FEDERAL CIVIL PRACTICE
by
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I. Subject Matter Jurisdiction

A. Limited Jurisdiction: Federal Courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life,* 511 U.S. 375 (1994).

1. No Jurisdiction Presumed: It is presumed that jurisdiction does not exist, and it is always the burden of the party asserting jurisdiction to prove its existence. *Id.*

2. Never Waived: Lack of subject matter jurisdiction is never waived, and is not affected by stipulation. *Attorneys Trust v. Videotape Computer Products*, 93 F.3d 593 (9th Cir. 1996).

3. Pleading Jurisdiction: Fed.R.Civ.P. 8(a)(1) requires the complaint to set forth the grounds for subject matter jurisdiction.

a. Official Form 2 gives illustrations for pleading jurisdiction.

B. Federal Question Jurisdiction

1. Arising Under: Under the Constitution (Art. III, § 2) and 28 U.S.C. § 1331, the Federal Court has jurisdiction in actions "arising under the Constitution, laws or treaties of the United States."

2. An action "arises under" federal law if:

a. federal law creates the cause of action or

b. plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Bd. v. Construction Laborers Vac. Trust*, 463 U.S. 1 (1983); *Merrell*

Dow v. Thompson, 478 U.S. 804 (1986).

(1) No jurisdiction to hear domestic relation disputes. *McIntyre v. McIntyre*, 771 F.2d 1316 (9th Cir. 1985); *Twila Batt v. Shoshone Bannock Tribe*, Civ. No. 98-48-E-BLW (Feb. 12, 1998).

(2) No jurisdiction to hear quiet title actions, *Fairchild v. Friends*, Civ.No. 98-97-S-BLW (August 13, 1998), even if title is based on IRS tax lien sale. *Peters v. Moffet*, Civ. No. 97-600-S-BLW (February 25, 1998).

(3) No jurisdiction to interfere with state court probate proceedings. *Edwards v. Ellsworth*, Civ.No. 95-0324-S-BLW (March 10, 1997).

3. Well-Pleaded Complaint Rule: Whether a claim "arises under" federal law must be determined by reference to the well-pleaded complaint rule. *Merrell Dow v. Thompson*, 478 U.S. 804 (1986).

a. Under this rule, the federal question must appear on the face of the complaint. *Toumajian v. Frailey*, 1998 WL 30636 (9th Cir. Jan. 29, 1998); *Fairchild v. Friends*, Civ.No. 98-97-S-BLW (August 13, 1998)

b. "A defense that raises a federal question is inadequate to confer jurisdiction." *Merrell Dow,* 478 U.S. at 808.

4. Complete Preemption: Even if the only claim in the complaint is a state

law claim, if that claim is completely preempted by federal law, federal subject matter jurisdiction exists. *Toumajian*, 1998 WL 30636 at *3.

5. Supplemental Jurisdiction: 28 U.S.C. § 1367(a) replaces the old terms of "pendent" and "ancillary" jurisdiction with "supplemental jurisdiction"

   a. Under § 1367(a), so long as the complaint contains a federal question, the district court *may* adjudicate state law claims that are related to the federal claims.

   b. A district court could refuse to take jurisdiction over even a related state law claim if the state law claim is novel or complex; if it would dominate the litigation; if the federal claims are gone; or for other exceptional circumstances. § 1367(c).

   c. A litigant waives his objection under § 1367(c) unless he raises it to the district court. *Acri v. Varian*, 114 F.3d 999 (9th Cir. 1997)

6. Two Bites at the Apple: If your complaint has federal and state law claims (not based on diversity), and you are about to lose a summary judgment on the merits of all your claims, consider asking the judge that after he has dismissed your federal claims on the merits, to then dismiss your state claims under 28 U.S.C. § 1367(c) for lack of jurisdiction since the federal claims are gone. That way, you could re-file the state claims in state court. *Clark v. Bear Stearns*, 966 F.2d 1318 (9th Cir. 1992) (dismissal based on lack of jurisdiction has no res judicata effect).

C. Diversity Jurisdiction: Under 28 U.S.C. § 1332, diversity exists in a case

between citizens of different states; between a citizen of a state and an alien; or between a state (or its citizen) and a foreign state.

1. Complete Diversity: No defendant can reside in the same state as any plaintiff. *Munoz v. SBA*, 644 F.2d 1361 (9th Cir. 1981).

2. There is no requirement that the plaintiff be a citizen of the forum state. Wright, *The Law of Federal Courts*, § 24 at p. 153 (West 1994).

3. Corporate Citizenship: A corporation is a citizen of 2 states for diversity purposes: (1) the state of incorporation; and (2) the state of its principal place of business. *28 U.S.C. § 1332(c); Montrose v. American* 117 F.3d 1128 (9th Cir. 1997).

4. Amount in Controversy: In a diversity case, there must be more than $75,000 at issue. 28 U.S.C. § 1332(a).

    a. In a business injury case, it is the alleged lost profits--not the lost revenue--that must be more than $75,000, although if alleged lost revenues are high enough, Court can infer that lost profits exceed $75,000. *Pacific Coast v. MD4*, 97-272-S-BLW (Jan. 7, 1998).

