

JURAX CHEAT SHEET TEMPLATES

CIVIL PROCEDURE

FRCP and Cal Codes



FOR THE CALIFORNIA BAR EXAM

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JURAX CHEAT SHEET TEMPLATES FOR

CIVIL PROCEDURE

FRCP and Cal. Code of Civ. Pro.

Frequently Tested Rules and Issues

2022 EDITION

As Tested On The California Bar Exam

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Jurax Bar Preparation

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INTRODUCTION

This material contains actual examples from past California Bar Exams. It is suggested that the student *master* the issues and the rules contained in this writing. There exist substantially more rules under this topic. It is not reasonable to expect the examinee to know all of the rules. However, it is reasonable, *and expected*, for the test taker to have a competent understanding of most of the rules that appear here.

The format will be changed for clarity. For example, the content from past exams may appear in **bold**, may be underlined, contain additional spacing between paragraphs, and contain other format modifications. This is done so that the reader can readily comprehend the subject. However, the original content of the text will be preserved.

Disclaimer: Past exams, including sample answers, are the property of the State Bar of California.

SERVING A SUMMONS

Proper Summons.

The Federal Rules of Civil Procedure allow for a party member to be served with process in a number of ways. One accepted method of service is personally serving the summons and complaint on the Defendant. A person may be served personally by any non-party who is 18 years or older. To effect proper service the Defendant should be given a summons and two copies of the complaint.

Under California civil procedure, a person may similarly be personally served by a non-party 18 years or older by the same rules. This case has been filed in the superior court so it is under California rules. The CA rules prefer personal service.

End Black Letter Law.

Notice that the writer here distinguishes between the Federal Rules of Civil Procedure ("FRCP") and the California Code of Civil Procedure. We'll simply refer to the California codes as the California Rules ("California Rules"). This is an excerpt from Question 1 of the July 2016 exam. See Answer B. For that question, the instruction did not state whether to discuss California rules. The writer there properly discussed both Federal and California rules in a brief manner. Here is a link to that exam:

http://juraxbar.com/wp-content/uploads/2017/04/July2016_CBXSelectedAnswers_EssayQuestions1-6_R.pdf

PERSONAL JURISDICTION AND SUBJECT MATTER JURISDICTION

Personal Jurisdiction and Subject Matter Jurisdiction.

Personal Jurisdiction and Subject Matter Jurisdiction are commonly tested. As such, it is critical that the reader have a solid understanding of these legal concepts. Personal Jurisdiction generally means that a court has the authority to enforce a law upon a *particular person*. Whereas Subject Matter Jurisdiction means that a court has the authority to enforce a *particular law*. However, they are closely related under the issue of jurisdiction. As such, you must know the elements for both terms.

We first deal with Personal Jurisdiction. Thereafter, we'll move to Subject Matter Jurisdiction. Commentary will be in parentheses and it will be in italics. Also, the black letter law will be in bold. Moreover, for sample answers from the State Bar of California, a bold format and shorter paragraphs may be applied. The content of the response will remain the same. This format will be continuous throughout this text.

Personal Jurisdiction.

Under Personal Jurisdiction, there are two key terms in which the court can satisfy this requirement. These versions are

- 1. General Jurisdiction and**
- 2. Specific Jurisdiction.**

Remember the basic objective here: for the court to have Personal Jurisdiction, the court must meet the elements for either General Jurisdiction or Specific Jurisdiction.

It is customary to perform a General Jurisdiction first. If the court has Personal Jurisdiction based on a General Jurisdiction analysis, then you are set! You usually do not have a need to perform a Personal Jurisdiction analysis. Whether to do such an analysis depends on time. If you are short on time, and if you meet the elements for General Jurisdiction, do *not* perform a Specific Jurisdiction analysis.

Template for Personal Jurisdiction.

Run through this template. Memorize the rules and the elements. There will be a sample question and model answer on Personal Jurisdiction below. There, you can see how to apply a response to a question. The template with the black letter law is on the next page.

PERSONAL JURISDICTION

Personal Jurisdiction.

The commentary will be in italics and in parenthesis.

General Jurisdiction

General Jurisdiction is met where the party's actions are Systematic and Continuous. Systematic and continuous is present when any of the following elements are met: (*Take note of the fancy term "Systematic and Continuous." Use this term in your discussion. Also, "General Jurisdiction is sometimes referred to as the "Traditional Method."*)

- 1) consent through an agent in the forum state;
- 2) person is served within the jurisdiction; or
- 3) the defendant is domiciled in the forum state.

End General Jurisdiction Template.

This completes the elements to General Jurisdiction. Remember that we are still under Personal Jurisdiction. Most likely (although not always. *See* analysis of Valerie, Question 1, July 2016, Cal. Bar Exam, link below) , you will then move to a Specific Jurisdiction discussion. The template is on the next page.

Further Reading.

Question 1 of the July 2016 California Bar Exam.

https://juraxbar.com/wp-content/uploads/2017/04/July2016_CBXSelectedAnswers_EssayQuestions1-6_R.pdf

Question 1 of the July 2012 California Bar Exam.

<https://juraxbar.com/wp-content/uploads/2016/04/July-2012-CBX.pdf>

SPECIFIC JURISDICTION

(STILL UNDER PERSONAL JURISDICTION)

Specific Jurisdiction.

Specific jurisdiction is also known by other terms. Whichever term you use, stay consistent so as to avoid confusion. Some of these other terms are listed here: (i) Long Arm Statute, (ii) Minimum Contacts, (iii) Constitutional Limitations, or (iv) a combination of these terms. The black letter law now follows.

Specific Jurisdiction is present where the state has:

- 1) a long arm statute; and**
- 2) where due process is met.**

We now discuss both 1) the long arm statute and 2) due process. The long arm statute will be discussed first.

1) Long Arm Statute.

The long arm statute can be statutory. (*The facts may or may not tell you if the state has adopted a long arm statute. In such a case, assume there is one. State this in your analysis: The facts do not state there is a long arm statute. However, the absence of such a statute is not an issue. This is because the facts do not state that the long arm statute is at issue. Thus, this element is met*)

2) Due Process.

Due process is met where the party has minimum contacts in the state. Minimum contacts are achieved where:

- 1) the party purposely avails himself of the state; and**
- 2) where it is foreseeable that the party will be hauled into court; and**
- 3) due process is met where the statute does not offend traditional notions of fair play and substantial justice.** (*Notice that traditional notions of fair play and substantial justice will have its own elements. See directly below.*)

Traditional Notions of Fair Play and Substantial Justice Factors.

(The discussion here is extensive already. So focus on time. If you have other issues to discuss, you should apply timing techniques. For timing techniques, visit the Jurax home page and get the ebook 1440: Advanced IRAC Strategies.)

Factors to consider:

- 1) Interest of the forum state in protecting its citizens from foreign tortfeasors;**
- 2) the plaintiff's interest in being able to seek the protection of the law of his domicile;**
- 3) the fairness given to Defendant in forcing him to litigate outside of his state; and**
- 4) administrative details in litigating the plaintiff's state.**

End Specific Jurisdiction Template.

This now ends the elements for Personal Jurisdiction. Remember that under this term, General Jurisdiction and Specific Jurisdiction will be discussed. Let's move not to Subject Matter Jurisdiction.

SUBJECT MATTER JURISDICTION

Subject Matter Jurisdiction.

Below is the black letter law. Take note of the abbreviations.

