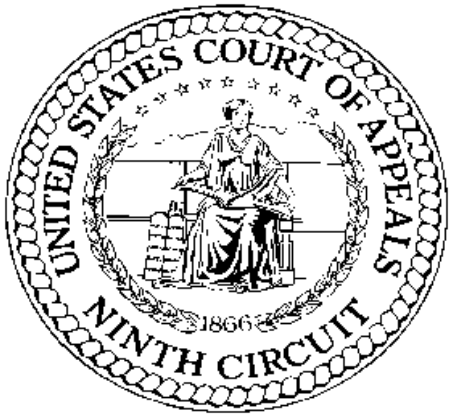
NINTH CIRCUIT COURT OF APPEALS

SEPTEMBER 2002

OUTLINE

STANDARDS OF REVIEW



TOM CARTER

CHAMBERS OF THE HONORABLE OTTO R. SKOPIL, JR.
807 UNITED STATES COURTHOUSE
1000 SW THIRD AVENUE
PORTLAND, OREGON 97204

DESCRIPTION

The Ninth Circuit's Standards of Review Outline was first produced in 1984 and has been published annually since 1990. This edition replaces those issued in prior years. The outline is organized by subject matter. An introductory section defines the several standards of review and illustrates their various applications. Criminal and civil appeals are separated, with each section containing standards pertaining to pre-trial, trial and post-trial decisions made by the district court. Finally, administrative appeals are discussed with introductory topics and then agency-by-agency. Please note that this outline is not intended to express the position of the Ninth Circuit. Users are strongly encouraged to read the cases and conduct independent research. Cases may be withdrawn, amended or overruled.

Comments are strongly solicited from all users. I can be reached by phone: (503-326-8390); by electronic mail (tom_carter@ca9.uscourts.gov) or by mail (807 United States Courthouse, 1000 SW Third Ave., Portland, OR 97204).

I hope the outline proves useful to you.

Tom Carter
9/02

STANDARDS OF REVIEW OUTLINE

SEPTEMBER 2002

TABLE OF CONTENTS

I. **Definitions** 1

A. **Standard of Review** 1

1. Definitions 1
2. Applications 2

B. **De Novo** 4

1. Definitions 4
2. Applications 5

C. **Clearly Erroneous** 7

1. Definitions 7
2. Applications 8

D. **Abuse of Discretion** 9

1. Definitions 9
2. Applications 10

E. **Arbitrary and Capricious** 12

1. Definitions 12
2. Applications 13

F. **Substantial Evidence** 15

1. Definitions 15
2. Applications 16
a. Review of Agency Determinations 16
b. Jury Verdicts 17

G. **Reasonableness** 18

1. Definitions 18
2. Applications 19

II. **Criminal Proceedings** 20

A. I**ntroduction** 20

1. Findings of Fact and Conclusions of Law 20
2. Harmless Error 22
3. Plain Error 24
4. Structural Error 26

B. **Pretrial Decisions** 27

1. Appointment of Expert Witness 27
2. Bail 28
3. Bill of Particulars 28
4. Brady Violations 29
5. Confessions 30
6. Competency to Stand Trial 30
7. Consolidation of Counts 31
8. Continuances 31
9. Defenses 32

10. Discovery 33
a. Bill of Particulars 33

b. Brady Materials 34
c. Confidential Informants 35
d. Depositions 35
e. Jencks Act 36
f. Sanctions 36

11. Discriminatory or Selective Prosecution 37
12. Dismissals 37
13. Evidentiary Hearings 40
14. Ex Parte Hearings 41
15. Ex Post Facto 41
16. Extradition 42
17. Faretta Requests 43
18. Franks Hearing 43
19. Fugitive Status 44
20. Guilty Pleas 44
a. Voluntariness 44
b. Withdrawal 44
c. Rule 11 Hearing 45

21. Immunity Agreements 45
22. In Camera Proceedings 46
23. Indictments and Informations 46
a. Constructive Amendments 46
b. Dismissals 46
c. Duplicitous/Multiplicitous 49
d. Misjoinder 50
e. Prosecutorial Misconduct 50
f. Sufficiency 51
g. Validity 51

24. In Limine Orders 52
25. Interpreters 52
26. Investigators 52
27. Judicial Estoppel 52
28. Judicial Notice 53
29. Jurisdiction 53
30. Jury Demand 53

31. Jury Waiver 53
32. Juvenile Certification 54
33. Lack of Prosecution 54
34. Law of the Case 55
35. Lineups 55
36. Magistrate Judges 55
37. Miranda Rights 56
38. Motion to Quash 58
39. Out-of-Court Identification 59
40. Plea Agreements 59
    a. Breaches/Enforcement 59
    b. Negotiations 60
    c. Terms of the Agreement 60

41. Preclusion of Defense 61
42. Preindictment Delay 62
43. Pretrial Detention and Release 62
44. Pretrial Hearings 62
45. Pretrial Identifications 63
46. Probable Cause 64
47 Recusal 65
48. Regulations 65
49. Representation 66
    a. Conflict-Free Representation 66
    b. Disqualification of Counsel 66
    c. Hybrid Representation 66
    d. Ineffective Representation 66
    e. Pro Se Representation 68
    f. Right to Counsel 68
    g. Substitution of Counsel 69
    h. Waiver of Representation 69
    i. Withdrawal of Counsel 69

50. Search and Seizure 70
    a. Abandonment 71
    b. Border Searches 71
    c. Coast Guard Searches 71
    d. Consent to Search 71

e. Exigent Circumstances 72
f. Expectation of Privacy 72
g. Governmental Conduct 72
h. Inevitable Discovery 73
i. Investigatory Stops 73
j. Issuance of a Search Warrant 74
k. Knock and Announce 75
l. Private Searches 75
m. Probable Cause 75
n. Probation Searches 77
o. Protective Sweeps 77
p. Reasonable Suspicion 77
q. Rule 41(e) Motions 78
r. Suppression Motions 78
s. Terry Stops 79
t. Warrantless Searches and Seizures 80

51. Selective Prosecution 81
52. Severance 81
53. Sixth Amendment Rights 82
54. Speedy Trial 84
55. Statutes of Limitation 85
56. Statutes 85
57. Suppression 86
58. Transfer of Trial 87
59. Venue 87
60. Vindictive Prosecution 88
61. Voluntariness of a Confession 88
62. Waiver of Rights 89
63. Warrants 91
64. Wiretaps 92

C. **Trial Decisions** 93

1. Acquittals 93
2. Admission of Evidence 94

3. Allen Charges 95
4. Authenticity 95
5. Batson Claims 96
6. Bruton Violations 96
7. Burden of Proof 96
8. Chain of Custody 97
9. Character Evidence 97
10 Closing Arguments 97
11. Credibility Determinations 98
12. Coconspirator Statements 98
13. Comments on the Evidence 100
14. Confrontation Clause 100
15. Constitutionality of Regulations and Statutes 101
16. Contempt 102
17. Continuances 103
18. Cross-Examination 103
19. Documentary Evidence 104
20. Double Jeopardy 105
21. Entrapment 106
22. Evidentiary Rulings 106
23. Expert Testimony 108
24. Extrinsic Evidence 110
25. Fifth Amendment Rights 110
26. Hearsay 111
a. Admitting Hearsay 111
b. Right of Confrontation 112
c. Unavailability of a Witness 113

27. Immunity from Prosecution 113
28. Impeachment Evidence 114
29. In Absentia Proceedings 114
30. In-Court Identification 114
31. Ineffective Assistance of Counsel 115
32. Jewell Instruction 116
33. Judge's Conduct 116
34. Juror Misconduct 117
35. Jury Examination of Evidence
119
36. Jury Inquiries 120

37. Jury Instructions 120
38. Jury Selection 124
a. Challenges for Cause 124
b. Jury Composition 125
c. Peremptory Challenges 126
d. Voir Dire 126

39. Materiality of a False Statement 127
40. Opening Statements 128
41. Opinion Evidence 128
a. Expert Opinion Evidence 128
b. Lay Opinion Testimony 129

42. Photographs 130
43. Prior Crimes, Wrongs or Acts 130
44. Presence of Defendant 131
45 Privileges 131
46. Prosecutorial Misconduct 133
47. Probative Value vs. Prejudicial Harm 135
48. Rebuttal and Surrebuttal Evidence 135
49. Recess 136
50. Recusal and Disqualification of Judge 136
51. Relevancy of Evidence 137
52. Reopening 138
53. Rule of Completeness 138
54. Sanctions 138
55. Shackling 139
56. Supplemental Jury Instructions 139
57. Verdict Forms 139
58. Vouching 140
59. Witnesses 140

D. **Post-Trial Decisions** 142

1. Allocution 142
2. Appeals 142
3. Apprendi Violations 143

4. Arrest of Judgment 143
5. Attorneys Fees 144
6. Bail Pending Sentence and Appeal 144
7. Disciplinary Orders 145
8. Excusable Neglect 145
9 Expungement 145
10. Fines 145
11. Forfeiture 146
12. Mistrial 146
13. Motion to Correct or Reduce Sentence 147
14. New Trial 147
15. Parole 148
16. Probation 149
17. Resentencing 159
18. Restitution 150
19. Rule 32 151
20. Sentencing 151
a. Pre-Guidelines 151
b. Guidelines 152

21. Sufficiency of the Evidence 160
22. Supervised Release 161
23. Transcripts 162
24. Writ Ad Testificandum 163
25. Writ of Audita Querela 164
26. Writ of Coram Nobis 164