5. Burden of Proving Amount in Controversy: The sum claimed by the plaintiff controls unless defense shows "to a legal certainty that the claim is really for less than the jurisdictional amount." *Pachinger v. MGM*, 802 F.2d 362, 364 (9th Cir. 1986).

    a. But in a *removed* diversity case where it is unclear from plaintiff's complaint that he is seeking more than $75,000, the

defendant bears the burden of actually proving the facts to support jurisdiction, including the jurisdictional amount. *Sanchez v. Monumental*, 102 F.3d 398, 403 (9th Cir. 1996) (en banc).

6. Time to Determine Diversity: If diversity exists when the action is filed, diversity jurisdiction is not divested by subsequent events. *Freeport v. K.N. Energy*, 498 U.S. 426 (1991).

   a. "There is no requirement that diversity exist at the time of the filing of the complaint." *Galt v. Safeway*, 1998 WL 199336 (9th Cir. April 27, 1998).

   b. A district court "may dismiss a dispensable, non-diverse party in order to perfect retroactively the district court's original jurisdiction." *Id.*

D. Ripeness

1. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 118 S.Ct. 1257 (1998).

2. The ripeness doctrine "precludes federal courts from exercising their jurisdiction over an action that is filed before a real dispute exists between the parties." *Hawaii v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996).

3. A claim's ripeness depends on the "fitness of the issues for judicial decision and the hardship to the parties of withholding court

consideration." *Id.*

4. "Legal questions that require little factual development are more likely to be ripe." *Freedom v. Newcomb,* 82 F.3d 1431, 1434 (9th Cir. 1996).

E. Standing

1. Constitutional and Prudential: The doctrine of standing is comprised of both Article III requirements and prudential considerations. *Hartman v. Summers*, 120 F.3d 157, 159 (9th Cir. 1997).

2. Can't Be Waived: Standing cannot be waived. *U.S. v. Hays,* 515 U.S. 737 (1995).

3. Article III Requirements: Under Article III of the Constitution, federal courts only have jurisdiction over a "case or controversy." This constitutional element of standing requires:

   a. injury in fact where plaintiff has suffered actual loss or in threatened with impairment of interests;

   b. a causal connection between the injury and the conduct complained of; and

   c. a likelihood that the injury will be redressed by a favorable decision. *Steel Company v. Citizens For A Better Environment,* 118 S.Ct. 1003 (1998).

   d. Declaratory & Injunctive relief: If plaintiffs seek only declaratory and/or injunctive relief, there is a 4th requirement that they show a very significant possibility of future harm; it is

not enough to show only past injury. *San Diego v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

e. Procedural Standing: To establish procedural standing, plaintiff must show (1) that it has been accorded a procedural right to protect its concrete interests, and (2) that it has a threatened concrete interest that is the ultimate basis of its standing. *Churchill v. Babbitt*, 1998 WL 391879 (9th Cir. July 15, 1998).

f. Ancillary Standing: A party with standing to argue certain issues, may have ancillary standing to argue closely related issues that the party normally would not have standing to litigate if brought separately. *Idaho Sporting Congress v. Computrol*, Civ.No. 96-27-S-BLW (July 21, 1998).

4. Prudential Requirements: These standing requirements are flexible and are balanced on a case-by-case basis. *Valley Forge v. Americans,* 454 U.S. 464 (1982).

a. Zone of Interests: To establish standing under a statute, plaintiff must fall "within the zone of interests protected" by the statute. *U.S. v. Mindel*, 80 F.3d 394 (9th Cir. 1996).

b. Own Injuries: Plaintiffs claim must be for an injury to her own interests, not injuries to a 3rd party who is capable of protecting herself. *U.S. v. Chesnoff*, 62 F.3d 1144 (9th Cir. 1995).

c. "If Plaintiffs don't have standing, no one does": "[T]he

assumption that if [plaintiffs] have no stading to sue, no one would have standing, is not a reason to find standing." *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997).

5. Burden of Proof: Plaintiffs bear the burden of establishing their standing to sue. *San Diego v. Reno*, 98 F.3d 1121 (9th Cir. 1996).

F. Mootness: Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must contijnue throughout its existence (mootness)." *United States Parole Comm'n v. Geeraghty*, 445 U.S. 388, 397 (1980).

1. Mootness Exception: A claim is not moot if it is "capable of repetition, yet evades review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

2. To qualify for this exception, two criteria must be shown: (1) the injury ceased quickly enough that complete litigation was impossible before it expired, and (2) there is a "reasonable expectation" that injury will occur again in the future. *Id.*

G. Political Questions: *Marbury v. Madison* created this doctrine that holds that matters committed to the Executive or Legislative branches are not justiciable in federal court.

1. Five-Part Test: In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set out a 5-part test for determining if an issue was a political question. This test looks to see whether the Constitution commits the

question to a certain branch; whether the courts have workable standards; whether a judicial ruling would express a lack of respect; whether the dispute requires a discretionary policy decision; and whether the Court's opinion is needed.