Subject Matter Jurisdiction (SMJ)

For the Court to have SMJ, either of two elements must be met: 1) a federal question arising out of the US Constitution exists; or 2) Diversity of Citizenship is found. Federal Question will be discussed first.

1) Federal Question

In order for federal question jurisdiction to exist, the cause of action must arise under federal law.

2) Diversity of Citizenship

For diversity of citizenship to apply, the amount in controversy must exceed \$75,000 (exclusive of court costs) and opposing parties must be domiciled in different states. Also, a corporation's domicile can be their Principle Place of Business ("PPB") or their place of incorporation.

End Subject Matter Jurisdiction Template.

There are other terms which are regularly tested that are part of Subject Matter Jurisdiction. One of these terms is Supplemental Jurisdiction. Let's go there now.

SUPPLEMENTAL JURISDICTION

Supplemental Jurisdiction may fall under a discussion of Subject Matter Jurisdiction. Moreover, it may arise under a question of diversity (as in the example that follows). Here, the black letter law will be stated first. Thereafter, an example will be provided.

Supplemental Jurisdiction

When the court has original jurisdiction over a matter, the court may also assert supplemental jurisdiction over other claims that are so related that they form the same case or controversy as the original claim. The test here is whether the other claims arose from the same nucleus of operative facts.

End Supplemental Jurisdiction Template.

Example

Below is an excerpt from the July 2012 California Bar Exam. *See* Question 1.

<https://juraxbar.com/wp-content/uploads/2016/04/July-2012-CBX.pdf>

The question will be presented in its entirety. Thereafter, an interpretation and a model answer will be provided. See the next page please.

SUPPLEMENTAL JURISDICTION EXAMPLE

Question 1

Pam and Patrick are residents of State A. While visiting State B, they were hit by a truck owned and operated by Corporation, a freight business.

Corporation is incorporated under the laws of Canada and has its headquarters there, where its President and Secretary are located. State B is the only state in which Corporation conducts its business. Corporation's drivers and other employees work out of its warehouse in State B.

Pam and Patrick jointly filed a lawsuit against Corporation in federal district court in State A. In their complaint, Pam demanded damages for personal injury in the amount of \$70,000 and for property damage in the amount of \$10,000; Patrick demanded damages in the amount of \$6,000.

End Excerpt.

Interpretation.

Here is what to expect and one way in which Supplemental Jurisdiction is used. There are two plaintiffs. One plaintiff (Pam) meets the minimum amount under the amount in controversy (it must exceed \$75,000). However, the other plaintiff (Patrick) will not meet the elements. However, under Supplemental Jurisdiction, the court will have Supplemental Jurisdiction over the amount that does not exceed \$75,000. The reason is because, in this situation, the claims arose from a Common Nucleus of Operative Facts. Here is a model response. *See Sample Answer A.* A bold format and shorter paragraphs are applied. The content is the same.

Excerpt of Answer.

SUPPLEMENTAL JDX

Where the court has jurisdiction over one claim in a matter, it may exercise supplemental jurisdiction over other claims that arise from a Common Nucleus of Operative Fact. The common nucleus test is generally considered broader than the same transaction or occurrence test, and therefore any party that would meet the Same Tran. and Occ. test will meet the Common Nucleus of Operative Fact test. *(This is the rule and the elements.)*

Here, Pam and Patrick are both suing for injuries and damages arising from the same car accident. While visiting State B, they were hit by a truck owned by Corp, the same truck, in the same accident. The witnesses to both will be the same, as will the evidence. *(The analysis using the Common Nucleus of Operative Facts element.)*

Therefore, Patrick's claim arises from a Common nucleus of operative fact with Pam's claim, and the federal district court could exercise supplemental jdx over Patrick's claim. *(The conclusion is stated.)*

End Excerpt.

Let's move away from Supplemental Jurisdiction.

VENUE

Venue Rule and The FRCP.

Venue is proper where only of the following applies: 1) District where any defendant resides; 2) District where a substantial part of the cause of action occurred; 3) If neither is possible, any district where any defendant is subject to personal jurisdiction. Key words are underlined for emphasis.

End Black Letter Law.

Venue Rules and the California Rules.

Different rules apply based on whether the action is a local action or a transitory action. If it is not a local action (land action where the venue is where the land is) then venue is where any defendant resides. Further for a personal injury case venue is proper where the injury took place. Answer B, Question 1, July 2016 California Bar Exam.

Alternative Rule.

Venue is proper in a local action, one involving real property, in the county in which the real property lies. For a transitory action, venue is generally proper in a California Superior Court in any county where any defendant resides. For contract actions, venue is additionally proper in the county where the contract was entered into and the county where the contract was expected to be performed. For tort actions, venue is proper in the county where the act or omission giving rise to the tort occurred. If no venue is proper following the application of these rules, then venue is proper in any county in which a court has personal jurisdiction over the defendants. Answer A, Question 1, July 2016 California Bar Exam.

End Black Letter Law.

Take the time to memorize these rules. Also, key words Many times, you will also be asked to discuss transfer of venue. Transfer of venue will be discussed on the next page. For an example of venue, *See* Question 1 of the July 2001 California Bar Exam. Here is a link: <http://juraxbar.com/wp-content/uploads/2016/04/July-2001-CBX.pdf>

Exam Tip.

For venue, for the most part, you are also being tested on **personal jurisdiction**. Read the third prong again that is stated above. It includes a personal jurisdiction element. However, this is not always the case. Sometimes, the plaintiff will file his case in the district where the defendant lives. This would then be a straightforward question and it does happen, albeit rarely. *See* Question 1, July 2021, California Bar Exam.

TRANSFER OF VENUE

Transfer of Venue Rule.

Although the plaintiff may have established a proper venue, a federal court may transfer the action to any other district in which it might have been brought, for the convenience of parties and witnesses, in the interest of justice. Key words are underlined for emphasis.

End Black Letter Rule.

Notice the fancy language above: "in the interest of justice." What does that mean? When you have a vague term like this in Civil Procedure, take the time to consider if there is a standard present. In this matter, there is a standard to determine if justice is served.

Interest of Justice Rule.

The burden is on the party making the motion to show that 1) the convenience of the parties and witnesses, the ease of access to proof, calendar congestion, and other factors favor transfer; and 2) The action could have been brought in the transferee court; that is, the transferee court has personal and subject matter jurisdiction. Key words are underlined for emphasis.

End Black Letter Rule.

As you can see, it is important for you to know what the "interest of justice" rule is. Otherwise, you will not be able to know what rule and facts to analyze.

Further Reading.

A venue question also appeared in the July 2016 exam. See Question 1. We will now move to joinder. Before we do, we'll provide a link to the July 2016 exam. Here is the link:

http://juraxbar.com/wp-content/uploads/2017/04/July2016_CBXSelectedAnswers_EssayQuestions1-6_R.pdf

JOINDER

Joinder.

There are two main type of joinder. These are (1) **Joinder of Parties** and (2) **Joinder of Claims**. Also, keep in mind that joinder may fall under *jurisdiction*. This is because a joinder discussion can prevent the court from establishing jurisdiction over a party. Let's begin with joinder of parties.

JOINDER OF PARTIES

Joinder of Parties.

This area deals with *joinder of parties* (as opposed to *joinder of claims*, which is discussed in the following section). There are two classifications under **joinder of parties**. They are **(1) compulsory joinder** and **(2) permissive joinder**. The joinder discussion may appear to be confusing. However, do not be intimidated by this concept. We'll go through some of these examples and show you how they have been tested in the past. We'll begin with compulsory joinder.