E. **Habeas Corpus Petitions** 164

III. **Civil Proceedings** 172

A. **Introduction** 172

1. Findings of Fact and Conclusions of Law 172
2. Affirming on Alternative Grounds 173

B. **Pretrial Decisions** 173

1. Abstention 173
2. Affirmative Defenses 174
3. Amended Complaints 174
4. Appointment of Counsel 175
5. Appointment of Guardian Ad Litem 176
6. Arbitration 176
7. Bifurcation 178
8. Burden of Proof 178
9. Case Management 179
10. Certification to State Court 179
11. Claim Preclusion 180
12. Class Actions 180
13. Collateral Estoppel 181
14. Consolidation 182
15. Constitutionality of Regulations 183
16. Constitutionality of Statutes 183
17. Contempt 184
18. Continuances 184
19. Declaratory Relief 185
20. Discovery 186
21. Disqualifying Counsel 188
22. Disqualifying the Judge (Recusal) 189
23. Dismissals 189
24. Diversity Jurisdiction 195
25. Evidentiary Hearings 195
26. Exhaustion 195
27. Failure to State a Claim 196
28. Forum Non Conveniens 198
29. Forum Selection Clauses 198
30. Frivolousness 199
31. Impleader 199
32. Immunities 200
33. In Forma Pauperis Status 202
34. Inherent Powers 203
35. Injunctions 204
36. Interlocutory Appeals 206

37. Intervention 207
38. Involuntary Dismissal 208
39. Issue Preclusion 208
40. Joinder/Indispensable Party 209
41. Judicial Estoppel 210
42. Judicial Notice 210
43. Judgment on the Pleadings 210
44. Jurisdiction 211
45. Jury Demand 214
46. Laches 214
47. Lack of Prosecution 215
48. Law of the Case 215
49. Leave to Amend 215
50. Local Rules 218
51. Magistrate Judges 218
52. Mandamus 219
53. Mootness 220
54. Oral Argument 220
55. Pendent Jurisdiction 220
56. Personal Jurisdiction 221
57. Preemption 222
58. Preliminary Injunctions 222
59. Pretrial Conferences 224
60. Pretrial Orders 224
61. Protective Orders 225
62. Qualified Immunity 225
63. Recusal 226
64. Removal 227
65. Res Judicata 228
66. Ripeness 228
67. Sanctions 229
68. Service of Process 231
69. Severance 231
70. Sovereign Immunity 232
71. Special Masters 233
72. Standing 233
73. Stare Decisis 234
74. Statutes of Limitation 234
75. Stay Orders 235

76. Subject Matter Jurisdiction 236
77. Subpoenas 237
78. Substitution of Parties 238
79. Summary Judgment 238
80. Summons 242
81. Supplemental Complaints 242
82. Supplemental Jurisdiction 242
83. Venue 243
84. Vexatious Litigants 243
85. Voir Dire 243
86. Voluntary Dismissals 244

C. **Trial Decisions** 244

1. Alter Ego 244
2. Authentication 244
3. Bench Trials 245
4. Bifurcation 246
5. Choice of Laws 246
6. Closing Arguments 247
7. Credibility Findings 247
8. Cross-Examination 248
9. Directed Verdict 248
10. Evidentiary Rulings 249
11. Experts 250
12. Foreign Law 251
13. Judgment as a Matter of Law 252
14. Juror Misconduct, Partiality or Bias 252
15. Jury Instructions 253
16. Jury Selection 254
17. Jury Verdicts 255
18. Opening Statements 257
19. Parol Evidence 257
20. Proximate Cause Determinations 257
21. Regulations 257
22. State Law 258
23. Statutes 259
24. Substantive Areas of Law 261

a. Admiralty 261
b. Americans with Disabilities Act (ADA) 263
c. Antitrust 264
d. Bankruptcy 264
e. Civil Rights 270
f. Discrimination Claims 272
g. Constitutional Law 274
h. Contracts 275
i. Copyright/Trademark 277
j. Declaratory Judgment Act 279
k. Defamation 279
l. Environmental Law 280
m. ERISA 282
n. Fair Debt Collection Practices Act 285
o. Fair Labor Standards Act 285
p. False Claims Act 286
q. Federal Employers' Liability Act (FELA) 287
r. Federal Tort Claims Act 287
s. Feres Doctrine 288
t. Freedom of Information Act (FOIA) 289
u. Immigration 290
i. Board of Immigration Appeals 290
ii. District Court Appeals 297

v. Individuals with Disabilities Ed. Act 298
w. Labor Law 299
x. Negligence 304
y. Securities 305
z. Social Security 306
aa. Tariffs 308
bb. Tax 309
cc. Title VII 312
dd. Warsaw Convention 313

25. Supervising Trials 314
26. Supplemental Jury Instructions 314
27. Territorial Laws 314
28. Treaties 315
29. Tribal Courts 316

30. Verdict Forms 317

D. **Post-Trial Decisions** 317

1. Appeals 317
2. Attorneys Fees 317
   a. Antitrust 319
   b. Bankruptcy 319
   c. Civil Rights 319
   d. Class Actions 320
   e. Contract Provision 320
   f. Copyright/Trademark 321
   g. Environmental Laws 322
   h. Equal Access to Justice Act (EAJA) 322
   i. ERISA 323
   j. FOIA 324
   k. Inherent Powers 324
   l. Removal 324
   m. Rule 68 325
   n. Social Security 325
   o. State Law 325
   p. Tax 326
   q. Title VII 326
3. Bonds 326
4. Certified Appeals 327
5. Consent Decrees 328
6. Costs 329
7. Damages 329
   a. Liquidated 331
   b. Punitive 332
   c. Remittitur 333
8. Equitable Relief 333
9. Excusable Neglect 334
10. Default 334

11. Interest 335
12. JNOV 336
13. Judgments (Amending, Vacating, Reopening) 337
14. Mandates 338
15. New Trials 339
16. Permanent Injunctions 339
17. Reconsideration 341
18. Renewed Motion for Judgment as Matter of Law 341
19. Reopen/Supplement Record 342
20. Sanctions 343
21. Settlements 346
22. Supersedeas Bonds 347
23. Surety Bonds 348
24. Vacatur 348
25. Void Judgments 348

IV. **Review of Agency Decisions** 349

A. **Introduction** 349

1. Arbitrary and Capricious 349
2. Substantial Evidence 350
3. Statutory Interpretations 351
4. Regulatory Interpretations 353
5. Constitutional Review 354
6. Sanctions 355

B. **Specific Agency Review** 355

1. Bonneville Power Administration 355
2. Department of Energy 356
3. Environmental Protection Agency 357
4. Federal Communications Commission 357
5. Federal Energy Regulatory Commission 358

6. Federal Labor Relations Authority 358
7. Federal Trade Commission 358
8. Immigration and Naturalization Service 359
9. Interior Board of Land Appeals 366
10. Labor Benefits Review Board 367
11. Mine Safety and Health Rev. Commission 368
12. National Labor Relations Board 368
13. National Transportation Safety Board 370
14. Occupational Safety/Health Review Commission 371
15. Railroad Retirement Board 371
16. Railway Adjustment Board 372
17. Securities Exchange Commission 372
18. Social Security Administration 372

INDEX 375

I. DEFINITIONS

A. Standard of Review

1. Definitions

"The standard of review focuses on the deference an appellate court affords to the decisions of a District Court, jury or agency." Federal Appellate Practice: Ninth Circuit, Ulrich, Kessler & Anger; Sidley & Austin, 2d ed. 165 (1999). It is the measure of the degree of discretion owed to the reviewed agency or court. See Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1387 (9th Cir. 1994) ("The court must temper its standard of review according to the degree of discretion Congress has given to the agency concerned."). "Standards of review distribute power within the judicial branch by defining the relationship between trial and appellate courts." W. Wendell Hall, Standards of Review in Texas, 29 St. Mary's L.J. 351, 356 (1998).

"At its clearest level, a standard of review prescribes the degree of deference given by the reviewing court to the actions or decisions under review." Steven Alan Childress & Martha S. Davis, 1 Federal Standards of Review § 1.01 (2d ed. 1992). Unfortunately, "[t]he various catchphrases associated with standards of review are often difficult for court and counsel to define and apply in practice." Steven Alan Childress, Primer on Standards of Review in Federal Civil Appeals, 161 F.R.D. 123, 126 (1995).

One commentator states that standard of review "refers to the limits of review, or the extent to which, and the manner by which a court will scrutinize the findings of fact, conclusions of law, or rulings of the trial court." Richard Maloy, "Standards of Review" - Just a Tip of the Icicle, 77 Univ. of Detroit Mercy L.R. 603, 604 (2000).

Another commentator notes that "[s]tandards of review . . . define the parameters of a reviewing court's authority in determining whether a trial court erred and whether the error warrants reversal." Hall, 29 St. Mary's L.J. at 356. Thus, the standard of review is the appellate judge's "measuring stick." Id. (quoting John C. Godbold, Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal, 30 Sw. L.J. 801, 810 (1976)). Each standard serves as a "limiting mechanism which defines an appellate court's scope of review, and hence its power." Ronald R. Hofer, Standards of Review -- Looking Beyond the Labels, 74 Marq. L. Rev. 231, 232 (1991) (internal quotation omitted). Thus, "[t]he standard of review provides the perspective within which the Court of Appeals review the lower courts' decisions." Federal Appellate Practice: Ninth Circuit at 165.

2. **Applications**

"[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)." See Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000); see also Maloy, 77 Univ. of Detroit Mercy L.R. at 610-11 (noting the three traditional standards of review -- de novo, clearly erroneous and abuse of discretion -- but listing numerous variations).