2. 9th Circuit: No political question presented by plaintiff's challenge to California's system for allocating judges to county courts. *Los Angeles v. Eu*, 979 F.2d 697 (9th Cir. 1992).

II. Personal Jurisdiction

A. General Standard: The assertion of personal jurisdiction must comply with the requirements of Idaho's long-arm statute (I.C. §5-514(a)) and must not offend due process. *See Lake v. Lake,* 817 F.2d 1416 (9th Cir. 1987) (interpreting the Idaho long-arm statute).

1. In *Lake*, the 9th Circuit found that the Idaho legislature, in adopting I.C. § 5-514, "intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution." *Id*. at 1420. The Idaho Supreme Court had so held, and continued to so hold for a few years after *Lake*. *See Houghland Farms v. Johnson*, 119 Idaho 72, 803 P.2d 978 (1990). But more recently, the Idaho Supreme Court has, without commenting on this precedent, instituted a two-part test for resolving long-arm jurisdiction questions. The Court first looks at whether the defendant's conduct falls within the terms of the statute, and then looks to see whether exercising jurisdiction would comport

with the Due Process Clause. In two cases, the Idaho Supreme Court has held that the defendant's conduct did fall within I.C. § 5-514, but that jurisdiction could not be exercised consistently with the Due Process Clause. *See Smalley v. Kaiser*, 130 Idaho 909, 950 P.2d 1248 (1997); *Saint Alphonsus v. State of Washington*, 123 Idaho 739, 852 P.2d 491 (1993). These decisions imply that I.C. § 5-514 reaches beyond the limits of due process, and that the Idaho Supreme Court must use the Due Process Clause to rein-in the statute's grasp. Thus, *Lake's* reading of I.C. § 5-514 appears no longer to be accurate. The result is the same--the Due Process Clause sets the limit--but the Idaho Supreme Court's new two-part test recognizes that the reach of the statute is not identical with the reach of the Due Process Clause.

B. Minimum Contacts: The basic requirement of due process is that the defendant have "certain minimum contacts with [Idaho] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

III. Minimum Contacts Not Always Required

A. There are circumstances where the Idaho Federal District Court has personal jurisdiction over a defendant who **does not have minimum contacts with Idaho.**

1. Nationwide Service of Process: Congress has authorized nationwide service of process on some federal claims that require only that the

defendant have minimum contacts with the United States as a whole.

a. Examples include *ERISA* (29 U.S.C. § 1132(e)(2)); *RICO* (18 U.S.C. § 1965); *Sherman Act* (15 U.S.C. § 22); and *SEC actions* (15 U.S.C. §§ 77aa & 78aa).

2. Foreign Defendants With National Contacts: Under Fed.R.Civ.P. 4(k)(2), the Idaho Federal District Court has jurisdiction over defendants who lack "minimum contacts" with any particular state but have sufficient contacts with the *nation as a whole.*

a. As a practical matter, Rule 4(k)(2) is limited to defendants residing in foreign countries.

b. Court had personal jurisdiction under Rule 4(K)(2) over Swiss citizen who had obtained U.S. patent and was threatening U.S. companies, including an Idaho corporation, with patent infringement suits. *Micron v. Lans*, Civ.No. 96-523-S-BLW (August 19, 1998).

IV. "Gotcha" Jurisdiction

A. The Idaho Federal District Court has personal jurisdiction over any defendant served while voluntarily present in Idaho. *Burnham v. Sup.Ct.* 495 U.S. 604 (1990).

1. When the defendant is served in Idaho, personal jurisdiction exists "without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there." *Id.* at

610-11.

V. General Jurisdiction

A. Personal jurisdiction may be predicated on defendant's activities unrelated to the suit at issue if the defendant has engaged in "continuous and systematic" or "substantial" activities in the forum state. This is known as "general" jurisdiction. *See, Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985).

B. Local advertising in the forum, by itself, is *not* enough to subject a nonresident to general personal jurisdiction here. *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984).

C. Purchasing goods in the forum at regular intervals, by itself, is *not* enough. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

D. Selling goods in the forum through independent, non-exclusive sales reps, by itself, is *not* enough. *Congoleum Corp. v. DLW*, 729 F.2d 1240 (9th Cir. 1984).

E. A Swedish citizen's attendance at 5 medical conferences in California in four years did not constitute systematic and continuous contacts with California that would vest federal district court in California with personal jurisdiction over citizen. *Core-Vent Corp. v. Nobel Indus.,* 11 F. 3d 1482 (9th Cir. 1993).

VI. Specific Jurisdiction

A. Even if a defendant's contacts with Idaho are not sufficiently "continuous" for General Jurisdiction, the defendant may still be subject to Specific Jurisdiction on *claims related to his activities in Idaho.*

B. Specific Jurisdiction turns on 3 criteria:

1. The non-resident defendant must "*purposely avail* itself of the privilege of conducting activities in the forum." *Doe v. American Nat. Red Cross,* 112 F.3d 1048, 1051 (9th Cir. 1997) (emphasis added);

   a. "Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state." *Id.* at 1051.

