

**CALIFORNIA FEDERAL PROCEDURAL  
CONTRAST: A PROPOSAL**

**By WILLIAM R. SLOMANSON**

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## California-Federal Procedural Contrast: A Proposal

William R. Slomanson<sup>1</sup>

*Abstract.* The American legal landscape is strewn with procedural reform efforts. There have been innumerable revisions to the FRCP, and to the nation's state procedural rules, in the eighty years since promulgation of the FRCP. The resulting procedural diversity has been both valued and vilified. Various critics have disavowed the efficacy of procedural reform efforts. They have identified inherent anti-uniformity factors that should be embraced.

A consequence of the above patchwork of historical imitations and amendments is the countless procedural differences between state and federal courts across the nation. Most practicing lawyers and judges are far too busy to focus on reforming the system where they have learned to function. There is precious little time to devote to individual consideration of whether another judicial system offers a better solution to the practice at hand.

On their behalf, there are numerous state and federal entities—perhaps no more so than in California—that propose intra-system or single-subject changes from time to time. But there is no “go to” institution with the resources to routinely canvass differences between state and federal procedure within each state. There is no evolving national database that tracks this genre of state and federal variances.

This article proposes a grass roots approach that would initiate and sustain more informed procedural reform. The initial phase would identify the genre of differences between state and federal courts in the majority of states (which are no longer Federal Rules replicas). Each study would likewise spotlight major procedural differences between the two judicial systems in other states. The author offers some perhaps parochial conclusions about *which* specific state or federal procedure is superior. But the core purpose of this proposal is to invite one or more of the relevant governmental entities, or a nongovernmental organization, to commission law school faculty members, or other interested parties, to prepare like studies outside of California.

This first such comparison may serve as a menu for: processing more meaningful access to multi-jurisdictional procedural differences; categorizing and publicizing those differences; and generating a low cost, highly informative, methodology that could lead to the next milestone in American procedural reform.

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<sup>1</sup> Professor Emeritus and Adjunct Professor of Law, Thomas Jefferson School of Law. The author thanks the following individuals for their valuable insight on various issues: Hon. Anthony J. Battaglia, United States District Court, San Diego, California; Hon. Joel Wohlfeil, San Diego County Superior Court; and Jeremy Robinson, Partner, Casey Gerry Reed & Schenk, San Diego, California. Gracias a mi esposa por su apoyo durante la escritura de mi Última Conferencia.

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I. PROCEDURAL REFORM

The 1938 Federal Rules of Civil Procedure (FRCP) dashed the pre-existing symmetry whereby federal courts followed the rules of procedure of the state in which they were located.<sup>2</sup> The FRCP initially spawned a role reversal, where by a number of states tracked the Federal Rules.<sup>3</sup> The FRCP trailblazers envisioned a symmetry whereby “[r]eplication by states of the Federal Rules would streamline both the teaching and the practice of procedure. By mastering one set of

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<sup>2</sup> FEDERAL COURTS STUDY COMMITTEE, 1 WORKING PAPERS AND SUBCOMM. REPORTS, at 21 (1990) (except for equity and admiralty cases). Federal courts still invoke state procedures as gap fillers. *See, e.g.*, “Congress ‘quite clearly instructs [federal courts] to refer to state statutes’ when federal law provides no rule of decision for actions brought under [42 U.S.C.] § 1983.” Board of Regents v. Tomanio, 446 U.S. 478, 484, 100 S. Ct. 1790, 1795 (1980).

<sup>3</sup> State endorsement of the FRCP was heartily proclaimed, after two decades of FRCP practice: “[T]he trend of state adoption is proceeding apace. Now a quarter of the states are followers; half have adopted substantial portions of the federal system; and hardly a local jurisdiction remains unaffected.” Charles E. Clark, *The Federal Rules of Civil Procedure 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, at 435 (1958).

procedural rules nascent lawyers would be prepared to practice in [both] federal and state courts. But most states did not replicate the Federal Rules.”<sup>4</sup>

Uniformity was the goal. Divergence was the result. There have been innumerable revisions to the FRCP—and the nation’s state procedural rules—in the eighty years since promulgation of the FRCP. In the critical arena of discovery, for example, inter-generational overhauls bred major changes in California’s two judicial systems.<sup>5</sup>

The American legal landscape is strewn with procedural reform efforts. Numerous individuals and entities grappled with wide-ranging missions including: creating New York’s 1848 Field Code model for other states;<sup>6</sup> offering Cannons of procedural reform shortly after promulgation of the FRCP;<sup>7</sup> depicting the history of and evolving best practices for procedural reform;<sup>8</sup> addressing what it means to “implement procedural change;”<sup>9</sup> proposing enhanced cooperation between Congress and the federal judiciary;<sup>10</sup> scrutinizing the recurring jurisdictional divide between state and federal courts;<sup>11</sup> responding to the severe caseload crisis in California’s state and federal courts;<sup>12</sup> and Congress’s 1988 Federal Courts Study Act.<sup>13</sup>

But various critics have disavowed the efficacy of procedural reform efforts, including one who in 2003 classified half the states as Federal

<sup>4</sup> Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 504 (2016).

<sup>5</sup> In a telling illustration:

One major drawback in the original [1956] Discovery Act stemmed from California’s belated adoption of the then-current federal system. The federal discovery provisions were the products of an earlier generation’s thinking. They had been formulated in the years leading up to the 1938 adoption of the Federal Rules of Civil Procedure. Even as California was basing its system on this foundation, the federal courts themselves were beginning to rethink their own discovery provisions. These efforts culminated in 1970 with the adoption of extensive amendments overhauling the federal discovery system.

James E. Hogan & Gregory S. Weber, 1 CALIFORNIA CIVIL DISCOVERY § 1.3 at 1–6 (2d ed. 2005).

<sup>6</sup> Robert Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 3 (1989).

<sup>7</sup> Judge Leon R. Yankwich, *Jurisdiction and Procedure of the Federal District Courts Compared with California Procedure*, 1 F. R. D. 453, 463 (1941).

<sup>8</sup> Edgar B. Tolman, *Historical Beginnings of [the] Procedural Reform Movement in This Country—Principles to be Observed in Making Rules*, 22 AM. BAR ASS’N J. 783 (1936) (crediting Roscoe Pound’s 1906 speech at the A. B. A. annual meeting for reenergizing the nation’s procedural reform movement).

<sup>9</sup> Stephan B. Burbank, *Implementing Procedural Change: Who, How, Why, and When—*, 49 ALABAMA L. REV. 221 (1997).

<sup>10</sup> BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989).

<sup>11</sup> AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968).

<sup>12</sup> John B. Oakley, *The Future Relationship of California’s State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233 (1993).

<sup>13</sup> Judicial Improvements and Access to Justice Act, Pub. Law No. 100-702, 102 Stat. 4644 (1988). See generally David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F. R. D. 399 (1989).

Rules Replicas.<sup>14</sup> One might thus conclude that “[t]he history of procedure is a series of attempts to solve the problems created by the preceding generation’s procedural reforms.”<sup>15</sup>

Perhaps the most provocative skeptic, although not a critic of procedural reform, is Professor Richard Marcus—Special Reporter to the U.S. Judicial Conference’s Advisory Committee on Civil Rules since 1996. He astutely identified various *anti*-uniformity factors including: the role of judicial independence, which does not necessarily toe the line set by central authorities; the degree to which uniformity undercuts judicial discretion; the need to distinguish between metropolitan and rural judicial districts when assessing the operation of procedural rules; contemporary state divergence from the Federal Rules and from each other; whether national uniformity in state practice is in fact a virtue; and whether the value of simplicity is over-rated.<sup>16</sup>

A consequence of the above patchwork of historical imitations and amendments is the innumerable procedural differences between state and federal courts across the nation. Perhaps the most intriguing by-product is the mixed perceptions about the intrinsic value of these systemic differences. Many lawyers, who focus on either state or federal practice, would prefer to practice under one procedural system. But others robustly embrace the value of procedural contrast.<sup>17</sup>

<sup>14</sup> John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L. J. 354, 356 (2003). His survey features exhaustive detail about each state’s procedural posture vis-à-vis the FRCP. Professor Oakley therein chronicles the evolving “disinclination of states to conform to the ever-changing contours of the FRCP.” *Id.* at 355. He concludes that: “Federal influence on state procedure . . . remains substantial, and important. [But i]t may . . . be too soon to conclude that there are no federal replicas left among the states.” *Id.* at 383-384.

<sup>15</sup> Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

<sup>16</sup> Richard Marcus, *Confessions of a Federal “Bureaucrat:” The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 116-119 (2007) hereinafter *Confessions of a Federal Bureaucrat*.

<sup>17</sup> Contrast *objectionable*:

Many are upset about the diversity of procedural regimes that exists today. In federal courts, local rules and individual judicial practices present a challenge to lawyers, and perhaps a reason why they need local counsel. No longer are state courts—half of which fell in line by adopting the Federal Rules a half-century ago—still toeing the Federal Rules’ line. So conformity to federal practice, perhaps a hoped-for result of the adoption of the Rules . . . has receded.

*Id.* 116. Contrast *valued*: As soundly articulated by former U.S. Supreme Court justice O’Connor:

While uniformity is a necessary and desirable goal, its immediate achievement is not always possible. Nor is immediate action necessarily desirable. Part of the beauty of our federalism is the diversity of viewpoint it brings to bear on legal problems. State court judges at times may bring a different set of experiences to bear on a problem than might a federal court judge; the lessons that can be learned from being a judge in one part of our country will not be immediately obvious to those who have always lived, practiced, and judged in another part. Under our system, the . . . countless trial and intermediate appellate courts may bring diverse experiences to bear on questions that . . . they must answer in common.

Remarks by Hon. Sandra Day O’Connor, Associate Justice of the United States Supreme Court, in John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F. R. D. 233 242 (1993) hereinafter O’Connor. Contrast *neutrality*:

The systemic differences between state and federal courts, as [well as] between states, create a procedural laboratory. Various judicial councils and other

Practicing lawyers and judges are far too busy to focus on changing the system within which they have learned to function. Managing demanding court dockets and law practices typically preclude individual consideration of whether another judicial system offers a better solution to the practice at hand. On their behalf, there are numerous state and federal entities that propose intra-system changes from time to time. There is no “go to” entity, however, that routinely canvasses differences between state and federal procedure in each state. So there is no evolving national database that tracks this genre of state and federal procedural differences within one state. That lapse yields, at a minimum: diverse practices under two or more sets of rules;<sup>18</sup> federal jurisprudence requiring intricate assessments of inter-system governing law;<sup>19</sup> and the nose-of-the-beholder stench or bouquet of forum shopping.<sup>20</sup>

This article thus pursues the following three objectives. *First*, it spotlights twenty state-federal procedural differences between California’s two judicial systems (and a dozen more in the associated subtexts). This procedural smorgasbord provides a one-stop-shopping tour of prominent differences between state and federal practice in California. It is seemingly limited to the comparison of the two procedural systems in one state. But similar differences lurk beneath the litigation surface throughout the nation.<sup>21</sup>

*Second*, it offers some conclusions about which procedure is preferable for some of those differences. But its author acknowledges that

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administrative bodies [ostensibly] observe what the others are doing, as a means of resolving how best to implement each system’s procedural philosophy. Academic assessments are also useful resources for avoiding the natural tendency to think that one’s own system is the best.

DAVID I. LEVINE, WILLIAM R. SLOMANSON & ROCHELLE J. SHAPPELL, *CASES AND MATERIALS ON CALIFORNIA CIVIL PROCEDURE* 332 (5th ed. 2015) hereinafter *CASES AND MATERIALS*.

<sup>18</sup> See footnote quote in *Confessions of a Federal Bureaucrat*, *supra* note 17.

<sup>19</sup> See *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938) hereinafter *Erie*, regarding state law in federal courts. Given space limitations, attempting to address when a state procedure should be applied in federal courts would overtake quantitative coverage of the procedural differences that can be surveyed in one article. To launch that governing law journey, one can instead depart via CHARLES ALAN WRIGHT & MARY KAY KANE, *The Law Applied by the Federal Courts*, in *LAW OF FEDERAL COURTS* § 55-60, 338-381 (8th ed. 2017) hereinafter *LAW OF FEDERAL COURTS*.

<sup>20</sup> U.S. Supreme Court Justice Marshall once scolded counsel for manipulating corporate domicile to achieve a tactical advantage. He likened that practice to the “odor of impermissible forum shopping which pervades this case.” *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 24, 107 S. Ct. 1519, 1533 (1987) (Marshall, J. concurring) hereinafter *Odor*. This perception raises the question of the degree to which the litigants should influence the allocation of cases to the respective court systems. See Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S. C. L. Rev. 961 (1995).

<sup>21</sup> As articulated in the leading federal practice treatise:

[I]n choosing between a particular state court and a particular federal court . . . there are still differences that . . . may attract a litigant to one court or another. . . . The reputation of the judges in the two courts, or folklore about the relative liberality or parsimony of juries in the two systems, may tip the balance one way or the other. . . . [¶] The books are filled with cases involving devices by which a particular party sought to create diversity, and thus get to federal court, or to prevent diversity, and thus keep the case in state court.

CHARLES ALAN WRIGHT & MARY KAY KANE, 20 *FED. PRAC. & PROC. DESKBOOK* § 33 ¶1-2 (Apr. 2018 Update).

reforms for which one advocates may “tend to dominate his viewpoint to the exclusion of competing considerations.”<sup>22</sup>

*Third*, the Conclusion proposes a national project that would: more clearly identify the corpus for pursuing American procedural reform;<sup>23</sup> expand upon this article’s core as the springboard for like contrasts in other states; and be monitored by one or more of the therein listed entities.

There are a half-dozen intended limitations to this article. The author: (a) narrows this analysis to some, but not all, of the prominent differences between state and federal procedure; (b) acknowledges, but does not address, the valuable role of federalism—whereby the substantive laws of the nation’s state and federal systems may diverge;<sup>24</sup> (c) avoids *Erie*-related governing law issues, in a project designed to aid judges, practitioners, and rules-makers—not just fellow academicians;<sup>25</sup> (d) avoids carved-in-stone differences, which are not likely to change;<sup>26</sup> and (e) focuses on general rules, rather than attempting a book-length discourse on exceptions.

This article’s sequential section numbering (1.-20.) is not a comparative ranking. It is the organizational scaffolding surrounding the core progression of a civil law suit. Those subsections are introduced by a succinct state versus federal restatement of the comparative essentials.

## II. JURISDICTION

### 1. Amount in Controversy and Diversity Abolition

*State*: The upper jurisdictional limits of the California Superior Court divisions are \$10,000 (Small Claims), \$25,000 (Limited Case), and over \$25,000 (Unlimited Case).<sup>27</sup> *Federal*: The minimum jurisdictional amount for Diversity Jurisdiction (DJ) cases is \$75,000+. There is no minimum amount for Federal Question (FQ) cases.<sup>28</sup>

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<sup>22</sup> Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L. J. 914, at 914 (1976).

<sup>23</sup> As advocated by former U.S. Supreme Court Chief Justice William Rehnquist:

We need to view our systems as one resource and use that resource as wisely and efficiently as we can. Whether it be cooperating on the mega-case, exchanging information, sharing facilities, or joint planning for the future, we are at a stage where circumstances require a closer relationship among our systems.

William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1658 (1992).

<sup>24</sup> See generally, Christopher B. Power, Robert M. Stonestreet & Babst Calland, *Evolution of Federalism Jurisprudence*, 36 Energy & Min. L. Found. § 6.03 (2015) (analyzing the six discrete federalism periods from the 18th century to the present).

<sup>25</sup> For related details, see LAW OF FEDERAL COURTS, *supra* note 19.

<sup>26</sup> *E.g.*, state judges standing for periodic re-election, while federal judges serve for life; the ability of federal (but not state) courts to transfer cases across state lines; and federal judicial control of state punitive damage awards via *State Farm Mutual Auto. Insur. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).

<sup>27</sup> Small: CAL. CIV. PROC. CODE § 116.221 (West 2011); Limited: § 86 (West 2013); and Unlimited: § 88 (West 1999).

<sup>28</sup> DJ: 28 U.S. C. § 1332(a). FQ: 28 U.S. C. § 1331.

Congress has shielded the federal courts from becoming small claims tribunals since 1789. It then established—and later upwardly revised—a minimum amount requirement for both DJ and FQ cases,<sup>29</sup> although not required to do so.<sup>30</sup> But Congress seemingly increased the federal caseload in 1980. It removed the minimum amount in controversy provision from the FQ statute. But “[t]here was much less to this than met the eye.”<sup>31</sup> During the prior 105 years, many new federal laws were germinated by the 1875 FQ enabling statute. Unlike DJ cases, they did not require a minimum amount jurisdictional element.<sup>32</sup>

There have been multiple calls for the partial or complete abolition of federal DJ.<sup>33</sup> Abolition “Plan B” would be withdrawal of 28 U.S. C. § 1332—the enabling statute which triggered this segment of the Constitution’s Article III, § 2 judicial power. But the American Bar Association’s most recent defense of DJ (in 2016, purporting to represent its 400,000 members) was that: “It has long been the ABA’s position that federal diversity jurisdiction serves many useful and important purposes and that it should not be abolished. . . .”<sup>34</sup> Federal judges might appreciate the lighter caseload.<sup>35</sup> It was vividly characterized in a congressional committee hearing as “shifting the manure pile” from federal courts to the state courts.<sup>36</sup> But practitioners would lose the cherished ability to

<sup>29</sup> The minimum amount in the first Judiciary Act of 1789 “fixed this sum at \$500, and it was increased to \$2,000 in 1887, \$3,000 in 1911, \$10,000 in 1958, \$50,000 in 1988, and to the present figure of \$75,000 in 1996.” LAW OF FEDERAL COURTS, *supra* note 19, § 32 at 173. The politics of including a minimum amount are evinced by “The \$500 amount-in-controversy limitation . . . prevent[ing] many cases of small amount, thus presumptively those concerning poor people, from being brought into federal court, and it also would exclude a huge number of the British debt claims.” Wythe Holt, “*To Establish Justice*”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L. J. 1421, 1487-1488 (1989).