The selection of the appropriate standard of review is always contextual. See United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000). For example, the de novo standard applies when issues of law predominate in the district court's decision. Id. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate; if an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then the appellate court gives deference to the decision of the district court, otherwise review is de novo. Id. "While the distinction between these standards seem clear enough in the abstract, in practice the distinction often begins to blur as a body of appellate law begins to develop with respect to issues which frequently are the subject of appeals." See Harman v. Apfel, 211 F.3d 1172, 1176 (9th Cir. 2000) (noting that the choice of standards requires the court to balance "the peculiar need of a full appellate review; see also, United States v. Asagba, 77 F.3d 324, 325 (9th Cir. 1996) (noting that case "actually turns on the standard of review").

Standards of review are sometimes referred to as "scope of review." See, e.g., Rice v. Sullivan, 912 F.2d 1076, 1080 (9th Cir. 1990), rev'd on other grounds by Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (en banc); see also Maloy, 77 Univ. of Detroit Mercy L.R. at 604 n.7 (noting that "[t]he term 'standard of review' is sometimes incorrectly referred to as 'scope of review'"); Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle U. L. Rev. 11, 13 (1994) (noting that terms standard of review and scope of review are often used interchangeably). Some cases, however, have carefully distinguished the "standard of review" from the "scope of review." See First Nat'l Bank & Trust v. Department of Treasury, 63 F.3d 894, 896 n.5 (9th Cir. 1995); McCarthy v. Mayo, 827 F.2d 1310, 1313-14 (9th Cir. 1987); Asarco Inc. v. EPA, 616 F.2d 1153, 1158 (9th Cir. 1980); see also United Food & Commercial Workers Int'l Union v. Foster Poultry Farms, 74 F.3d 169, 173 (9th Cir. 1995) (describing scope of review of arbitrator's decision); National Audubon Soc'y v. United States Forest Serv., 46 F.3d 1437, 1446 (9th Cir. 1993) ("Whether the district court exceeded its proper scope of review of the administrative record is a question of law we review de novo.").

Standard of review has also been used to describe the degree of scrutiny in equal protection analysis. See Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997); United States v. Sahhar, 56 F.3d 1026, 1028 (9th Cir. 1995); United States v. Sahhar, 917 F.2d 1197, 1201 n.4 (9th Cir. 1990) ("Modern equal protection analysis involves at least three possible standards of review: strict scrutiny, heightened scrutiny and rational basis."). The same terminology -- standard of review -- is also used to describe the test for challenges under the Privileges and Immunities Clause. See Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 298 (1998).

The test by which an appellate court measures for error has also been termed a standard of review. See Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citing standard for determining sufficiency of the evidence).

"The purpose of standards of review is to assure that the separate functions of trial and appellate courts in a judicial system are maintained." Maloy, 77 Univ. of Detroit Mercy L.R. at 609. The relevant standard of review may be critical to the outcome of the case. See Dickinson v. Zurko, 527 U.S. 150, 152-61 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); Krull v. SEC, 248 F.3d 907, 914 (9th Cir. 2001) (noting that deferential standard or review "constrains us, even if we might decide otherwise were it left to our independent judgment"); Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this

case."); Walsh v. Centeio, 692 F.2d 1239, 1241 (9th Cir. 1982) ("[T]he outcome of the instant case turns on the standard of review . . . ."). In some cases, the court has elected not to decide which standard of review is applicable on the ground that the outcome would not be changed by applying different standards of review. See, e.g., Cheo v. INS, 162 F.3d 1227, 1230 (9th Cir. 1998); United States v. Robinson, 94 F.3d 1325, 1327 n.1 (9th Cir. 1996); In re Grand Jury Proceedings, 87 F.3d 377, 380 (9th Cir. 1996); Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1456 n.6 (9th Cir. 1996). Moreover, the Supreme Court has counseled that it is "undesirable to make the law more complicated by proliferating review standards without good reasons." First Options, Inc. v. Kaplan, 514 U.S. 938, 948 (1995). Finally, this court has made clear that, regardless of the label of the standard of review, a mistake is never beyond appellate correction. See United States v. Salcido-Corrales, 249 F.3d 1151, 1155 (9th Cir. 2001).

B. **De Novo**

1. **Definitions**

De novo review means that this court views the case from the same position as the district court. See Ka Makani ‘O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002); Environmental Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1078 (9th Cir. 2001); Lake Mohave Boat Owners Ass'n v. National Park Serv., 138 F.3d 759, 762 (9th Cir. 1998); Nevada Land Action Ass'n v. United States Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993). The appellate court must consider the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered. Ness v. Commissioner, 954 F.2d 1495, 1497 (9th Cir. 1992); United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). Such review is "independent," see Perez-Lastor v. INS, 208 F.3d 773, 777 (9th Cir. 2000); Sanders v. City of San Diego, 93 F.3d 1423, 1426 (9th Cir. 1996); Voigt v. Savell, 70 F.3d 1552, 1564 (9th Cir. 1995), or “plenary,” see United States v. Waites, 198 F.3d 1123, 1126 (9th Cir. 2000). Thus, no deference is owed to the district court. See Harman v. Apfel, 211 F.3d 1172, 1175 (9th Cir. 2000); United States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998).

2. **Applications**

Questions of law are reviewed de novo. See United States v. Carranza, 289 F.3d 634, 643 (9th Cir. 2002) (constitutionality of statute); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) (takings claim); Harper v. U.S. Seafoods. 278 F.3d 971, 973 (9th Cir. 2002) (statutory interpretation); Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 870 (9th Cir. 2001) (en banc) (statutory interpretation), cert. denied, 122 S. Ct. 1437 (2002); Kulas v. Flores, 255 F.3d 780, 783 (9th Cir. 2001) (jury trial), cert. denied, 122 S. Ct. 1557 (2002); United States v. Garrett, 253 F.3d 443, 446 (9th Cir. 2001) (jurisdiction), cert. denied, 122 S. Ct. 1451 (2002); Far Out Prod., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001) (issue preclusion); McBride v. PLM Int'l, Inc., 179 F.3d 737, 741 (9th Cir. 1999) (jurisdiction); Cacique v. Robert Reiser & Co., 169 F.3d 619, 622 (9th Cir. 1999) (state law); General Dynamics Corp. v. United States, 139 F.3d 1280, 1282 (9th Cir. 1998) (jurisdiction); Gibson v. County of Riverside, 132 F.3d 1311, 1312 (9th Cir. 1997) (state law); Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997) (federal law); Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997) (application of statute); United States v. Michael R., 90 F.3d 340, 343 (9th Cir. 1996) (constitutionality of statute); Twenty-Three Nineteen Creekside, Inc. v. Commissioner, 59 F.3d 130, 131 (9th Cir. 1995) (tax); United States v. Yacoubian, 24 F.3d 1, 3 (9th Cir. 1994) (jurisdiction, separation of powers, ex post facto, double jeopardy claims); United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc) (exigent circumstances).

A district court's interpretation of the federal rules is an application of law reviewed de novo. See United States v. Foster, 227 F.3d 1096, 1099 (9th Cir. 2000); United States v. Machado, 195 F.3d 454, 456 (9th Cir. 1999); United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999); Atchison, Topeka and Santa Fe Ry. Co. v. Hercules, Inc., 146 F.3d 1071, 1073 (9th Cir. 1998); Hilao v. Estate of Marcos, 95 F.3d 848, 851 (9th Cir. 1996); Schwarzschild v. Tse, 69 F.3d 293, 295 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995).

Mixed questions of law and fact are generally reviewed de novo. See Suzy's Zoo v. Commissioner, 273 F.3d 875, 878 (9th Cir. 2001) (tax court's finding that taxpayer is a "producer"); California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1042 (9th Cir. 2001); United States v. Female Juvenile (Wendy G.), 255 F.3d 761, 765 (9th Cir. 2001) (whether suspect is "in custody"); United States v. Percy, 250 F.3d 720, 725 (9th Cir.) (waiver of right to counsel), cert. denied, 122 S. Ct. 493 (2001); United States v. Medrano, 241 F.3d 740, 746 (9th Cir.)

(sentence enhancement), cert. denied, 533 U.S. 963 (2001); Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000); United States v. Jimenez-Medina, 173 F.3d 752, 754 (9th Cir. 1999) (reasonable suspicion); Dyer v. Calderon, 151 F.3d 970, 979 (9th Cir. 1998) (en banc) (implied jury bias); United States v. Duarte-Higareda, 113 F.3d 1000, 1002 (9th Cir. 1997) (adequacy of jury waiver); United States v. Eric B., 86 F.3d 869, 877 (9th Cir. 1996) (prosecutorial misconduct); United States v. Garcia-Camacho, 53 F.3d 244, 245 (9th Cir. 1995) (reasonable suspicion); Campbell v. Wood, 18 F.3d 662, 681 (9th Cir. 1994) (en banc) (Eighth Amendment). A mixed question of law and fact occurs when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982); Diamond, 215 F.3d at 1055; United States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998); In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997) (en banc); United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996); United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984) (en banc); see also Suzy's Zoo, 273 F.3d at 878 (stating that a mixed question "exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute"). Mixed questions generally are reviewed de novo because they require the consideration of legal concepts and the exercise of judgment about the values that animate legal principles. Bammer, 131 F.3d at 792; Boone v. United States, 944 F.2d 1489, 1492 (9th Cir. 1991); United States v. Spillone, 879 F.2d 514, 520 (9th Cir. 1989); McConney, 728 F.2d at 1204. For instance, mixed questions involving constitutional rights are reviewed de novo. See United States v. City of Spokane, 918 F.2d 84, 86 (9th Cir. 1990); McConney, 728 F.2d at 1204. If, however, the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error. See Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1210 (9th Cir. 1997); United States v. Marbella, 73 F.3d 1508, 1515 (9th Cir. 1996); United States v. Estrada-Plata, 57 F.3d 757, 760 (9th Cir. 1995). For example, a determination of proximate cause is reviewed for clear error. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 783 (9th Cir. 2000), aff'd, 122 S. Ct. 1465 (2002). Whether established facts constitute negligence is also reviewed for clear error. Sacks v. Commissioner, 82 F.3d 918, 920 (9th Cir. 1996); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995) ("This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed de novo."), aff'd, 517 U.S. 830 (1996). Whether an individual is "disabled" for purposes of an ERISA plan is a mixed question of law reviewed for clear error. See Deegan v. Continental Cas. Co., 167 F.3d 502, 506 (9th Cir. 1999).