2. The claim must be one which *arises out of* or relates to the defendant's *forum-related activities*; and

3. The exercise of jurisdiction must comport with fair play and substantial justice , *i.e.,* it must be *reasonable. Id.*

C. Test for "Purposeful Availment": In determining whether there has been "purposeful availment," the Ninth Circuit "distinguish[es] contract from tort actions." *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991).

1. Torts: In a tort case, the purposeful availment prong is analyzed under the "effects" test. *See Caruth v. International Psychoanalytical Ass'n,* 59 F.3d 126, 128 (9th Cir. 1995).

   a. The defendant must have committed (1) an intentional act (2) expressly aimed at the forum (3) causing harm, which is suffered--and which the defendant knew was likely to be suffered--in the forum state. *Id.*

2. Contracts: In a contract case, the mere fact that a defendant has entered

into a contract with a forum resident is not enough by itself to create personal jurisdiction. *See Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

a. Only parties "who reach out beyond one state and create continuing relationships and obligations with citizens of [the forum state]" are subject to personal jurisdiction in that forum. *Id.*

b. A "continuing relationship" is established if "most of the future of the contract would have centered on the forum." *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991).

3. Use of Mail or Telephone: "[O]rdinarily use of the mails, telephones, or other international communications simply do not qualify as purposeful activity." *Peterson v. Kennedy,* 771 F.2d 1244, 1262 (9th Cir. 1985).

4. Use of Internet: A Florida company that advertised in its homepage on the web could not be sued in Arizona where only one Arizona resident "hit" on the site and there was no effort to specifically target Arizona consumers. *Cybersell Inc. v. Cybersell Inc.,* 130 F.3d 414 (9th Cir. 1997); *See also, Tangled Web: Personal Jurisdiction and the Internet,* Litigation, Winter, 1998 at pages 27-35 (collecting cases discussing personal jurisdiction and the internet).

D. Test for "Arising Out of Forum Activities": To satisfy the second requirement

of Specific Jurisdiction in a tort case, the plaintiff must show that she would not have sustained her injury "but for" the defendant's alleged misconduct. *Red Cross*, 112 F.3d at 1051-52.

E. Test for Determining if Jurisdiction is Reasonable: In *Roth v. Garcia Marquez,* 942 F.2d 617, 623 (9th Cir. 1991), the Circuit listed 7 criteria that it would examine to determine whether the exercise of personal jurisdiction over a non-resident defendant is fair:

1. The extent of the defendant's purposeful interjection into the forum state's affairs;
2. The burden on the defendant;
3. Conflicts of law between the forum and defendant's home jurisdiction;
4. The forum's interest in adjudicating the dispute;
5. The most efficient judicial resolution of the dispute;
6. The Plaintiff's interest in convenient and effective relief; and
7. The existence of an alternative forum.

F. Inconvenience: Requiring the nonresident to defend locally is not as inconvenient as it used to be "in this era of fax machines and discount air travel." *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990).

1. On the other hand, "the law of personal jurisdiction is asymmetrical and is primarily concerned withe defendant's burden." *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995).
2. Burden was *unreasonable* on Utah car dealer to defend action in

California brought by person injured in Arizona. *Brand v. Menlove Dodge*, 796 F.2d 1070 (9th Cir. 1986).

VII. Difference between Corporate and Individual Conduct

A. A plaintiff cannot use corporate conduct to subject an individual corporate officer to personal jurisdiction absent allegations sufficient to raise an alter ego theory. *See Kransco Mfg. Inc. v. Markwitz*, 656 F.2d 1378-79 (9th Cir. 1981).

1. *Kransco* has been modified somewhat by *Calder v. Jones*, 465 U.S. 783 (1984) where the Supreme Court held that because defendants were "primary participants in an alleged wrongdoing [involving libel] intentionally directed at a [forum] resident," that "their status as [corporate] employees does not somehow insulate them from jurisdiction." *Id.* at 790.

VIII. Challenging Personal Jurisdiction: Federal Rule of Civil Procedure 12(b)(2) permits a Motion to Dismiss for "lack of jurisdiction over the person."

IX. Burden of Proving Personal Jurisdiction

A. The Plaintiff bears the burden of proving that the Court has personal jurisdiction over the defendants. *Rano v. Sipa Press, Inc.,* 987 F.2d 580 (9th Cir. 1995).

B. If the Court decides the matter on affidavits and depositions -- without an evidentiary hearing -- the Plaintiff need only establish a *prima facie* showing of jurisdictional facts to withstand a motion to dismiss. *Ballard v. Savage,* 65 F.3d 1495 (9th Cir. 1995).

1. But the issue remains alive for trial where the Plaintiff must prove personal jurisdiction by a preponderance of the evidence. *Rano,* 987 F.2d at 587 n. 3.

C. If the plaintiff makes a *prima facie* case (1) that the defendant has purposefully directed his activities at the forum state and (2) has shown that the claim against the defendant grows out of the defendant's forum-related activities, then the burden shifts to the defendant to make a "compelling case" that the exercise of jurisdiction would be unfair or unreasonable. *Burger King*, 471 U.S. at 477.