<sup>30</sup> U.S. Const. art. III, § 2 provides for both types of Article III jurisdiction; but not an amount. The latter was introduced by the subsequent DJ and FQ statutes.

<sup>31</sup> LAW OF FEDERAL COURTS, *supra* note 19, at 174.

<sup>32</sup> Numerous examples are set forth in LAW OF FEDERAL COURTS, *supra* note 19, at 174-175, n.13.

<sup>33</sup> Partial abolition: *e.g.*, U.S. District Court Judge Brian M. Cogan, *A Modest Proposal for the Reduction of the Size of the Federal Judiciary by Two-Thirds*, 18 FEDERALIST SOC’Y REV. 168 (2017). A variant of partial abolition would be a congressional action—overruling two centuries of precedent—shifting from complete to minimal diversity. Competing views are available in *Exploring Federal Diversity Jurisdiction*, H. Comm. On the Judiciary, 114 Cong., 1-46 (2016). Complete abolition: *e.g.*, U.S. Supreme Court Justice Jackson’s oft-cited plea: “[t]he greatest contribution that Congress could make to the orderly administration of justice . . . would be to abolish the jurisdiction . . . which is based solely on . . . the litigants [being] . . . citizens of different states.” ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 55 (Harvard Univ. Press, 1955).

<sup>34</sup> Letter from Thomas Susman, A.B.A. Director of Governmental Affairs, to Trent Franks and Steve Cohen of the House Subcommittee on the Constitution and Civil Justice (Sept. 16, 2016).

<sup>35</sup> DJ cases have long been a soft target for reformers. The recurring arguments include that these state-based cases typically account for one-fourth to one-fifth of the federal trial court docket, and at least ten percent of the federal judicial budget. Docket factor: LAW OF FEDERAL COURTS, *supra* note 19, § 23 at 135. Budget factor: U.S. Court of Appeals for the Fifth Circuit Chief Judge Carl E. Stewart, *Diversity Jurisdiction: A Storied Past, A Flexible Future*, 63 LOY. L. REV. 207, 218 (2017).

<sup>36</sup> Prominent Phoenix practitioner John P. Frank’s description—if Congress were to abolish DJ, thus effectively transferring DJ cases to the state courts to reduce federal court delay—was that “[m]anure is not made more attractive by moving it from one pile to another.” Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 95th Cong., 1st Sess., 71-72 (1977).



choose between forums.<sup>37</sup>

The state-federal option has spawned various proposals related to the abolition of DJ. This choice is derived from the general rule of concurrent subject matter jurisdiction—whereby numerous FQ and DJ cases can be (and are) filed in either court system.<sup>38</sup> That procedural flexibility, in turn, facilitates what U.S. Supreme Court Justice Thurgood Marshall once characterized as the odor of impermissible forum shopping.<sup>39</sup> But the failure to select an advantageous forum may constitute malpractice. This choice of forum also furthers legitimate goals of the American and international legal systems.<sup>40</sup>

## 2. Challenging Personal Jurisdiction

*State:* Defendants must attack personal jurisdiction (PJ) via a first appearance Motion to Quash. Otherwise, they waive the PJ defense. If denied, defendants must seek writ review within ten-twenty days of served notice of the denial.<sup>41</sup> *Federal:* Rather than require a first appearance motion, defendants may plead the affirmative defense of lack of PJ in the answer. Defendants may thus bring a post-answer motion attacking PJ any time before trial.<sup>42</sup> When denied, federal defendants normally cannot obtain appellate review until after final judgment.<sup>43</sup>

With a view toward tracking federal practice, a 2002 legislative amendment authorized state court defendants to simultaneously file a

<sup>37</sup> As vigorously asserted in a U.S. Senate committee hearing:

Mr. Frank: The proposal to abolish diversity jurisdiction is, from the standpoint of the bar, approximately as popular as tuberculosis in a hospital. The opposition is absolutely overwhelming.

[¶] Senator Deconcini: . . . Lawyers are opposed to the elimination of diversity because they want the choice of forum; is that right—

Mr. Frank: You bet. . . . [¶] We make no apologies [sic] for wanting the option [for our clients].

Hearings on Proposals Concerning Diversity of Citizenship Jurisdiction Before the Senate Subcommittee on Improvement in Judicial Machinery, 95th Cong., 2d Sess., 28, 40-41 (1978). The resolution of DJ cases by federal (rather than state) courts was characterized by the U.S. Supreme Court as providing advantages including “[a]rticle III judges [being] less exposed to local pressures than their state court counterparts, juries [being] selected from wider geographical areas, review in appellate courts reflecting a multistate perspective, and more effective review by this Court.” *United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 150, 86 S. Ct. 272, 275 (1965).

<sup>38</sup> As described by the Supreme Court in *Taffin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 795 (1990):

[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.

<sup>39</sup> Odor, *supra* note 20, at 20, 1533.

<sup>40</sup> Malpractice: Friedrich K. Junger, *Forum Shopping—Domestic and International*, 63 *TULANE L. REV.* 553, 572 (1989). Legitimate goals: Note, *Forum Shopping Reconsidered*, 103 *HARV. L. REV.* 1677, at 1677 (1990).

<sup>41</sup> Motion: CAL. CIV. PROC. CODE § 418.10(a)(1) (West 2002). Review: CAL. CIV. PROC. CODE § 418.10(c) (West 2002).

<sup>42</sup> Federal option: “No defense . . . is waived by joining it . . . in a responsive pleading. . . .” FED. R. CIV. P. 12(b). Hearing: “[A]ny defense listed in Rule 12(b)(1)-(7) . . . must be heard and decided before trial unless the court orders a deferral until trial.” FED. R. CIV. P. 12(i).

<sup>43</sup> See, e.g., “The [post-judgment] appeals process provides an adequate remedy in

Motion to Quash with an answer, demurrer, or motion to strike the complaint.<sup>44</sup> As state lawmakers then specified: “It is the intent of the Legislature . . . to conform California practice . . . to the practice under Rule 12(b) of the Federal Rules of Civil Procedure.”<sup>45</sup>

Yet the specified symmetry is by no means complete. Three years after the avowed legislative conforming-to-Rule-12 amendment, the leading California case minimized the perceived breadth of state-federal conformity:

It should be apparent that federal practice with respect to challenges to personal jurisdiction is very different from established California procedure. With all due respect, it is difficult to see the advantage in a scheme which permits a defendant to withhold his jurisdictional challenge essentially until trial. . . . [¶] In our view, by requiring that the issue of jurisdiction be raised and finally resolved at an early stage, California’s historical approach serves the interests of all parties and of the courts. Accordingly, we are reluctant to attribute to the Legislature an intent to alter this sensible and effective procedure.<sup>46</sup>

California considerably liberalized the common law view that *any* action by the defendant—other than attacking only PJ before filing an answer—constitutes a general appearance. But it nevertheless clings to the required first-appearance Motion to Quash—the thinly veiled first cousin of the common law special appearance. State court defendants must gather their jurisdictional facts to file that motion, generally within thirty days after being served with the complaint.<sup>47</sup> Across the street in federal court, the common law special appearance and its trap-for-the-unwary relatives were long ago banished from federal court.<sup>48</sup>

A federal defendant’s lawyer may thus incorporate, in a single pleading, all preliminary objections—as well as defenses to the merits—without fearing an inadvertent waiver of the personal jurisdiction defense.<sup>49</sup> Federal defendants thus have time to fully discover and

almost all cases, even where defendants face the prospect of an expensive trial. . . . [¶] To be an inadequate remedy, there must be ‘some obstacle to relief beyond litigation costs. . . .’ Nor is the ‘hardship [that] may result from delay’ . . . grounds for granting a mandamus petition.” In re Depuy Orthopaedics, Inc., 870 F.3d 345, 352-353 (5th Cir. 2017), denying the personal jurisdiction writ petition.

<sup>44</sup> CAL. CIV. PROC. CODE § 418.10(e) (West 2002).

<sup>45</sup> *Id.*, Cal. Stats. 2002, c. 69 § 2.

<sup>46</sup> Roy v. Super. Ct., 127 Cal. App.4th 337, 343, 25 Cal. Rptr.3d 488, 492 (4th Dist. 2005).

<sup>47</sup> CAL. CIV. PROC. CODE § 412.20(a)(3) (West 1989).

<sup>48</sup> In perhaps the most memorable articulation:

Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court’s jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law . . . in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in.

Orange Theatre Corporation v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944), *cert. denied*, 322 U.S. 740 (1944).

<sup>49</sup> See CHARLES ALAN WRIGHT et al., 5B FED. PRAC. & PROC. § 1344 (3d ed., Westlaw

present jurisdictional evidence,<sup>50</sup> well beyond the month within which a California defendant must answer or file a Motion to Quash.

While judicially claimed that California's historical approach serves the interests of the parties and the courts,<sup>51</sup> the federal approach better serves all concerned. It provides more time to gather the jurisdictional facts, as opposed to the comparatively lightning-quick demand of state practitioners to attack personal jurisdiction. To ameliorate the California concern regarding undue delay, federal judges have ample discretion to expeditiously resolve the personal jurisdiction issue well before trial.<sup>52</sup>

### III. PLEADING & MOTIONS

#### 3. *Pleading Nomenclature*

*State:* Defendants may expand the scope of the litigation via a cross-complaint. *Federal:* Defendants do so via a counterclaim, cross-claim, or third-party complaint.<sup>53</sup>

Nearly fifty years ago, the California Legislature substituted the single term "cross-complaint" for what were then the above three (state and) federal pleading terms. Professor Jack Friedenthal's influential plea aptly recommended using just "cross-complaint," because of "the absurd conglomeration of existing statutes and [the pressing need to] substitute a simple unified procedure [uniformly designated a cross-complaint] for all such claims."<sup>54</sup> He urged that California law regarding the joinder of claims, counterclaims, and cross-complaints had developed in piecemeal fashion—resulting in a proliferation of confusing, inconsistent, and sometimes meaningless [pleading] provisions.<sup>55</sup> The California cross-complaint would encompass the broad utility of federal pleading nomenclature.<sup>56</sup> California's departure from the federal model would thus allow state defendants to accomplish more with less.

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database FPP) hereinafter WRIGHT FPP).

<sup>50</sup> FED. R. CIV. P. 12(a)(1)(A)(i).

<sup>51</sup> See case quote in text accompanying *supra* note 46.

<sup>52</sup> Per an exemplary articulation:

It is 'advisable generally to decide such defenses as . . . lack of jurisdiction of person, [and] . . . venue, insufficient process or service of process' . . . 'promptly after they are raised, and not defer them to the trial.' To postpone a determination of the question until the trial 'would not be fair to defendant, since it would deprive defendant of any opportunity to avoid the trial by quashing service in advance.'

*Yules v. General Motors Corporation*, 297 F. Supp. 674, 675 (D. Mont. 1969). They may also permit jurisdictional discovery before ruling on the federal motion to dismiss. See, e.g., *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 679 (2d Cir. 2013) (vacating district court dismissal for failing to permit jurisdictional discovery).

<sup>53</sup> State term: CAL. CIV. PROC. CODE § 422.10 (West 1971), added by Cal. Stats. 1971, ch. 244 § 18. Federal terms: FED. R. CIV. P. 7(a)(3)-(5).

<sup>54</sup> Jack Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 29 (1970).

<sup>55</sup> *Id.* at 1.

<sup>56</sup> The federal objective was (and is) exemplified by the overarching theme that the Federal Rules be "employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. The Rules envision inaccurate pleading usage. For example, "[i]f a party mistakenly designates a defense as a counterclaim, or a

But California's seemingly innocuous procedural change had an unintended consequence. The Legislature achieved its objective of ostensibly simplifying pleading—perhaps too well. A complex case, featuring numerous parties, may have dozens of cross-complaints. A case with a dozen parties, fifty pleadings, and forty-six multiple purpose cross-complaints is unnecessarily confusing.<sup>57</sup>

One might thus reevaluate whether the state pleading paradigm should revert back to its pre-1971 pleading posture. “Counterclaim,” “cross-claim,” and “third party claim” more readily identify the pleader’s underlying objectives. The occasional claim, not readily shoehorned into this triad, could be designated a catchall “cross-complaint”—which would not thwart the availability of any substantive claim. Such pleading flexibility is certainly the case in the federal system.<sup>58</sup>

#### 4. Basic Pleading Test

*State:* The complaint must contain a “statement of facts constituting the cause of action.” It must include a fact for each element of each cause of action to present a valid prima facie case.<sup>59</sup> *Federal:* An element may be missing, or improperly plead. But the complaint must contain a “short and plain statement” that puts the defendant on “fair notice” of the nature of the claim. Federal pleading is not “meant to . . . require, or even invite, the pleading of facts,” but rather to demonstrate “facial plausibility.”<sup>60</sup>

The elements for California causes of action are conveniently set forth in the state jury instructions.<sup>61</sup> Failing to allege all required elements, and a supporting fact for each element, subjects a California complaint to demurrer—the state’s counterpart to the FRCP 12(b) Motion to Dismiss. In tort cases, for example, one must thus “be very specific as to each defendant and as to each . . . causation issue. . . .”<sup>62</sup>

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counterclaim as a defense, the court must . . . treat the pleading as though it were correctly designated. . . .” FED. R. CIV. P. 8(c)(2).

<sup>57</sup> This was the author’s first case as a new law firm associate. Various practitioners have advised this author that tracking a California case with numerous “cross-complaints”—against a pot pourri of plaintiffs, co-defendants and unnamed parties—wastes resources and makes client opinion letters more challenging and costly.

<sup>58</sup> For example: “[G]iven the encouragement of F. R. Civ. P. 1, it does not make sense to interpret the Rules of Civil Procedure as precluding the third-party defendant from filing a third-party complaint against the other . . . defendants on the ground that they are already parties to the action. . . .” *Capital Care Corp. v. Lifetime Corp.*, 1990 WL 2165 \*2 (E.D. Pa. 1990), denying motion to dismiss the third-party defendants’ crossclaims—“an issue which . . . is of greater interest to lawyers and the academic community than to litigants.” *Id.* at \*1.

<sup>59</sup> Statement of facts: CAL. CIV. PROC. CODE § 425.10(a)(1) (West 2006); fact for each element: *CASES AND MATERIALS*, *supra* note 17, at 144

<sup>60</sup> Short and plain statement: FED. R. CIV. P. 8(a)(2); fair notice: *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200 (2007) (citing *Twombly & Conley*); not invite facts: *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 580, 127 S. Ct. 1955, 1979 (2007) (Stevens, J. and Ginsburg, J., dissenting) hereinafter *Twombly* dissent; and “plausibility” pleading: *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). It is thus “manifestly inappropriate for a [federal] district court to demand that complaints contain all legal elements (or factors) plus facts corresponding to each.” *Rowlands v. United Parcel Service*, 901 F.3d 792, 800 (7th Cir. 2018).

<sup>61</sup> See Judicial Council of California Civil Jury Instructions at <http://www.courts.ca.gov/partners/317.htm> (last visited Oct. 13, 2018).

<sup>62</sup> *Bockrath v. Aldrich Chemical Co.*, 21 Cal.4th 71, 78, 86 Cal. Rptr.2d 846, 850 (Cal.

The *Twombly-Iqbal* federal “plausibility” standard envisions denying courthouse access for shaky claims and limiting costly discovery. But it also introduced oceanic discretion into the “fair notice of claim” federal pleading standard. Plausibility pleading thus debased a half-century of federal precedent. As of 1957, the U.S. Supreme Court had proclaimed a far less judicially malleable standard. Then, “a complaint should not be dismissed for failure to state a claim unless it *appears beyond doubt* that the *plaintiff can prove no set of facts* in support of his claim which would entitle him to relief.”<sup>63</sup> As described by the 2007 Justice Stevens (and Ginsburg) *Twombly* dissent:

Under the relaxed [1957 *Conley*] pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial [discovery] process and, as appropriate, through the crucible of trial. . . . [¶ T]he ‘simplified notice pleading standard’ of the Federal Rules ‘relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.’<sup>64</sup>

The dissenters objected to *Twombly*’s plausibility yardstick because “practical concerns presumably explain the Court’s dramatic departure from settled procedural law. . . . [But] they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority’s appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.”<sup>65</sup> The federal pleading paradigm “reflects [instead] a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process.”<sup>66</sup> Unlike the *Conley* era, far fewer cases have survived the pleading stage.

Federal trial judges now apply a “malleable and ill-defined” and an “increasingly restrictive” plausibility standard.<sup>67</sup> The state judge may first look to the California jury instructions; then ascertain whether each

1999) (“plaintiff must allege facts, albeit as succinctly as possible, explaining how the conduct caused or contributed to the injury”).

<sup>63</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 992, 102 (1957) (emphasis supplied). *Conley* was seemingly abrogated by the *Twombly* majority: “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.” *Twombly* (majority), *supra* note 60, at 562-563, 1969. The Court, instead, abrogated the manner in which the lower courts had applied *Conley*.

<sup>64</sup> *Twombly* dissent, *supra* note 60 at 575 & 583, 1976 & 1981. It therein cited related precedent: “The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.” *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 999 (2002).

<sup>65</sup> *Twombly* dissent, *supra* note 60 at 573, 1975.

<sup>66</sup> *Twombly* dissent, *supra* note 60 at 583, 1982.

<sup>67</sup> Malleable and ill-defined: “The Court’s reliance . . . in its reasoning on such malleable and ill-defined concepts as ‘plausibility’ and ‘common sense’ essentially invites subjectivity and intuition. . . .” Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1451 (2010). Increasingly restrictive: *Twombly* and *Iqbal* are “the latest in a sequence of increasingly restrictive changes during the last quarter century. These have created expensive and time-consuming procedural stop signs that produce earlier and earlier termination of cases, thereby increasingly preventing claimants from reaching trial—particularly jury trial.” Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 2 (2010) hereinafter Miller.

element of an attacked complaint has been pled; then review whether the plaintiff properly included a fact in support of each element. That approach may seem more mechanical than plausibility pleading. But it provides greater objectivity and predictability when assessing whether a case will survive the pleading stage.