C. **Clearly Erroneous**

1. **Definitions**

Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." See Easley v. Cromartie, 532 U.S. 234, 242 (2001); Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993); United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000); United States v. Maldonado, 215 F.3d 1046, 1050 (9th Cir. 2000); United States v. Palafox-Mazon, 198 F.3d 1182, 1186 (9th Cir. 2000); see also United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc) ("We accept the lower court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been committed."); United States v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1999) ("We will not disturb a district court's findings of fact unless we are left with a definite and firm conviction that a mistake has been made."); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1014 (9th Cir. 1997); McMillan v. United States, 112 F.3d 1040, 1044 (9th Cir. 1997); United States v. Murdoch, 98 F.3d 472, 475 (9th Cir. 1996); David H. Tedder & Assocs., Inc. v. United States, 77 F.3d 1166, 1169 (9th Cir. 1996).

Thus, an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. See Sawyer v. Whitley, 505 U.S. 333, 346 n.14 (1992); In re Banks , 263 F.3d 862, 869 (9th Cir. 2001) (BAP) Gonzalez-Caballero v. Mena, 251 F.3d 789, 792 (9th Cir. 2001); Alder v. Federal Republic of Nigeria, 219 F.3d 869, 876 (9th Cir. 2000); United States v. Beard, 161 F.3d 1190, 1194 (9th Cir. 1998); Cree v. Flores, 157 F.3d 762, 768 (9th Cir. 1998); Doe, 155 F.3d at 1074; Committee for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 819 (9th Cir. 1996); Snow v. Standard Ins. Co., 87 F.3d 327, 331 (9th Cir. 1996). "If the [trial court's] account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Phoenix Eng'g & Supply Inc. v. Universal Elec. Co., 104 F.3d 1137, 1141 (9th Cir. 1997) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985)); see also United States v. Working, 224 F.3d 1093, 1102 (9th Cir. 2000) (en banc) (apply standard); Alder, 219 F.3d at 876 (same); Doe, 155 F.3d at 1074 (same). Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Working, 224 F.3d at 1102; Cree, 157 F.3d at 769; Duckett v. Godinez, 109 F.3d 533, 535 (9th Cir. 1997) (internal quotation omitted).

2. **Applications**

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); Easley v. Cromartie, 532 U.S. 234, 242 (2001); Lawyer v. Department of Justice, 521 U.S. 567, 580 (1997); Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th Cir. 2001); United States v. Lam, 251 F.3d 852, 855 (9th Cir.), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1149 (9th Cir. 2000); Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1044 (9th Cir. 1999); United States v. Cooper, 173 F.3d 1192, 1204 (9th Cir. 1999); United States v. Doe, 136 F.3d 631, 636 (9th Cir. 1998); Adler v. Federal Rep. of Nigeria, 107 F.3d 720, 729 (9th Cir. 1997); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996); Campbell v. Wood, 18 F.3d 662, 681 (9th Cir. 1994) (en banc). That standard is applied in both civil and criminal proceedings. See United States v. Cazares, 121 F.3d 1241, 1245 (9th Cir. 1997); United States v. Lester, 85 F.3d 1409, 1410-11 (9th Cir. 1996); United States v. McConney, 728 F.2d 1195, 1200 n.5 (9th Cir. 1984) (en banc).

"Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard." Rand v. Rowland, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc). The standard applies to findings the district court adopts from proposed findings submitted by the parties. Anderson v. Bessemer City, 470 U.S. 564, 571-73 (1985); Phoenix Eng'g & Supply Inc. v. Universal Elec. Co., 104 F.3d 1137, 1140 (9th Cir. 1997); Saltarelli v. Bob Baker Group Med. Trust, 35 F.3d 382, 384 (9th Cir. 1994); but see Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 2000) (noting that while review is for clear error, the reviewing court will review with "particularly close scrutiny" when findings are adopted). The clear error standard also applies when the trial court relies solely on a written record. Phonetele, Inc. v. American Tel. & Tel. Co., 889 F.2d 224, 229 (9th Cir. 1989); Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel, 841 F.2d 259, 261 n.1 (9th Cir. 1988). Findings of fact based on stipulations are entitled to the same deference as those based on in-court testimony. See United States v. Bazuaye, 240 F.3d 861, 864 (9th Cir.), cert. denied, 122 S. Ct. 959 (2001).

The district court's findings of fact following a bench trial are reviewed for clear error. See Dubner v. City and County of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001); Troutt v. Colorado Western Ins. Co., 246 F.3d 1150, 1156 (9th Cir. 2001); Ambassador Hotel Co. v. Wei-Chuan Investment, 189 F.3d 1017, 1024 (9th Cir. 1999); Dolman v. Agee, 157 F.3d 708, 711 (9th Cir. 1998); United States v. Pend Oreille

County Pub. Util. Dist. No. 1, 135 F.3d 602, 609 (9th Cir. 1998); Delk v. Commissioner, 113 F.3d 984, 986 (9th Cir. 1997); Magnuson v. Video Yesteryear, 85 F.3d 1424, 1427 (9th Cir. 1996); Saltarelli, 35 F.3d at 384("In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous.").

Special deference is paid to a trial court's credibility findings. Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); Allen v. Iranon, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247, 1252 (9th Cir.), cert. denied, 122 S. Ct. 2645 (2002); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1110 (9th Cir. 1998); Anheuser-Busch, Inc. v. National Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996); United States v. Zermeno, 66 F.3d 1058, 1063 (9th Cir. 1995); see also Duckett v. Godinez, 109 F.3d 533, 535 (9th Cir. 1997) (habeas). Thus, the trial court's ruling on the credibility of a witness is reviewed for clear error. See United States v. Saya, 247 F.3d 929, 935 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Matta-Ballesteros, 71 F.3d 754, 766 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996).

D. **Abuse of Discretion**

1. **Definitions**

An abuse of discretion is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." See Wing v. Asarco Inc., 114 F.3d 986, 988 (9th Cir. 1997); International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993). Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. See SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Valley Eng'r, Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998) (sanctions); Solomon v. North Am. Life and Cas. Ins. Co., 151 F.3d 1132, 1138-39 (9th Cir. 1998) (motion to amend complaint); In re The Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996) (sanctions); Smith v. Jackson, 84 F.3d 1213, 1221 (9th Cir. 1996) (denial of attorneys fees); Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 805 (9th Cir. 1995) (same); In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994) (dismissal for lack of prosecution); Marchand

v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994) (reviewing award of fees and costs); see also United States v. Sherburne, 249 F.3d 1121, 1125 (9th Cir. 2001) (noting that reversal is appropriate only when reviewing court has a firm conviction that the district court committed a clear error on judgment); Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000) (noting that reversal under the abuse of discretion standard is possible only "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances").

The appellate court cannot simply substitute its judgment for that of the lower court. United States v. McMullen, 98 F.3d 1155, 1159 (9th Cir. 1996), In re Grand Jury Proceedings, 62 F.3d 1175, 1180 (9th Cir. 1995); Sibler v. Mabon, 18 F.3d 1449, 1455 (9th Cir. 1994). The abuse of discretion standard requires that an appellate court "uphold any district court determination that falls within a broad range of permissible conclusions." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1016 (9th Cir. 1997). An exercise of discretion, however that is based on an erroneous interpretation of the law can be freely overturned. In re Arden, 176 F.3d 1226, 1228 (9th Cir. 1999). Similarly, a court abuses its discretion when there is a "clearly erroneous assessment of the evidence." K.V. Mart Co. v. United Food and Comm. Workers, Local 324, 173 F.3d 1221, 1223 (9th Cir. 1999).

2. **Applications**

A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of a material fact. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002) (issuing preliminary injunction); SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001) (denying Rule 60(b)(5) motion); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (permitting amended answer); United States v. Tucor Int'l, Inc., 238 F.3d 1171, 1175 (9th Cir. 2001) (denying attorneys fees); Bogovich v. Sandoval, 189 F.3d 999, 1001 (9th Cir. 1999) (issuing stay); FTC v. Affordable Media, 179 F.3d 1228, 1233 (9th Cir. 1999) (issuing preliminary injunction); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1198 (9th Cir. 1999) (imposing sanctions on attorney); Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046 (9th Cir. 1999) (denying preliminary injunction); United States v. Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998) (denying motion to reduce sentence); United States v. Washington, 98 F.3d 1159, 1162 (9th Cir. 1996) (denying Fed. R. Civ. P. 60(b) motion); see also McClaran v. Plastic Indus., Inc., 97 F.3d 347, 354 (9th Cir. 1996) (reviewing district court's formulation of civil jury instructions); Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1464 (9th Cir. 1995) (reviewing court's determination of adequacy of

representation in class action); Beech Aircraft Corp. v. United States, 51 F.3d 834, 841 (9th Cir. 1995) (reviewing exclusion of expert testimony); Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994) (reviewing award of fees and costs). Moreover, even when a trial court applies the correct law to facts that are not clearly erroneous, it may abuse its discretion if it rules in an irrational manner. See United States v. Sherburne, 249 F.3d 1121, 1125 (9th Cir. 2001); In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996), overruled on other grounds by In re Bammer, 131 F.3d 788 (9th Cir. 1997) (en banc).