D. Discovery: The Court has the discretion to permit additional discovery before deciding the personal jurisdiction issue. *Data Disc, Inc., v. Systems Tech. Assoc., Inc.,* 557 F.2d 1280, 1285 at n. 1 (9th Cir. 1977).

9TH CIRCUIT LAW ON MOTIONS TO DISMISS & MOTIONS FOR SUMMARY JUDGMENT

X. MOTIONS TO DISMISS

A. General Legal Standards: A Motion to Dismiss should not be granted "unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Clegg v. Cult Awareness,* 18 F. 3d 752,

754 (9th Cir. 1994).

1. All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the non-moving party. *Parks v. Symington*, 51 F.3d 1480 (9th Cir. 1995).

2. In dismissals for failure to state a claim, a district court should grant leave to amend even if not requested, unless the pleading could not possibly be cured by the allegation of other facts. *Cook, Perkiss v. Northern California,* 911 F.2d 242, 247 (9th Cir. 1990).

    a. No amendment allowed when there is undue delay in bringing the motion, and the opposing party is unfairly prejudiced by the amendments. *U.S. v. Pend Oreille,* 28 F.3d 1544 (9th Cir. 1994)

B. Material Considered: Generally, the Court may not consider any material beyond the pleadings in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See, Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.), *cert. denied,* 114 S.Ct. 2704 (1994).

C. Implausible Allegations: The complaint's allegations must be accepted as true, no matter how improbable. *Neitzke v. Williams*, 490 U.S. 319 (1989).

1. Exception -- Judicial Notice: Court need not accept as true allegations that conflict with facts that can be judicially noticed. *Mullis v. U.S.,* 828 F.2d 1385 (9th Cir. 1987).

2. Exception -- Conclusory Allegations: Court need not accept as true

conclusory allegations or unreasonable inferences. *SEC v. Seaboard*, 677 F.2d 1315 (9th Cir. 1982), *criticized on other grounds*, *In re Glenfed Securities Litigation*, 42 F.3d 1541 (9th Cir. 1994).

3. Exception -- Exhibits Contradict Complaint: If exhibits attached to complaint contradict allegations in complaint, Court may not be obliged to accept allegations as true. *See generally Durning v. 1st Boston*, 815 F.2d 1265 (1987).

D. Motion Converted To Summary Judgment If Materials Outside Pleadings Examined: If materials outside the pleadings are considered, the motion is converted to a motion for summary judgment governed by Rule 56. *Jacobsen v. AEG Capital Corp.,* 50 F.3d 1493, 1496 (9th Cir. 1995).

1. Definition of "Materials Outside Pleadings": But "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting it into a summary judgment. *Branch*, 14 F.3d at 453.

E. Notice Required When Converting A Motion: When a Rule 12(b)(6) motion is converted to one for summary judgment, the district court must inform the non-moving party of that fact and afford her a reasonable opportunity to present all pertinent material. *Garaux v. Pulley*, 739 F.2d 437, 438 (9th Cir. 1984).

1. Pro Se Litigant: When the non-moving party is proceeding *pro se*, the district court must adhere strictly to the notice requirements of Rule

56(c). *See, Lucas v. Department of Corrections,* 66 F.3d 245, 248 (9th Cir. 1995). Either the Court or the moving party must provide the notice to the *pro se* litigant when the litigant is a prisoner. *See, Rand v. Rowland*, 1998 WL 541380 (9th Cir. Aug. 27, 1998), *en banc*, (containing a sample notice in Appendix A to the decision).

2. In addition, the Ninth Circuit has held that the notice to the *pro se* litigant must (1) be phrased in understandable language; (2) must inform him of his right to file counter-affidavits or other responsive material and alert him that a failure to respond might result in summary judgment being issued against him; and (3) that the failure to contradict the moving party means the moving party's evidence might be taken as the truth and final judgment may be entered against him. *Id.*

3. Beyond these accommodations, the *pro se* litigant is expected to follow the same rules of procedure as all other litigants. *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995).

XI. SUMMARY JUDGMENT

A. General Legal Standards***:*** The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact that would allow a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). The evidence must be viewed in the light most favorable to the non-moving party, *Id.* at 255, and the Court must not make credibility findings. *Id.* The trial judge must determine whether the evidence presented is such that a

jury applying the proper evidentiary standard could reasonably find for either the plaintiff or the defendant. *Id.*

1. Burden Shifts: Once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-moving party to produce evidence sufficient to support a jury verdict in her favor. *Id.* at 256-57.

2. Affirmative Proof: To meet this burden, the non-moving party must go beyond the pleadings and show "by her affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

3. Implausible Evidence: "If the facts make a claim 'implausible,' the non-movant must present 'more persuasive evidence than would otherwise be necessary in order to defeat a summary judgment motion.'" *U.S. v. Northern Telecom, Inc.,* 52 F.3d 810, 815 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 700 (1996).

B. Admissible Evidence: "[O]nly admissible evidence may be considered in ruling on a motion for summary judgment." *Beyene v. Coleman Sec. Services, Inc.,* 854 F.2d 1179, 1182 (9th Cir. 1988); *See also* Fed.R.Civ.P. 56(e).