### 5. Pleading Damages

*State:* In personal injury and wrongful death cases, plaintiffs cannot state the amount of compensatory damages in the complaint. They cannot state the amount of punitive damages in *any* complaint. California subjects punitive damage complaints to a heightened pleading standard.<sup>68</sup> *Federal:* The amount of damages is always stated in the prayer of the complaint. Federal punitive damage demands are not subject to a heightened pleading standard.<sup>69</sup>

The purpose of California's 1974 prohibition on stating the amount of damages in injury complaints was "to protect defendants . . . from the adverse publicity generated by the filing of lawsuits in which the amount claimed is greatly inflated."<sup>70</sup> This pleading prohibition was opposed by the plaintiff's bar—whose members could no longer use a high demand as a tactical bludgeon. The defense bar also complained that its members were unable to determine the size of the claim against their clients.<sup>71</sup>

In the federal system, neither FRCP 8(a)(3) regarding the demand, nor 28 U.S. C. § 1332(a) regarding the minimum amount for Diversity cases, specifically require the complaint to include the amount of damages demanded. But "[i]n all probability, Rule 8(a)(3) does assume that money damages will be alleged in terms of a precise amount because it requires a party to assert the relief to which 'the pleader seeks.'"<sup>72</sup>

The dearth of federal opinions on point have, ironically, embraced the same policy concerns as the California prohibitions. In the leading federal contrarian opinion, the amount stated was stricken from the complaint

<sup>68</sup> CAL. CIV. PROC. CODE § 425.10(b) (West 2006) (personal injury and wrongful death); CAL. CIV. PROC. CODE § 3295(e) (West 1987) (punitive damages). There is a direct conflict regarding heightened punitive damages pleading. State plaintiffs must allege specific evidentiary facts to support allegations of malice, oppression or fraudulent intent. *See, e.g.*, "Notwithstanding relaxed pleading criteria, certain tortious injuries demand firm allegations." *Smith v. Superior Court*, 10 Cal. App.4th 1033, 1041-1042, 13 Cal. Rptr.2d 133, 138 (4th Dist. 1992) (citing authorities).

<sup>69</sup> FRCP "8(a) and 9(b) therefore preclude district courts from applying a heightened pleading for allegations of malice or fraudulent intent." *Clark v. Allstate Ins. Co.*, 106 F. Supp.2d 1016, 1018-1019 (S.D. Cal., 1992).

<sup>70</sup> *Review of Selected 1974 California Legislation*, 6 PAC. L. J. 125, 217 (1975). That concern was "particularly true of medical malpractice suits where the amounts claimed very often bear little relationship to the amounts actually recovered. . . . Since these lawsuits often attract sensational coverage by the media, they constitute a source of unnecessary ill feeling between physicians and attorneys." *Id.*

<sup>71</sup> This legislative pleading gap was filled by the ensuing option of serving a Statement of Damages—a requirement for default judgements. CAL. CIV. PROC. CODE § 425.11(b) (West 2006) (injury and death) & § 425.115 (West 2005) hereinafter Statement of Damages.

<sup>72</sup> WRIGHT FPP, *supra* note 49, Vol. 5 § 1259. Per the United States Courts sample complaint: "Include any punitive or exemplary damages claimed, the amounts, and the reasons you claim you are entitled to actual or punitive money damages." Complaint for a Civil Case, Form Pro Se 1 (eff. Dec. 1, 2016).

in the following terms: “The *ad damnum* is not . . . permitted to be disclosed in my court. . . . It has no bearing on what should be awarded to the plaintiff by the verdict. . . . It is not conducive to obtaining substantial justice to disclose a fantastic *ad damnum* to the jury. . . .”<sup>73</sup> The leading federal practice treatise likewise supports this faux prohibition, given the “doubt as to whether the federal courts should require a party to assert the specific dollar amount of damages that is being claimed in a case to be tried before a jury.”<sup>74</sup>

One could argue that system-wide federal adoption of the state approach—prohibiting a quantified dollar amount in such complaints—might lead to Diversity Jurisdiction abuse. More cases might inappropriately survive a Motion to Dismiss, were the plaintiff no longer expected to state an express amount in controversy. It would thus be more challenging for a federal judge to resolve this motion. But any tempest in this procedural teapot would simmer down if the FRCP were to embrace the Statement of Damages device for claiming the amount *outside* of the complaint.<sup>75</sup>

## 6. “Doe” Defendants

*State:* Failure to include fictitious “Doe” defendants in a California state complaint borders on malpractice, especially in tort cases.<sup>76</sup> *Federal:* John Doe is occasionally tolerated, but rarely entitled to safe passage in federal venues.

John Doe defendants are particularly popular in California.<sup>77</sup> But federal courts in the state dodge him like an unwanted suitor. The resistance flows, in part, from the early federal dismissal of a complaint for failure to serve a defendant within ninety days of filing.<sup>78</sup> The state Code of Civil Procedure, on the other hand, allows plaintiffs to serve a defendant within three years after filing.<sup>79</sup> During this period, the Code authorizes the initial designation of a “Doe” defendant, who may be later

<sup>73</sup> Mitchell v. American Tobacco Company, 28 F.R.D. 315, 318 (M.D. Pa. 1961), referring to a District of Columbia federal judge’s 1959 presentation at an American Bar Association meeting.

<sup>74</sup> It further articulates the “concern [that] has been expressed that the presence of such a demand may improperly influence the jury’s decision if it becomes aware of a specific requested amount.” WRIGHT FPP, *supra* note 49, Vol. 5 § 1259.

<sup>75</sup> See Statement of Damages, *supra* note 71.

<sup>76</sup> See, e.g., “a plaintiff’s attorney should anticipate that later discovery may reveal and implicate other health care providers who are unidentified as of the filing date of the complaint, and that this warrants ‘an adequately pleaded cause of action against such fictitious defendants.’” Camarillo v. Vaage, 105 Cal. App.4th 552, 569, 130 Cal. Rptr.2d 26, 39 (4th Dist. 2003) (legal malpractice action).

<sup>77</sup> WRIGHT FPP, *supra* note 49, Vol. 13F § 3642. These “Doe” defendants often engage in rather nefarious activities. The ubiquitous presence of a large group of them, who placed a foreign substance on plaintiff’s coffee filter, allegedly explains why he did not do well on the Law School Admissions Test. Pearlson v. Does 1-646, 76 Cal. App.4th 1005, 1007, 90 Cal. Rptr.2d 787, 788 (2d Dist. 1993).

<sup>78</sup> FED. R. CIV. P. 4(m).

<sup>79</sup> All related timelines are provided in the Part V. section 12. *Diligent Prosecution* subdivision of this article.

actually named in an amendment to the complaint.<sup>80</sup> California practice thus permits these procedural phantoms to be added:

long after the original statute of limitations has expired, because the amendment is deemed to relate back to the filing of the original complaint. This is . . . considered by the courts not to be unfair to the defendant, even though as a practical matter it drastically extends the statute of limitations as to such defendant[s].<sup>81</sup>

Given the comparative speed at which federal litigation moves, one can thus appreciate the federal disdain for “Doe” defendants. In an oft-cited opinion, the Ninth Circuit growled that: “[t]hese John Doe complaints are dangerous at any time. It is inviting disaster to allow them to be filed and to allow fictitious persons to remain defendants if the complaint is still of record. . . .”<sup>82</sup> Academic support for this antagonistic posture may be drawn from the understandable concern that California’s “Doe” practice is a “pleading subterfuge [that] evolved to circumvent the statute [of limitations].”<sup>83</sup> John Doe struck out in the Ninth (Circuit) because he cannot be shoehorned into FRCP 15(c):

‘John Doe’ pleadings cannot be used to circumvent statutes of limitations because replacing a ‘John Doe’ with a named party in effect constitutes a change in the party sued. . . . [¶] This Circuit . . . preclude[s] relation back for amended complaints that add new defendants, where . . . [they] were not named originally because the plaintiff did not know their identities. We have held that, although ‘Rule 15(c) explicitly allows the relation back of an amendment due to a ‘mistake’ concerning the identity of the parties . . . [,] the failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake.’<sup>84</sup>

Professor Carol Rice made a convincing argument for federal adoption of “Doe” defendant pleading. She argued that “John Doe is not a mere procedural formality. He provides the plaintiff in many cases with the only means to pursue important substantive rights.”<sup>85</sup> Rice notes that fictitious party pleading has been central to the evolution of

<sup>80</sup> CAL. CIV. PROC. CODE § 474 (West 1955).

<sup>81</sup> *A. N., a Minor v. County of Los Angeles*, 171 Cal. App.4th 1058, 1066, 90 Cal. Rptr.3d 293, 300 (2d Dist. 2009).

<sup>82</sup> *Craig v. U.S.*, 413 F.2d 854, 856 (9th Cir. 1969) (citing precedent). Three decades later, the federal rules-makers whispered the following lip service to the value of fictitious defendants:

Doe pleading in California is *disruptive, posing real problems* for the courts. . . . [¶] There are many cases in which a diligent plaintiff is not able, without the help of discovery, to identify a proper defendant. . . . These problems are [admittedly] difficult. It may prove desirable to appoint a subcommittee to consider them in greater depth before the [Advisory] Committee considers them further.

Minutes of the Civil Rules Advisory Committee to FED. R. CIV. P. 15(c) (Oct. 3-4, 2002), lines 1844-1856 (citing precedent; emphasis supplied).

<sup>83</sup> James E. Hogan, *California’s Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51, 52 (1977).

<sup>84</sup> *Hogan v. Fischer*, 738 F.3d 509, 517-518 (9th Cir. 2013) (citations omitted). For a judicial survey, wherein the response was 3 to 1 anti-“Doe,” see William R. Slomanson, *John Doe Strikes Out in the Ninth*, 8 CALIFORNIA LAWYER 51-55 (May, 1988).

<sup>85</sup> Carol M. Rice, *Meet John Doe: It is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 886 (1996) hereinafter *Meet John Doe*.



constitutional rights. Two larger than life examples are the plaintiffs and defendants in *the* abortion rights case, and *the* case conferring the right to sue federal officers for constitutional violations of civil liberties.<sup>86</sup>

Professor Rice's plea is buttressed by other sources. First, as the leading federal practice treatise asserts:

Since the practice [of alleging fictitious defendants] plays an important part in some states in the tolling of the statute of limitations and in the procedure for acquiring personal jurisdiction, an absolute rule against its use in federal court actions seems unwise and might violate a federal court's obligation to apply the rules of decision of the forum state in order to achieve an identity of outcome for a particular matter in both court systems.<sup>87</sup>

Second, in 1988, Congress compelled the federal courts to neither accept nor deny—but rather *ignore*—fictitious defendants, in cases removed from state to federal court.<sup>88</sup> In 2004, the Supreme Court's flexibility blared from its statement:

'it is well settled that Rule 21 [of the FRCP] invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, *even after judgment* has been rendered. Indeed, the Court held in [a prior decision] that courts of appeals also have the authority to cure a jurisdictional defect by dismissing a dispensable nondiverse party.<sup>89</sup>

Third, the U.S. Supreme Court acknowledged a John Doe relative in the family quest for at least de facto recognition. Unnamed federal agents conducted an arrest and residence search with no warrant, no probable cause, and unreasonable force. While the plaintiff did not employ the more common "Doe" moniker, he successfully sought his constitutional remedy against these agents in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>90</sup>

The Supreme Court did not directly address the fictitious party pleading issue. Of course one must acknowledge that *Bivens* cannot stand for a proposition it did not expressly consider. Nevertheless, a footnote impliedly raised this issue.<sup>91</sup> *Bivens* was a Federal Question case, wherein

<sup>86</sup> Abortion: *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973). Constitutional claim: *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971) hereinafter *Bivens*.

<sup>87</sup> WRIGHT FPP, *supra* note 49, Vol. 13F FED. PRAC. & PROC. § 3642.

<sup>88</sup> Upon removal of state cases to federal court, the "citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(b)(1).

<sup>89</sup> *Grupo Dataflex v. Atlas Data Group, L. P.*, 541 U.S. 567, 572-573, 124 S. Ct. 1920, 1925 (2004) (emphasis supplied).

<sup>90</sup> *Bivens*, *supra* note 86.

<sup>91</sup> The agents were not expressly named in the complaint. But the District Court ordered that the it be served on the "unknown agents" who participated in the arrest. *Bivens*, *supra* note 86 at 390 n.2, 2001 n.2. *See also*:

States often allow a plaintiff to name an unknown party as an additional defendant. . . . For that matter, so does federal law in a suit based on the *federal question* jurisdiction, see, e.g., *Bivens v. Six Unknown Named Agents*. . . . But because the existence of *diversity* jurisdiction cannot be determined without knowledge of every defendant's place of citizenship, "John Doe" defendants are not

a fictitious defendant's state domicile is normally irrelevant.<sup>92</sup> But there should be symmetrical treatment of "Does," in both Diversity Jurisdiction and Federal Question filings. Any disparate treatment of such unnamed defendants conflicts with the liberal interpretation expressed in the Federal Rules and the congressional directive to ignore fictitious defendants in removed cases.<sup>93</sup>

As further noted by the federal rules-makers, if a law "affords a more forgiving principle . . . than the one provided in this rule [15(c)], it should be available to save the claim."<sup>94</sup> This loosening of the federal relation back standard effectively defers to state law in "Doe" pleading states. California's more forgiving relation back doctrine should thus be a pass through source for allowing "Doe" amendments in federal courts—at least in states like California, where fictitious defendants are parties from the outset of the case.

One can readily conclude that the federal disdain for John Doe defendants continues to exalt form over substance. There should be no wrong without a remedy. Cases should be resolved on the merits. Thus, the time has surely come for federal courts to adopt the pseudonym practice that our English predecessors established three centuries ago.<sup>95</sup>

### 7. *Anti-SLAPP Motion*<sup>96</sup>

*State:* A defendant may lodge an Anti-SLAPP Motion to Strike, when sued for engaging in constitutionally protected conduct. This motion

permitted in federal diversity suits.

Howell v. Tribune Entertainment Company, 106 F.3d 215, 218 (7th Cir. 1997) (emphasis supplied). *But see supra* note 88.

<sup>92</sup> Per FED. R. CIV. P. 12(h)(3): "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." The related concern is that "[b]ecause diversity jurisdiction must be proved by the plaintiff rather than assumed as a default, this court cannot presume that Does 1–10 are diverse with respect to the plaintiff." Moore v. General Motors Pension Plans, 91 F.3d 848, 850 (7th Cir.1996), which evinces the disparate treatment between "Does" in an original versus a removed complaint. *But see* text accompanying *supra* notes 87–89.

<sup>93</sup> FED. R. CIV. P. 15(a)(2). For the relevant state law, *see* text accompanying *supra* notes 79–81.

<sup>94</sup> FED. R. CIV. P. 15(c) Advisory Committee Note to 1991 amendment.

<sup>95</sup> *See Meet John Doe*, *supra* note 85, at 885.

<sup>96</sup> Both judicial systems incorporate a *general* Motion to Strike. California expressly authorizes a *special* Motion to Strike on constitutional grounds. "SLAPP" is the acronym for Strategic Lawsuit Against Public Participation. The origin of this moniker was a multi-jurisdictional survey by the Political Litigation Project at the University of Denver. The concern was (and is) that:

public participation or citizen involvement in governance is an axiom of representative democracies, encouraged by a variety of legal and cultural norms and specifically protected by the Petition Clause of the First Amendment to the United States Constitution. Yet a growing body of civil-damage lawsuits filed against such political participants by their opponents are threats to an active polity. While labeled as ordinary, apolitical, judicial claims, they are clearly reactions against past or anticipated opposition on political issues.

Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385, 385–386 (1988). As adopted in some two-dozen states, the defendant first alleges engagement in suit-related constitutionally protected activity. Then, the plaintiff alleges the "probability" (in states including California) of success on the merits. CAL. CIV. PROC. CODE § 425.16(b)(1) & (b)(3) (West 2010).

seeks an early dismissal of an allegedly frivolous suit. It generally prohibits discovery (until the motion is denied).<sup>97</sup> *Federal*: There is no federal anti-SLAPP motion. Unlike the Ninth Circuit, anti-SLAPP motions have been squarely rejected by the D.C. Circuit, the Seventh Circuit, and the Tenth Circuit.<sup>98</sup> A federal anti-SLAPP bill was introduced in 2009.<sup>99</sup>

California's anti-SLAPP motion and response must be accompanied by supporting affidavits—not just relevant portions of the pleadings. This augmented pleading procedure, and the associated lack of discovery, lie at the heart of the vigorous federal pushback. In the leading case on point, four federal judges succinctly articulated the recurring opposition to state anti-SLAPP motions in federal court:

California's anti-SLAPP statute conflicts with Federal Rules 12 [(b)(6) Motion to Dismiss] and 56 [Summary Judgment]. . . . California's anti-SLAPP statute impermissibly supplements the Federal Rules' criteria for pre-trial dismissal of an action. . . . [¶] Rule 12 provides the *sole* means of challenging the legal sufficiency of a claim before discovery commences. . . . [¶] Any attempt to impose a *probability* requirement at the pleading stage would obviously conflict with [the] Rule 12 [plausibility requirement]. Yet . . . California's anti-SLAPP statute . . . bars an action from proceeding beyond the pleading stage “unless the court determines that the plaintiff has established [via affidavit] that there is a *probability* that the plaintiff will prevail on the claim.” . . . [¶] The anti-SLAPP statute eviscerates Rule 56 by requiring the plaintiff to prove that she will *probably* prevail if the case proceeds to trial—a showing considerably more stringent than identifying material factual disputes that a jury could reasonably resolve in the plaintiff's favor. . . . [¶] California's anti-SLAPP statute mandates a stay of all discovery pending the court's resolution of a motion to strike. . . . [T]he discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspects of Rule , and we therefore refused to apply the statute's discovery provisions in federal court.<sup>100</sup>

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<sup>97</sup> This motion must be filed within sixty days of service of the complaint. Once filed, discovery is possible, but only upon noticed motion for good cause. CAL. CIV. PROC. CODE § 425.16(f) & (g) (West 2010).