Compulsory Joinder.

A joinder may destroy complete diversity. To determine if the party is a compulsory joinder, the court will first look to see if a party is a necessary party. A party is necessary 1) where the court cannot afford complete relief without the party or 2) there is danger that the absentee will be harmed as there may be an inconsistent judgment or 3) there may be a possibility of double liability.

End Black Letter Law.

In essence, a plaintiff must sue more than one party. Otherwise, his case will be dismissed for not joining another defendant.

Look for facts where there is one defendant being sued. However, a second defendant may be involved. That second defendant is not named in the suit. For example, a plaintiff could be suing an employee. But the employer is not named as a defendant. The defendant may then file a motion to dismiss the plaintiff's suit.

Re: Exam Tip and Diversity.

Look for situations where diversity is necessary. This is because a joinder may destroy complete diversity. If this sounds confusing, don't be discouraged. It makes perfect sense once you read a hypothetical. We are now going to look at an example. The source is the [February 2004, California Bar Exam, Question 6](#). See the next page please.

COMPULSORY JOINDER EXAMPLE

Please read the fact pattern. We'll then discuss joinder. To summarize the facts, a plaintiff sues an employer. However, the plaintiff does not name the employee of the employer. The employer then files a motion to dismiss since the employee was not joined. The **highlight** below is added for emphasis.

Excerpt of Fact Pattern.

Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, **Tom, who was working as a delivery truck driver for Danco**, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Danco does no business in State X.

Paul filed a complaint against Danco in federal district court in State X on the basis of diversity jurisdiction, alleging \$70,000 in property and personal injury damages. Danco was properly served with the complaint at its principal place of business.

Appearing specially in the State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction and that **Paul's action could not proceed without joining Tom**. The district court denied Danco's motion.

Danco then filed a counterclaim against Paul to recover \$20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

1. Did the district court rule correctly on **Danco's motion to dismiss Paul's complaint**? Discuss.

End Fact Pattern.

On the next page is an excerpt from the model response. Before reading the answer, try to answer the compulsory joinder question by examining the elements.

Introduction.

Below is an excerpt of the model answer. Note that the joinder discussion comes right *after* the diversity analysis. This is important because *joinder can destroy complete diversity*. Therefore, the organization of the discussion is proper. The excerpt now follows.

Excerpt of Model Answer.

Joinder: (*This is the issue.*)

P claims that the matter cannot proceed without joining Tom. **Under** (*This is the rule.*) **compulsory joinder of parties, the court will first look to see if the party is a necessary party. A party is necessary where the court cannot afford complete relief without the party or there is a danger that the absentee will be harmed, there may be an inconsistent judgment or there may be a possibility of double liability.**

Here, (*This is the analysis.*) it is arguable whether Tom is a necessary party because although he may be liable to Danco for the accident, P may get a judgment solely against D for the accident because Tom was an agent of D when the accident occurred and because the accident was within the scope of Tom's employment, D will be liable for Tom's negligence.

However, (*This is a transition to introduce a new issue.*) if Tom is a necessary party, the court will next determine whether he is an indispensable party. **An indispensable party is one whose joinder will destroy diversity.** (*Next term is used: Indispensable party. Make a note of this term and understand it.*)

Here, (*This is the analysis.*) Tom's joinder will destroy diversity because Tom is also a State X resident and this would destroy complete diversity because P is also from State X.

Where (*Here is the issue and the rule.*) **the party is indispensable, the court may dismiss the case or proceed without the party.**

The factors (*These are the elements to determine if the court should dismiss the case or proceed without the party.*) **the court will use to determine that are the following: (1) alternative forum; (2) likelihood of prejudice; (3) chance of inconsistent judgment.**

Here, (*This is the analysis.*) State X appears to be the best forum for the case because the claim arose here and it would be highly inconvenient to require P to travel to State Y or Z. Also, there is not a high chance of prejudice because State X will likely fairly administer its laws. There is also not a chance of inconsistent judgment because as discussed, P can sue D alone for her damages.

Therefore, (*This is the conclusion to the issue of indispensable parties.*) the court may continue the case without joining Tom.

Conclusion: (*This is the overall conclusion to the question.*) The court was correct in denying D's motion for failure to join. Had the court had SMJ, it could proceed with the case without joining Tom.

End Excerpt of Model Answer.

JOINDER OF CLAIMS

Joinder of Claims.

Generally, a plaintiff may bring any number of claims against the same defendant, even if they are unrelated or do not have a common nucleus of operative fact, in the same action. If the claims are brought in federal court, at least one of the claims must satisfy the requirements of subject matter jurisdiction.

Rules is from Selected Answer A, Question 4, July 2017, California Bar Exam.

Refer to this link: <http://juraxbar.com/wp-content/uploads/2018/05/July-2017-CBX.pdf>

Commentary.

Notice that the subject here are the claims (as opposed to joinder of parties). For example, this question above, the claims were a claim for **(1) fraud** and a claim for **(2) breach of contract**. These claims seem to be unrelated. However, they must meet the *common nucleus of operative facts* requirement.

Here is the analysis from the same quoted exam.

Here, both the fraud claim with respect to the Rothko painting and the breach-of contract claim with respect to the real property are being brought by the same plaintiff, Buyer (B), against the same defendant, Seller (S). Therefore, the two claims may be joined, and they may be brought in federal court if one of them satisfies subject matter jurisdiction. (The issue of subject matter is discussed below, in Part 3.)

End Except.

Notice how subject matter jurisdiction must still be met when the litigation occurs in federal court. That discussion will not be addressed here. Refer to the aforementioned link.

Let's now move away from the area of joinder.

COUNTERCLAIM

Counterclaim.

Let's now discuss the area of counterclaim. In sum, the defendant that is being sued can also sue the plaintiff in the same case. However, the defendant may only have a limited time to do so. After that, the defendant may lose his right to sue. Let's look at the black letter law.

Black Letter Law.

A counterclaim is when the defendant asserts a claim against the plaintiff that is suing him. Compulsory counterclaims are claims against the suing party that arise out of the same conduct, transaction, or occurrence. Counterclaims are non waivable and must be raised during the pretrial stage or the defendant will lose his right.

End Black Letter Law.

Let's now see how a counterclaim will appear on an exam. We'll again use the July 2004, California Bar Exam, Question 6 (the same question as used in the *joinder* example). See the next page please.

COUNTERCLAIM EXAMPLE

Please read the fact pattern again. We'll then discuss the issue of counterclaim. To summarize the facts, a plaintiff sues an employer (Danco) for the acts of the employee (Tom). The defendant employer then files a counterclaim against the plaintiff. The question is this: was the counterclaim properly filed?

Excerpt of Fact Pattern.

Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, Tom, who was working as a delivery truck driver for Danco, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Danco does no business in State X.

Paul filed a complaint against Danco in federal district court in State X on the basis of diversity jurisdiction, alleging \$70,000 in property and personal injury damages. Danco was properly served with the complaint at its principal place of business.

Appearing specially in the State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction and that Paul's action could not proceed without joining Tom. The district court denied Danco's motion.

Danco then filed a counterclaim against Paul to recover \$20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

[Question 1 omitted.]

2. Did the district court rule correctly on Paul's motion to dismiss Danco's counterclaim? Discuss.

End Fact Pattern.

Let's look now at a sample answer. See the next page please.

Excerpt of Model Answer.

Below is an excerpt of the model answer. See Answer B of the February 2004 exam.

