption in their final form, these rules then become the "local" law. All local rules are sent to the Judicial Council, which in turn forwards copies to every county court and law library in the state. The rules are usually published in legal newspapers or special booklets. In addition, each California court has a website that contains information about that court's local rules and policies. Those sites can be accessed at: <www.courtinfo.ca.gov/rules/localrules.htm>. Attorneys should always review the special procedural requirements of any court where they will appear.

The statutory authority given to courts under CCP § 575.1 to adopt local rules is severely limited by CRC 3.20. Rule 3.20(a) precludes courts from enacting local rules purporting to govern a wide range of pretrial procedures:

The Judicial Council has preempted all local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers. No trial court * * * may enact or enforce any local rule concerning these fields. All local rules concerning these fields are null and void unless otherwise permitted or required by a statute or a rule in the California Rules of Court.

As a result of the preemptive effect of CRC 3.20, numerous pretrial procedures that formerly would have appeared in a county's set of local rules are now contained only in the CRC. For example, statewide rules govern motions for change of venue (CRC 3.1326), discovery motions (CRC 3.1020), and motions for summary judgment (CRC 3.1350).

While CRC 3.20(a) broadly impacts civil pretrial matters, CRC 3.20(b) contains several exceptions. These include trial and post-trial proceedings, as well as local case management rules adopted under the Trial Court Delay Reduction Act. Under the case management program described in Chapter 5(C), for example, a court's local rules, rather than the CRC, ordinarily determine several key litigation time limits, such as those governing service of the complaint.

CRC 3.20 has been blamed for the "gradual but steady erosion in the rule-making authority of the trial courts in California." Arnold H. Gold, *California Rules!: Important Local Rules of the Los Angeles Superior Court have been Trumped by California's New Rule of Court 981.1 [now CRC 3.20] and Court Unification*, L.A.Law. 36, 38 (Sept. 2000). One might wonder whether the Judicial Council has overstepped its authority in diminishing the broader local rulemaking power given to courts by the Legislature, as evidenced in CCP § 575.1 and Cal. Gov't Code § 68070(a). You will recall that the Court of Appeal in *Trans-Action* (see *supra*, at p. 15) raised this concern as to the Judicial Council's authority with respect to its enactment of CRC 2.30.

The court or presiding judge promulgating a local rule must avoid any conflict with other primary sources of California procedural law. As stated by the California Supreme Court:

* * * A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law. As provided in Government Code section 68070, subdivision (a): "Every court may make rules for its own government and the government of its officers *not inconsistent with law or with the rules adopted and prescribed by the Judicial Council.*" * * *

Reviewing courts have not hesitated to strike down local court rules or policies on the ground they are inconsistent with statute, with California Rules of Court promulgated by the Judicial Council, or with case law or constitutional law. Appellate decisions have invalidated local rules or restricted their application in many areas of affected litigation, including dissolution actions, litigation under the Trial Court Delay Reduction Act * * *, complex litigation, and general civil litigation. We also have disapproved rules and procedures adopted by the Courts of Appeal, as well as rules adopted by the Judicial Council.

Elkins v. Superior Court, 41 Cal.4th 1337, 1351–52, 63 Cal.Rptr.3d 483, 490–91, 163 P.3d 160 (2007) (holding family court local rule requiring parties in dissolution matters to present their case by declarations invalid because inconsistent with statute).

Local Policies and Practices. Local policies and practices are one of the most overlooked sources of procedure. Yet the violation of a local policy or practice may result in sanctions against the offending party or attorney.

In the absence of an express local court rule, individual superior courts or judges within them may resort to their inherent power to control judicial proceedings. *Litmon v. Superior Court*, 123 Cal.App.4th 1156, 21 Cal.Rptr.3d 21 (2004). This power is codified in several statutes. CCP § 128(3) permits a court to “provide for the orderly conduct of proceedings before it.” CCP § 187 gives a court “all the means necessary to carry it[s jurisdiction] into effect.” Cal. Gov’t Code § 68070(a) also permits a court to make rules for its own governance, as long as these rules are not inconsistent with statutes or the statewide CRC. This power may be exercised in a variety of ways. The presiding Superior Court judge, for example, may require adherence to certain procedures as a condition for lawyers to litigate matters in that county’s Superior Court or one of its branches. In addition to county- or branch-wide policies, an individual judge may adopt a policy that requires a particular procedure or practice in his or her courtroom. Local policies and practices are often temporary in nature and are frequently amended.