<sup>98</sup> *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828, 836 (9th Cir. 2018) (Gould, J., concurring), hereinafter *Planned Parenthood*.

<sup>99</sup> *Citizen Participation in Government and Society Act*, H. R. 4364, 111th Cong. (2009) hereinafter *FedSLAPP*.

<sup>100</sup> *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-1189 (9th Cir. 2013) (dissent from en banc denial of rehearing; citations omitted; citing precedent; and emphasis supplied) hereinafter *Trump Univ.* There is normally no discovery after the filing of an anti-SLAPP motion, which represents a “stark collision” with federal law:

[W]hen . . . an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule[s] of Civil Procedure . . . will apply. . . . A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure while in a federal district court. In this context, if there is a contest between a state procedural rule and the federal rules, the federal rules of procedure will prevail.

*Planned Parenthood*, *supra* note 98, at 834 (9th Cir. 2018). Furthermore, CAL. CIV. PROC. CODE § 904.1(a)(13) provides that the ruling on an anti-SLAPP motion is automatically appealable in California. But the prevailing federal view in circuits embracing state anti-SLAPP motions is that: “interlocutory appeal of this issue is incorrect, [because it] potentially

But the *Trump University* concurring opinion backed the majority via its view which: (a) also accepted the invitation for the federal courts to hear and resolve state anti-SLAPP motions; (b) allegedly facilitated states' rights; (c) discouraged frivolous suits; and (d) prevented forum shopping.<sup>101</sup>

A proposed U.S. House of Representatives federal anti-SLAPP bill was lodged in 2009.<sup>102</sup> Its *raison d'être* was to parry the anti-First Amendment "threat of financial liability, litigation costs, destruction of one's business, loss of one's home, and other personal losses from groundless lawsuits [which] seriously impacts government, interstate commerce, and individual rights by significantly chilling public participation in government, public issues, and in voluntary service."<sup>103</sup>

But the possibility of Congress or the federal rules-makers ultimately embracing a federal anti-SLAPP process has its critics. The Federal Rules already provide a device for ferreting out frivolous law suits filed for improper reasons.<sup>104</sup> An unintended consequence of Rule 11 was the proliferation of satellite litigation over fees and sanctions.<sup>105</sup> Various commentators have reinforced the perception that Rule 11 inhibits creative advocacy. Adding an anti-SLAPP weapon to the existing

conflicts with federal procedural rules, and burdens the federal courts with unneeded interlocutory appeals." *Id.* 835 (Gould, J., concurring).

<sup>101</sup> The concurrence in denial of a rehearing embraced these principles in the following terms:

If we ignore how states have limited actions under their own laws, we not only flush away state legislatures' considered decisions on matters of state law, but we also put the federal courts at risk of being swept away in a rising tide of frivolous state actions that would be filed in our circuit's federal courts. Without anti-SLAPP protections in federal courts, SLAPP plaintiffs would have an incentive to file or remove to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP defendant's speech-related activities. Encouraging such forum-shopping chips away at 'one of the modern cornerstones of our federalism.'

*Trump Univ.*, *supra* note 100, at 1187 (Wardlaw, J., et al., concurring in denial of rehearing en banc). This portion of *Trump Univ.* effectively embraced Supreme Court Justice Marshall's famous anti-forum shopping concern. See *Odor*, *supra* note 20. Favoring anti-SLAPP motions in federal court: William James Seidleck, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Shows They Should Apply in Federal Diversity Suits*, 166 U. PA. L. REV. 547 (2018). *Disavowing anti-SLAPP motions in federal court: see* text accompanying *supra* note 98.

<sup>102</sup> FedSLAPP, *supra* note 99.

<sup>103</sup> FedSLAPP, *supra* note 99 § 2(6). A defendant who would lodge this motion "must make a prima facie showing that the underlying [plaintiff's] claim arises from an act in furtherance of the constitutional right of petition or free speech. If this burden is met, the burden shifts to the plaintiff . . . to demonstrate that the underlying claim is both legally sufficient and supported by a sufficient prima facie [as opposed to California's ["probability"]] showing of facts to sustain a favorable judgment. . . ." FedSLAPP, *supra* note 99, § 7(b).

<sup>104</sup> FED. R. CIV. P. 11(b)(1).

<sup>105</sup> The 1983 version of Rule 11 required sanctions for Rule 11 violations. The 1993 FRCP amendments reverted back to discretionary sanctions. The prior version "spawned thousands of court decisions and generated widespread criticism. . . . The rule was abused by resourceful lawyers, and an entire cottage industry developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims." Stephanie Francis Ward, *Bill Would Reinvigorate Rule 11 Sanctions: Some Applaud, While Others Fear More Satellite Litigation*, A.B.A. J. E-REPORT (October 1, 2004) (Westlaw LAWPRAC Index).

truth-seeking arsenal would shoot down litigants who possess a novel claim or defense, but fear large sanction awards.<sup>106</sup>

Criticism of the proposed federal anti-SLAPP bill is not limited to its overlap with Rule 11. The federal proposal authorized its version to be filed not only “in relation to speech protected by the First Amendment, [but also] . . . appears to extend the statute’s reach far beyond [permissible] petitioning activity. . . [to] even *allow frivolous filings* of anti-SLAPP motions that inherently do not qualify for protection.”<sup>107</sup>

As state anti-SLAPP motions continue to worm their way into federal jurisprudence, Congress may reintroduce a federal counterpart. If so, the federal rules-making process would hopefully integrate California’s restrictions. Although California’s anti-SLAPP statute “shall be construed broadly,”<sup>108</sup> legislative amendments to the original statute now prohibit its use when either: (1) the plaintiff has filed a public interest case, or (2) the defendant is engaged in commercial speech.<sup>109</sup>

There are additional judicial restrictions as well. Judges have blocked the anti-SLAPP motion in a variety of other contexts. It is barred when the alleged misconduct involves ordinary litigation tactics, legal malpractice claims, contractual arbitration, and illegal speech or petitioning acts.<sup>110</sup> Any future federal reformers would thus be wise to digest California’s twenty-five years of anti-SLAPP practice.<sup>111</sup>

#### IV. DISCOVERY

##### 8. *Initial Core Disclosures*

*State:* The parties must *ask* for witness, document, and insurance information during the discovery stage.<sup>112</sup> *Federal:* The parties must

<sup>106</sup> See generally Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994).

<sup>107</sup> Note, *Rule 11’s Big-Mouthed Little Brother: How A Federal Anti-SLAPP Statute Would Reproduce Rule 11’s Growing Pains*, 9 AVE MARIA L. REV. 367, 382 (2011) (emphasis supplied).

<sup>108</sup> CAL. CIV. PROC. CODE § 425.16(a) (West 1993).

<sup>109</sup> *Id.* §§ 425.17(b) & (c) (West 2011).

<sup>110</sup> Tactics: *Cotati v. Cashman*, 29 Cal.4th 69, 78, 124 Cal. Rptr.2d 519, 527 (Cal. 2002). Malpractice: *Oasis West Realty v. Goldman*, 51 Cal.4th 811, 826, 124 Cal. Rptr.3d 256, 267-268 (Cal. 2011). Arbitration: *Sheppard v. Lightpost Museum Fund*, 146 Cal. App.4th 315, 323, 52 Cal. Rptr.3d 821, 826 (6th Dist. 2006). Illegal speech: *Flatley v. Mauro*, 39 Cal.4th 299, 305, 46 Cal. Rptr.3d 606, 609-610 (Cal. 2006).

<sup>111</sup> Regarding the practice abuses under the original statute, the Legislature disowned the “disturbing abuse of Section 425.16 . . . which has undermined the exercise of constitutional rights of freedom of speech and petition for the redress of grievances. . . .” CAL. CIV. PROC. CODE § 425.17(a) (West 2003). Those changes are covered in the text accompanying *supra* note 109. An extensive legislative history is available in *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.*, 183 Cal. App.4th 1186, 1214, 107 Cal. Rptr.3d 861, 884 (1st Dist. 2010) (“Legislative history”).

<sup>112</sup> California’s Form Interrogatories-General statewide form, for example, authorizes the parties to exchange information regarding witnesses, documents, amount of damages, and insurance. Cal. Jud. Council Form DISC-010. That exchange may commence “without leave of court at any time” (defendant), and “10 days after the service of summons” (plaintiff). CAL. CIV. PROC. CODE § 2030.020(a) and (b) (West 2007).

exchange Initial Core Disclosure (ICD) of witnesses, documents, plaintiff's computation of damages, and defendant's insurance information prior to commencing formal discovery.<sup>113</sup>

The 1993 FRCP introduced ICD "without awaiting formal discovery requests, [of] certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."<sup>114</sup> This novel approach was designed "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information. . . ."<sup>115</sup> It was rooted in a proposal to restructure the pre-1993 discovery paradigm by shifting the emphasis from discovery (the process) to disclosure (the objective).<sup>116</sup>

But mandatory ICD was not without its critics. Civil litigation features a fundamental antagonism between truth and the competitive impulses that are at the heart of the adversarial system of dispute resolution.<sup>117</sup> Supreme Court Justices Scalia, Thomas, and Souter vehemently dissented from its adoption, urging that ICD:

*adds a further layer of discovery.* It will likely increase the discovery burdens on district judges, as parties [will] litigate what is 'relevant' to 'disputed facts,' whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. [¶] The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts . . . . By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative . . . the new Rule would place intolerable strain on the lawyer's ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skill in the service of the adversary.<sup>118</sup>

The ICD provisions were nevertheless approved by the Advisory Committee on Civil Rules, the Standing Committee, the U.S. Judicial

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<sup>113</sup> FED. R. CIV. P. 26(a)(1)(A)(i)-(iv). Sanctions: FED. R. CIV. P. 37(c)(1); e.g., plaintiff's failure to provide a Computation of Damages prior to commencement of the discovery stage—which must contain more detail than just the amount demanded in the complaint—rendered it subject to sanctions, including the inability to provide evidence of damages at trial. *Anhing Corporation v. Viet Phu, Inc.*, 671 F. App'x. 956, 958 (9th Cir. 2016) (extending a wide latitude of discretion to issue such sanctions).

<sup>114</sup> Notes of Advisory Committee on Rules to 1993 Amendment of Rule 26(a). A federal court may also require the parties to disclose *additional* pre-discovery information without a discovery request. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Federal District Court Judge William Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721 (1989).

<sup>117</sup> Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1299 (1978).

<sup>118</sup> Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 507, 510-511 (three-judge dissent; emphasis in original text).

Conference, the Supreme Court, and Congress “in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state, and local bar and professional groups.”<sup>119</sup> Because ICD was initially optional, half of the federal district courts opted out of the entire ICD regime.<sup>120</sup>

The ensuing 1997 Federal Judicial Council’s chest-thumping assessment was that “[i]nitial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs. . . . Attorneys reported that initial disclosure reduced litigation cost and time.”<sup>121</sup> Reportedly, “initial disclosure decreased their client’s overall litigation expenses, the time from filing to disposition, the amount of discovery, . . . the number of discovery disputes . . . overall procedural fairness, fairness of case outcome and the prospects for settlement.”<sup>122</sup> However, under closer scrutiny by Professor Kuo-Chang Huang: “[a] more accurate description of the research findings is that most attorneys did not think that initial disclosure had *any* effects. . . . [and] a majority of respondents believed that initial disclosure had no effect on time from filing to disposition.”<sup>123</sup>

California does not employ the ICD form of discovery. California’s lone analogy to the above federal practice is the Case Questionnaire. It is “designed to elicit fundamental information about each party’s case, including names and addresses of all witnesses with knowledge of any relevant facts, a list of all documents relevant to the case, a statement of the nature and amount of damages, and information covering insurance coverages. . . .”<sup>124</sup> If the plaintiff opts to serve a completed form with the complaint, the defendant must likewise respond.

This device evolved from California’s Economic Litigation Project (ELP).<sup>125</sup> It is available for use only in the state’s lower-tier Limited Case

<sup>119</sup> *Id.* 512.

<sup>120</sup> Forty-five out of ninety-four federal districts chose to opt out of the mandatory disclosure requirement of Rule 26(a)(1). Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that Have Transpired Since its Adoption*, 21 SETON HALL LEGIS. J. 425, 462 (1997). Seven years later, the ICD Rule became mandatory for all districts.

<sup>121</sup> THOMAS E. WILLGING ET AL., *DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES* at 2 (Federal Judicial Center, 1997).

<sup>122</sup> Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 562 (1998) (national survey of attorneys who responded to a 1997 questionnaire to 2,000 attorneys in 1,000 closed civil cases).

<sup>123</sup> Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 PACE L. REV. 203, 237 (2000) (emphasis supplied).

<sup>124</sup> CAL. CIV. PROC. CODE § 93(c) (West 2005). The Code authorizes two more categories of ICD, not listed in the Federal Rule: information about specific injuries and treating physicians. *Id.* See also CAL. CIV. PROC. CODE § 1141.11(d)(2) (West 2004), whereby the “court may provide by local rule for the voluntary or mandatory use of case questionnaires. . . .” for judicial arbitrations.

<sup>125</sup> CAL. CIV. PROC. CODE § 93 (West 2005), initially codified in 1982. See California Stats. 1982, ch. 1581 § 1, Art. 2. The ELP project was designed to streamline litigation in California’s smaller cases. See *Pilot Project*, 2 WITKIN CAL. PROC. § 250 (5th ed. 2008).

category.<sup>126</sup> Several county courts have developed a local Case Questionnaire for specific types of cases not included in the ELP.<sup>127</sup>

But the Case Questionnaire never evolved beyond its potential in California's smaller cases—perhaps because many practitioners are liberal, except when it comes to change. The value of this inexpensive discovery option has been lost on most California practitioners. Commentators tend to acknowledge its existence, but warn against its supposed dangers.<sup>128</sup> Of the handful of (mostly unreported) cases making a passing reference to a Case Questionnaire, none of them actually analyze it.

California's ELP, which includes the Case Questionnaire, was initiated nearly four decades ago. It was then a pilot program in selected county courts. It made the cut to become a permanent part of the procedure code for the state's smaller (Limited) cases. But this author's recent call to the San Diego County Superior Court Clerk's Office—in the second largest judicial system in the State—revealed that no one there was familiar with the statewide Case Questionnaire form. One likely reason is that it is not to be filed with the court, unless the plaintiff files a Section 93 motion to require a recalcitrant defendant to respond to plaintiff's Questionnaire.

There is no shortage of complaints about cost and delay in California's state and federal discovery systems. So it is rather curious that Case Questionnaires have not migrated over to California's larger (Unlimited) cases category—especially when the federal system's Initial Core Disclosure counterpart has been mandatory in California's federal courts for nearly two decades.

### 9. Scope of Discovery

Both systems license the discovery of matters that are relevant, while protecting those that are privileged.<sup>129</sup> But the respective general scope of discovery differs in other respects.

*State:* California's procedure code definition of relevance authorizes inquiry into the *subject matter* of the case; and into matter which is

<sup>126</sup> Limited Case: see text accompanying *supra* note 27 (controversy no greater than \$25,000). Form: Judicial Council Form DISC-010.

<sup>127</sup> See, e.g., Los Angeles County Super. Ct., Complex Civil Case Questionnaire, LA-CV211.

<sup>128</sup> As a prominent California practice guide cautions:

[U]se these case questionnaires *cautiously*. If the facts are at all in dispute, you may not *want* to make the kinds of disclosures required by these forms (e.g., amount of damages, names of all witnesses, etc.). Be sure to leave the door open as to later-discovered evidence, by including wording such as "To the best of my present knowledge. . . ."

Justice Lee S. Edmon & Judge Curtis E. A. Karnow, *Special Discovery Procedures Permitted* § 8:1818, CAL. PRAC. GUIDE CIV. PRO. BEFORE TRIAL (June 2017). Such advice presumably evolved from the era when any state-court duty to supplement earlier responses was still in question. See *infra* this article's Part IV, section 10.

<sup>129</sup> There are divergent state-federal applications of the terms "relevance" and "privilege." See, e.g., *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 327, 66 Cal. Rptr.2d 210, 222 (Cal. 1997) (comparing the state and federal rights to privacy). But those distinctions are beyond the reach of this subsection's comparison of the general scope of discovery basics.



“admissible . . . or reasonably calculated to lead to . . . admissible evidence.”<sup>130</sup> *Federal*: Discovery relevance is limited to the *claim or defense* allegations in the pleadings. A 2015 amendment deleted the prior “admissible” and companion “lead to admissible” evidence tandem—in favor of “need not be admissible.”<sup>131</sup>

Regarding the *relevance* prong of the scope of discovery, California employs the comparatively liberal subject matter discovery standard. As long ago articulated in an oft-cited state Supreme Court decision:

While the order on demurrer ruled out certain issues for the time being, the status of the pleadings . . . is not the exclusive measure of the scope of inquiry. . . . Different principles govern the determination of the materiality of evidence sought to be obtained by means of depositions and the admissibility of evidence offered upon the trial. The relevancy of evidence . . . is to be determined by the *subject matter of the action* and by the *potential as well as actual issues* in the case. [¶] The sustaining of a demurrer relates only to the issues raised by the pleadings as they exist at the time of the ruling on the demurrer. A trial court may nevertheless properly permit an amendment to the pleadings during the course of trial; it may reconsider its ruling during trial; or the ruling may be reversed upon appeal. . . .<sup>132</sup>

California’s comparatively broad subject matter alternative thus looks beyond the direct call of the pleadings—as opposed to the federal claim or defense limitation.<sup>133</sup> The latter 2000 amendment to FRCP 26(b)(1) materialized after a generation of proposals to limit its scope to the complaint’s *claim or defense* allegations.<sup>134</sup> According to the federal rules-makers, that change was not likely to make a practical difference. Per their proffered justification: “[t]he [Advisory] Committee has been informed that this language [subject matter-good cause tandem] is rarely invoked.”<sup>135</sup>

This portrayal falls squarely into the contemporary federal dominoes approach to reigning in modern litigation expense. Proceedings on the

<sup>130</sup> CAL. CIV. PROC. CODE § 2017.010 (West 2012).