Note that the Joinder headline comes after the diversity analysis. Again, this is important because joinder can destroy complete diversity. Therefore, the organization of the discussion is proper. The excerpt now follows.

Begin Excerpt of Answer.

Counterclaims

A counterclaim is when the defendant asserts a claim against the plaintiff that is suing him. **Compulsory counterclaims** are claims against the suing party that arise out of the same conduct, transaction, or occurrence. **Compulsory counterclaims must be plead [sic] or the claim is lost. (The defendant cannot sue on that claim later as a plaintiff.)**

Here, D alleges that P damaged its truck as a consequence of the same accident P is suing for. This is the same transaction and occurrence. Thus, D's counterclaim is compulsory.

Supplemental Jurisdiction

Supplemental jurisdiction is the federal court's power to hear cases associated with the main claim (the plaintiff's claim which must meet all jurisdictional requirements) even though the associated claims may not meet all jurisdictional requirements. For a plaintiff w/a valid federal case, the federal court can hear a plaintiff's state claim if it comes from the same common nucleus of operative facts and has a common question of law or fact.

Supplemental jurisdiction also covers a state law claim by the defendant against the plaintiff if the defendant's claim arose out of the same conduct, transaction, or occurrence. In a diversity case, supplemental jurisdiction includes compulsory counterclaims. The rationale is that it would not make sense to make a defendant sue in state court on a claim that arose from the same conduct, transaction, or occurrence for which the plaintiff is suing in federal court. It would help the parties and serve judicial economy to hear both claims at one time.

Here, **D's counterclaim is compulsory**. Thus, the **federal court has supplemental jurisdiction** to hear that claim.

End Excerpt of Model Answer.

Let's move away from the counterclaim issue. The issue of *joinder* and *counterargument* appears on a past exam and the link is referenced here for further reading. Please refer to Question 6 of the February 2004 California Bar Exam. Link: <http://juraxbar.com/wp-content/uploads/2016/04/February-2004-CBX.pdf>

CLAIM PRECLUSION (RES JUDICATA) AND ISSUE PRECLUSION (COLLATERAL ESTOPPEL)

Claim Preclusion (Res Judicata) and Issue Preclusion (Collateral Estoppel)

Here is the black letter law. We'll begin first with Claim Preclusion. It is strongly suggested that you memorize the black letter law for both legal terms below.

Claim Preclusion (Res Judicata).

To assert claim preclusion, 3 elements must be satisfied: 1) same claimant vs. same defendant in both case #1 and #2; 2) case #1 ended in a valid final judgment on the merits (which means it did not end based on jurisdiction or indispensable party, etc.); and 3) the claimant is asserting the same claim as case #1 (same claim usually means arises out of the same transaction or occurrence).

Issue Preclusion (Collateral Estoppel)

To assert collateral estoppel, 5 elements must be satisfied: 1) case #1 ended in a valid final judgment on the merits; 2) the issue was actually litigated in case #1; 3) the issue was essential to the judgment; 4) collateral estoppel is being used against one who was a party in case #1, and 5) collateral estoppel is being used by

- (i) one who was a party in case #1 (and satisfies mutuality requirement if require to do so),**
- (ii) one who was not a party in case #1 but is a defendant in case #2 if plaintiff actually litigated the issue in case #1, or**
- (iii) one who was not a party in case #1 but is a plaintiff in case #2 if fairness is met.**

End Black Letter Law.

Commentary.

This area of Claim Preclusion and Issue Preclusion is extremely confusing for many reasons. We are going to tackle the confusing parts and make this area easy to comprehend. First, take note that there are a total of *four main terms* in the name of the issues (claim preclusion, res judicata, etc.) These four terms are directly below in bold. Take the time to memorize the terms as this will prevent anxiety from developing later on.

A Total of Four Main Terms:

Claim Preclusion is the same as Res Judicata.

Issue Preclusion is the same as Collateral Estoppel.

From this point on, Claim Preclusion and Res Judicata will be used interchangeably. The same will be true for Issue Preclusion and Collateral Estoppel. We'll discuss both definitions in a bit.

Exam Tip.

When you have THE SAME PARTIES, that is to say, the same plaintiff and the same defendant in the first case and the second case, the focus on the exam will usually be CLAIM PRECLUSION (Res Judicata). Why is this so? Because the element of Claim Preclusion requires that the same parties be involved in both cases. This would be a

straightforward fact pattern. Is this straight forward fact pattern ever tested? The answer is ‘yes.’ It was tested on Question 1, July 2021, Cal. Bar Exam.

Link: <https://juraxbar.com/wp-content/uploads/2021/12/July-2021-CBX.pdf>

This Fact Pattern is Highly Tested. Memorize the Scenario.

However, **Issue Preclusion** is tested more often as this fact pattern can be more complex. Here is what you can expect: Plaintiff 1 will sue Defendant 1 (e.g., Patient 1 sues Doctor 1 in a negligence case). Plaintiff 1 will prevail over Defendant 1 (e.g., Patient 1 prevails in his negligence case against Doctor 1) . Then some time will pass and a new plaintiff, Plaintiff 2, will discover that Plaintiff 1 successfully sued Defendant 1. As such, Plaintiff 2 will assert Issue Preclusion over Defendant 1 (e.g., Patient 2 will file his case against the same Doctor 1 and Patient 2, as the **new plaintiff**, will move for summary judgment against Doctor 1). *See* July 2011, Cal. Bar Exam, Question 2, discussed further below in this section.

Link: <http://juraxbar.com/wp-content/uploads/2016/04/July-2011-CBX.pdf>

Let’s now continue the topic regarding Claim Preclusion and Issue Preclusion.

CLAIM PRECLUSION AND ISSUE PRECLUSION CONTINUED

Should You Always *Thoroughly* Discuss Both Claim Preclusion and Issue Preclusion?

The answer to this is “no,” you should not always *thoroughly* discuss both Claim Preclusion and Issue Preclusion. Here is an exam tip: First determine if you have the same parties in *both* Case 1 and Case 2. If you don’t, you can eliminate claim preclusion (recall that Claim Preclusion involves the same parties in Case 1 and Case 2).

Exam Tip.

In such a situation, *briefly* discuss the issue and state that it does not apply. Avoid an extensive discussion as this will only waste time in most cases.

Possible Scenario.

Let’s say we have Case 1 where a final judgment was entered between Plaintiff A and Defendant A. Then we have Case 2 that is filed later between Plaintiff B and Defendant A. Notice that the parties are *not* the same in both cases. This eliminates the discussion of *Claim Preclusion*. Again, this is because this element of Claim Preclusion is not met: **1) same claimant vs. same defendant in both case #1 and #2.**

Exam Tip.

Do not expect the question to ask you if the party can assert res judicata or collateral estoppel. Rather, the question *may* ask you if a party can succeed on a *motion for summary judgment*.

Moreover, a **plaintiff** may also assert **Collateral Estoppel**. Do not think that these legal tools may only serve as defenses for a defendant. Remember that the same parties do *not* have to be the same in Case 1 and Case 2 for Collateral Estoppel to apply. As such, a new plaintiff can appear and sue for damages against the defendant from Case 1. Therefore, when reading the question, pay attention to whether the moving party is a plaintiff or a defendant. We will cover such an example on the next page.

Past Appearance On Exams.