A local policy will be invalid unless it is adopted in accordance with the publication, comment and filing requirements specified by statute and the CRC. For example, a rule contained only in a memorandum of the supervising judge of a court branch does not satisfy the adoption requirement. See *Hall v. Superior Court*, 133 Cal.App.4th 908, 35 Cal. Rptr.3d 206 (2005).

A local policy or practice may take one of several forms. One type is a General Order regulating the procedures for particular matters in a Superior Court. The Order, however, will be invalid if it conflicts with statutory law. In the Superior Court of San Francisco, for example, a General Order permitting expedited summary judgment motions in asbestos litigation to be heard on 60 days notice improperly conflicted with the 75-day notice required under the statute governing summary judgment motions. See *Boyle v. CertainTeed Corp.*, 137 Cal.App.4th 645, 40 Cal.Rptr.3d 501 (2006).

Sometimes, judges within a court will develop a practice that over time becomes the standard that effectively governs appearances in that court. The practice might then become more formalized as a local policy and, subsequently, a local rule. For example, several of the judges of a county Juvenile Court had developed a practice whereby they appointed independent counsel for minors appearing in dependency proceedings. This long-standing practice assumed greater weight when it was adopted by the court as a “policy.” It ultimately became a formal local rule. The Court of Appeal upheld both the local rule and the underlying policy

because neither was “inconsistent with state legislation or court rule.” *Los Angeles County Department of Children and Family Services v. Superior Court*, 51 Cal.App.4th 1257, 1267, 59 Cal.Rptr.2d 613, 619 (1996).

Procedural manuals are another means of locally regulating court procedure. These relatively informal manuals are typically written and promulgated by judges in one court to provide guidance to practitioners in a comparatively narrow area. They also must be consistent with statute. For example, the Los Angeles County Superior Court adopted a *Judicial Arbitration Handbook*, which permitted a procedure for filing an arbitration award that differed from the procedure required by a California Government Code section. The Court of Appeal invalidated the procedure set forth in the Handbook, stating that “[a] local court rule or practice which is inconsistent with a statute enacted by the Legislature is invalid.” *Mentzer v. Hardoin*, 28 Cal.App.4th 1365, 1372, 34 Cal.Rptr.2d 214, 218 (1994).

California Code of Regulations. Administrative regulations comprise an important component of California primary authority. The California Code of Regulations, formerly known as the California Administrative Code, is a compilation of regulations enacted by administrative agencies, which are part of the executive branch of the state’s government. The Office of Administrative Law oversees the adoption of regulations. Some of these regulations govern procedural matters, such as those concerning judicial review of administrative decisions.

Statutes frequently delegate authority to administrative agencies to implement the terms of the statute. An administrative regulation or action that amends, enlarges, or impairs the scope of the statute, however, will be found void. *San Francisco Fire Fighters Local 798 v. City and County of San Francisco*, 38 Cal.4th 653, 42 Cal.Rptr.3d 868, 133 P.3d 1028 (2006).

2. SECONDARY AUTHORITIES

Legislative Histories. The written records of various state legislative sessions can be a useful resource for judicial interpretation of statutory changes. Cases of first impression are often decided on the basis of the legislative history accompanying the statute in question.

A trial or appellate court may take judicial notice of “cognizable” legislative history when the associated statutory language is ambiguous. Cognizable history “shed[s] light on the collegial view of the Legislature as a whole” and includes such items as committee reports, transcripts of committee hearings, and reports of the Legislative Analyst. Items that only reflect the statements of individual legislators, such as letters to particular members or the governor, are not considered cognizable legislative history. *Kaufman & Broad Communities, Inc. v. Performance*

Plastering, Inc., 133 Cal.App.4th 26, 30–31, 34 Cal.Rptr.3d 520, 523 (2005). See also *Bonanno v. Central Contra Costa Transit Authority*, 30 Cal.4th 139, 148, 132 Cal.Rptr.2d 341, 346, 65 P.3d 807 (2003) (comments of the California Law Revision Commission are persuasive evidence of the Legislature’s intent).