<sup>131</sup> FED. R. CIV. P. 26(b)(1) (general scope of discovery). A third FRCP basic scope of discovery difference from its California counterpart is that federal discovery requests must be “proportional.” The 2015 federal addition of “proportionality”—although not in California’s general scope statute—effectively aligned it with California discovery practice. See CAL. CIV. PROC. CODE § 2017.020(a) (West 2012) (comparable judicial limits on discovery).

<sup>132</sup> *McClatchy Newspapers v. Superior Court of Sacramento County*, 26 Cal.2d 386, 395-396, 159 P.2d 944, 949 (Cal. 1945) (emphasis supplied).

<sup>133</sup> *Compare* CAL. CIV. PROC. CODE § 2017.010 (West 2012) *with* FED. R. CIV. P. 26(b)(1). Regarding the broader California version: “[I]t is well established that relevancy of the subject matter does not depend upon a legally sufficient pleading, nor is it restricted to [only] the issues formally raised in the pleadings.” *Williams v. Super. Ct.*, 3 Cal.5th 531, 551, 220 Cal. Rptr.3d 472, 489 (Cal. 2017) (citing Court of Appeal precedent).

<sup>134</sup> As of 1997, “[n]early one-third of the lawyers surveyed . . . endorsed [so] narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. . . . [Subject matter requests] sweep far beyond the claims and defenses of the parties. . . .” FED. R. CIV. P. 26(b)(1) Advisory Committee Note to 2000 amendment, hereinafter 2000 Amendment Note. The Rule then retained the judicial discretion to permit subject matter discovery for good cause. The good cause option was ultimately deleted by the 2015 amendments to Rule 26.

<sup>135</sup> Advisory Comment to Fed. R. Civ. P. 26(b)(1) 2015 Amendment.

merits are seemingly being knocked over by the competing penchant for expediency. Examples include the U.S. Supreme Court's *Twombly-Iqbal* pleading paradigm. It scaled back the federal approach to "plausible" pleading—whereby far fewer cases reach the discovery stage.<sup>136</sup> The federal rules-makers have also scaled back subject matter discovery, in favor of the narrower claim or defense approach.<sup>137</sup> Furthermore, summary judgment is the favored disposition in today's federal litigation environment.<sup>138</sup>

Regarding the *admissibility* prong, one could debate whether the federal need-not-be admissible articulation—or the state's *admissible*, coupled with *lead to admissible*, evidence articulation—in fact yields a discrete scope of discovery. The FRCP 26 Advisory Committee Note claimed that the now truncated "need not be admissible" articulation soothed the concern that "the [former] 'reasonably calculated to lead to . . . admissible evidence' standard might swallow any other limitation on the scope of discovery."<sup>139</sup>

This particular state-federal comparison is not intended to *resolve* whether the discrete articulations in the general scope of discovery rules should co-exist. This would not be the first time that the respective rules-makers have snubbed the reality that different procedural rules are bound to lead to different substantive results. But the existing semantic diversity begs the question of whether uniformity is good or bad for the two judicial systems operating within the same state(s).

### 10. Continuing Discovery Responses

*State:* California does not require the responding party to update prior discovery responses. *Federal:* Discovery responses must be timely updated by the responding party.<sup>140</sup>

As in federal litigation, California discovery responses must not be incorrect or misleading. Such misinformation would violate statutory prohibitions against responses that are evasive, incomplete, or not correctly answered.<sup>141</sup> Associated judicial taboos eschew responses that

<sup>136</sup> See *supra* Part III, section 4 of this article, especially Miller, *supra* note 67 quote ("earlier and earlier termination of cases, thereby increasingly preventing claimants from reaching trial—particularly jury trial").

<sup>137</sup> See text accompanying *supra* notes 133-135.

<sup>138</sup> See *infra* Part V, section 13 of this article, regarding California's summary judgment being a "drastic" measure.

<sup>139</sup> 2000 Amendment Note, *supra* note 134.

<sup>140</sup> California: In the leading case, "we deconstruct a civil discovery 'urban legend'—that a responding party has an affirmative duty to supplement responses . . . if and when new information comes into that party's possession. . . ." *Biles v. Exxon Mobile Corp.*, 124 Cal. App.4th 1315, 1318-1319, 22 Cal. Rptr.3d 282, 283-284 (1st Dist. 2004) hereinafter *Biles*. Federal: "A party who has made a[n initial core] disclosure . . . —or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or [prior] response." FED. R. CIV. P. 26(e)(1).

<sup>141</sup> Evasive: *e.g.*, CAL. CIV. PROC. CODE § 2023.010(f) (West 2005); incomplete: *id.* §§ 2030.220(a) (interrogatories) and 2033.220(a) (requests for admission); incorrect: *id.* § 2030.310(c)(1) (interrogatories).

are *willfully* false.<sup>142</sup> But unlike the federal duty to supplement prior responses, there is no state duty to update responses that were correct when given—even when the responding party gratuitously “reserved the right to amend or supplement the earlier responses.”<sup>143</sup> State litigants seeking updated responses, such as subsequently discovered witnesses, must thus propound supplemental requests.<sup>144</sup>

The federal duty to supplement was more constrained under the initial draft of FRCP 26(e). There was “no *general* duty to supplement discovery responses in federal litigation . . . [although] local rules in the [various] federal district courts . . . imposed a duty to supplement responses.” The revised 1970 draft imposed a general duty to supplement.<sup>145</sup>

Enter the 1993 Initial Core Disclosure (ICD) requirements.<sup>146</sup> To facilitate the new ICD requirements, the federal supplementation paradigm further dictated that the responding party “*must* supplement or correct its [ICD] disclosure or . . . [any earlier response that] . . . was incomplete or incorrect . . . and [that] . . . information has not otherwise been made known to the other parties. . . .”<sup>147</sup> The Rule 26(e) supplementation subdivision was thus revised to apply to *all* disclosures required by subdivisions (a)(1)-(3).<sup>148</sup> Sanctions will thus be imposed if a party does not supply the updated information required by Rule 26(a) ICD and (e) all other responses, unless substantially justified.<sup>149</sup>

California would be wise to reconsider whether to adopt the more robust federal approach to updating discovery. When one balances the benefits and burdens, “expediting pretrial exchange of *unadulterated* discovery information is inevitable if future litigants desire to avoid excessive costs, delays, and ineffective judicial disposition of actions.”<sup>150</sup>

## 11. “Deemed” Admission Motion<sup>151</sup>

*State*: Failure to serve, or timely serve, responses to Requests for Admission (RFA) authorizes the *requesting* party to move for an order

<sup>142</sup> *E.g.*, “[w]here the party served with an interrogatory asking the names of witnesses to an occurrence then known to him deprives his adversary of that information by a willfully false response, he subjects the adversary to unfair surprise at trial.” Thoren v. Johnston & Washer, 29 Cal. App.3d 270, 274, 105 Cal. Rptr. 276, 278 (2d Dist. 1972).

<sup>143</sup> *Biles*, *supra* note 140, at 1319, 284.

<sup>144</sup> *E.g.*, CAL. CIV. PROC. CODE § 2030.070(a) (West 2005) (interrogatories).

<sup>145</sup> Initial draft: William R. Slomanson, *Supplementation of Discovery Responses in Federal Civil Procedure*, 17 SAN DIEGO L. REV. 233, 238-239 (1980) (emphasis supplied) hereinafter *Supplementation of Discovery Responses*. Final version: FED. R. CIV. P. 26(e)(1) (generally) & (e)(2) experts.

<sup>146</sup> FED. R. CIV. P. 26(a)(1)(A), addressed in *supra* Part IV section 8 of this article.

<sup>147</sup> FED. R. CIV. P. 26(e)(1) & (A) (emphasis supplied).

<sup>148</sup> Notes of Advisory Committee on Rules—1993 Amendment to Rule 26(e). Those subdivisions include: Rules 26(a)(1)–ICD; 26(a)(2)–experts; and the four 26(a)(3) pre-trial discovery-stage disclosures set forth in the text accompanying *supra* note 113.

<sup>149</sup> FED. R. CIV. P. 37(c)(1).

<sup>150</sup> *Supplementation of Discovery Responses*, *supra* note 145, at 236 (emphasis in original text).

<sup>151</sup> In both systems, “one must pay special attention upon . . . receipt of RFA—as compared to interrogatories. The expiration of time, within which to respond to RFA, can

that the genuineness of any documents, and the truth of any matters specified in the RFA, be deemed admitted.<sup>152</sup> *Federal*: The same non-response results in automatic admissions—whereby the *responding* party must petition the court to be excused from these “deemed” admissions.<sup>153</sup>

*Prior* California RFA practice mirrored today’s federal RFA instantly deemed admitted approach. California then considered that consequence “problematic because it: (1) was too ‘draconian’ and ‘imposed a [n automatic] sanction for [a] nonresponse or tardy response that [was, in effect] out of all proportion to the abuse of discovery;’ and (2) created no incentive for a party willing to make the admissions to serve an actual response.”<sup>154</sup> The California Code was thus amended to instead require the requesting party to file a motion to have the tardy or unanswered RFA content be admitted, if approved by the court.<sup>155</sup>

Federal RFA practice thus presents a comparatively heavy-handed environment. Unlike the California RFA approach, FRCP 36(b) is self-executing. No motion is required for the admissions to be conclusive.<sup>156</sup> The 1970 amendments to federal RFA practice were thus bittersweet. On the one hand, Rule 36 provided a relief valve for clawing back deemed admissions. But the burden was placed on the responding party to bring a motion to obtain the admissions claw back.

The federal approach is presumably more effective for ensuring compliance with the RFA process. But California’s *additional* step, requiring a motion to deem such admissions conclusive, is more likely to achieve both the state and federal policy goal of pursuing litigation on the merits—rather than the automatic admission windfall that may occur in federal cases.

Courts have broad discretion regarding whether to impose sanctions for discovery abuses. Such sanctions should align with the abuse at hand. The federal Advisory Committee has emphasized “the importance of having the action resolved on the merits . . . [and] assuring that each party . . . [achieves] justified reliance on an admission in preparation for

result in an admission of the contents. Experience is a good thing. But inattention to such RFA details is not the ideal way to get it.” WILLIAM R. SLOMANSON, CALIFORNIA CIVIL PROCEDURE IN A NUTSHELL 270 (5th ed. 2014).

<sup>152</sup> CAL. CIV. PROC. CODE § 2033.280(a) (West 2005) (not *automatically* admitted).

<sup>153</sup> FED. R. CIV. P. 36(b) (automatically deemed admitted). California’s two-step RFA process—requesting party sends RFAs, followed by requesting party’s deemed admitted motion—resembles its two-step default judgment process: first, advise defendant who is in default, followed by the default judgment process set forth in CAL. CIV. PROC. CODE § 580 (West 2006).

<sup>154</sup> *Wilcox v. Birtwhistle*, 21 Cal.4th 973, 979-980, 90 Cal. Rptr.2d 260, 265 (Cal. 1999).

<sup>155</sup> *Compare* CCP § 2033.280(b) (West 2005) (*requesting* party must make motion) *with* FED. R. CIV. P. 36(b) (*responding* party must make withdrawal/amendment motion). California objections, however, including privilege and work product, are automatically waived by a tardy or non-response. A “responding” party who ultimately chooses to finally respond must then make a motion to relieve the waiver. CCP § 2033.280(a) (West 2005).

<sup>156</sup> Thus, the revised federal provisions give an admission a conclusively binding effect. So “[u]nless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.” Advisory Committee Note to the 1970 amendment to Rule 36(b), 48 F. R. D. 487, 534 (1970).

trial. . . .<sup>157</sup> But its self-executing conclusive admission approach does not bear witness to the consternation that “[i]f suppression of the merits were necessary in order to protect the interests of some party or to insure effective operation of the admission procedure, suppression might be justified. . . .”<sup>158</sup>

A final matter for potential reconsideration (in both systems) is whether RFAs should be permitted to address major contentions—*e.g.*: “Admit you were negligent.” The trier of fact is supposed to determine the facts at trial. But modern RFA practice has moved away from limiting such fact-finding to trial. Key facts are now more expeditiously determined before trial, via the threat of sanctions for failing to admit principal (and subordinate) facts.<sup>159</sup>

## V. DISPOSITION WITHOUT TRIAL

### 12. Diligent Prosecution Statutes

*State:* California’s Diligent Prosecution Statutes generally require *service* on defendants within three years of filing the complaint; and *trial* within five years of filing.<sup>160</sup> *Federal:* Defendants must be served within ninety days of filing. The relevant Federal Rule does not contain a specific time frame for bringing a case to trial. However, the local rules of California’s federal districts implicitly threaten dismissal when plaintiffs have been inactive after filing and service.<sup>161</sup>

The respective time frames—*e.g.*, the Code of Civil Procedure’s three-year period for service versus the FRCP’s ninety-day period—are not as divergent as meets the eye. California’s approach to case management narrowed that gap. Its 1990 Trial Delay Reduction Act<sup>162</sup> was designed

<sup>157</sup> *Id.*

<sup>158</sup> Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L. J. 371, 431 (1962) hereinafter *Request for Admissions*.

<sup>159</sup> As noted in a 1962 summary: “In numerous cases the courts have said that requests for the admission of a ‘controversial fact,’ a ‘vitaly disputed’ contention, or the ‘main’ or ‘principal’ issue in a case are improper.” *Id.* at 394 (footnotes & citations omitted). Initial federal perspective: “The purpose of Rule 36 is to expedite trial and to relieve parties of the cost of proving facts which will not be disputed on trial. . . . [I]t would seem that parties should not request admissions of controversial facts.” *Electric Furnace Co. v. Fire Ass’n of Phila.*, 9 F. R. D. 741, 742 (N.D. Ohio, 1049). Current federal view: “[t]his conclusive effect applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party’s claim [or defense].” *American Automobile Association, Inc. v. AAA Legal Clinic of Jefferson Croke*, P. C., 930 F.2d 1117, 1120 (5th Cir. 1991) (footnotes citing authorities omitted). Current California view: Post-trial sanctions may be imposed unless “[t]he admission sought was of no substantial importance.” CAL. CIV. PROC. CODE § 2033.420(b)(2) (West 2005) (emphasis supplied).

<sup>160</sup> CAL. CIV. PROC. CODE § 583.210(a) (three years) (West 2005); CAL. CIV. PROC. CODE § 583.250(b) (five years) (West 1984).

<sup>161</sup> FED. R. CIV. P. 4(m) (service); FED. R. CIV. P. 41(b) (no time provision); C.D. Cal. Civ. R. 41-1 & S.D. Cal. Civ. R. 41-1 (when the case is “pending for an unreasonable period of time without any action having been taken”); E.D. R. 280 (“counsel shall proceed with reasonable diligence to . . . bring an action to . . . trial); and N.D. R. 40-1 (“[f]ailure of a party to proceed . . . may result in . . . the imposition of appropriate sanctions, including dismissal or entry of default”) hereinafter Cal-Fed Local Rules.

<sup>162</sup> CAL. GOV’T CODE §§ 68600-68620 (West 1990).

to implement the policy goal of adjudicating all *non*-complex cases within two years of filing.<sup>163</sup> California also permits such cases to be served on all named defendants within sixty days after the filing of the complaint.<sup>164</sup> Counties may provide for longer periods, but no less than sixty days from filing the complaint.<sup>165</sup>

The federal approach to diligence in trial readiness is comparatively fluid. There are no specific must-bring-to-trial timeframes in either the FRCP or in the California federal court local rules. California, on the other hand, provides detailed guidance to its state courts and practitioners.<sup>166</sup>

This is an important gap in need of closure. On the one hand, the federal rules-makers often avoid injecting procedures into the national FRCP that will generate unintended forum shopping. That understandable caution facilitates parity with local state practice. But California's four federal districts should reconsider the comparative silence in their local rules regarding diligent prosecution. When the merits are trumped by a dismissal for failure to timely bring a case to trial, those local rules should provide some specifics. The state Legislature provides extensive guidance to its state practitioners and courts.<sup>167</sup> Augmenting the local federal rules—to approximate California practice—would be preferable to an earlier junior scholar's suggestion that "California should abandon its detailed scheme for the more fluid federal approach to diligent prosecution."<sup>168</sup>

### 13. Summary Judgment Separate Statement

*State:* A summary judgment motion must contain a Separate Statement, designed to facilitate the identification of contested issues.<sup>169</sup> *Federal:* FRCP 56 does not require Separate Statements. Some federal judges allow them. Others prohibit them.

In 2009, the federal Advisory Committee on Civil Rules debated whether it should institute a similar "point-counterpoint" requirement. The Committee decided not to propose it—after hearing from a number of practitioners and judges. They generally characterized the procedure as "burdensome and expensive." Some courts adopted the

<sup>163</sup> The Act's public policy, disposition objectives, plan for expedited case disposition, etc., are presented in CAL. GOV'T CODE § 68616 (West 2011) & CAL. R. CT. 3.714(b) (2007).

<sup>164</sup> *Id.* 3.110(b) (2007).

<sup>165</sup> CAL. GOV'T CODE § 68616(a) (West 2011).

<sup>166</sup> Compare the specific case disposition timelines in CAL. R. CT. 3.714(b) (2007), and the eighteen factors for applying those timelines in Cal. R. Ct. 3.715(a) (2007), with the lack of guidance in FED. R. CIV. P. 41(b), and the federal local rules. Two districts within this tetrad provide only that a case can be dismissed when "pending for an unreasonable period." See Cal-Fed Local Rules, *supra* note 161.

<sup>167</sup> *E.g.*, the statutory paradigm governing such dismissals set forth in CAL. CIV. PROC. CODE §§ 583.310-583.420 (West 1984).

<sup>168</sup> William R. Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 CALIF. WEST. L. REV. 1 (1982).