What now follows is the hypothetical and excerpts to a past exam dealing with Res Judicata and Collateral Estoppel. For the entire exam, refer to Question 2 of this past exam. It is from the July 2011 California Bar Exam. A link is provided here. <http://juraxbar.com/wp-content/uploads/2016/04/July-2011-CBX.pdf>

July 2011 Cal. Bar Exam Question 2

Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton, Inc. (Bolton). Shortly after the surgery, Perry developed severe back pain at the location where the rod was inserted. Within the applicable statute of limitations for a tort action for negligence, Perry sued Doctor in federal district court, alleging that she was negligent in using Bolton's rod for the kind of back condition from which he suffered. Personal jurisdiction, subject matter jurisdiction, and venue were proper.

During a deposition, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods and, if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected to the questions on the ground that the information requested had nothing to do with whether Doctor was negligent as to Perry, and Doctor refused to answer. After the attorneys properly met and conferred concerning Doctor's refusal, Perry's attorney filed a motion to compel Doctor to answer the questions.

Shortly after the statute of limitations had run, Perry learned through a newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Perry immediately sought and obtained leave to amend his federal complaint to join and include a claim against Bolton, alleging that it had negligently designed the rod. Bolton immediately filed a motion to dismiss Perry's claim against it on the ground that the statute of limitations had already run.

Perry also learned that Doctor had lost a lawsuit brought by another patient with a back condition like his who had also alleged negligence by Doctor for inserting Bolton's rod into his spine. **Perry filed a motion for summary judgment** against Doctor on the basis of **preclusion**.

[*Question 1 and 2 omitted.*]

3. How should the court rule on Perry's motion for **summary judgment**? Discuss.

End Excerpt of Question.

Notice that only the word **preclusion** is mentioned in the question. However, the hypothetical does not contain the words *res judicata* and *collateral estoppel*. As such, it is the responsibility of the examinee to perform proper issue spotting. Moreover, notice that the question asks you about *summary judgment*. It is up to you to connect the pieces here. By the way, **if you don't have a solid grasp of how a summary judgment operates, please refer to the earlier section above on this topic**. For now, let's look at a past sample answer.

Excerpt of Model Answer.

Below is an excerpt of the model answer. *See Answer A, Question 2 of the July 2011 California Bar Exam.* Notice how Claim Preclusion is briefly discussed because the parties in Case 1 and Case 2 are not the same.

Begin Excerpt of Answer.

Perry v. Doctor: 3. Perry's Motion for Summary Judgment

Motion for summary judgment will be granted if the court determines there is no dispute of fact in the case. The court may look at evidence when making such a determination. (*We'll discuss summary judgment later.*)

Claim Preclusion (res judicata) (*This could be the issue but it should not be the focus of your discussion.*)

To assert claim preclusion (*This is the rule.*), **3 elements must be satisfied: 1) same claimant [sic] vs. same defendant in both case #1 and #2, 2) case #1 ended in a valid final judgment on the merit (which means it did not end based on jurisdiction, venue or indispensable party), and 3) the claimant is asserting the same claim as case #1 (same claim usually means arises out of the same transaction or occurrence).**

The first lawsuit (*This is the analysis.*) was **brought by another patient, not Perry**. Thus, **the first element requiring the same claimant and defendant fails** because Perry was not the plaintiff in the first case, as he is in the second case. Although it appears that case #1 ended in valid final judgment on the merits, case #1 did not assert the same claim because it is not the same transaction or occurrence. The previous patient's claim arises under his individual surgery, and Perry's claim arises out of his own separate surgery.

Thus, claim preclusion should not be asserted. (*Even though the first element met, the examinee still discussed the other elements. Now, on to issue preclusion.*)

Issue preclusion (collateral estoppel) (*This is a key issue. Please focus on the 5th prong since it is highly tested and it could be complex.*)

To assert collateral estoppel (*This is the rule.*), **5 elements must be satisfied: 1) case #1 ended in a valid final judgment on the merits, 2) the issue was actually litigated in case #1, 3) the issue was essential to the judgment (if the issue was decided differently, the case would have ended differently), 4) collateral estoppel is being used against one who was a party in case #1, and . . .**

[*Author's comment: The 5th Prong is isolated for emphasis as this prong is highly tested.*]

. . . **5)** [*Author's comments: The first two following scenarios described in the elements don't apply in this fact pattern. The element that applies is the third scenario found below in red.*] **collateral estoppel is being used by one who was a party in case #1 (satisfies mutuality requirement in those jurisdictions who require it), one who was not a party in case #1 but is a defendant in case #2 if plaintiff actually litigated the issue in case #1, and one who was not a party in case #1 but is a plaintiff in case #2 if it is fair. Collateral estoppel may be used by nonparties in case #1 because many jurisdictions have found that not complying the mutuality requirement does not violate due process.**

Commentary.

Note that **Element 5** contains the *Mutuality Requirement*. Consider this the elephant in the room because it sounds confusing. Let's now understand what is meant by the *Mutuality Requirement* (trust me, it's not as complex as it sounds).

The Elephant in the Room: Mutuality Requirement.

This is where it gets confusing. Here is the definition: **Mutuality Requirement means that the parties in the new case were the same exact parties in the second case.**

Simple. Here is another definition: **It means that both the party seeking to utilize Collateral Estoppel and the party against whom collateral estoppel is sought were parties to the prior action.**

Also keep in mind that the discussion of mutuality requirement only applies to Collateral Estoppel. Claim Preclusion already requires that the parties be the same, as such, there is no discussion there. Furthermore most jurisdictions no longer have a Mutuality Requirement. Now, let's return to the Civil Procedure fact pattern described above from July 2011.

Return to the Civ. Pro. Fact Pattern From July 2011.

Notice three things about the fact pattern. (1) **The plaintiff wants to succeed on this complaint via a summary judgment** using Collateral Estoppel (Issue Preclusion). (2) Moreover, notice that the plaintiff was *not* a plaintiff in case #1. However, the fact that he was not a plaintiff in case #1 will not bar his plea. Last (3), there is a *fairness* element that must be met in this scenario. It is usually via discussion of the fairness element where you will score points. See the discussion that follows.

Exam Tip.

This is how you will usually be tested on the Collateral Estoppel issue: Mr. First Case plaintiff sues and prevails against Dr. First Case defendant and a final judgment is entered. After some time, Mr. Second Case plaintiff will sue Dr. First Case defendant. Mr. Second Case plaintiff will file a motion for summary judgment against Dr. First Case defendant. Let's continue to break the 5th element in the fact pattern above.

Used by nonparty in case #1 but plaintiff in case #2. (*This is the 5th element above.*)

For Perry (*This is the issue.*) **to assert issue preclusion, the use of issue preclusion must be fair.**

Here, (*This is the analysis.*) Perry would argue that it is fair because the previous plaintiff/patient's injuries had a back condition like Perry's and Doctor inserted the same Bolton's rod into his spine, just like Doctor did with Perry. However, this argument would likely fail. Doctor would argue that although the previous patient in case #1 had a "back condition like" Perry's, medical conditions/injuries, especially back injuries, are almost never exactly the same. Its causes may be different and its symptoms may be different, which would call for different treatment.

Thus, even if Perry and the previous patient had similar injuries, its causes, symptoms and other factors may require Doctor to use different technique or treatment. Or even if the same technique was used, each patient may react different based on the patient's physiology even without any negligence on the part of Doctor.

Therefore, **it would not be fair** to preclude Doctor from litigating the issue of negligence in Perry's case based on Perry's injuries/condition, causes of Perry's injuries/medical condition, and techniques used during Perry's surgery. Because it would be unfair to preclude Doctor from litigating the issue of negligence in Perry's lawsuit, this element is not satisfied.