"A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996); see also Brown v. Roe, 279 F.3d 742, 744 (9th Cir. 2002) (habeas); United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (applying Koon); United States v. Sherburne, 249 F.3d 1121, 1125 (9th Cir. 2001); United States v. Banuelos-Rodriguez, 215 F.3d 969, 972 (9th Cir. 2000) (en banc); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999); United States v. Stein, 127 F.3d 777, 779 (9th Cir. 1997) (quoting Koon); United States v. Sablan, 114 F.3d 913, 916 (9th Cir. 1997) (en banc) (same). Thus, the court abuses its discretion by erroneously interpreting a law. Beech Aircraft, 51 F.3d at 841; United States v. Beltran-Gutierrez, 19 F.3d 1287, 1289 (9th Cir. 1994); see also United States v. Iverson, 162 F.3d 1015, 1026 (9th Cir. 1999) ("A district court abuses its discretion if it rests its decision on an inaccurate view of the law."). A trial court may also abuse its discretion when the record contains no evidence to support its decision. United States v. Schmidt, 99 F.3d 315, 320 (9th Cir. 1996); Oregon Natural Resources Council v. Marsh, 52 F.3d 1485, 1492 (9th Cir. 1995); MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1122 (9th Cir. 1991).

E. **Arbitrary and Capricious**

1. **Definitions**

Under the arbitrary and capricious standard, a reviewing court must consider only whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. See Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001) (explaining standard); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 573 (9th Cir. 1998); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517, 1521 (9th Cir. 1995). The

standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." See Independent Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotations omitted); see also Irvine Medical Ctr. v. Thompson, 275 F.3d 823, 830-31 (9th Cir. 2002) (explaining degree of deference owed to agency's decisions); Arizona Cattle Growers' Ass'n, 273 F.3d at 1236 (same). The court may reverse only when the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or it so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See Pacific Coast Fed. of Fishermen's Ass'n, Inc. v. National Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001); United States v. Snoring Relief Lab Inc., 210 F.3d 1081, 1085 (9th Cir. 2000); Alvardo Comm. Hosp. v. Shalala, 155 F.3d 1115, 1121 (9th Cir. 1998), amended by 166 F.3d 950 (9th Cir. 1999); Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1448 (9th Cir. 1996); Western Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996).

Thus, the scope of review under the arbitrary and capricious standard is narrow, and a court may not substitute its judgment for that of the agency. See United States Postal Service v. Gregory, 122 S. Ct. 431, 434 (2001); Arizona Cattle Growers' Ass'n, 273 F.3d at 1236 (noting the "narrow scope of review); Snoring Relief Labs, 210 F.3d at 1085; Washington v. Daley, 173 F.3d 1158, 1169 (9th Cir. 1999); Presidio Golf Club v. National Park Serv., 155 F.3d 1153, 1160 (9th Cir. 1998); In re Transcon Lines, 89 F.3d 559, 563 (9th Cir. 1996); Dioxin/Organochlorine, 57 F.3d at 1521; see also Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (defining standard); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (same); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (same), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977).

2. **Applications**

Review of agency determinations is limited to whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedure required by law. 5 U.S.C. § 706(2)(A); Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001); Mak v. FBI, 252 F.3d 1089, 1091 (9th Cir. 2001); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998); Natural Resources Defense Council v. United States Dep't of Interior, 113 F.3d 1121, 1123-24 (9th Cir. 1997); see also Western Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996) (applying standard); Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 941 (9th Cir.

1994) (same). Under the arbitrary and capricious standard, the court considers only whether the agency's decision is based on reasoned evaluation of the relevant factors. Price Rd. Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505, 1511 (9th Cir. 1997); Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1466 (9th Cir. 1996); California Trout v. Schaefer, 58 F.3d 469, 473 (9th Cir. 1995). This court will overturn an agency's decision only if the agency committed a "clear error of judgment." Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 666 (9th Cir. 1998); California Trout, 58 F.3d at 469 (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)); see also Washington v. Daley, 173 F.3d 1158, 1170 (9th Cir. 1999) (reviewing court must determine whether agency committed a "clear error of judgment"); UOP v. United States, 99 F.3d 344, 346 (9th Cir. 1996) (same).

An agency's interpretation of a statutory provision or regulation it is charged with administering is generally entitled to deference. See Navaho Nation v. Dept. of Health and Human Servs., 285 F.3d 864, 868 (9th Cir. 2002) (noting agency's interpretation is entitled to "substantial deference") Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1053 (9th Cir. 2002) (noting deference is owed unless agency's interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001); Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998); Natural Resources Defense Council, 113 F.3d at 1124; Providence Hosp. v. Shalala, 52 F.3d 213, 216 (9th Cir. 1995); Todd Shipyards Corp. v. Director, OWCP, 950 F.2d 607, 610 (9th Cir. 1991); see also United States v. Mead Corp., 121 S. Ct. 2164, 2171-73 (2001) (explaining when deference is owed); Pronsolino v. Nastri, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference). The court must defer to the agency's interpretation "[u]nless an alternative reading is compelled by the plain language of the regulation or by other indications of the agency's intent at the time it promulgated the regulation." French Hosp. Med. Ctr. v. Shalala, 89 F.3d 1411, 1416 (9th Cir. 1996) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)); see also Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir. 1998) ("Although we accord a high degree of deference to an agency's interpretation of its own regulation, that interpretation cannot be upheld if it is plainly erroneous or inconsistent with the regulation."). "Radically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." Pfaff v. United States Dep't of Housing & Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996). Similarly, no deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position. United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995); see also Resources Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference does not extend to agency litigating positions that are

wholly unsupported by regulations, rulings, or administrative practice). Moreover, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." See Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997) (quoting INS v. Cardozo-Fonseca, 480 U.S. 421, 446 n.30 (1987)); cf. Irvine Medical Ctr. v. Thompson, 275 F.3d 823, 831 n.6 (9th Cir. 2002) (noting that agency is not required to establish rules of conduct that last forever); Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala, 65 F.3d 1472, 1480 (9th Cir. 1995) (noting that an agency "is not disqualified from changing its mind"). Finally, "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n, 83 F.3d 1130, 1133 (9th Cir. 1996). A state agency's interpretation of a federal statute is not entitled to deference. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo).

F. Substantial Evidence

1. Definitions

Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); see also Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2000); Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001); Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999); Amos v. Director, OWCP, 153 F.3d 1051, 1054 (9th Cir. 1998); see also Todd Shipyards Corp. v. Director, OWCP, 139 F.3d 1309, 1312 (9th Cir. 1998); Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997); Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). The court must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's decision. See Mayes, 276 F.3d at 459; Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Sandgathe, 108 F.3d at 980; Smolen, 80 F.3d at 1279; Andrews, 53 F.3d at 1039.

Under the substantial evidence standard of review, the court of appeals must affirm where there is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence. See In re Exxon Valdez, 270 F.3d 1215, 1237 (9th Cir. 2001) (jury verdict); Lambert v. Ackerley, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc) (same); Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1057 (9th Cir. 1997); United States

ex rel. Hopper v. Anton, 91 F.3d 1261, 1268 (9th Cir. 1996); Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 941 (9th Cir. 1994); see also Edlund, 253 F.3d at 1156 (noting that "[i]f the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the [agency]"); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) ("Where evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.").

The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record. NLRB v. Iron Workers of Cal., 124 F.3d 1094, 1098 (9th Cir. 1997); California Pac. Med. Ctr. v. NLRB, 87 F.3d 304, 307 (9th Cir. 1996). A review for "substantial evidence" is one undertaken with some deference. Alderman v. SEC, 104 F.3d 285, 288 (9th Cir. 1997); Howard v. FAA, 17 F.3d 1213, 1216 (9th Cir. 1994); see also Ubau-Marenco v. INS, 67 F.3d 750, 754 (9th Cir. 1995) (under substantial evidence standard, court defers to BIA's factual findings), overruled on other grounds by Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (en banc). Recently, the Supreme Court noted that under the substantial evidence standard, the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366 (1998).

2. **Applications**

a. **Review of Agency Determinations**

An agency's factual findings must be upheld if supported by substantial evidence in the record. See Dickinson v. Zurko, 527 U.S. 150, 152-61 (1999) (rejecting "clearly erroneous" review and reaffirming that standard of review an agency's findings is substantial evidence); Mayes v. Massanari, 276 F.3d 453, 458-59 (9th Cir. 2001) (disability); Valderrama v. INS, 260 F.3d 1083, 1085 (9th Cir. 2001) (credibility findings); Krull v. SEC, 248 F.3d 907, 911 (9th Cir. 2001); Pondoc Hernaez v. INS, 244 F.3d 752, 756 (9th Cir. 2001); Ortiz v. INS, 179 F.3d 1148, 1154 (9th Cir. 1999); Northern Montana Health Ctr. v. NLRB, 178 F.3d 1089, 1093 (9th Cir. 1999); DeLeon-Barrios v. INS, 116 F.3d 391, 393 (9th Cir. 1997) (INS); Associated Ready Mixed Concrete, Inc. v. NLRB, 108 F.3d 1182, 1184 (9th Cir. 1997) (NLRB); In re Transcon Lines, 89 F.3d 559, 564 (9th Cir. 1996) (ICC); Hanlester Network v. Shalala, 51 F.3d 1390, 1396 (9th Cir. 1995) (HHS); Hawaii Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 215 (9th Cir. 1995) (FAA).