<sup>169</sup> Separate statement: CAL. CIV. PROC. CODE § 437c(b) (West 2016). Format: Cal. R. Ct. 3.1350(h) (West 2008), which provides detailed guidance. The desired visual result is a side-by-side presentation of contested issues in a two column format.

point-counterpoint procedure by local rule, but subsequently either abandoned or are rethinking it.<sup>170</sup>

As cautioned by a Seventh Circuit Court of Appeals judge:

[T]he Northern District of Illinois[ ] uses the point-counterpoint procedure that was part of the proposed rule, [and] I was frankly surprised at the depth of opposition that this provision sparked. . . . [I]t was the district judges who objected to the nationalization of the point-counterpoint procedure. [¶ Furthermore,] Southern Indiana judges began seeing ‘huge, unwieldy, and especially expensive presentations of hundreds of factual assertions . . . [that] became the focus of lengthy debates over relevance and admissibility.’ [¶] This is the stuff of nightmare[s]. . . . [A] great deal of duplication is inevitable if the point-counterpoint system is used. The facts are set out in the separate statement, but then it is necessary to address them all over again in the briefing. It is hard to draw out inferences from facts in the separate statement, which again forces the parties over to the briefing.<sup>171</sup>

The California Court of Appeal’s presumptive rejoinder would be that “‘separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for . . . summary judgment to determine quickly and efficiently whether material facts are disputed.’ ”<sup>172</sup>

Judges in California’s four federal districts are split regarding a comparable Statement of Genuine Disputes requirement. Two districts require such a statement—although the format is not specified in the detail required by state practice. One district prohibits these separate statements, absent an authorizing court order. The final district has no local rule. Individual judges may thereby embrace or prohibit a detailed Separate Statement.<sup>173</sup>

This diversity of approaches enables some conjecture about the dueling banjo Separate Statement perspectives within California’s borders. The legislative and judicial views about summary judgment itself are in not in sync. The California Legislature has warned that the “[s]ummary judgment [motion] is a *drastic procedure* and should only be granted when an action is without merit.”<sup>174</sup> In the federal system, however, “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as *an integral part* of the

<sup>170</sup> REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Agenda E-19 at 18 (2009).

<sup>171</sup> Hon. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 247-248 (2011).

<sup>172</sup> *Kojababian v. Genuine Home Loans, Inc.*, 174 Cal. App.4th 408, 415-416, 94 Cal. Rptr. 3d 288, 293 (2d Dist. 2009) (citing authorities).

<sup>173</sup> Required: Central District L. R. 56-1 and 56-2; Eastern District Rule 260(a)-(b). Prohibited: Northern District Rule 56-2(a). The Southern District has no such rule.

<sup>174</sup> Cal. Stats. 2002 § 1, ch. 448 (S. B. 688) (2002) (emphasis supplied). This pessimistic characterization dovetails with the state’s mandated Separate Statement requirement.

Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’<sup>175</sup>

One might theorize that state judges, federal judges in half of the state’s federal districts, and sizeable defense law firms robustly embrace the Separate Statement-Statement of Genuine Disputes augmentation of the summary judgment process. The judges have law clerks. The firms have associates. One or more of these subordinates are likely to be their designated summary judgment gurus.

But the Separate Statement requirement can also be a time-consuming bludgeon for new and small plaintiff firms. They would likely assert the view that this device undoubtedly adds to case complexity for most litigators. As articulated by a partner in a prominent San Diego law firm, whose primary responsibility is managing the firm’s state and federal motions:

My general perspective on the separate statement requirement is that I understand the intent behind it. But I don’t feel like it accomplishes the desired goal. Mostly, it allows either side to avoid the page limits placed on the Memorandum of Points and Authorities. Lawyers can thereby inundate the court (and each other) with a barrage of arguments therein disguised as facts. I would be interested in knowing the judicial perspective on the separate statement, but I would be surprised if most judges found them all that helpful.<sup>176</sup>

#### 14. Offer of Judgment

The state and federal written offer of judgment procedures differ in the following respects: (a) who can make the offer; (b) the period of time it remains open; (c) whether it is revocable; (d) the impact of a defense judgment; and (e) the availability of expert witness fees.

(a) *State*: Either party may make an offer of judgment.<sup>177</sup> *Federal*: Only the defending party may make an offer of judgment.<sup>178</sup> (b) *State*: The offer of judgment period is thirty days.<sup>179</sup> *Federal*: It is fourteen days.<sup>180</sup> (c) *State*: The offer is revocable.<sup>181</sup> *Federal*: It is irrevocable.<sup>182</sup> (d) *State*: A defense judgment does not block the operation of the offer of judgment

<sup>175</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (emphasis supplied). Thus, it is not surprising that FRCP 56 practice does not require the Separate Statement augmentation. *But cf.* Miller, *supra* note 67 quote.

<sup>176</sup> E-mail to author, from Jeremy Robinson, Esq., dated July 19, 2018 (on file with author; *see* note 1 for firm name).

<sup>177</sup> CAL. CIV. PROC. CODE § 998(b) (West 2015) (“any party”).

<sup>178</sup> FED. R. CIV. P. 68(a) (only “party defending”).

<sup>179</sup> CAL. CIV. PROC. CODE § 998(b)(2) (West 2015).

<sup>180</sup> FED. R. CIV. P. 68(a).

<sup>181</sup> *T. M. Cobb Co. v. Super. Ct.*, 36 Cal.3d 273, 278, 204 Cal. Rptr. 143, 146-147 (Cal. 1984). KeyCite Yellow Flag-Negative Treatment (Colorado, Oklahoma and Tennessee).

<sup>182</sup> The leading case is *Richardson v. National R. R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995). The timeframe was ten days, when *Richardson* was decided. The revised fourteen-day federal period further minimized this state-federal offer of judgment difference from twenty to sixteen days (previously thirty days for California and ten days for federal offers). KeyCite Yellow Flag-Negative Treatment (E.D. N.Y. and C.D. Cal.).



statute.<sup>183</sup> *Federal*: A defense judgment negates a defendant's otherwise conforming offer of judgment.<sup>184</sup> (e) *State*: In addition to costs, the a party *may* recover expert witness fees as a consequence of an unaccepted offer of judgment.<sup>185</sup> *Federal*: FRCP 68 is silent regarding expert witness fees.

Three of these differences dictate further comment. The first involves *who* can make such offers. Rule 68 "has no application to offers made by the plaintiff. The Rule applies [only] to settlement offers made by the defendant. . . ." <sup>186</sup> The driving force in both judicial systems is to facilitate settlement.<sup>187</sup> But FRCP 68's wording limits an offer of judgment. It can be made only the *defending* party. The U.S. Supreme Court traced the Rule's evolution to "an outgrowth of the equitable practice of denying costs to a plaintiff 'when he sues vexatiously after refusing an offer of settlement. . . . Therefore, the only purpose served by these state offer-of-judgment rules was to penalize prevailing plaintiffs who had rejected reasonable settlement offers without good cause.'" <sup>188</sup>

But that aging restraint is now counter-intuitive to federal settlement objectives in the post-WWII era of mushrooming litigation and spiraling discovery costs. As acknowledged by the U.S. Supreme Court: "The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat *provide both parties with an incentive to settle* in advance of trial."<sup>189</sup> No Rule 68 amendment has since addressed this glaring exception to Rule 68's settlement rationale, whereby the plaintiff—and the original defendant who files a counterclaim—remain barred from making a Rule 68 offer.

The U.S. Supreme Court has further opined that Rule 68's policy of encouraging settlements is "neutral, *favoring neither* plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits."<sup>190</sup> It is hard to reconcile that statement with the one-sided limitation that the plaintiff may not make a Rule 68 offer.

The Federal Rules Committee of the Federal Magistrate Judges Association (FMJA) proposed that Rule 68 be amended to authorize mutual offers. That would have expressly aligned Rule 68 practice with

<sup>183</sup> Unlike the federal rule, nothing in the California offer of judgment statute purports to limit the application of Section 998, when there is a defense judgment. There are a number of appellate opinions affirming defense judgment "998" consequences; e.g., *Jones v. Dumrichob*, 63 Cal. App.4th 1258, 1264, 74 Cal. Rptr.2d 607, 611 (1st Dist. 1998) ("the trial result itself [defense judgment] constitutes prima facie evidence that the offer was reasonable") hereinafter *Dumrichob*.

<sup>184</sup> *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 354, 101 S. Ct. 1146, 1151 (1981) (Rule 68 "does not apply to judgments in favor of the defendant") hereinafter *Delta*.

<sup>185</sup> CAL. CIV. PROC. CODE § 998(c)(1) & (d) (West 2015) both provide that "the court or arbitrator . . . in its discretion may require the [plaintiff or defendant] . . . to pay . . . postoffer costs of the services of expert witnesses."

<sup>186</sup> *Delta*, *supra* note 184, at 350, 1149.

<sup>187</sup> Rule 68's "purpose . . . is to encourage the settlement of litigation"). *Delta*, *supra* note 184, at 352, 1150. Per the Advisory Committee: "These provisions should serve to encourage settlements and avoid protracted litigation." FED. R. CIV. P. 68 Advisory Committee Note to 1946 amendment, 5 F.R.D. 433, 483 (1946).

<sup>188</sup> *Delta*, *supra* note 184, at 356-357, 1152-1153 (citing treatise).

<sup>189</sup> *Delta*, *supra* note 184, at 352, 1150 (emphasis supplied).

<sup>190</sup> *Marek v. Chesny*, 473 U.S. 1, 10, 105 S. Ct. 3012, 3017 (1985) (emphasis supplied), *superseded by statute on other grounds*, as noted in *Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757 (10th Cir. 1999).

California's 998 practice. The Association thus hoped that Rule 68 would (a) go both ways, and (b) include expert witness fees.<sup>191</sup> This proposal died in the Federal Rules Advisory Committee process. That Committee feared that Congress would, instead, convert the FMJA (California alignment) proposal into a "loser pays fees" Rule 68 outcome.<sup>192</sup>

The second remarkable difference in the state-federal offer of judgment comparison is the impact of a defense judgment. FRCP 68(d) provides that the Rule's consequences attach if the judgment that the plaintiff offeree finally obtains is not more favorable than the unaccepted offer. The U.S. Supreme Court quite reasonably interpreted this language via a plain meaning approach to this Rule 68 constraint. In doing so, the Court nevertheless exposed the following *anti-settlement* thread embedded within Rule 68's fabric: "if we limit our analysis to the text of the Rule itself, it is clear that it applies only to . . . judgments obtained by the plaintiff. It therefore is simply inapplicable to this case because it was the defendant that obtained the judgment."<sup>193</sup>

The Court next undertook an issue not addressed by Rule 68: "If . . . Rule 68 applies to defeated plaintiffs, any settlement offer, no matter how small, would apparently trigger the operation of the Rule. Thus any defendant . . . [could perform] the meaningless act of making a nominal settlement offer. . . ." <sup>194</sup> California's judges readily sacked this nominal offer problem by a "token offer" approach to such abuse. Thus:

[t]o effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement. . . . The offer 'must carry with it some reasonable prospect of acceptance. One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer. . . .'<sup>195</sup>

Windfall-seeking offers are often presented at the outset of the litigation, before discovery reveals the merits of the claim or defense. If the offeror happens to prevail at trial, he or she would otherwise obtain the statutory benefits, without any serious hope of an early acceptance. Such offers are thus subject to being judicially upended. The issue of "[w]hether a section 998 offer was reasonable and made in good faith is left to 'the sound discretion of the trial court.' "<sup>196</sup>

<sup>191</sup> The FMJA rationale was that "[t]hese changes would be consistent with the law in many state jurisdictions (i.e., California Code of Civil Procedure §998) and it is submitted that the cost shifting effect will have a positive impact on case resolution." FJMA Committee Note, dated May 6, 1996 (on file with this article's author).

<sup>192</sup> Letter to author from the Hon. Anthony J. Battaglia, U.S. District Court (S. D. CA), dated July 15, 2018 (on file with author).

<sup>193</sup> *Delta*, *supra* note 184, at 352, 1150.

<sup>194</sup> *Delta*, *supra* note 184, at 353, 1150-1151.

<sup>195</sup> *Dumrichob*, *supra* note 183 at 1262-1263, 610-611 (1st Dist. 1998) (quoting authorities), *superseded by statute on other grounds*, *McCain v. County of Lassen*, 2003 WL 123065 \*12 (3d Dist. 2003).

<sup>196</sup> *Adams v. Ford Motor Co.*, 199 Cal. App.4th 1475, 1484, 132 Cal. Rptr.3d 424, 431 (2d Dist. 2011) (citing precedent).

Unlike the California statute,<sup>197</sup> FRCP 68 does not mention expert witness fees.<sup>198</sup> This distinction poses yet another opportunity for federal reconsideration of its Rule 68 settlement policy. Recoverable costs are often minimal, in comparison to state court expert witness fees. California's expert witness fee Sword of Damocles is suspended over both plaintiffs and defendants. It thus requires the litigants to even more carefully assess California's statutory offer of judgment process when a section 998 offer is thrust onto the tactical battlefield.

The federal rules-makers should consider adopting several prominent features of California's Section 998 practice. They could then do a far better job of facilitating settlement. They must address whether Rule 68 should be amended to: (1) allow plaintiffs to make offers of judgment; (2) expand the Rule to include defense judgments within its ambit; and (3) authorize judicial discretion to include expert witness fees within the Rule 68 settlement arsenal.

### 15. Relief from Judgment / Order

*State:* A court *may* relieve a party or lawyer from a judgment or order resulting from his or her "mistake, inadvertence, surprise, or excusable neglect." But the court *shall* vacate such results whenever an application for relief is accompanied by an attorney's sworn affidavit—attesting to causing the client's default, default judgment, or dismissal.<sup>199</sup>

*Federal:* The court *may* relieve a party or its legal representative for the same reason. But there is no mandatory relief process.<sup>200</sup> California's *mandatory* attorney affidavit relief provision was designed "to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys. . . ." <sup>201</sup> It thus requires the court to grant relief if the attorney admits neglect, even when his or her neglect was *inexcusable*.<sup>202</sup> California law thus: (1) relieves the innocent client from the burden of the attorney's fault; (2) imposes that burden on the real sinner; and (3) avoids another round of

<sup>197</sup> CAL. CIV. PROC. CODE § 998(c)(1) & (d) (West 2015) (expert fees payable by respective parties).

<sup>198</sup> The Rule's silence binds California judges when hearing Federal Question cases. Thus, "the availability of expert witness fees in a FELA [Federal Employer's Liability Act] action filed in state court is controlled by federal law. . . . [W]e conclude federal law does not authorize an award of expert witness fees to a . . . rejected offer of settlement. . . ." Kinsey v. Union Pacific Railroad Co., 178 Cal. App.4th 201, 204, 100 Cal. Rptr.3d 253, 254 (3d Dist. 2009).

<sup>199</sup> CAL. CIV. PROC. CODE § 473(b) (West 1996).

<sup>200</sup> FED. R. CIV. P. 60(b) (emphasis supplied to both rules). Rule 60(b) was based upon section 473 of the California Code of Civil Practice. Fiske v. Buder, 125 F.2d 841, 844 (8th Cir. 1942) (applying the same construction of the California statute to Rule 60). However, subsequent amendments to FRCP 60(b), and the addition of California's above-quoted *mandatory* relief provision, diminished federal reliance on California's relief from judgment/order law.

<sup>201</sup> Zamora v. Clayborn Contracting Group, Inc., 28 Cal.4th 249, 257, 121 Cal. Rptr.2d 187, 193 (Cal. 2002) (emphasis in original text). The court may impose a "penalty [on the attorney] of no greater than one thousand dollars . . . or other relief as is appropriate." CAL. CIV. PROC. CODE § 473(c)(1) (West 1996).

<sup>202</sup> Metropolitan Service Corp. v. Casa de Palms, Ltd., 31 Cal. App.4th 1481, 1487, 37 Cal. Rptr.2d 575, 578-579 (2d Dist. 1995).

related litigation in the form of a malpractice suit against the erring attorney.

The U.S. Supreme Court, instead, imputes the lawyer's negligence to the client. Per its seminal case:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'<sup>203</sup>

But as bellowed by the dissenters, it is "*contrary to the most fundamental ideas of fairness and justice* to impose the punishment for the lawyer's failure . . . upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do."<sup>204</sup> The pressure to reconsider this harsh result is further evident from ensuing academic pleas, including that "[m]any of the most troubling cases would be avoided if the imputed-negligence rule were abandoned and the case reopened wherever that could be done without prejudice to the other party because he relied on the judgment."<sup>205</sup>

A contemporary work-around has since surfaced. FRCP 60(b)'s discretionary relief standard includes subsection (6). It authorizes judicial intervention for "any other reason that justifies relief." There is a related split among the circuits regarding its axiomatic availability for rescuing the client from counsel's blunders.<sup>206</sup> Federal courts on the lenient side of this split offer essentially automatic relief, premised upon their equitable power to thereby undo dispositive attorney errors. As one commentator prudently concludes:

When a litigant suffers an adverse judgment solely because of his attorney's misconduct, an issue arises with respect to how the courts should allow the litigant to proceed: by granting relief from the prior judgment pursuant to Rule 60(b)(6) or [by] steering the litigant toward a malpractice suit against the attorney. . . . [¶] [C]ourts ought to uniformly recognize an attorney's gross negligence as a valid basis for Rule 60(b)(6) relief.<sup>207</sup>

While an admirable perspective, there is a better way to resolve the state-federal discretionary-mandatory malpractice divide. That would be for the federal rules-makers to revisit FRCP 60(b). The purpose would be

<sup>203</sup> *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634, 82 S. Ct. 1386, 1390 (1962), *reh'g denied*, 371 U.S. 873 (1962).

<sup>204</sup> *Id.* 643, 1395 (Black, J. & Warren, C. J., dissenting; emphasis supplied).

<sup>205</sup> Lester J. Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120, 1137 (1968).

<sup>206</sup> Regarding the varied applications, see Note, *Interpreting Rule 60(B)(6) of the Federal Rules of Civil Procedure: Limitations on Relief from Judgments for "Any Other Reason,"* 7 SUFFOLK J. TRIAL & APP. ADVOC. 127 (2002).