Thus, (*This is the conclusion.*) the court should deny Perry's motion for summary judgment.

Exam Tip.

Use this rule for the *fairness* element. It is from Answer B of the July 2011 California Bar Exam:

[I]f the party is asserting it as a plaintiff (offensive collateral estoppel) the court will be more reluctant to apply CE and will look at a number of factors- 1) did the defendant have a full and **fair opportunity to litigate the issue in case 1, 2) could this new plaintiff have joined case 1, 3) could the defendant have foreseen multiple lawsuits, and 4) are there any inconsistent judgments so that assertion of CE could be **unfair** to the defendant.**

End Exam Tip.

End Excerpt of Answer and Further Reading.

For another question on this area, see Question 1 of the July 2015 California Bar Exam.

<https://juraxbar.com/wp-content/uploads/2016/04/July-2015-CBX.pdf>

Further Reading Continued On Next Page.

Claim Preclusion: Same Transaction or Occurrence Test (Under Claim Preclusion).

As stated earlier, courts can use the “same transaction or occurrence” test to establish the scope of a claim (as applied to *claim preclusion*). This is the majority view. As such, a plaintiff may raise all *potential* causes of action that arise from the same transaction or occurrence. To put it in simple terms, think of “claim” as a broad fishnet that is intended to capture all of the “**causes of actions**” that stem from the “same transaction or occurrence.” If the plaintiff does raise a cause of action, then he may be barred from doing so in the future. Let's do an example.

Assume a plaintiff sues a defendant. The plaintiff could have alleged three (3) causes of actions against the defendant. However, he only alleged two (2) causes of action. Notice that one cause of action was never litigated. If the plaintiff later files a complaint to litigate the third cause of action, he may then be in for a nasty surprise. The defendant can then assert *claim preclusion* to bar the suit. He can say that the plaintiff could have raised *Cause of Action Three* along with *Cause of Action One* and *Cause of Action Two*. However, since he did not take such action, the plaintiff has lost his right to do so.

Same Transaction or Occurrence Test and the Black Letter Law.

A majority of the courts use the "same transaction or occurrence" test to determine what *potential* causes of action can be included in the claim. The scope of the claim is determined by a single transaction. If this test is met, then a claim preclusion defense could be properly asserted.

With this said, let's discuss the minority test known as Primary Rights (as it involves claim preclusion).

Primary Rights Test (Under Claim Preclusion).

This is the minority view as the potential causes of actions are not determined by the “transaction or occurrence” test. Rather, the causes of action are determined by the *type* of damages that have resulted to a given victim (or plaintiff).

Primary Rights and the Black Letter Law.

This test asks whether the same primary right was violated by the same primary wrong. The cause of action is determined by the type of damages (e.g., person or property) suffered by the plaintiff.

End Definition.

To understand this concept, let's look at an example. Before moving to the next paragraph, remember the black letter law above as it will serve as a foundation to your discussion. This is an article from a law review journal. *See Res Judicata: Should California Abandon Primary Rights. Digital Commons and Loyola Marymount University and Loyola School of Law, November 1, 1989.* **Bold** content will be added for emphasis.

RES JUDICATA: SHOULD CALIFORNIA ABANDON PRIMARY RIGHTS?

I. INTRODUCTION.

An automobile accident occurs where one driver is clearly at fault. The accident victim is hospitalized for injuries, and the car is destroyed. How many of the victim's "primary rights" have been violated? If the victim sues the other

driver, how many "causes of action" will the victim have? How many times will the victim be allowed to sue the other driver in order to collect all of the damages due? Should it matter that the victim suffered **injuries to both person and property** in the same occurrence? The answers to these questions depend on whether the jurisdiction whose laws govern the suit defines a cause of action for purposes of res judicata in terms of **primary rights**, or in terms of the **transaction or occurrence** giving rise to the plaintiff's claim.

California courts analyze a cause of action for purposes of res judicata according to "primary rights." In California and other primary rights jurisdictions, certain rights are accorded "primary" status; these rights include the right to be free from **injury to person** and the right to be free from **injury to property**. The number of primary rights violated is significant because it determines the number of causes of action a plaintiff has in California. The victim's primary rights to be free from personal injury and free from injury to property were violated in the above-described accident, and the victim therefore **has two causes of action**.

The number of causes of action is crucial in determining whether the victim **can file two lawsuits based on the accident**. An axiom of res judicata states that a plaintiff **must sue on the entire cause of action at one time** and may not "split" the cause of action. The victim in this example has two distinct causes of action.' Thus, the victim **can** proceed against the defendant in **two separate suits without "splitting"** the cause of action, and res judicata will not bar the second suit. According to the primary rights theory, the fact that the victim sustained both kinds of damage in the **same transaction or occurrence has no bearing** on the preclusive effect of the first lawsuit.

By contrast, in the majority of jurisdictions, primary rights are irrelevant. Instead, in the res judicata analysis, the cause of action is coterminous with the **transaction or occurrence** that caused the plaintiff's damage. In a same transaction or occurrence jurisdiction, the accident victim in the example above has a single cause of action because the damage resulted from the same "occurrence," **even though the victim suffered injury to both person and property**. A plaintiff may not relitigate a cause of action if a valid and final judicial determination was reached in a prior suit involving the same cause of action. Therefore, under the same transaction or occurrence definition, the defendant **can prevent the plaintiff from bringing a second suit on a claim** that arose out of the same transaction or occurrence that gave rise to the first claim.

End Section.

MOTION TO DISMISS UNDER 12(b)(6)

Introduction.

In this area, we'll discuss *motion to dismiss under 12(b)(6)*, *summary judgment*, *demurrer*, *judgement as a matter of law* and *renewed motion for judgment as a matter of law*. Students tend to confuse these terms with one another. We'll clear everything up to avoid confusion. We'll begin with a motion to dismiss under FRCP Section 12(b)(6).

Motion to Dismiss Under 12(b)(6).

Exam Tip - Video Explanation: Watch this YouTube video for an explanation on how a 12(b)(6) applies in actual practice. [Click here.](#)

Under Federal Rule 12(b)(6), which controls in a state law diversity action properly brought in federal court, the Supreme Court has held that a plaintiff must allege specific facts that operate to push the allegations over the line from speculative to plausible. This comes from the Twombly and Iqbal line of cases.

This does not move the requirements for pleading from the traditional notice pleading requirement that only requires the plaintiff to provide a short and plain statement of the allegation to fact pleading requiring a detailed list of all facts in the case that make the claim likely to survive, which is what is required under California.

Again, what is required to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is that the complaint does not allege sufficient facts to make the allegation [of fraud] plausible. See Sample Answer B, Question 4, July 2017, California Bar Exam. "Of fraud" language stricken out.

End Black Letter Law.

You may be curious as to what triggered the discussion of 12(b)(6). Here is the question in its entirety.

"Is Buyer's allegation sufficient to state a claim for fraud involving the painting? Discuss." See Question 2 within the hypothetical of Question 4 of the July 2017 exam.

In the fact pattern, the plaintiff alleged fraud. However, the plaintiff left out many details. This is what he pled as per the fact pattern:

Buyer filed suit against Seller in federal court in California. Buyer claimed fraud as to the painting, alleging only that Seller committed "fraud in the supposed value," and sought \$1 million in damages.

Do you see how not many facts are provided? As such, a motion to dismiss discussion is adequate.

Difference Between a Motion to Dismiss and Summary Judgment.