1. Statements in Brief: Statements in a brief, unsupported by the record, cannot be used to create an issue of fact. *Barnes v. Independent Auto.*

Dealers, 64 F.3d 1389, 1396 n.3 (9th Cir. 1995).[1]

2. Authentication: The 9th Circuit "has repeatedly held that documents which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment." *Beyene,* 854 F.2d at 1182.

   a. Authentication, required by Federal Rule of Evidence 901(a), is not satisfied simply by attaching a document to an affidavit. *Id.*

   b. The affidavit must contain testimony of a witness with personal knowledge of the facts who attests to the identity and due execution of the document. *Id.*

3. Waiver of Objection to Inadmissible Evidence: The Court must consider even hearsay evidence presented by the non-moving party if the moving party does not object. *See, Skillsky v. Lucky Stores, Inc.,* 893 F.2d 1088, 1094 (9th Cir. 1990).

4. Preserve Objection with Motion to Strike: The failure to move to strike an affidavit containing inadmissible statements constitutes a waiver of any

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[1] Although statements in a brief are not considered part of the record in the Ninth Circuit, the Circuit has nevertheless held that "statements in briefs may be considered admissions in the court's discretion." *American Title Ins. Co. v. Lacelaw Corp.,* 861 F.2d 224 (9th Cir. 1988). This leads to the anomalous situation where your statement in a brief cannot be used *by* you for summary judgment purposes, but may be used *against* you if it constitutes an admission of some kind. The Circuit has, however, blunted the harsh effect of this rule. Where the party "making an ostensible judicial admission [in a brief] explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." *Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848, 859-60 (9th Cir.), *cert. denied*, 116 S.Ct. 170 (1995). The Circuit appears very willing to find that the judicial admission was retracted. *Id.*

objection to that affidavit and permits the Court to consider those statements. *Gasaway v. Northwestern,* 26 F.3d 957 (9th Cir. 1994).

5. Bad Faith Affidavits: If an affidavit is "presented in bad faith or solely for the purpose of delay," the Court may order the offending party to pay costs and attorney's fees, and the offending party or attorney may be adjudged guilty of contempt." *Fed.R.Civ.P. 56(g).*

C. Timely Filing of Evidence: The moving party must file any affidavits or other supporting evidence with her motion for summary judgment. *Local Rule 7.1(b).* But our Local Rules do not expressly require the opposing party to file affidavits with their response brief. With no applicable Local Rule, Fed.R.Civ.P. 56(c) applies which merely requires that the opposing party file affidavits "prior to the day of the hearing." And Fed.R.Civ.P. 6(d) states that opposing affidavits may be filed "not later than 1 day before the hearing."

1. To avoid sandbagging, our Local Rules will be amended to require opposing affidavits to be filed with the response brief.

2. Authority to set affidavit deadlines: "[Rule] 56(c) does not unconditionally require a district court to accept affidavits up to the date set for hearing on the motion for summary judgment." *Marshall v. Gates*, 44 F.3d 722 (9th Cir. 1995)

3. Late-filed affidavits: "Parties are not permitted to file late affidavits in support of their opposition to summary judgment without invoking Rule 56(f) and indicating why they cannot timely file the affidavits." *Claar v.*

Burlington, 29 F.3d 499, 504 (9th Cir. 1994).

D. Continuance For Discovery Under Rule 56(f): Fed.R.Civ.P. 56(f) authorizes the Court to "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had . . . ."

1. Showing Required: To obtain continuance to do discovery, you must show a diligent pursuit of your *previous* discovery, and that the *additional* discovery you seek may preclude summary judgment. *Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994).

2. The moving party must also show that "actual and substantial prejudice" would result if the discovery is not allowed. *Martel v. County of Los Angeles*, 56 F.3d 993, 995 (9th Cir.) (en banc), *cert. denied*, 116 S.Ct. 381 (1995).

3. Deadline for Rule 56(f) Motion: A Rule 56(f) motion cannot be filed after the deadline set for filing of the opponent's response brief and affidavits. *Ashton-Tate Corp. v. Ross,* 916 F.2d 516, 520 (9th Cir. 1990).

E. Denials of Summary Judgment Not Appealable: The Circuit courts have jurisdiction only over appeals from "final decisions." *28 U.S.C. § 1291.* An Order denying summary judgment is unappealable under § 1291. *Hopkins v. City of Sierra Vista,* 931 F.2d 524, 529 (9th Cir. 1991).

F. Granting Partial Summary Judgment Not Appealable: Granting a partial summary judgment is interlocutory and not appealable. *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1317 (9th Cir. 1981), *vacated on other grounds*, 454

U.S. 934 (1982).

G. Exception for Qualified Immunity Issues Under § 1983: In a § 1983 suit, when summary judgment is denied on qualified immunity, and the decision is based on an abstract question of law, it is immediately appealable. *Behrens v. Pelletier*, 116 S.Ct. 834 (1996).

H. How To Appeal Interlocutory Orders: Move for a certification under either Fed.R.Civ.P. 54(b) or 28 U.S.C. § 1292(b), or the "collateral order doctrine."