<sup>207</sup> Comment, *Rule 60(B)(6): Whether "Tapping the Grand Reservoir of Equitable Power" is Appropriate to Right an Attorney's Wrong*, 88 MARQ. L. REV. 997, 997 & 1010 (2005).

to consider whether the mandatory attorney error relief perspective of states like California makes more sense. This assessment should include: (a) whether judicial efficiency would be *enhanced* by the mandatory relief approach; (b) whether ensuing malpractice suits should remain as the preferable form of redress; (c) whether the federal imputed negligence protocol best serves the client's interests; and (d) whether trial on the merits deserves a more robust role in correcting attorney errors.<sup>208</sup> That study might also consider the degree to which authorizing mandatory relief would encourage lawyers to falsely claim sole responsibility to avoid malpractice suits.

## VI. TRIAL

### 16. Law-Equity Right to Jury

Where there is a right to jury trial,<sup>209</sup> the notable state and federal differences are as follows: (a) when the pleadings present *overlapping* law and equity issues, a state trial judge often tries the equity issues first—which a federal judge cannot do; (b) when an equity complaint pleads *incidental* legal relief, the state judge—unlike a federal judge—may resolve both types of relief without a jury; and (c) there is a looming federal “complexity” exception to the right to jury, which does not exist under state law.

(a) As first year law students learn, factual issues spilling into both the law and equity sectors of the same federal lawsuit must first be resolved by a jury. The question was which trier of fact would resolve the matching (overlapping) issues. As somewhat overstated by the U.S. Supreme Court in its seminal right to jury case: “In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with . . . a demand for equitable relief in aid of the legal action. . . .”<sup>210</sup>

A California judge, however, may resolve the same issues without a jury. California has rejected *Beacon Theaters*.<sup>211</sup> A state complaint may be purely equitable, and the cross-complaint purely legal. Alternatively, a lone complaint may present overlapping equitable and legal issues. Unlike *Beacon Theaters*, both of these pleading scenarios trigger California's “equity-first” discretion:

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<sup>208</sup> See *id.*, at 1006-1010. The related issues also include whether counsel's mistakes must be extraordinary; and whether mere negligence or gross negligence would be required to trigger FRCP 60(b)(6) relief. See generally Note, *No More Excuses: Refusing to Condone Mere Carelessness or Negligence Under the “Excusable Neglect” Standard in Federal Rule of Civil Procedure 60(B)(1)*, 50 VAND. L. REV. 1619 (1997).

<sup>209</sup> In both systems, a jury may be requested by either party when the complaint presents an action “at law”; that is, one that seeks money damages, *i.e.*, “legal” relief—as opposed to an equitable claim seeking injunctive relief.

<sup>210</sup> *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510, 79 S. Ct. 948, 957 (1959), hereinafter *Beacon Theaters*, thus overruling 150 years of contrary federal precedent. The Court then cautioned that “only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.” *Id.* at 510-511, 956.

<sup>211</sup> The federal Constitution's Seventh Amendment right to jury trial does not apply to the states. See, *e.g.*, “The Court has *not* held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.” *Curtis v. Loether*, 415 U.S. 189, 192 n.6, 94 S. Ct. 1005, 1007 n.6 (1974) (emphasis supplied).

Where plaintiff's claims consist of a "mixed bag" of equitable and legal claims, the equitable claims are properly tried first by the court. A principal rationale for this approach has been explained as follows: 'When an action involves both legal and equitable issues, the equitable issues, ordinarily, are tried first, for this may obviate the necessity for a subsequent trial of the legal issues.' Numerous cases having a mixture of legal and equitable claims have identified this same principle—that trial of equitable issues first may *promote judicial economy*.<sup>212</sup>

Both the state and federal approaches make textbook sense, from a legal analysis standpoint.<sup>213</sup> Yet the practical nature of California's equity-first precedent is patently more sound, from an efficiency point of view. California's equity-first rule promotes judicial economy, given the multiple number of trial days it takes to try a jury case versus a bench trial.<sup>214</sup> One must acknowledge that a bench trial, especially in complex cases, features the:

tradition and heredity of the flexible . . . powers of the modern trial judge [which] derives from the role of the trained and experienced chancellor and depend[s] upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.<sup>215</sup>

(b) California's "equity-first" first cousin is the Incidental Legal Relief (ILR) doctrine. The *Beacon Theaters* pleadings offered a full-throated equitable complaint and an equally boisterous money damages

<sup>212</sup> *Nwosu v. UBA*, 122 Cal. App.4th 1229, 1238, 19 Cal. Rptr.3d 416, 423 (6th Dist. 2004) (emphasis supplied).

<sup>213</sup> Federal adherence to the immersed supremacy of the federal right to jury is rooted in the modern expansion of legal remedies:

Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the [historical] justification for equity's deciding legal issues once it obtains jurisdiction . . . must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.

*Beacon Theaters*, *supra* note 210, at 509, 956. Per California's legal history, "the right so guaranteed is the right as it existed at common law when the Constitution was adopted [in 1850]." *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 286-287, 231 P.2d 832, 835 (1951).

<sup>214</sup> *E.g.*: "The average federal civil *jury* trial in 1983 lasted 4.48 days, compared to 2.21 days for the average *nonjury* trial." RICHARD POSNER, *THE FEDERAL AIPLA COURTS: CRISIS AND REFORM* 130 n.1 (1985). The 2013 federal (patent) case numbers are strikingly similar; *e.g.*, in the Northern District of California, 5.5 v. 12.7 days; in the Central District of California, 3.75 v. 8.24 days. Mark A. Lemley, Jamie Kendall, Clint Martin, *Rush to Judgment— Trial Length and Outcomes in Patent Cases*, 41 AM. INTELL. PROP. ASS'N J. 169, 180-181 (2013). The California numbers are approximately three days for a jury trial versus one day for a bench trial. In San Diego County Superior Court, for example:

I still do not have a source which compares the average number of trial days for a judge v. a jury trial in California. However, over lunch today with a number of my civil colleagues, our best estimate is that . . . the average number of jury trial days, compared to bench or non-jury trial days, is . . . three jury trial days for every one non-jury trial day.

E-mail from California Superior Court Judge "X" to this article's author, dated July 03, 2018 (on file with author).

<sup>215</sup> *A-C Company, Inc. v. Security Pacif. Nat'l Bank*, 173 Cal. App.3d 462, 473, 219 Cal. Rptr. 62, 69 (4th Dist. 1985).

counterclaim. Three years later, the U.S. Supreme Court detached federal jurisprudence from the exceptionally practical ILR doctrine. The Court rejected prior case law, which had authorized federal judges to “clean up.” They could previously tidy up the litigation mess by also resolving any minimal damages appendage.<sup>216</sup>

California courts have rejected the U.S. Supreme Court’s rejection of the ILR doctrine. As exemplified by the state Court of Appeal: “Any damages he sought were merely incidental to . . . [the plaintiff’s] principal request for specific performance and injunctive relief. The trial court did not err in ordering a bench trial on the claims for breach of contract and the covenant of good faith and fair dealing.”<sup>217</sup>

(c) The Complexity Exception tip of the right to jury iceberg protruded from a 1970 U.S. Supreme Court footnote. Per the Court’s fleeting reference: “the ‘legal’ nature of an issue is determined by considering [inter alia] . . . the practical abilities and limitations of juries.”<sup>218</sup> Both the federal Ninth Circuit, and its California home state, have rejected this dicta as not implicating a Due Process limitation on the right to jury.<sup>219</sup>

The U.S. Supreme Court has opted not to resolve this fundamental constitutional issue,<sup>220</sup> generated by its chimerical mention of what became the so-called Complexity Exception. Its members have routinely opted to deny certiorari in subsequent cases. Were the Court to reconsider, it would pit the 5th Amendment Due Process “practical abilities and limitations of juries” antagonist against the 7th Amendment Right to Jury “shall be preserved” protagonist. This is the classic constitutional Clash of Titans with no predictable winner.

In a comparable diminution of the federal right to jury, Congress has seemingly chosen to implement a *Beacon Theaters* “imperative circumstances” basis for deflating the right to jury trial.<sup>221</sup> This path to a practical resolution of complex cases is exemplified by administrative

<sup>216</sup> *Dairy Queen v. Wood*, 369 U.S. 469, 470, 82 S. Ct. 894, 896 (1962) (demise of the federal ILR doctrine).

<sup>217</sup> *Benach v. County of L. A.*, 149 Cal. App.4th 836, 846-847, 57 Cal. Rptr. 363, 372 (2d Dist. 2007). *Accord*: “The fact that damages is one of a full range of possible remedies does not guarantee . . . the right to a jury. . . .” *Nationwide v. Super. Ct.*, 24 Cal. App.5th 438, 445, 199 Cal. App.4th 1475, 234 Cal. App.3d 468, 473 (2018) (citing authority).

<sup>218</sup> *Ross v. Bernhard*, 396 U.S. 531, 538 n.10, 90 S. Ct. 733, 738 n.10 (1970).

<sup>219</sup> *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 424 (9th Cir. 1979), *cert. denied*, *Grant v. Union Bank*, 446 U.S. 929 (1980); *Rankin v. Frebank Co.*, 47 Cal. App.3d 75, 92, 121 Cal. Rptr. 348, 359 (2d Dist. 1975).

<sup>220</sup> There are competing academic conclusions; *e.g.*: 7th Amendment Right to Jury trumps: “Recently, four district courts have struck demands for juries in cases of unusual complexity . . . [but] the district courts’ approach would leave tremendous discretion in the hands of the trial judge—discretion that the Supreme Court sought to eliminate in *Beacon Theaters* and in *Dairy Queen*.” Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99, 120 (1979). *Contra*: 5th Amendment Due Process trumps: “[I]n assessing the validity of a complexity exception to the Seventh Amendment . . . the trial judge should have discretion to decide whether the case could be sensibly managed by a (common) jury.” James Oldham, *On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 OHIO ST. L. J. 1031, 1052 (2010).

<sup>221</sup> See *Beacon Theaters*, *supra* note 210 footnote quote.

adjudication. It is, in essence, another way of end-running the federal Constitution's seemingly inviolate right to jury.<sup>222</sup>

### 17. Jury Size and Percentages

*State:* California's civil-case juries normally consist of twelve persons.<sup>223</sup> *Federal:* Civil juries typically consist of six members.<sup>224</sup> Various federal judges employ additional jurors for more complex cases. Thus:

[m]ost use 7 or 8 jurors, depending on case length. So if you lose a juror you still have the required 6 at the end. All deliberate and all must agree. I always use 7 for a one-week trial and 8 for longer trials. The more you add, the tougher it is on the plaintiff. That's because a unanimous verdict is required, so each additional juror beyond 6 is one more the plaintiff has to convince. I had an 8-week trial and sat 8, which worked fine. It's rare that you can get a stipulation for less than a unanimous jury, but some judges have used an agreement for 4 of 7 to reach a verdict.<sup>225</sup>

Regarding the required minimum, three-fourths of a California jury must agree for a valid civil verdict.<sup>226</sup> A federal verdict must be unanimous, absent a stipulation to the contrary.<sup>227</sup>

The respective state and federal jury *sizes*, and *percentages* required for a verdict, raise discrete issues. Both offer a rich vein for legal exploration that a reviewing entity could mine for profit. The problem is

<sup>222</sup> As explained by the Supreme Court:

That [Seventh] Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. . . . [¶] The right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved. [¶] [W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible. . . . Congress is not required by the Seventh Amendment to choke the already crowded federal courts. . . . KeyCite Yellow Flag-Negative Treatment.

Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455, 97 S. Ct. 1261, 1269 (1977). But mixed Supreme Court approaches to post-*Atlas Roofing* cases arguably suggest that "the current Seventh Amendment methodology is simply result oriented—that the Justices determine the result they want to reach and devise a methodology for arriving at that result." Margaret L. Moses, *What The Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 256 (2000).

<sup>223</sup> CAL. CONST. art. I, § 16. A state (civil) jury "shall be 12 persons . . . or any number . . . upon which the parties may agree." CAL. CIV. PROC. CODE § 220 (West 1988). A half-dozen alternate jurors are commonly employed. For an Expedited Jury Trial, the jury "shall be composed of eight or fewer jurors with no alternates." *Id.* § 630.03 (West 2016). Other states vary. Virginia, for example, permits three jurors to render a civil verdict, two of whom must agree: VA CODE ANN. § 8.01-359D (West 2005).

<sup>224</sup> A federal jury "must begin with at least 6 and no more than 12 members. . . ." FED. R. CIV. P. 48(a). Alternate jurors are not normally used in federal court. A federal six-person jury could theoretically conclude trial with less than six jurors. Per Supreme Court dicta: "we express no view as to whether any number less than six would suffice . . . in civil cases." *Colgrove v. Battin*, 413 U.S. 149, 159-160, 93 S. Ct. 2450, 2454 (1973).

<sup>225</sup> E-mail to author from the Hon. Anthony J. Battaglia, U.S. District Court (S.D. CA), dated July 15, 2018 (on file with author).

<sup>226</sup> CAL. CONST. art. I, § 16.

<sup>227</sup> Federal: FED. R. CIV. P. 48(a).



that no state or federal body is in fact the “go to” venue for monitoring the numerous procedural differences between state and federal courts.

## VII. APPELLATE REVIEW

### 18. *Interlocutory Review*

*State:* One may (unconditionally) appeal the final judgments and enumerated interlocutory orders conveniently set forth in the Code of Civil Procedure. Non-appealable orders, not so listed, are reviewable via discretionary writ.<sup>228</sup> *Federal:* Attempting to trigger *federal* appellate review—prior to final judgment as to all issues and parties—is a nightmare with no equal in American civil procedure.<sup>229</sup> The Russian Roulette-like choices for successfully choosing among the overlapping alternatives, and how each of them is triggered, often presents a stressful challenge.<sup>230</sup>

Many federal appeals courts thus begin their required jurisdictional statement by citing *only* the Judicial Code section that is the non-descript fountainhead for all federal appellate subject matter jurisdiction: “This court has jurisdiction under section 1291.” But that affirmation is merely a scaffolding which barely supports the applicable foundation for appellate jurisdiction. Section 1291 thus provides that those courts “shall have jurisdiction of appeals from *all final decisions* of the district courts.”<sup>231</sup> This leitmotif is often absent, however, when appellate subject matter jurisdiction is the crux of the opinion.

The quixotic view in a leading federal treatise is that “in almost all situations it is entirely clear, either from the nature of the order or from a crystallized body of decisions, that a particular order is or is not

<sup>228</sup> One may thus unconditionally appeal the Limited Case interlocutory orders set forth in CAL. CIV. PROC. CODE § 904.2 (West 2008). The appealable Unlimited Case interlocutory orders are listed in *id.*, § 904.1 (West 2017). Discretionary interlocutory appellate review is obtained via writ. California’s judicial system thus provides another avenue obtaining interlocutory review, when unusual circumstances render it appropriate. Petitioning for a writ enables the aggrieved party to seek immediate review. *Morehart v. County of Santa Barbara*, 7 Cal.4th 725, 743, 29 Cal. Rptr.2d 804, 815 (Cal. 1994). One of California’s interlocutory writ review options is *unconditionally* available. Personal jurisdiction denials cannot be appealed after final judgment. *See text accompanying supra* note 41.

<sup>229</sup> The Supreme Court’s 1892 acknowledgment was that “the cases on finality are ‘not altogether harmonious’ . . . [and the Court’s 1974 restatement was that] ‘[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.’” LAW OF FEDERAL COURTS, *supra* note 19, at 670 (citations omitted).

<sup>230</sup> *See, e.g.*, the often overlapping bases for interlocutory appellate review which include: FED. R. CIV. P. 54(b) multiple claims/parties appeal; 28 U.S. C. § 1292(a)(1) interlocutory injunction order; 28 U.S. C. § 1292(b) controlling question appeal; 28 U.S. C. § 1651(a) writ application; and collateral order appeal under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949). As aptly stated by a Michigan practitioner: “If you seek advice from an appellate specialist about a potential interlocutory appeal in your civil case, the first question will undoubtedly be whether your case is in state or federal court.” Jill M. Wheaton, *One of These Things is Not Like the Other: The Differences in Interlocutory Appeals in State and Federal Courts*, 92 MICH. B. J. 30, 31 (Feb. 2013) (significant differences regarding state and federal appellate practice).

<sup>231</sup> 28 U.S. C. § 1291 (the ubiquitous but feckless restatement of the so-called Final Judgment Rule).

final”—citing a student law review note as authority.<sup>232</sup> The judicial pushback against this alleged clarity was best articulated by the former Third Circuit Chief Judge John Gibbons:

Any system of adjudication that provides for appellate review should, for the benefit of all participants in that system, have at least these three features: 1) clear rules as to when appellate review may or must be sought; 2) workable rules that tend to avoid unnecessary or premature adjudications at both the original and the appellate levels of the system; and 3) rules that in operation do not tend to multiply disputes which require judicial resolution. The monstrous edifice which the federal judiciary has erected as a temple to that great white whale, the final judgment rule, satisfies none of these criteria. Moreover, the syllogistic process whereby federal judges impose one bad rule as the inevitable logical consequence of prior bad rules is mechanical jurisprudence at its worst. At all levels, the federal judiciary has demonstrated its incapacity to deal intelligently with the subject of when interlocutory review should be available.<sup>233</sup>

The “death knell doctrine” presents yet another informative illustration of the genre of procedural differences that are the cannon fodder for this article. The genealogy of this doctrine—now abandoned by the federal courts, but still embraced by the California courts—is that denial of class action status effectively sounds the death knell of numerous (valid) individual claims. Absent class certification, those claims are typically too small to warrant further prosecution.