In summary, a defendant can dispose of a complaint against it in many ways. Two common rules are through a motion to dismiss under FRCP 12(b)(6) and also via a summary judgment.

A good way to distinguish the two is by considering the appropriate time for filing the motion. A motion to dismiss is usually filed immediately after a complaint is filed. On the other hand, a summary judgment is filed after the discovery phase has been completed. Let's now discuss summary judgment.

Exam Tip:

Before you move on, don't forget to watch the YouTube video to emphasize the concepts. Here is the link again:
<https://www.youtube.com/watch?v=itTPm93a8K0>

SUMMARY JUDGMENT

Summary Judgment.

Exam Tip - Video Explanation: Watch this YouTube video for an explanation on how a summary judgment applies in actual practice. [Click here.](#)

The legal standard requires the moving party to demonstrate that there are no genuine issues of material fact. When deciding whether to dismiss the case, the court must accept the allegations of the complaint as true. The court must also view the facts in the light most favorable to the nonmoving party.

Commentary.

Notice that a question for summary judgment may *not* deal specifically with resolving the elements for summary judgment. Rather, a question may ask you to resolve *another* issue. In the example above, the issues of res judicata and collateral estoppel were discussed *before* reaching the conclusion for summary judgment.

However, this is not always the case. In other situations, a summary judgment may deal specifically with the elements. For example, does the plaintiff's complaint have genuine issues of material fact?

Recap of Terms.

Is a summary judgment the same as a 12(b)(6) or a demurrer? The answer is *no*. Remember that a summary judgment is different from a 12(b)(6). A summary judgment is usually filed by the defendant after the plaintiff files his complaint. Also, discovery is usually not allowed until the plaintiff survives the 12(b)(6) motion.

Exam Tip:

Before you move on, don't forget to watch the YouTube video to emphasize the concepts. Here is the link: <https://www.youtube.com/watch?v=Y9Dd4AfX5Hg&t=8s>

Let's look at the term *judgment as a matter of law* now. Let's go to that discussion now.

JUDGMENT AS A MATTER OF LAW

Introduction to Judgment as a Matter of Law.

Judgment as a matter of law sounds similar to the term *summary judgment*. Below are the differences so do not confuse them.

Judgment as a Matter of Law is based on whether sufficient facts exist. **It is fact-based.**

Summary Judgment is based on whether a certain claim is present in the facts. **It is claim-based.**

Judgment As A Matter Of Law.

A motion for judgment as a matter of law may be brought after the close of party's evidence or at the close of all evidence. The motion is granted if no reasonable person could differ as to the outcome of the trial. Also, there must be no disputed issues of material fact to be tried. As a result, it asks the judge to take the case out of the jury's hands and decide it as a matter of law.

End Black Letter Law.

Commentary.

For a proper analysis of this issue, focus on the evidence that is presented. This is because the element explicitly states that the motion is brought *after* the close of a party's evidence. Let's move away from this and go to a Renewed Motion for a Judgment as a Matter of Law.

RENEWED MOTION FOR A JUDGMENT AS A MATTER OF LAW

Renewed Motion For Judgment As A Matter Of Law.

A renewed motion for judgment as a matter of law is made after the jury has returned its verdict. The motion seeks to alter the verdict. To be proper, a motion for judgment as a matter of law must first be made at the close of all evidence.

Commentary.

For a proper analysis under a renewed motion for judgment as a matter of law, discuss whether a motion for judgment as a matter of law was *previously* made. Keep in mind that we are now discussing two motions:

- 1. A Motion for Judgment As A Matter Of Law.**
- 2. A Renewed Motion For Judgment As A Matter Of Law.**

Moreover, keep in mind that the renewed motion for judgment as a matter of law can be made *after* the jury has returned the verdict. For a practice exam on this issue, refer again to Question 1 of the February 2002 California Bar Exam. Here is the link. <http://juraxbar.com/wp-content/uploads/2016/04/February-2002-CBX.pdf>

STATUTE OF LIMITATIONS EXPIRATION AND RELATION BACK DOCTRINE

Statute of Limitations (SOL) Had Run.

A plaintiff must file his complaint with all claims and all defendants within the applicable statute of limitations ("SOL). There are two limited exceptions where the plaintiff may (1) add a new claim and/or (2) add a new defendant after the SOL has run. In these situations, the new claim or new defendant will "relate back" to the original complaint and the date that this original complaint was filed. This way, if the original complaint was filed within the applicable SOL, the plaintiff will be able to avoid the SOL problem.

Relation Back-Amendment of Pleadings to Add a Claim.

A plaintiff must establish (1) that his claim against this new defendant arises from the same transaction or occurrence as the original complaint, (2) that the new defendant knew about the original action within 120 days of its filing, and (3) that the defendant knew that, but for a mistake, he would have been originally named in the plaintiff's original complaint.

End Black Letter Law.

Commentary.

Discuss the element of "new defendant" even if the applicable discussion calls for a "new claim." For further reading, see Question 2 of the July 2011, California Bar Exam. Here is the link:

<http://juraxbar.com/wp-content/uploads/2016/04/July-2011-CBX.pdf>

REMOVAL AND REMAND

Removal and remand are heavily tested topics. Removal is common and remand is a possible outcome. Below is the black letter law.

Removal of Case.

A defendant may remove the case to the federal court in the state where the claim was filed provided if these elements are met: (1) the case could have initially been filed in federal court; (2) the claim for removal is brought by all defendants; (3) it is removed within 30 days of filing of the complaint or the pleading which triggered the right of removal; and (4) the defendant may not remove if he is a resident of the state in which the court is remanded to.

End Black Letter Law.

Commentary.

Typical fact patterns are straight forward. A plaintiff will sue a defendant in state court. The defendant may then remove the case to federal court. Notice that removal is only proper where the case originates at the state level. Then an action to remove the case to the federal level will take place. If removal is not proper, then the case will be remanded to the state court. Do not confuse removal with change of venue. That will come later. For a practice exam, see Question 1 of the February 2002, California Bar Exam. Click on this link:

<http://juraxbar.com/wp-content/uploads/2016/04/February-2002-CBX.pdf>

ERIE DOCTRINE

Erie Doctrine.

Under the Erie doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the state where it sits and the procedural laws of the federal system, generally the Federal Rules of Civil Procedure and in most cases the Federal Rules of Evidence. Whether or not a rule is substantive or procedural is a balancing test that depends on whether 1) the rule is outcome determinative, 2) the federal court's interest in applying their own rules, and 3) whether or not application of the federal rule will result in forum shopping. See Answer A, February 2015, California Bar Exam.

End Black Letter Rule.

Commentary.

The Erie Doctrine is usually accompanied by another issue. Here, past examples have tested *motion to strike*, *jury trial* and *breach of contract*. Let's now move into the area of appeals.

JURY TRIAL (VERSUS BENCH TRIAL)

Jury Trial.

Not all matters are entitled to a jury trial. For example, questions of equity may be decided via a bench trial. The following is from Sample Answer B, Question 4 of the July 2017 exam. Read this content to understand the difference between remedies at law and remedies at equity. That will aid you in your determination of whether an issue is entitled to a jury trial.

BEGIN EXCERPT.

Issues in Which Buy Is Entitled to Jury Trial.

The Seventh Amendment to the Constitution guarantees a jury trial upon timely demand to litigants in questions of law. There is no right to a jury trial for questions of equity. While under the Federal Rules of Civil Procedure, actions are no longer brought exclusively in law or equity - there is instead only the "civil action" - the application of the right to a jury trial is determined by whether or not the cause of action contained in the complaint would have qualified for a jury trial in 1789.