Opinions of the California Attorney General. The Attorney General of California provides legal opinions when requested by state, county or city agencies. These opinions assist agencies in resolving practical issues for which primary authorities do not provide adequate guidance. Many of these opinions are published. “Opinions of the Attorney General, while not binding, are entitled to great weight. In the absence of controlling authority, these opinions are persuasive since the Legislature is presumed to be cognizant of that construction of the statute . . . and that if it were a misstatement of the legislative intent, some corrective measure would have been adopted.” *Fagan v. Superior Court*, 111 Cal.App.4th 607, 618 n.10, 4 Cal.Rptr.3d 239, 248 n.10 (2003).

Scholarly Publications. Various scholarly treatises, encyclopedias, and legal periodicals are secondary but extremely valuable resources for information on California procedural law. They are considered “secondary” authorities because they contain an expert’s perspective on what the law is or should be, as opposed to being the law itself.

The ancillary nature of treatises and other secondary authorities does not at all mean that they are of limited persuasive value. Lawyers and judges routinely draw upon these authorities in their research and formulation of legal analysis. The preeminent example of a highly regarded analysis of California law is the body of work of Bernard E. Witkin, whose vast writings on California procedure, evidence, criminal law, and civil law have been cited in thousands of judicial opinions. His treatises have been described as “typically sage, accurate, and thoroughly succinct.” *People v. Funches*, 67 Cal.App.4th 240, 243, 78 Cal.Rptr.2d 882, 883 (1998). They have “captured and controlled the state law of California.” Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U.Cin.L.Rev. 581, 642 (2004).

In a tribute to Witkin following his death in 1995, a former California law school dean described Witkin’s extraordinary impact as follows:

Bernie’s monumental 33-volume Summary of California Law was quintessentially practical—summarizing, condensing and codifying virtually all of the state’s rules of law for the profession’s lawyers and judges. His genius, as described by Justice Norman Epstein, was his ability to synthesize, analyze and state the law in clear, concise terms. (Still, it should not be thought that Bernie

simply reported the law. In fact, he periodically made it as well. A prominent California litigator once told me that no matter how clear the judicial opinions themselves may have been on a particular point, Witkin's pronouncement as to what the courts had held—and what the rule was—represented the higher authority.)

Jesse H. Choper, In Memoriam: William B. Lockhart and Bernard E. Witkin, 47 Hastings L.J. 581, 581 (1996). Witkin's treatises are now revised and updated by the Witkin Foundation. They can be accessed on Westlaw.

The ubiquity and utility of scholarly works on California law, however, is not necessarily synonymous with precise descriptions of the law's actual content. As stated by some prominent legal research experts:

The narrative simplicity of some secondary sources may, however, carry disadvantages. Secondary sources which seek to provide clear and concise statements of law often oversimplify complicated concepts and describe as settled and fixed a body of law which is in fact unsettled and changing. Many text writers are more comfortable with order and certainty, while the law is in reality often disordered and uncertain. The researcher is cautioned to use secondary sources for what they can provide, but to be aware of these dangers.

Morris L. Cohen, Robert C. Berring & Kent C. Olsen, How to Find the Law 359 (9th ed.1989).

Practice Guides. Practice guides serve as yet another resource for practitioners, judges, law professors, and students. They provide busy lawyers and judges with convenient and current summaries of the procedural requirements of state and federal law. A comprehensive and well-organized practice guide for California procedural law is The Rutter Group's annually updated publication, Civil Procedure Before Trial, originally written by Judges Robert I. Weil and Ira A. Brown, Jr. (available on Westlaw).

C. ADDITIONAL RESEARCH RESOURCES

There are several additional resources for answering procedural questions beyond those included in this casebook. Citations in the book's text and notes are useful starting points. Another especially helpful bibliographic resource for researching the varied aspects of California procedural law is John K. Hanft, Legal Research in California (6th ed.2007). In addition, the State Bar of California publishes two practical resources discussing recent developments and topics of interest in California civil procedure. They are: California Litigation (published three times a year); and California Litigation Review (published annually).