Per California’s death knell precedent:

We found compelling justifications for . . . embracing what is known in this and other jurisdictions as the ‘death knell’ doctrine. . . . Because the [non-certification] order effectively rang the death knell for the class claims, we treated it as in essence a final judgment on those claims, which was appealable immediately. [¶] We emphasized that permitting an appeal was necessary because ‘[i]f the propriety of [a disposition terminating class claims] could not now be reviewed, it can never be reviewed,’ and we were understandably reluctant to recognize a category of orders effectively immunized by [this] circumstance from appellate review. This risk of immunity from review arose precisely . . . because the individual claims [theoretically] lived while the class claims died.<sup>234</sup>

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<sup>232</sup> Quote: LAW OF FEDERAL COURTS, *supra* note 19, § 101 at 671. Authority: Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 354 (1975). This article yielded a rich body of citing references.

<sup>233</sup> *Beckwith Machinery Co. v. Travelers Indem. Co.*, 815 F.2d 286, 292 (3d Cir. 1987) (John J. Gibbons, C. J., dissenting) hereinafter *Gibbons* dissent. California state judges occasionally offer a similar criticism. For example: “California’s law of appellate jurisdiction is full of fiendishly fine distinctions worthy of the most legalistic of medieval clergy.” *Quest Int’l, Inc. v. Icode, Corp.*, 19 Cal. Rptr.3d 173, 175-176 (2004), rev. granted and opinion superseded, 23 Cal. Rptr.3d 693 (2005) (mem.), rev. dismissed, 35 Cal. Rptr.3d 316 (2005) (mem.). But for those who have grappled with both California and federal appellate jurisdiction, there is an oceanic difference in the ease with which students and attorneys can, in most cases, promptly identify whether a state versus federal prejudgment order is appealable.

<sup>234</sup> *In re Baycol Cases I and II*, 51 Cal.4th 751, 757, 122 Cal. Rptr.3d 153, 156-157 (Cal. 2011) (referring to the Court’s 1967 death knell precedent).

The U.S. Supreme Court rejected the automatic appealability of class action denials in 1978. Its decision was endorsed by the Federal Rules Committee process. The previously unconditional availability of federal death knell appeals was replaced by a discretionary basis for federal interlocutory review of class action denials.<sup>235</sup>

The scope of this article precludes an extensive discourse on the superiority of one approach or the other. Its Conclusion, instead, proposes a robust review of such NIMBY-like variances. It envisions a more in-depth assessment of whether the federal system's above-quoted "monstrous edifice," which houses interlocutory appellate review, should be remodeled. The potential makeover could not possibly be as "monstrous" as fittingly described in Justice Gibbons' above quote.<sup>236</sup>

### 19. Claim Preclusion

*State:* California ceremoniously clings to the teetering "primary rights" approach to the res judicata (RJ) impact of a prior judgment. *Federal:* When a federal court is reconsidering a prior federal judgment for RJ purposes, the federal courts will apply their own rules of res judicata in federal-question cases.<sup>237</sup> When reviewing a federal diversity judgment, federal common law governs its claim preclusive effect.<sup>238</sup> Finally, federal courts give preclusive effect to state-court judgments whenever the courts of the rendering state would do so.<sup>239</sup>

All jurisdictions agree that the same claim should not be re-litigated. They differ, however, regarding the scope of the term res judicata. The common law approach has historically allocated a discrete claim to each of plaintiff's *rights* disturbed by the wrong of the defendant. The modern majority state approach focuses on the *wrong* of the defendant, when defining the parameters of a claim. The plaintiff must thus pursue all rights and remedies flowing from the transaction or occurrence alleged in the pleadings.<sup>240</sup>

California's primary rights dinosaur is a procedural fossil in need of extinction. There have been numerous calls to completely abandon this

<sup>235</sup> Federal rejection of unconditional death knell appeal: *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475-476, 98 S. Ct. 2454, 2461-2462 (1978). Rules process resulting in discretionary appeal: FED. R. CIV. P. 23(f).

<sup>236</sup> See text accompanying *Gibbons* dissent, *supra* note 233. No constitutional impediment: The *existence* of the appellate courts enjoys some constitutional footing. But how they *exercise* their subject matter jurisdiction over interlocutory review is, in the final analysis, rooted in a statutory setting not confined by constitutional limits. In California, "many contemporaneous and later decisions of this court and the Courts of Appeal stated that the right of appeal is entirely statutory and that there is no constitutional right of appeal. 22 Cal.4th 660, 668, 94 Cal. Rptr.2d 61, 65 (Cal. 2000). As condoned by the U.S. Supreme Court: "A State is not required by the Federal Constitution to [either] provide appellate courts or a right to appellate review at all." *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590 (1956).

<sup>237</sup> *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 324 n.12, 91 S. Ct. 1434, 1440 n.12 (1971).

<sup>238</sup> *Semtek v. Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S. Ct. 1021, 1028 (2001).

<sup>239</sup> *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct. 411, 415 (1980).

<sup>240</sup> A succinct comparison of the RJ's historical "rights," versus and the modern "wrong" definition, of "claim" is as follows:

The federal courts and the great majority of state courts follow a transactional

vintage doctrine. Pleas have been lodged by frustrated litigants, puzzled academics, and a bewildered California Supreme Court justice.<sup>241</sup> But with no specific audience primed to receive such suggestions, calls for discarding the nationally debunked primary rights doctrine appear to reside only in Jurassic Park.

## 20. Unpublished Case Citation

*State:* Unpublished case opinions may not be cited as precedent in California (except for claim or issue preclusion purposes).<sup>242</sup> *Federal:* Unpublished federal opinions may be cited.<sup>243</sup>

The California Supreme Court's unpublished opinion citation bar flows from its task of "oversee[ing] 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."<sup>244</sup>

Unlike California, the 2007 federal shift authorized citation to unpublished court opinions. Also unlike California, the federal rules-makers did not articulate the circumstances whereby a court may designate an opinion as publishable or unpublished. Federal law does not

approach in defining 'claim.' . . . This broad approach promotes efficiency and certainty in that it encourages parties to raise all related claims in one action. [¶] In contrast, the California [approach] . . . is framed in terms of . . . [plaintiff's] 'primary rights.' [But i]n order to know whether an action is barred . . . in California, it is key to know whether a party is trying to invoke the same or a different primary right from a prior action . . . [and it] can be difficult to . . . [ascertain whether] a court will apply the primary rights doctrine in a particular set of circumstances.

CASES AND MATERIALS, *supra* note 17, at 925.

<sup>241</sup> Litigants: "We need not linger on appellant's request . . . because she does not cite any California authority applying the transaction doctrine to define a cause of action." *Fugi Film Corp. v. Yang*, 223 Cal. App.4th 326, 333, 167 Cal. Rptr.3d 241, 246 (2d Dist. 2014). Academics: "This substantive inefficiency, curious in a time of great concern over excessive litigation and limited judicial resources, is a sufficient reason by itself to strongly criticize California's claim preclusion doctrine and call for its revision." Walter H. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO. L. REV. 559, 560 (1998). Supreme Court justice:

[N]o generally approved and adequately defined system of classification of primary rights exists; indeed, primary rights are usually defined in terms of such abstraction and elasticity as to be of little or no predictive significance. The concept . . . may thus be enlarged or narrowed in proportion to the breath of the particular court's concept of 'primary rights.'

*Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 806, 108 Cal. Rptr.3d 806, 820 (Cal. 2010) (Carlos Moreno, J., dissenting).

<sup>242</sup> CAL. RULE CT. 8.115(a).

<sup>243</sup> Federal authorization: FED. R. APP. P. 32.1(a). One must acknowledge the fallibility of the misnomer "unpublished." The actual state-federal contrast involves whether such opinions—appearing, *e.g.*, in Westlaw and Lexis—may be cited as precedent.

<sup>244</sup> *Schmier v. Supreme Ct. of Calif.*, 78 Cal. App.4th 703, 708, 93 Cal. Rptr.2d 580, 584 (1st Dist. 2000), *cert. denied*, 531 U.S. 958 (2000). Leaving no stone unturned, the Schmier's unsuccessfully protested California's unpublished opinions prohibition in federal court. *Schmier v. Justices of the Calif. Supreme Ct.*, 2009 WL 2246205 (N.D. CA 2009). Unpublished opinions constitute between eighty and ninety percent of the respective caseloads. The state practitioner who therein discovers a unique legal gem must leave it buried below the surface of his or her work product.

specify the procedure that a court must follow in making that determination.<sup>245</sup>

There is an associated disconnect in the narrative regarding unpublished opinions, now that the federal system authorizes the citation of unpublished cases. Professor Elizabeth Beske has succinctly captured its essence. She presents (and analyzes) the question whether breaking new ground in an unpublished federal case should affect pending cases in the litigation pipeline:

A nonprecedential case by definition has no application beyond its litigants. This raises no problem where a case adds nothing new, as other litigants already have access to the precedents on which it relies. However, the majority of [federal] circuits allow nonprecedential opinions to break new ground, and these nonprecedential opinions frequently make law, command dissents, create or deepen circuit splits, and go up on certiorari to the Supreme Court.<sup>246</sup>

Finally, the comparatively liberal federal citability rule resolved a circuit split about unpublished opinions. So now that the federal courts permit citation of unpublished federal opinions, one could reasonably argue in favor of state jurisdictions developing a uniform law governing unpublished opinions. Given the size and historical impact of the California court system, and its definitive bases for publication certification, California could be a leader in that enterprise.<sup>247</sup> On the other hand, inter-state uniformity is not as pressing a theme as uniformity between state and federal courts in the same state.

## VIII. CONCLUSION

Procedural diversity is a given, that is valued by many reformers.<sup>248</sup> So this article does not advocate national state-federal uniformity, nor uniformity among the states. It instead takes a smaller bite of this orchard's apples. It identifies a basket of procedural differences between the nation's largest state judiciary—larger than the entire federal judicial system combined<sup>249</sup>—and the federal courts operating within its borders. This legal smorgasbord serves as a menu for further consideration of whether such differences should be identified and categorized on an ongoing basis, especially in the majority of states that are no longer Federal Rules replicas. The envisioned state-by-state (and perhaps circuit by circuit) collations would then be re-examined through the lens of their actual or potential impact on judges, practitioners, and litigants in the nation's state and federal judicial systems.

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<sup>245</sup> FED. R. APP. P. 32.1 Advisory Committee note to 2007 amendment. CAL. RULE CT. 8.1105(c), on the other hand, dictates nine alternative certification standards for publication hereinafter Publication requirements.

<sup>246</sup> Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 808 (2016) (offering a mechanism for differentiating those opinions that may be designated non-precedential).

<sup>247</sup> Proposed uniform state law: see, e.g., Comment, *Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561 (2016). California law: see Publication requirements, *supra* note 245.

<sup>248</sup> See, e.g., O'Connor, quoted in *supra* note 17.

<sup>249</sup> California Supreme Court Justice Ronald M. George, *Foreword: Achieving Impartiality in State Courts*, 97 CALIF. L. REV. 1853, 1855 (2009).

No entity listed below is likely to single-handedly tackle this article's proposed hunter-gatherer phase. Most, if not all, of today's state and federal judges—working in their mostly understaffed courts—should not be called upon to participate in accumulating this first step database.<sup>250</sup> But one or more of those heavily multi-tasked entities could readily commission law schools or individual faculty members to amass like state-federal contrasts outside of California.<sup>251</sup>

Commissionable faculty members would presumably be honored to pen comparable essays. Law school faculty members might first seek a willing entity to vet the survey of the individual author(s). They would subsequently publish their state-federal comparisons in the forum of their choice. Their essays (or at least citations) could all be catalogued on an evolving website.<sup>252</sup>

The traditional players, to date, are the entities that wrestle with discrete pieces of the procedural reform pie. A brief synopsis of the California reform environment may offer a useful guide for linking this article's faculty-research proposal to the comparable reform apparatuses within each state. As a cautionary tale, a state like California hosts a bulky procedural reform environment. The ubiquity of its numerous entities below triggers the concern that “[i]ntimately linked to . . . ‘first principles’ . . . is the question of who should be in charge of procedural reform. . . .”<sup>253</sup>

The primary *state* entities that do, or can, impact California practice include the Judicial Council (of California),<sup>254</sup> the California Law Revision Commission (CLRC);<sup>255</sup> the (California) Senate Committee on the Judiciary;<sup>256</sup> the California State Assembly Committee on the

<sup>250</sup> As exemplified by an anonymous and likely representative response to a recent Federal Judicial Center report:

We have so many meetings to attend on top of our workload. . . . Perhaps the best way to facilitate more formal cooperation would be to hold state-federal judge meetings either at the same time or before/after the state bar meeting and/or local bar retreats so as to minimize additional time taken away from [our indispensable] work demands.

Jason A. Cantone, *Report on Federal-State Court Cooperation Survey of Chief District Judges*, Judges' Comments Appendix (2016), response 2, at 11 hereinafter *Federal-State Court Cooperation Survey*.

<sup>251</sup> A nongovernmental entity, in one or more states, could shepherd the proposed research and writing projects. They could be undertaken by one or more project-affiliated law schools.

<sup>252</sup> A temporary venue might be this author's academic website at <http://www.tjisl.edu/slomansonb> (last visited Oct. 13, 2018).

<sup>253</sup> *Confessions of a Federal Bureaucrat*, *supra* note 16, at 110.

<sup>254</sup> The Council is tasked with the duties to “improve the administration of justice . . . survey judicial business and make recommendations to the courts, make recommendations . . . to the Governor and Legislature, [and to] adopt rules for court administration, practice and procedure. . . .” CAL. CONST. art. VI, § 6(d).

<sup>255</sup> The CLRC is “an independent state agency . . . that assists the Legislature and Governor by examining *California* law and recommending needed reforms” (emphasis supplied). For the CLRC's Mission and Recommendations process, see <http://www.clrc.ca.gov> (last visited Oct. 13, 2018).

<sup>256</sup> It considers bills to amend the various state codes and matters relating to the courts and judges. Further detail is available at <https://sjud.senate.ca.gov> (last visited Oct. 13, 2018).

Judiciary;<sup>257</sup> and the National Center for State Courts (NCSC).<sup>258</sup> The main *federal* entities include the Federal Judicial Conference (FJC) of the United States;<sup>259</sup> Federal Judicial Center (Center) and its associated Research Center (FJCRC);<sup>260</sup> and the Federal Rules Advisory Committee.<sup>261</sup>

The proposed process and the ensuing work products would: (a) spawn more meaningful access to multi-jurisdictional procedural differences, rather than single-subject analyses;<sup>262</sup> (b) routinely monitor how other jurisdictions feature such differences within the same state;<sup>263</sup>

<sup>257</sup> The State Assembly Commission's "[p]rimary jurisdictions are family law, product liability, tort liability, Civil Code, and Evidence Code (excluding criminal procedure)." See <https://ajud.assembly.ca.gov> (last visited Oct. 13, 2018).

<sup>258</sup> NCSC acts as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts. Thus, "[a]ll of NCSC's services . . . are focused on helping [state] courts plan, make decisions, and implement improvements that save time and money, while ensuring judicial administration that supports fair and impartial decision-making. See website description at <https://www.ncsc.org/About-us.aspx> (last visited Oct. 13, 2018).

<sup>259</sup> The FJC is the national policy-making body for the federal courts. Among a myriad of other duties, its members "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law." 28 U.S.C. § 331.

<sup>260</sup> The FJCRC is the research and education agency of the judicial branch of the federal government. Its cornucopian functions include the provision of staff, research, and planning assistance to the Judicial Conference of the United States and its committees. 28 USC §§ 620-629. A recent FJCRC project is designed to facilitate development of reports on federal-state court cooperation. That project's stated objective is:

to improve and expedite the administration of justice by the state and federal courts of [each of] the state[s] through cooperative efforts; to promote and encourage collaborative judicial relationships between the state and federal judicial systems in the state; to promote discussions between state and federal judges on issues of mutual interest; to share materials and information that could benefit both systems; and to provide a forum where state and federal courts can work together to explore and solve problems of mutual concern.

See *Federal-State Court Cooperation Survey*, *supra* note 250. See also the FJCRC website Sample Charter for a State–Federal Judicial Council (last visited Oct. 13, 2018). Perhaps this entity might be the focal point for shepherding this article's faculty research proposal. But at present, as illustrated in its first report: "Across the survey, the chief district judges most commonly reported [about their] current collaboration with state counterparts regarding attorney discipline and misconduct and educational programs for the bar." See Executive Summary, *Federal-State Court Cooperation Survey*, *supra* note 250, at iii. The 1988-1990 work product of the former Federal Judicial Study Committee is not available for distribution from the Federal Judicial Center. See generally <https://www.fjc.gov/content/report-federal-courts-study-committee-0>. Its two volumes are on file with this article's author.

<sup>261</sup> There are several Advisory Committees (Civil Procedure, Evidence, etc.). Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary." Federal Judicial Conference, Procedures for Committees on Rules of Practice and Procedure § 440.20.10.

<sup>262</sup> Single-subject examples include *Supplementation of Discovery Responses*, *supra* note 145, and *Request for Admissions*, *supra* note 158.

<sup>263</sup> Surveys to busy judges and law firm managing partners may not be the most productive device for producing useful data. For the 2016 Federal Judicial Center survey, only fifty-nine of the ninety-four chief district judges responded. Many of those provided limited responses. (Procedural reform was not a topic for consideration.) Two-thirds reported that they had no state-federal judicial council or functional equivalent in their state. Executive Summary, *Federal-State Court Cooperation Survey*, *supra* note 250 at iii. There is an alternative to the understandable judicial reluctance for taking on projects that could adversely impact fundamental job performance. That is California's new (no longer

(c) yield—at a minimum—a remarkably useful work product for the nation’s judges, practitioners, and reformers, many of whom have learned about just some of these differences the hard way,<sup>264</sup> and (d) facilitate a low cost, highly informative, methodology that could lead to the next milestone in American procedural reform.

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pilot) Judicial Sabbatical Program. A judge can thus apply for an unpaid leave that would “benefit the administration of justice and enhance judges’ performance of their duties.” Cal. R. Ct. 10.502(a) (West 2108).

<sup>264</sup> This author’s four-decade focus on state-federal procedural differences began with advising a former law review student, who was then a California practitioner before exiting the profession. He had been sued for malpractice because of a federal suit dismissed on the basis of a difference between state and federal procedure.