Fraud and Damages: Remedy at Law

Damages are a remedy at law. Therefore, the Buyer is entitled, upon timely demand, to a jury trial on the issue of damages (provided that the claim survives the various hurdles earlier laid out).

Real Property and Specific Performance: Remedy at Equity

Specific performance is a version of an injunction, which is a remedy at equity. A litigant is not entitled to a jury trial on an issue of equity; it may instead be decided by a bench trial.

Mixed Issues of Law and Equity

When a complaint alleges both legal and equitable remedies and demands a jury trial, the court should separate the questions and hold a jury trial on the legal question first. It can then move to a bench trial on the equitable question. Therefore, in this case, Buyer is entitled to a jury trial on the question of his damages in fraud. That should be held first; the court can then move to his demand for specific performance on the real estate contract.

END EXCERPT.

The information above is thorough and further explanation is not needed. Click here for the link to this particular exam: <http://juraxbar.com/wp-content/uploads/2018/05/July-2017-CBX.pdf>

APPEALS

Appeal.

Where the court has reached a final judgment, only the final judgment may be taken to the appellate court. Key words are underlined.

End Black Letter Law.

The rule for this will usually be short. Look to the facts to see if there is a final judgment. Usually there won't be. But anything can happen. With this said, ensure you analyze this rule using the facts.

Moreover, appeals are usually tested alongside another issue. Do you know what this issue is? It is interlocutory appeals. Let's discuss this now.

Interlocutory Appeal

A party may appeal before a final judgment on certain matters by right, such as a granting of an injunction, or if the lower court certifies that the issue is a close one and the appellate court agrees. Key words are underlined. See Answer B, Question 1, July 2001, California Bar Exam.

End Black Letter Law.

Pay close attention to the facts. See if there is an injunction present. Here is a link to Question 1 of the July 2001 exam: <http://juraxbar.com/wp-content/uploads/2016/04/July-2001-CBX.pdf>

Let's move no into the area of discovery.

DISCOVERY

Introduction.

An essay question relating to discovery appeared on the July 2019 California Bar Exam. We'll state the black letter law here. It is a good idea to begin your discussion by stating the scope of discovery. Then proceed from there. The source of the black letter law below originates from the selected answers chosen by the State Bar.

<https://juraxbar.com/wp-content/uploads/2020/01/July-2019-CBX.pdf>

PROPER SCOPE OF DISCOVERY

Under the Federal Rules of Civil Procedure, a litigant is entitled to discover all non-privileged information relevant to the subject matter of the litigation so long as the requests are not disproportional to the needs of the litigation. Relevance is defined broadly and is not limited to evidence that will be admissible at trial. To obtain relevant information, a litigant may use several discovery devices to another party. The party responding to interrogatories must provide written responses, under oath. See Answer A, Question 1 of the July 2019 California Bar Exam.

Motion to compel

If a party fails to comply with a good faith and permissible discovery request, the other party may file a motion to compel. Typically, courts request that the parties meet and confer to attempt to resolve the dispute before the motion to compel stage. A motion to compel will ultimately be granted in the court's discretion. See Answer B, Question 1 of the July 2019 California Bar Exam.

Commentary.

The test for admission of discovery is not as stringent as that of evidence so do not confuse the two. Examples of discovery have appeared as interrogatories, admissions or requests for production.

Here, we are assuming that the entities are parties to the case. What if there is a person that is not a party? We then go to the area of third party discovery. This area is covered next.

THIRD PARTY DISCOVERY

Third Party Discovery.

The rules provide for limited discovery of third parties through use of a subpoena. Thus, a third party may be subpoenaed to appear for deposition or to produce documents. The requesting party must serve a subpoena duces tecum to obtain the documents.

If the party objects to the subpoena, he may file a motion to quash or may simply respond to the subpoena duces tecum with written objections along with a refusal to produce the records. In such a case, the burden shifts to the moving party to establish the need for the discovery.

End Black Letter Law.

It is important that you distinguish between who the parties are and who the other characters are. As stated above, the discovery for third parties is limited (as compared to that between parties to the case). We will now emphasize this point.

Exam Tip and Reading the Exam Carefully.

Read the hypothetical carefully! Here is an excerpt from Question 2 of the February 2009 exam.

Excerpt.

Sally is a citizen of State B. Sally was using a Copyco copy machine at Blinko, a copy center within the northern federal judicial district of State B, when the machine started to jam.

End Excerpt.

Do you see how easy it is to miss that Blinko was not a party to the case? The plaintiff was Sally and the defendant was Copyco. You probably won't capture that information from the excerpt. However, the point is that a third party may appear in a subtle way. As such, you should pay close attention to every character in the hypothetical.

Let's step away now from rules relating to third parties. We'll move to the area of orders compelling medical examinations.

PHYSICAL AND MENTAL EXAMINATIONS

Requests for Physical Examination and Mental Examination.

A party may obtain a mental or physical examination of the other party if that party's physical or mental condition is in controversy, and good cause exists for ordering the examination. Good cause will be found to exist if the examination in question is not overly intrusive and it is relevant.

Steps.

Unlike in state court in California, where one physical examination is granted as a matter of right, if the physical condition of the party is in issue, in federal court, the requesting part must take a motion to the court to compel a physical examination and issue an order.

The court then allows a hearing where both sides present their case, and decides whether it should issue an order. This is a form of discovery called a request for physical or mental examination. See Answer B, Question 2, February 2009, California Bar Exam. Key words are underlined for emphasis.

End Black Letter Law.

Medical Examination and Good Cause.

In personal injury cases, defendants have a right to examine the injured plaintiff upon a showing of good cause. The showing of good cause depends on the extent to which the plaintiff is alleging any special emotional or mental damages.

End Black Letter Law.

Good cause can be shown when the plaintiff files her claim for personal injuries against defendant. A showing of cause good is more stringent for mental examinations.

Mental Examination and Good Cause.

Mental examination is proper when the plaintiff's mental condition is in controversy. Additionally, a mental examination is an intrusive procedure that should not be granted unless necessary to establish a claim or defense.

End of Black Letter Law.

For further reading, see also Question 3 of the February 2015 exam. Let' move now to work product.

WORK PRODUCT

Work Product Under the FRCP.

The work product privilege applies to all materials prepared by an attorney, or a client at the attorney's request, in anticipation of litigation.

Not all aspects of the work product privilege are absolute. Any mental impressions, opinions, theories of the case, and related information is absolutely privileged and is never discoverable. However, the remaining aspects of a document may be disclosed if the requesting party establishes: (1) there is a substantial need for the information; and (2) he or she cannot obtain the information from any other source. See Selected Answer A, Question 5, February 2013 California Bar Exam.

End Black Letter Law.

Understand that if the work product was made before the anticipation of litigation, it will not fall under the work product privilege. Moreover, understand the difference between absolute and qualified privilege as it applies here. In the example above, the term *absolute privilege* appears. However, qualified privilege is not mentioned. Make a note of these two terms in your notes. Let's move now to work product under California Rules.

Work Product and California Rules.

Work Product In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need and inability to acquire the materials elsewhere. See Selected Answer A, Question 2, July 2017 California Bar Exam.

End Black Letter Law.

Again, the distinction between absolute and qualified work product is emphasized. For the most part, an opposing party will not be entitled to work product considered absolutely protected. On the other hand, qualified work product is more likely to be attained (as discussed above).

Conclusion.

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