D. THE CHOICE BETWEEN STATE AND FEDERAL COURT

The casebooks used in federal civil procedure courses occasionally address some of the differences between state and federal procedure. Unfortunately, there is a very limited body of literature on a question often asked in practice but rarely answered:

Why should I choose either state or federal court for my client?

Several non-tactical assumptions are necessary prerequisites for this choice. The first one is jurisdictional. The basic civil procedure course covered the key features of subject matter jurisdiction. Unlike the general jurisdiction exercised by state courts, federal courts have limited jurisdiction. There is concurrent subject matter jurisdiction in state and federal court if:

(1) the action arises under federal law, or is a diversity case where the amount in controversy exceeds \$75,000; and

(2) the particular case does not fall within the exclusive jurisdiction of either judicial system.

As an example of concurrent jurisdiction between the federal and California courts, imagine a claim alleging a violation of a federal civil rights statute. Even though this claim arises under federal law, it is presumed that the state and federal courts have concurrent jurisdiction where Congress is silent about which court system may enforce the statutory rights. See *Clafin v. Houseman*, 93 U.S. (3 Otto) 130, 23 L.Ed. 833 (1876).

Exclusive jurisdiction in the federal courts exists only when there is: (a) an express congressional divestment of concurrent jurisdiction; (b) unmistakable implication from the legislative history of the federal statute; or (c) a clear incompatibility between the relevant federal interests and state-court jurisdiction. See *Tafflin v. Levitt*, 493 U.S. 455, 459–60, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990) (concurrent state court jurisdiction over RICO claims). If Congress has spoken, by placing jurisdiction exclusively in the federal courts, state courts are divested of subject matter jurisdiction. See, e.g., *Totten v. Hill*, 154 Cal.App.4th 40, 64 Cal.Rptr.3d 357 (2007) (exclusive federal subject matter jurisdiction over ERISA claims for reimbursement).

Assuming concurrent subject matter jurisdiction over a case that could be heard in either judicial system, there are a number of tactical reasons to forum-shop. One of the best examples of such maneuvering can be deduced from the facts of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). As you may recall from your first procedure course, the plaintiffs purchased an Audi automobile in New York, ultimately intending to drive it to a new home in Arizona. Unfortunately, their trip was interrupted by the now-famous accident on an interstate highway in Oklahoma. The Supreme

Court decision dealt only with the preliminary personal jurisdiction issue of whether the suit was sustainable in an Oklahoma state court.

The inter-system tactical skirmish was rather subtle. It is obvious why the New York retail dealer, Seaway Volkswagen, Inc. (Seaway), and the New York regional distributor, World-Wide Volkswagen Corporation (WWVW), moved for a dismissal of their cases in the Oklahoma state trial court. Neither arguably had any forum-affiliated contacts with Oklahoma. But why did the German manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi), and the American importer, Volkswagen of America, Inc. (Volkswagen), concede personal jurisdiction? They, too, could have joined in the motion to have the action dismissed on the grounds of lack of personal jurisdiction. And why did the plaintiffs relentlessly pursue the comparatively small retailer and distributor all the way to the Supreme Court, when the other defendants—who were solvent and responsible for any design or manufacturing defect—were parties to the Oklahoma action?

Some answers are suggested by the procedural developments after the United States Supreme Court reversed the Oklahoma state court's assertion of personal jurisdiction. Seaway and WWVW were dismissed from the case for lack of personal jurisdiction. Removal had been impossible prior to the successful personal jurisdiction motion of the New York defendants because the plaintiffs remained domiciled in New York, given that they did not reach their intended Arizona domicile. The initial departure of WWVW and Seaway from this suit facilitated the exercise of federal subject matter jurisdiction because complete diversity now existed among the plaintiffs and defendants. Audi and Volkswagen had the option of remaining in the Oklahoma state court or removing this case to a federal court in Oklahoma. They decided to remove the case to the federal court.

One factor affecting this procedural smorgasbord could have been the traditional concern with jury bias favoring individual plaintiffs over nonresident defendant corporations. Another factor might have been the potential size of jury awards. It appears that jury verdicts were then smaller in the Oklahoma federal courts than in the particular county court. That may explain why the plaintiffs pursued the smaller (nondiverse) defendants all the way to the U.S. Supreme Court. Those defendants tried equally hard to get themselves dismissed during the personal jurisdiction segment of this litigation.