1. Rule 54(b): Rule 54(b) applies when there are multiple claims or parties and the district court's order only resolves some of the claims or only affects some but not all of the parties. While such an order is interlocutory and unappealable under § 1291, the district court can certify the order under Rule 54(b), allowing an appeal to be taken.

a. Showing Required Under Rule 54(b): Rule 54(b) requires the district court to find that "there is no just reason for delay." The Ninth Circuit has noted that Rule 54(b) certification is proper if it will aid "expeditious decision" of the case. *Sheehan v. Atlanta Int'l Ins. Co.,* 812 F.2d 465, 468 (9th Cir. 1987).

b. Trend in 9th Circuit: The Circuit has held that the "present trend is toward greater deference to a district court's decision to certify under Rule 54(b)." *Texaco v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). Nevertheless, "Rule 54(b) certification is scrutinized to prevent piecemeal appeals in cases which should be reviewed only

as single units." *Id.* at 797-98.

2. 28 U.S.C. § 1292(b): Section 1292(b) applies "only to orders that would be considered interlocutory even if presented in a simple single-claim two-party case." *See,* 10 Wright, Miller, Kane, *Federal Practice and Procedure,* § 2658.2 at 81 (1983).

   a. Showing Required Under § 1292(b): The district court must certify that its order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Steering Committee v. United States*, 6 F.3d 572, 575-76 (9th Cir. 1993).

3. Collateral Order Doctrine: A 3rd method for appealing an interlocutory order is to invoke the "collateral order doctrine." A non-final order is appealable under the collateral order doctirne if the non-final order is: (1) conclusively determinative; (2) completely separate form the merits; and (3) effectively unreviewable on appeal from the fianl judgment in the case. *Williamson v. UNUM Life Insurance Company*, 1998 WL 809547 (9th Cir. Nov. 28, 1998); *State of Alaska v. U.S.,* 64 F.3d 1352, 1354 (9th Cir. 1995).

XII. IDAHO FEDERAL DISTRICT COURT LOCAL RULES ON MOTIONS

A. File Affidavits and Deposition Excerpts With Opening Brief: Local Rule 7.1(b) requires moving party to file all supporting affidavits and other evidence at the

same time motion is filed.

B. 20 Page Brief Limit: Local Rule 7.1(a)(2) sets a 20 page limit on briefs. It is strictly enforced. Motions to extend limits are granted where case is complex.

C. Briefing Schedule: Local Rule 7.1 allows 14 days for the Response Brief and 14 days for the final Reply.

D. Hearings: Contact the appropriate docket clerk to set a hearing for your motion. Counsel for the moving party sends out the notice of hearing date.

1. Judge Winmill: Loves oral argument on dispositive motions. Reads briefs before hearing and expects counsel to get right to the issues.

2. Judge Lodge: Not so enamored with oral argument, but will hear it if requested in certain cases

3. Docket Clerks: Listed on front page of these materials.

EXPERT WITNESSES

9th Circuit & Idaho Federal District Case Law

XIII. Expert Checklist: When faced with a proffer of expert testimony, the district court engages in a 4-part analysis:

A. Rule 26 compliance: The party proffering the expert must have provided a timely report under Fed.R.Civ.P. 26(a)(2).

B. Qualifications: The expert must be qualified by "knowledge, skill, experience,

training, or education." *Rule 702.*

C. Subject Matter: The subject matter of the testimony must concern "scientific, technical, or other specialized knowledge." *Rule 702.*

D. Assist Jury: The testimony must "assist the trier of fact to understand the evidence." *Rule 702.*

XIV. Rule 26 Compliance

A. Deadlines: The deadline for submitting the Rule 26 report required of every expert is set in the Scheduling Order issued after a Scheduling Conference.

B. Sanctions: The sanctions for failing to file a Rule 26 report are set out in *Fed.R.Civ.P. 37(c)* and *Local Rule 26.2*, and include exclusion of the expert's testimony.

1. Failure to meet deadlines for submission of expert's report resulted in exclusion of expert's testimony. *Sadler v. Boise State*, Civ. 95-391-S-BLW (June 6, 1996 --Winmill, J.).

2. Failure to file report meeting all of Rule 26's requirements resulted in exclusion of expert's testimony. *Intrex Corp. v. FMC Corp.,* 124 F.3d 211 (Table--Unpublished Decision), 1997 WL 599984 (9th Cir. 1997).

C. Contents of Rule 26 Report: The Rule 26 report must contain:

1. A complete statement of all opinions to be expressed and the reasons therefor;

2. The data or other information considered by the expert in forming her opinions;

3. Any exhibits to be used as a summary of opinions;

4. The expert's qualifications;

5. The expert's compensation;

6. A listing of "similar cases" that the expert has testified in during the last 4 years.

a. The requirement of "similar cases" is imposed by Local Rule 26.2, modifying Fed.R.Civ.P. 26(a)(2)(B)'s requirement that the expert disclose "any other cases" where she testified in the last 4 years.)

