

Motion to Vacate a Default Judgment or Set Aside a Dismissal

Research Guide

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Scope: This research guide provides information on sample language and relevant code sections for making a motion to vacate a default judgment or set aside a dismissal. We have also provided the names and call numbers of background sources with more information about making this type of motion. This research guide is *not intended as a substitute for doing your own research.*

Definition: A default judgment is usually obtained by the plaintiff when the defendant does not appear at a hearing or neglects to file an answer to the summons and complaint. A dismissal, in contrast, might be granted to the defendant where the plaintiff files a lawsuit, but then fails to respond to filings and orders in the case. A default judgment or dismissal may be set aside or vacated by the court at the request of a party:

- if a motion to do so is made within six months of the entry of default or dismissal, if the default or dismissal was the result of the party's "mistake, inadvertence, surprise, or excusable neglect," or because the court has assumed jurisdiction of the law practice of the party's attorney (California Code of Civil Procedure §§ 473(b), 473.1); or
- up to two years after entry of a default judgment where service of the original summons did not result in actual notice to a defendant in time to defend, or, if the defendant received written notice of the default judgment, within 180 days thereafter. In either case, the defendant must show that the lack of notice was not caused by the defendant's deliberate avoidance of service or inexcusable neglect (California Code of Civil Procedure § 473.5).

Examples of mistake, inadvertence, surprise, or excusable neglect include:

- Illness of defendant.
- Attorney's abandonment of client.
- Fraud of the plaintiff.

The following instructions and forms assume that you are a defendant who is filing a motion to vacate a default judgment. If you are a plaintiff who is filing a motion to set aside a dismissal, you will need to change the language accordingly. The statutes and rules you rely upon, however, will be the same.

Procedural Checklist:

1. Prepare a Notice of Motion to Set Aside Default and Default Judgment. See Form 38.114 in volume 2, Chapter 38, California Civil Procedure Before Trial, KFC 995.C34 2006. Also, if your reason is due to mistake, inadvertence, surprise, or excusable neglect, please see Forms 489.360 through 489.362 in volume 43 of California Forms of Pleading and Practice, KFC 1010.A65 C3 for more specific samples. If your reason is due to lack of actual notice, see Forms 489.380 through 489.381 in volume 43 of California Forms of Pleading and Practice for more specific examples and instructions.

2. Prepare a Memorandum of Points & Authorities (See 7 California Points & Authorities, Chapter 70: *Defaults*. KFC 1010. B4. The form you choose will depend upon the basis of your motion).

3. If appropriate, prepare a proposed responsive pleading, such as an answer or demurrer, which you would have filed had you been given the chance.

4. Prepare affidavits or declarations in support of the motion.

a. If the motion is made under Code of Civil Procedure § 473(b), the declaration must include facts showing:

Mistake, inadvertence, surprise or excusable neglect and/or mistake, inadvertence, surprise or neglect of the defendant's attorney, accompanied by attorney's Affidavit or Declaration of Fault. (See Forms 489.360 through 489.362 in volume 43 of California Forms of Pleading and Practice, KFC 1010.A65 C3 and Form 38.115 in volume 2, Chapter 38, California Civil Procedure Before Trial, KFC 995.C34 2006).

b. If the motion is made under Code of Civil Procedure § 473.5 (Service of Summons Too Late to Defend Action) it must include facts showing:

Lack of actual notice not caused by defendant's inexcusable neglect or avoidance of service. (See Form 489.380 through Form 489.381 in volume 43 of California Forms of Pleading and Practice for more specific examples and instructions.)

Note: The library also has a book of sample forms which you may use as models. You will need to alter the language in these forms to suit your particular situation.

5. Call the calendar clerk of the judge who handled the case, and schedule a "hearing date."

a. This is actually a "tentative ruling date." In most counties, you would schedule a date for your motion to be heard. In San Diego County, in contrast, you get a "tentative ruling date," which is the date when (hopefully) the judge will issue a tentative ruling indicating how he or she is thinking of ruling on your motion. But the calendar clerk will understand if you ask for a "hearing date." This is why your forms will say "Tentative Ruling - No Appearance Required" where you would usually list the hearing time.

b. Make sure you leave yourself time to serve and file the papers at least 16 court days before the hearing date. Add another 5 calendar days if you serve your motion by mail inside California. Add ten calendar days if you are mailing your notice to an address outside California but in the United States. Code of Civil Procedure § 1005.

6. File and serve your Notice of Motion and supporting papers, as well as your proposed responsive pleading.

7. At 3:00 p.m. on your hearing date, either call the court or check the court's website, at www.sdcourt.ca.gov (click on "Civil and Probate Law and Motion Rulings"), and find out what the judge's tentative ruling is. If you disagree with the ruling and therefore want to have an oral argument, you must notify the other parties and the court by telephone within **two** court days of the day the tentative ruling was issued. The court will schedule a hearing one week after the tentative ruling.

8. If your motion is granted, file the responsive pleading.

Format: The forms must be typed on pleading paper (which has numbers down the left side). The Reference Desk has a master which is available for copying. There are also handouts in the California Reading Room showing how to create pleading paper using Microsoft Word and WordPerfect. See *California Rules of Court*, Rule 2.100 et seq., for the required format for typing the forms.

For more details of the law and examples:

California Civil Procedure Before Trial 4th ed., vol. 2, ch. 38, *Relief From Default or Default Judgment*, §§ 38.75 - 38.109, Forms §§ 38.114 - 38.117, CEB. KFC 995 .C34 2006 v.2.

California Practice Guide: Civil Procedure Before Trial, vol. 1, ch. 5, *Defaults*, pp. 5-67 et seq., Rutter Group. KFC 995 .W4 v.1.

California Forms of Pleading & Practice, vol 43, ch. 489, *Relief From Judgments*, Matthew Bender. KFC 1010 .A65 C3.

California Forms of Pleading & Practice, vol. 33, ch. 372, *Motions & Orders*, Matthew Bender. KFC 1010 .A65 C3.(Use this for ex parte applications when it is necessary to stay execution of a judgment or recall a writ of possession before your full motion to vacate default judgment can be heard.)

California Points & Authorities, vol. 7, ch.70, *Defaults, Default Judgments, and Relief from Judgments and Orders*, Matthew Bender. KFC 1010 .B4 (includes sample forms).

Calif. Civil Litigation Forms Manual, vol. B, ch. 39, *Defaults* §§ 39.4 - 39.7, pp. 850 - 858, CEB. KFC 995 .A65 P49.

California Civil Practice: Procedure, vol. 2, ch. 10, *Responsive Procedures* §§ 10:30 - 10:43, and vol. 4, ch. 29, *Attacking The Judgment* §§ 29:73- 29:76, Thompson West. KFC 995.C3.