As the facts unfolded, the role that these tactical factors could have played was supported by the verdict. After removal, an Oklahoma federal jury rendered a verdict in favor of Audi and Volkswagen. See *Robinson v. Audi NSU Auto Union Aktiengesellschaft*, 739 F.2d 1481 (10th Cir. 1984). You can sense the tactical maneuvering regarding: (a) which defendants the plaintiffs should name in their suit; (b) whether to seek or try to prevent removal to federal court; and (c) the comparative size of jury awards in state and federal courts.

The saga of this case is detailed in Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 *Neb.L.Rev.* 1122 (1993). The article ends by mentioning a then-unresolved separate lawsuit filed by the plaintiffs against Audi in the district court in Oklahoma to vacate the underlying judgment for defendants on the ground of fraud upon the court. The district court, finding the evidence insufficient to support the claim of fraud, dismissed the action. Plaintiffs appealed. The Tenth Circuit affirmed the judgment. See *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259 (10th Cir.1995), cert. denied, 516 U.S. 1045, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996). In a companion case plaintiffs brought against Volkswagenwerk AG alleging fraud, products liability and other similar claims, the Tenth Circuit also upheld the district court's judgment dismissing plaintiffs' action. See *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268 (10th Cir.1995), cert. denied, 516 U.S. 1045, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996). Plaintiffs emerged from years of litigation focused primarily on procedural issues with no relief.

As you can see, analyzing the choices between the state and federal systems at the early stages of a lawsuit can help you develop a better sense of the tactical considerations that underscore the selection of forum for your client in California. For a deeper look at the significance of the differences between state and federal civil procedure, see William R. Slomanson, *California Civil Practice Handbook: The Choice Between State and Federal Courts* (1994).

E. THE EDIBLE WIDGETS HYPOTHETICAL

The following hypothetical highlights some of the important distinctions between state and federal procedure in California. There is a twofold purpose for considering this hypothetical at the outset of the course. The first is to expose you to the fact that many important state procedural rules were not addressed in your federal procedure course. The second is to provide a summary of some of the content of this state-oriented course. This hypothetical is designed to raise questions now and serve as a springboard for others addressed later in various sections of this casebook:

Edible Widgets and the Law Students

Pam and Paul are law students in California. One day, they decide to take a break from their studies. They go to Dan's Deli, a fast-food delicatessen near campus. The menu includes "Edible Widgets," an entrée that Pam and Paul cannot resist. After consuming their Edible Widgets, they return to the law library, begin to read the next assignment for their state civil procedure course, and become sick (from food poisoning). Pam's illness is short-lived and she recovers by the next day. Paul, however, is hospitalized for several days. He suffers residual pain and discomfort, which causes him to miss all of his classes for several weeks.

Pam and Paul consult Lee—the lawyer who is your boss. They want your law firm to determine whether they can recover damages for their illnesses. Lee assigns you to this case. After some preliminary investigation, you learn that Edible Widgets are served by several California restaurants and are made by an Oregon food processor named Widgecorp, Inc. You also learn that Dan’s Deli is incorporated in California, and that Dan is a California resident. Pam and Paul are both citizens of California.

1. One preliminary concern will be whether and how to sue Dan’s Deli, Dan, and Widgecorp in the same suit.

(a) Since this case does not arise under federal law, and there is no diversity of citizenship between the plaintiffs on the one hand and Dan and the Deli on the other, you will probably not recommend a federal forum. Lee might consider suing the defendants separately in order to gain access to a federal court on the basis of diversity between your clients and the Oregon defendant. You will likely advise Lee, however, that your clients should sue Dan’s Deli, Dan and Widgecorp in the same action. It would be too cumbersome and expensive to simultaneously sue Dan’s Deli and Dan in a California state court and Widgecorp in a federal court in California or Oregon.

(b) The other typical reason for suing in state court (even if concurrent jurisdiction were available) is the comparative familiarity of many California lawyers with state court proceedings. You have thus made your initial recommendation that this case should be filed in a California state court.