When an agency and a hearings officer disagree, the court reviews the decision of the agency, not the hearings officer. Maka v. INS, 904 F.2d 1351, 1355 (9th Cir.

1990), amended by 932 F.2d 1352 (9th Cir. 1991); NLRB v. International Bhd. of Elec. Workers, Local 77, 895 F.2d 1570, 1573 (9th Cir. 1990); see also Northern Montana Health Care Ctr., 178 F.3d at 1093 ("We employ the substantial evidence test even if the Board's decision differs materially from the ALJ's.); Perez v. INS, 96 F.3d 390, 392 (9th Cir. 1996) (where BIA conducts independent review of the IJ's findings, court reviews BIA's decision, not IJ's). Thus, the standard of review is not modified when a disagreement occurs. Maka, 904 F.2d at 1355; International Bhd., 895 F.2d at 1573. When the agency rejects the hearings officer's credibility findings, however, it must state its reasons and those reasons must be based on substantial evidence. Maka, 904 F.2d at 1355; Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986). Nevertheless, when the agency and the hearings officer disagree, the appellate court's reviewing eye may be more searching. UAW v. NLRB, 834 F.2d 816, 819 (9th Cir. 1987).

This court gives special deference to credibility determinations made by hearings officers. See Underwriters Lab., Inc. v. NLRB, 147 F.3d 1048, 1051 (9th Cir. 1998); Walnut Creek Honda Assocs. 2, Inc. v. NLRB, 89 F.3d 645, 648 (9th Cir. 1996); Murphy v. INS, 54 F.3d 605, 611 (9th Cir. 1995); Silver v. United States Postal Serv., 951 F.2d 1033, 1042 (9th Cir. 1991). Such credibility determinations must be upheld unless they are "inherently or patently unreasonable." Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 (9th Cir. 1995) (internal quotation omitted). Although such deference is given, a hearings officer must give specific, cogent reasons for adverse credibility findings. See Valderrama v. INS, 260 F.3d 1083, 1085 (9th Cir. 2001); Stoyanov v. INS, 172 F.3d 731, 736 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); DeLeon-Barrios v. INS, 116 F.3d 391, 393 (9th Cir. 1997); Lopez-Reyes v. INS, 79 F.3d 908, 911 (9th Cir. 1996).

b. **Jury Verdicts**

The standard of review for a jury verdict in a civil case is whether it is supported by substantial evidence. See Swenson v. Potter, 271 F.3d 1184, 1190 (9th Cir. 2001); Johnson v. Paradise Valley Unified School District, 251 F.3d 1222, 1227 (9th Cir.), cert. denied, 122 S. Ct. 645 (2001); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000); Lambert v. Ackerley, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc); Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir. 1999); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1207 (9th Cir. 1997); Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1128 (9th Cir. 1997); Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997); Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995); Murphy v. FDIC, 38 F.3d 1490, 1495 (9th Cir. 1994). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to

support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence. Johnson, 251 F.3d at 1227; Three Boys Music, 212 F.3d at 482; Lambert, 180 F.3d at 1012; Image Tech. Servs., 125 F.3d at 1206-7; Neibel, 108 F.3d at 1128; Maynard v. City of San Jose, 37 F.3d 1396, 1404 (9th Cir. 1994); Sanders v. Parker Drilling Co., 911 F.2d 191, 193 (9th Cir. 1990). Neither the trial court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. See Gilbrook, 177 F.3d at 856; Murray, 55 F.3d at 1452; Sanders, 911 F.2d at 194; see also Three Boys Music, 212 F.3d at 482 ("The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.").

In some criminal cases, the court has stated that a jury verdict must stand if it is supported by "substantial evidence." See, e.g., United States v. Service Deli, Inc., 151 F.3d 938, 941 (9th Cir. 1998); United States v. Nordbrock, 38 F.3d 440, 445 (9th. Cir. 1994). In that context, substantial evidence is defined as evidence which reasonable minds might accept as adequate to support a conclusion. Nordbrock, 38 F.3d at 445.

G. **Reasonableness**

1. **Definitions**

Review of an agency's action raising predominantly legal rather than factual issues may be reviewed under a reasonableness standard. See, e.g., Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002); Price Rd. Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505, 1508 (9th Cir. 1997); Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 727 (9th Cir. 1995). The reviewing court must determine whether the agency's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. See California v. FCC, 75 F.3d 1350, 1358 (9th Cir. 1996); California v. FCC, 4 F.3d 1505, 1511 (9th Cir. 1993). The reasonableness standard affords agencies less latitude than the arbitrary and capricious standard. See McLean v. Crabtree, 173 F.3d 1176, 1181 (9th Cir. 1999).

To meet this reasonableness standard, the court may require the agency to provide a reasoned analysis. See California v. FCC, 39 F.3d 919, 925 (9th Cir. 1994). "Moreover, if the record reveals that the agency has failed to consider an important

aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before [it], we must find the agency in violation of the APA." Id. (internal quotations omitted). "The scope of judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference." California, 4 F.3d at 1511. "Nevertheless, although the standard of review is deferential, it may not be uncritical." Id.

Some decisions have stated that the reasonableness standard is more rigorous than the arbitrary and capricious standard. See Ka Makani, 295 F.3d at 959 (describing reasonableness standard as "less deferential"); McLean, 173 F.3d at 1181 (describing reasonableness standard as giving "less latitude" to the agency); National Audubon Soc'y v. United States Forest Serv., 46 F.3d 1437, 1445 (9th Cir. 1993). Other decisions make clear, however, that "'reasonableness' review does not materially differ from an 'arbitrary and capricious' review." Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 528 (9th Cir. 1997) (noting that there is little difference between the two standards). "A reviewing court may overturn agency rulemaking decisions only where a clear error of judgment has occurred." California, 75 F.3d at 1358 (internal quotation omitted). Finally, some decisions have observed that "[t]he rule of reason analysis and the review for an abuse of discretion are essentially the same." See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002); Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002); Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998).

2. **Applications**

An agency's decision not to prepare an EIS is reviewed under the reasonableness standard. See Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 n.3 (9th Cir. 2002) (clarifying law). The adequacy of an EIS is also reviewed under the reasonableness standard. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1071 (9th Cir. 2002); American Rivers v. FERC, 201 F.3d 1186, 1195 (9th Cir. 2000); Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066-67 (9th Cir. 1998); Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 528 (9th Cir. 1997); see also Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001) (applying "rule of reason" to adequacy of agency's EIS), amended by 282 F.3d 1055 (9th Cir. 2002); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir.

1998) (stating that "rule of reason" requires an agency to take a "hard look" to determine if the EIS is adequate).

A "reasonableness standard" is also applied in determining whether the government's position was substantially justified for purposes of awarding attorneys fees under the Equal Access to Justice Act. See United States v. Sherburne, 249 F.3d 1121, 1127-28 (9th Cir. 2001) (discussing standard); Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir. 1998) (explaining standard); Sampson v. Chater, 103 F.3d 918, 921 (9th Cir. 1996); Flores v. Shalala, 49 F.3d 562, 569 (9th Cir. 1995). "Reasonableness" is also used as the standard for measuring a law enforcement officer's entitlement to qualified immunity and for Fourth Amendment claims of excessive force. See, e.g., Robinson v. Solano County, 278 F.3d 1007, 1009 (9th Cir. 2002) (explaining standard).

II. CRIMINAL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

The district court's findings of fact are reviewed for clear error. See United States v. Patterson, 292 F.3d 615, 625 (9th Cir. 2002) (motion to suppress); United States v. Novak, 284 F.3d 986, 988 (9th Cir. 2002) (sentencing); United States v. Pirello, 255 F.3d 728, 731 (9th Cir.) (sentencing), cert. denied, 122 S. Ct. 577 (2001); United States v. Lam, 251 F.3d 852, 855 (9th Cir.) (speedy trial), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); United States v. Mattarolo, 209 F.3d 1153, 1155-56 (9th Cir. 2000) (suppression); United States v. Benboe, 157 F.3d 1181, 1183 (9th Cir. 1998) (possession of firearm); United States v. Doe, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial); United States v. Kohli, 110 F.3d 1475, 1476 (9th Cir. 1997) (sentencing); United States v. Hernandez, 109 F.3d 1450, 1454 (9th Cir. 1997) (exculpatory evidence); United States v. Lester, 85 F.3d 1409, 1410-11 (9th Cir. 1996) (criminal forfeiture); United States v. Von Willie, 59 F.3d 922, 925 (9th Cir. 1995) (suppression); United States v. George, 56 F.3d 1078, 1084 (9th Cir. 1995) (motion to proceed pro se). Findings of fact based on stipulations are entitled to the same deference as those based on in-court testimony. See United States v. Bazuaye, 240 F.3d 861, 864 (9th Cir.), cert. denied, 122 S. Ct. 959 (2001).