XV. Qualifications

A. In medical malpractice cases, Idaho Code § 6-1013 requires that an expert physician have "professional knowledge and expertise." Judge Winmill interprets these terms to require both knowledge of the field and at least some analogous personal experience in it.

1. A gynecologist with no experience in removing patients from respirators or in operating blood recycling systems was not allowed to testify that based on his study of the literature, the hospital's respirator removal procedure and operation of the blood recycling system was negligent. *Hollingsworth v. U.S.,* Civ. 94-242-S-BLW (Jan. 17, 1997--Winmill, J.)

B. The 9th Circuit has held that Rule 702 "contemplates a broad conception of expert qualifications." *Thomas v. Newton Intern. Enterprises*, 42 F.3d 1266, 1269 (9th Cir. 1994).

XVI. Subject Matter

A. Daubert: If the testimony involves "scientific testimony" instead of "specialized knowledge gained from years of experience," then the *Daubert* standard must be met. *Daubert v. Merrill Dow,* 509 U.S. 579 (1993).

1. 9th Circuit Conflict: There is a 9th Circuit case holding that *Daubert* applies to "all expert testimony," *Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134, 1143 n. 8 (9th Cir. 1997), but it appears to have been refuted by *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997), and *U.S. v. Bighead*, 128 F.3d 1329 (9th Cir. 1997), both of which held that *Daubert* does not apply to expert testimony based on specialized knowledge gained by experience.

B. Kumho Tire: In *Kumho Tire Co. v. Carmichael*, 1999 WL 152455 (March 23, 1999) the U.S. Supreme Court held that *Daubert* applies not only to experts who are scientists, but also to experts who testify based on "technical" and other "specialized" knowledge.

1. In Kumho, a tire expert testified that a minivan tire blew-out because it was defective. The expert testified that his visual examination and a two-part test he developed convinced him that the tire was defective. The trial court found that the expert's testimony was more technical than scientific but nevertheless applied Daubert and threw the testimony out.

2. The Supreme Court agreed that Daubert applies to all experts whether testifying on the basis of "scientific" "technical" or "other specialized

knowledge." Specifically, the Supreme Court answered an issue that has arisen often in the 9th Circuit by holding that Daubert governs an expert who relies "on skill- or experience-based observation."

3. The Supreme Court then applied Daubert to the expert and found him wanting. The expert failed to rely on his own two-part test in an early report he filed concluding that the tire was defective. Also, in the mountain of literature on tire failures, there is no mention of his two-part test.

4. This decision would appear to overrule a string of 9th Circuit cases holding that Daubert does not apply to an expert testifying on the basis of his experience. McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997) (Daubert did not apply to engineer's testimony, based on his experience, in product liability case regarding feasible safety features for forklifts); U.S. v. Bighead, 128 F.3d 1329 (9th Cir. 1997) (Daubert did not apply to child psychiatrist's testimony about behavior of abused children based on her long years of experience.)

C. Ninth Circuit Application

1. *Daubert* did not apply to testimony of longshoreman with 29 years experience who testified about ship safety procedures -- his testimony was based on personal experience, not scientific theory. *Thomas v. Newton Intern. Enterprises*, 42 F.3d 1266 (9th Cir. 1994). **(overruled by Kumho?)**

2. *Daubert* did not apply to engineer's testimony in product liability case regarding feasible safety features for forklifts. *McKendall v. Crown Control Corp.,* 122 F.3d 803 (9th Cir. 1997).(**overruled by Kumho?)**

   a. The engineer had investigated "hundreds of forklift accidents." *Id.* at 806.

   b. The engineer examined the allegedly defective forklift, "but did not provide a model or test his proposed design." *Id.* at 807.

3. *Daubert* did not apply to testimony of child abuse expert that based on her 1300 interviews with child victims, it was typical for a victim to delay reporting and to have faulty recollection of details. *U.S. v. Bighead*, 128 F.3d 1329 (9th Cir. 1997).

4. *Daubert* did not apply to policeman who testified as expert about jargon used in drug trade. The officer's specialized knowledge is not scientific knowledge and therefore not subject to *Daubert.* See *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir.), *amended by* 161 F.3d 1195 (9th Cir. 1998). **[Overruled by Kumho?]**

D. Daubert Requirements: If the expert is going to testify concerning "scientific knowledge," (and since *Kumho,* "technical and other specialized knowledge") *Daubert* requires the Court to examine:

1. Whether the theory or technique can be tested;

2. Whether it has been subjected to peer review;

3. Whether the technique has a high known or potential rate of error; and

4. Whether the theory has attained general acceptance within the scientific community.

E. Expert Advertising on the Internet: A board-certified internist with a specialty in nephrology (kidney) could not testify that silicone brain shunt caused plaintiff's ailments when he had no peer-reviewed research justifying his conclusion and "advertised his services on the World Wide Web as an expert for plaintiffs in silicone gel breast implant cases." *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir. 1998).

XVII. Role of the Court

A. Rejecting Expert Testimony: "The court may conclude that there is simply too great an analytical gap between the data and the opinion proffered" and reject the expert's opinion. *General Electric v. Joiner*, 118 S.Ct. 572 (1997).