2. The next decision will be to evaluate issues of subject matter and personal jurisdiction, and to choose the particular location in which to file the suit. How will Pam and Paul’s action be classified for subject matter jurisdiction purposes? Will a California court have personal jurisdiction over the out-of-state defendant, Widgecorp? Among the 58 counties in California, which county or counties will be proper for venue purposes? And how should Lee respond if Widgecorp files a motion contending that the action should be heard in Oregon because California is an inconvenient forum?

(a) In your initial procedure course, you concentrated on the subject matter jurisdiction of the federal courts. In California, subject matter jurisdiction refers to whether a case will be classified as a limited civil case or an unlimited civil case. You will first examine the CCP to determine the requirements for these classifications. You will then evaluate the amount in controversy of Pam and Paul’s cases and ascertain whether the court will aggregate Pam’s and Paul’s claims.

(b) Since you decided to recommend joining the Oregon defendant in the California suit, you will have to assess the application of personal jurisdiction law to Widgecorp. The manner in which process is served on all defendants must meet California statutory and federal due process requirements.

(c) You will examine the California venue statutes to determine where Dan's Deli and Dan can be sued, and in which counties in the state Lee can file the suit against the nonresident Oregon food processor.

(d) You will advise Lee of the factors the court considers on a state forum non conveniens motion and the impact of Pam and Paul's California residency on the likelihood of the court granting Widgecorp's motion.

3. There are a number of pleading considerations that will affect the progress of this California case. In your first procedure course, you probably studied the difference between state "fact" or "code" pleading and federal "notice" pleading. Now you will have to apply a host of additional California pleading rules. For example:

(a) It may amount to malpractice to omit fictitious "Doe" defendants as potential codefendants of Dan's Deli, Dan and Widgecorp. Such fictitious parties are generally banned from federal pleadings, but they are a routine feature of California pleading practice. You will need to understand the mechanics of California's Doe practice and the circumstances under which this device permits "new" defendants to be named after the statute of limitations has otherwise expired.

(b) You must determine whether Pam and Paul are required to plead the amount of their damages in their California personal injury action.

(c) The defendants may wish to expand the case with cross-complaints that raise issues or bring in parties beyond those included in Pam and Paul's original complaint. California practice has adopted the single term "cross-complaint" to refer to each of the three types of cross-pleadings—counterclaims, cross-claims, and third-party complaints—used to widen the scope of litigation in federal court.

(d) You should be prepared for pleadings or motions attacking your complaint. They may contain different terminology than used in the federal motion practice emphasized in your first civil procedure course. Under California practice, for example, the functional equivalent of the FRCP 12(b)(6) motion to dismiss is a pleading known as a general demurrer. The CCP also authorizes several categories of "special demurrers," which have no federal equivalents. If either plaintiff's action is classified as a limited civil case, you must determine what restrictions may exist on the types of motions and pleadings that can be filed in response to his or her complaint.

4. Pam and Paul must comply with statutory directives requiring the diligent prosecution of their cases. The CCP generally provides specific time frames within which plaintiffs must serve defendants with process and must bring their case to trial. A case that is subject to case management rules under the Trial Court Delay Reduction Act must be served and brought to trial within a much shorter time frame than under the diligent prosecution statutes. There are no express grounds within the FRCP for federal dismissals for lack of diligent prosecution once the complaint has been served in a timely fashion.

5. Once the initial pleading is filed, the next question is whether one or both of the plaintiffs' claims are subject to compulsory judicial arbitration or court-annexed mediation under California's alternative dispute resolution system.

(a) Unlike the general practice in most federal districts, many California cases are automatically subject to judicial arbitration. The court will determine whether the amount in controversy in Pam's and Paul's action requires referral to judicial arbitration.

(b) There is also a question concerning whether under California's judicial arbitration system your clients' right to a jury under the Constitution of California is adequately protected. Will your clients lose their right to jury trial if they undergo judicial arbitration?

(c) In the California counties that have enacted the Civil Action Mediation Program, the court may order Pam and Paul's action to be submitted to mediation in an attempt to lead the parties toward a voluntary resolution of their dispute. You will need to research whether the Superior Court in the county in which Pam and Paul's complaint is filed has a court-required or voluntary mediation program.

6. After the Edible Widgets lawsuit is filed and answered, Lee will likely spend substantial time on discovery. A few examples will illustrate some of the issues that might arise during the discovery process.