The district court's legal conclusions are reviewed de novo. See United States v. Enas, 255 F.3d 662, 665 (9th Cir. 2001) (en banc) (double jeopardy), cert. denied, 122 S. Ct. 925 (2002); United States v. Silva, 247 F.3d 1051, 1054 (9th Cir. 2000) (standing); United States v. Olafson, 213 F.3d 435, 439 (9th Cir. 2000) (reasonable suspicion); United States v. Sarkisian, 197 F.3d 966, 986 (9th Cir. 1999) (standing); United States v. Bowen, 172 F.3d 682, 688 (9th Cir. 1999) (joinder); United States v. Lester, 85 F.3d 1409, 1410 (9th Cir. 1996) (criminal forfeiture). Thus, the district court's construction or interpretation of a statute is reviewed de novo. See United States v. Carranza, 289 F.3d 634, 642 (9th Cir. 2002) (criminal statute); United States v. Lincoln, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA); United States v. Stephens, 237 F.3d 1031, 1033 (9th Cir.) (sentencing statute), cert. denied, 122 S. Ct. 357 (2001); United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000) (Sentencing Guidelines); United States v. Kaluna, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc) (three-strikes law); United States v. Frega, 179 F.3d 793, 802 n.6 (9th Cir. 1999) (mail fraud statute); United States v. Deeb, 175 F.3d 1163, 1166-67 (9th Cir. 1999) (money laundering); United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999) (possession of firearms); United States v. DeLaCorte, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking); United States v. Hunter, 101 F.3d 82, 84 (9th Cir. 1996) (firearm enhancement); United States v. Salemo, 81 F.3d 1453, 1457 (9th Cir. 1996) (Criminal Justice Act); United States v. Valencia-Andrade, 72 F.3d 770, 772 (9th Cir. 1996) (sentencing); United States v. Bailey, 41 F.3d 413, 416 (9th Cir. 1994) (statute defining "access device"); United States v. Ramos, 39 F.3d 219, 220 (9th Cir. 1994) (state law).

The district court's interpretation of the Federal Rules is reviewed de novo. See United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999) (evidence); United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995) (evidence); United States v. Carper, 24 F.3d 1157, 1158-59 (9th Cir. 1994) (criminal procedure).

When a district court does not make specific findings of fact or conclusions of law, the court of appeals may nevertheless uphold the result if there is a reasonable view of the record to support it. United States v. Twine, 853 F.2d 676, 681 (9th Cir. 1988) (diminished capacity); United States v. Moline, 833 F.2d 190, 192 (9th Cir. 1987) (speedy trial); United States v. Most, 789 F.2d 1411, 1417 (9th Cir. 1986) (waiver). Failure to make the required findings of fact pursuant to Federal Rule of Criminal Procedure 32(c)(3)(D), however, requires a remand. United States v. Del Muro, 87 F.3d 1078, 1082 (9th Cir. 1996).

2. **Harmless Error**

An error made by a district court may be harmless. See Chapman v. California, 386 U.S. 18 (1967); United States v. Hermanek, 289 F.3d 1076, 1092-93 (9th Cir. 2002) (admission of expert testimony); United States v. Pierre, 254 F.3d 872, 877 (9th Cir. 2001) (concluding that jury instruction error was not harmless); United States v. Butler, 249 F.3d 1094, 1098 (9th Cir. 2001); United States v. Marsh 144 F.3d 1229, 1240 (9th Cir. 1998); United States v. Miguel, 111 F.3d 666, 671 (9th Cir. 1997); United States v. Annigoni, 96 F.3d 1132, 1143 (9th Cir. 1996) (en banc); United States v. Rubio-Villareal, 967 F.2d 294, 296 n.3 (9th Cir. 1992) (en banc); Coleman v. McCormick, 874 F.2d 1280, 1288-89 (9th Cir. 1989) (en banc) (discussing when harmless error rule can be applied).

"[M]ost constitutional error can be harmless." See Neder v. United States, 527 U.S. 1, 8 (1999). Such error may be disregarded, however, only if it is harmless beyond a reasonable doubt. See id. at 15 (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)); Pierre, 254 F.3d at 877; United States v. Marsh, 144 F.3d 1229, 1240 (9th Cir. 1998); United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998); United States v. Castaneda, 16 F.3d 1504, 1509 (9th Cir. 1994). Review of such error "'requires not only an evaluation of the remaining incriminating evidence in the record, but also the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact.'" Garibay, 143 F.3d at 539 (quoting United States v. Harrison, 34 F.3d 886, 892 (9th Cir. 1994)). The test "is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." See Neder, 527 U.S. at 7 (internal quotation omitted); see also United States v. Oaxaca, 233 F.3d 1154, 1158 (9th Cir. 2000) (noting that "the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict").

When the error is both constitutional in nature and implicates a "structural" right so basic to a fair trial that, by definition, it can never be harmless, the error is deemed harmful per se. See Neder, 527 U.S. at 8; Chapman, 386 U.S. at 23 & n.8; see also Powell v. Galaza, 282 F.3d 1089, 1096-97 (9th Cir. 2002) (explaining that structural error rule applies in habeas review); United States v. Tam, 240 F.3d 797, 801 (9th Cir. 2001) (defining structural error); United States v. Arnold, 238 F.3d 1153, 1155 n.8 (9th Cir.) (contrasting structural and trial error), cert. denied, 533 U.S. 937 (2001); United States v. Hernandez, 203 F.3d 614, 626 (9th Cir. 2000) (defining structural error); United States v. Beard, 161 F.3d 1190, 1195 (9th Cir. 1998) (describing structural error); United States v. Annigoni, 96 F.3d 1132, 1143-44 (9th Cir. 1996) (en banc) (explaining structural error); United States v. Noushfar, 78 F.3d 1442, 1445 n.2 (9th

Cir. 1996) (defining structural error); see also United States v. Perkins, 937 F.2d 1397, 1407 n.2 (9th Cir. 1990) (O'Scannlain, J., dissenting) (describing the three levels of harmless error scrutiny). Thus, in some instances, a district court's error is not subject to harmless error analysis. See United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (defective indictment); Beard, 161 F.3d at 1195 (improper substitution of jurors); United States v. Duarte-Higareda, 113 F.3d 1000, 1003 (9th Cir. 1997) (failure to ensure adequacy of defendant's jury waiver); see also Mach v. Stewart, 137 F.3d 630, 632 (9th Cir. 1997) (habeas). Structural errors "are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible." Eslaminia v. White, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998) (giving examples); see also Neder, 527 U.S. at 8 (defining structural error).

If the error is not of constitutional magnitude, the government must show only that the prejudice resulting from the error was more probably than not harmless. United States v. Mett, 178 F.3d 1058, 1066 (9th Cir. 1999); United States v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); United States v. Hicks, 103 F.3d 837, 842 (9th Cir. 1996); United States v. Erickson, 75 F.3d 470, 479 (9th Cir. 1996). This requires a showing of a "fair assurance" that the judgment was not substantially swayed by the error. See Mett, 178 F.3d at 1066 (discussing standard); United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997); United States v. Annigoni, 96 F.3d 1132, 1144 n.9 (9th Cir. 1996) (en banc); United States v. Crosby, 75 F.3d 1343, 1349 (9th Cir. 1996) (explaining standard); see also United States v. Edwards, 235 F.3d 1173, 1178 (9th Cir. 2000) (noting that test is whether nonconstitutional error more likely than not affected the verdict); United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997) (noting that test may be either "fair assurance" or "more probably than not").

In the context of collateral appeals, such as habeas petitions, the Supreme Court has indicated that the standard is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 766 (1946)); see also California v. Roy, 519 U.S. 2, 4 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the Brecht standard); O'Neil v. McAninch, 513 U.S. 432, 438-440 (1995) (applying standard); Murtishaw v. Woodford, 255 F.3d 926, 973 (9th Cir. 2001) (same), cert. denied, 122 S. Ct. 1313 (2002); Dillard v. Roe, 244 F.3d 758, 774 (9th Cir.) (same), cert. denied, 122 S. Ct. 238 (2001); Spivey v. Rocha, 194 F.3d 971, 975 (9th Cir. 1999); United States v. Gergen, 172 F.3d 719, 724 (9th Cir. 1999); Jeffries v.

Wood, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc); Hanna v. Riveland, 87 F.3d 1034, 1038 (9th Cir. 1996).

3. **Plain Error**

When a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error. See Fed. R. Crim. P. 52(b); Jones v. United States, 527 U.S. 373, 388 (1999) (jury instructions); United States v. Buckland, 289 F.3d 558, 563 (9th Cir.) (en banc) (Apprendi claim), cert. denied, 122 S. Ct. 2314 (2002); United States v. Godinez-Rabadan, 289 F.3d 630, 632 (9th Cir. 2002) (sufficiency of indictment); United States v. Smith, 282 F.3d 758, 765 (9th Cir. 2002) (jury instructions); United States v. Antonakeas, 255 F.3d 714, 727 (9th Cir. 2001) (sentencing); United States v. Hernandez, 251 F.3d 1247, 1250 (9th Cir.) (notice of upward departure), amended by 280 F.3d 1216 (9th Cir. 2001); United States v. Matsumaru, 244 F.3d 1092, 1102 (9th Cir. 2001) (jury instructions); United States v. Romero-Avila, 210 F.3d 1017, 1021-22 (9th Cir. 2000) (prosecutor's statements); United States v. Ross, 206 F.3d 896, 899 (9th Cir. 2000) (sufficiency of the indictment); United States v. Bahe, 201 F.3d 1124, 1127 (9th Cir. 2000); United States v. Vences, 169 F.3d 611, 613 (9th Cir. 1999); United States v. Garcia-Guizar, 160 F.3d 511, 516 (9th Cir. 1998); United States v. Montgomery, 150 F.3d 983, 997 (9th Cir. 1998); United States v. Burt, 143 F.3d 1215, 1217 (9th Cir. 1998) (applying plain error standard to "forfeited" error); United States v. Moore, 136 F.3d 1343, 1344 (9th Cir. 1998); United States v. Amlani, 111 F.3d 705, 714 (9th Cir. 1997); United States v. Jackson, 84 F.3d 1154, 1158 (9th Cir. 1996); United States v. Karterman, 60 F.3d 576, 579 (9th Cir. 1995); see also United States v. Perez, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) (forfeited rights are reviewable for plain error, while waived rights are not).