(a) In contrast to the federal discovery rules, California litigants are not required to make automatic initial disclosures to other parties in the absence of a formal discovery request. You must determine the proper methods by which to obtain discovery or production of information in Pam and Paul's state civil litigation.

(b) Under both the FRCP and the CCP, there are express but distinct limitations on the number of interrogatories and other discovery devices that may be served. California imposes some additional restrictions on the form in which various discovery methods must be prepared. If Paul's case is an unlimited civil case and Pam's is a limited civil case, their two cases might be subject to different limitations on the number of interrogatories and depositions.

(c) In California practice, must discovery responses be supplemented automatically when the response is—or becomes—inaccurate or outdated? Under the federal rules, certain types of information must be revised by the answering party, without the need for a subsequent request to update. You must ascertain whether Pam and Paul are entitled to automatic updates of the defendants' previous answers, or whether they must submit a new discovery request to ensure the continuing accuracy of those earlier responses.

(d) Lee must understand the legal protection afforded to the files generated during the pendency of this suit. In particular, are office memoranda, particularly those that contain Lee's impressions about the various aspects of this case, shielded from discovery to a greater extent in California than under federal law?

7. There are a number of other pretrial procedures that may significantly affect the direction and outcome of Pam and Paul's litigation.

(a) While California summary judgment motions largely conform to federal procedure, California's summary judgment statute is far more detailed and contains many more requirements than its federal rule counterpart. Lee must be familiar with California's relatively lengthy notice period for summary judgment motions, as well as the types of moving and opposition papers that must be filed in state court.

(b) Formal written offers of judgment are made for the purpose of shifting the costs of litigation to the other party when their judgments are less than the amount offered to them prior to trial. Lee may wish to make such an offer to the Edible Widgets defendants, on behalf of plaintiffs Pam and Paul. While only the party defending an action can make such an offer in federal court, California law encourages all parties to use this device for settling cases.

8. If the Edible Widgets case is presented to a jury, Lee will have a different experience in state court than in federal court. Voir dire is controlled primarily by the judge in the federal system, but lawyers in California civil actions take a more active role and have more freedom to question prospective jurors. The two judicial systems also differ as to whether a unanimous verdict is required.

9. After the trial is completed, one of the parties may wish to bring a motion for new trial on one or more of the many state statutory grounds. The judge, for example, may believe that Pam or Paul did not receive enough damages from the jury. A California judge has authority to grant a conditional new trial motion on this ground, whereas a federal judge may not do so.

10. Lee might determine that appellate review is needed to protect Pam's and Paul's rights during the pretrial and trial phases of the lawsuit. Lee will have to decide whether to bring an appeal only after the court has entered a final judgment in the case, or whether a particular trial court ruling meets the criteria for immediate review through an appeal or via a petition for an extraordinary writ.

(a) In your basic civil procedure course, you might have heard your professor refer to the "Alice-in-Wonderland" nature of federal appellate jurisdiction. This type of jurisdiction consists primarily of case law analysis of the "finality" of pre-judgment orders in the federal system. California, however, has a detailed statutory scheme for determining which specific interlocutory judgments and orders are appealable. If Lee wishes to appeal a judge's order prior to final judgment, it will be easier to determine the appealability of such orders in California than if the same case were pending in a California federal court.

(b) If the trial court renders a nonappealable order or judgment, Lee must decide whether to pursue review by a petition for an extraordinary writ. Civil writ applications are filed more frequently in California

appellate courts than in the federal system. A writ petition may be the exclusive means of appellate review for certain California trial court rulings.

11. Another potential procedural issue is the effect of a prior judgment. For example, suppose that several years after their food poisoning suit became final, Pam and Paul discovered that bacteria in the Edible Widgets also affected their reproductive systems, rendering them sterile. Under California procedure, it might be possible for Pam and Paul to sue the defendants a second time—if Lee can establish the existence of distinct legal rights that were adversely affected by similar conduct of the defendants. In federal actions involving federal questions and in most states other than California, Pam and Paul might not be able to bring a subsequent suit for their newly-discovered injuries.

This hypothetical is a snapshot of California practice and raises many intriguing state/federal procedural differences. It will reappear in the context of various notes in the ensuing chapters to facilitate your understanding of some of the major themes presented in this casebook.