Under the plain error standard, relief is not warranted unless there has been (1) error; (2) that is plain, and (3) affects substantial rights. Jones, 527 U.S. at 389; Buckland, 289 F.3d at 563; Antonakeas, 255 F.3d at 727; Matsumaru, 244 F.3d at 1102; Romero-Avila, 210 F.3d at 1022; see also Bahe, 201 F.3d at 1127; Vences, 169 F.3d at 613 ("Plain error is found only where there is (1) error, (2) that was clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings.") (quoting United States v. Randall, 162 F.3d 557, 561 (9th Cir. 1998); Garcia-Guizar, 160 F.3d at 516 ("[B]efore an appellate court may address and correct an error not raised at trial, several conditions

must be satisfied: 'There must be (1) error, (2) that is plain, and (3) that affects substantial rights." If all conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or pubic reputation of the judicial proceedings.'") (quoting Johnson v. United States, 520 U.S. 461, 466-67 (1997)); United States v. Scrivner, 114 F.3d 964, 970 (9th Cir. 1997); Karterman, 60 F.3d at 579; United States v. Ortiz-Lopez, 24 F.3d 53, 55 (9th Cir. 1994) ("A plain error is a highly prejudicial error affecting substantial rights."); see also United States v. Lussier, 128 F.3d 1312, 1317 (9th Cir. 1997) ("Before a judgment will be reversed for plain error, the defendant must show that the error affected his 'substantial rights,' that is, '[i]t must have affected the outcome of the District Court proceedings.'"); United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997) ("Plain error . . . is error that is so clear-cut, so obvious, a competent district judge should able to avoid it without the benefit of objection.").

Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. See United States v. Olano, 507 U.S. 725, 736 (1993); Buckland, 289 F.3d at 563; United States v. Lam, 251 F.3d 852, 861 (9th Cir.), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999); Garcia-Guizar, 160 F.3d at 516; United States v. Campbell, 42 F.3d 1199, 1204 (9th Cir. 1994); Ortiz-Lopez, 24 F.3d at 54. In Olano, the Supreme Court defined limitations on a reviewing court's authority to correct plain error. Olano, 507 U.S. at 730-36. First, there must be an actual error and not merely a waiver of rights. Id. at 732. Second, the error must be plain in that it is "clear" or "obvious" under current law. Id. at 734. Third, the plain error must "affect substantial rights." Id. at 735. This means in most cases that the error was prejudicial in that it affected the outcome of the proceedings. Id. Finally, the Court noted that even if the forfeited error is plain and affected substantial rights, the reviewing court is not required to order correction. Id. at 735-36. Rather the discretion to correct the error should be employed only in those cases "'in which a miscarriage of justice would otherwise result.'" Id. at 736 (quoting United States v. Young, 470 U.S. 1, 15 (1985)). This means that the error must "seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. (internal quotation omitted). See Jones, 527 U.S. at 389 (applying standard); Johnson v. United States, 520 U.S. 461, 466-67 (1997) (same); Garcia-Guizar, 160 F.3d at 516; United States v. Moore, 136 F.3d 1343, 1345 (9th Cir. 1998) (reciting standard); United States v. Sayetsitty, 107 F.3d 1405, 1411-12 (9th Cir. 1997) (applying standard); United States v. Tisor, 96 F.3d 370, 376 (9th Cir. 1996) (same); see also Hemmings v. Tidyman's,

Inc., 285 F.3d 1174, 1183 (9th Cir. 2002) (noting applicability of plain error standard to civil litigation).

4. **Structural Error**

When an error is constitutional in nature and implicates a "structural" right so basic to a fair trial that, by definition, it can never be harmless, the error is deemed harmful per se. Chapman v. California, 386 U.S. 18, 23 & n.8 (1967). See also Powell v. Galaza, 282 F.3d 1089, 1096-97 (9th Cir. 2002) (explaining that structural error rule applies in habeas review); United States v. Tam, 240 F.3d 797, 801 (9th Cir. 2001) (defining structural error); United States v. Arnold, 238 F.3d 1153, 1155 n.8 (9th Cir.) (contrasting structural and trial error), cert. denied, 533 U.S. 937 (2001); United States v. Hernandez, 203 F.3d 614, 626 (9th Cir. 2000) (defining structural error); United States v. Beard, 161 F.3d 1190, 1195 (9th Cir. 1998) (describing structural error); United States v. Annigoni, 96 F.3d 1132, 1143-44 (9th Cir. 1996) (en banc) (explaining structural error); United States v. Noushfar, 78 F.3d 1442, 1445 n.2 (9th Cir. 1996) (defining structural error); see also United States v. Perkins, 937 F.2d 1397, 1407 n.2 (9th Cir. 1990) (O'Scannlain, J., dissenting) (describing the three levels of harmless error scrutiny).

Errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. See Neder v. United States, 527 U.S. 1, 7 (1999) (defining structural error). Thus, in these instances, the error is not subject to harmless error analysis. See United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (defective indictment); Beard, 161 F.3d at 1195 (improper substitution of jurors); Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc) (biased juror); United States v. Duarte-Higareda, 113 F.3d 1000, 1003 (9th Cir. 1997) (failure to ensure adequacy of defendant's jury waiver); see also Mach v. Stewart, 137 F.3d 630, 632 (9th Cir. 1997) (habeas). Structural errors "are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible." Eslaminia v. White, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998) (giving examples).

B. **Pretrial Decisions in Criminal Cases**

1. **Appointment of Expert Witness**

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. United States v. Nelson, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996). The district court's exclusion of expert testimony on the reliability of eyewitness identification is also reviewed for an abuse of discretion. United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996).

A district court's decision whether to appoint an expert witness at court expense pursuant to Federal Rule of Criminal Procedure 17(b) is reviewed for an abuse of discretion. United States v. Cruz, 783 F.2d 1470, 1473-74 (9th Cir. 1986).

A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. See United States v. Depew, 210 F.3d 1061, 1065 (9th Cir. 2000).

The district court's decision whether to admit or exclude expert testimony is also reviewed for an abuse of discretion. See United States v. Hanna, 293 F.3d 1080, 1085 (9th Cir. 2002); United States v. Mendoza, 244 F.3d 1037, 1046 (9th Cir.), cert. denied, 122 S. Ct. 221 (2001); United States v. Vallejo, 237 F.3d 1008, 1015 (9th Cir.), amended by 246 F.3d 1150 (9th Cir. 2001); United States v. Campos, 217 F.3d 707, 710 (9th Cir. 2000); United States v. Benavidez-Benavidez, 217 F.3d 720, 723 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 971-72 (9th Cir. 1999); United States v. Webb, 115 F.3d 711, 713 (9th Cir. 1997); United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997); United States v. Morales, 108 F.3d 1031, 1035 & n.1 (9th Cir. 1997) (en banc); see also United States v. Varela-Rivera, 279 F.3d 1174, 1177-78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error); United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000) (noting that admission of expert testimony is reviewed for an abuse of discretion "except where no objection is raised, in which case we review for plain error").

2. **Bail**

Factual findings underlying a district court's pretrial detention order are reviewed under a deferential, clearly erroneous standard. United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991); United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990). The court's finding of potential danger to the community is entitled to

deference. Marino v. Vasquez, 812 F.2d 499, 509 (9th Cir. 1987). The court's finding that a defendant is a flight risk is also reviewed under the clearly erroneous standard. United States v. Donaghe, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." United States v. Fowlie, 24 F.3d 1070, 1072 (9th Cir. 1994). A conclusion based on factual findings in a bail hearing presents a mixed question of fact and law. The facts, findings, and record are reviewed de novo to determine whether the detention order is consistent with constitutional and statutory rights. Townsend, 897 F.2d at 994.

A district court's decision to set aside or remit forfeiture of appearance bond is reviewed for an abuse of discretion. See United States v. Nguyen, 279 F.3d 1112, 1115 (9th Cir. 2002); United States v. Amwest Sur. Ins. Co., 54 F.3d 601, 602 (9th Cir. 1995).

The district court's decision whether to exonerate bail bond sureties is reviewed de novo. See United States v. Noriega-Sarabia, 116 F.3d 417, 419 (9th Cir. 1997); United States v. Toro, 981 F.2d 1045, 1047 (9th Cir. 1992). The legal validity of the bond is also reviewed de novo. Noriega-Sarabia, 116 F.3d at 419.

3. **Bill of Particulars**

The district court's decision to deny a motion for a bill of particulars is reviewed for an abuse of discretion. United States v. Robertson, 15 F.3d 862, 874 (9th Cir. 1994), rev'd on other grounds, 514 U.S. 669 (1995); United States v. Ayers, 924 F.2d 1468, 1483 (9th Cir. 1991).

4. **Brady Violations**

Challenges to convictions based on alleged Brady violations are reviewed de novo. See United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002); United States v. Ciccone, 219 F.3d 1078, 1085 (9th Cir. 2000); United States v. Mikaelian, 168 F.3d 380, 388 (9th Cir.), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Amlani, 111 F.3d 705, 712 (9th Cir. 1997); United States v. Alvarez, 86 F.3d 901, 903 (9th Cir. 1996); United States v. Manning, 56 F.3d 1188, 1197-98 (9th Cir. 1995). A district court's denial of a new trial motion based on an alleged Brady violation is also reviewed de novo. See United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001); United States v. Steinberg, 99 F.3d 1486, 1489 (9th Cir. 1996). The denial of a motion for mistrial based on a Brady violation is reviewed de novo. See United States v.

Howell, 231 F.3d 615, 624 (9th Cir. 2000), cert. denied, 122 S. Ct. 76 (2001). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed, however, for an abuse of discretion. See United States v. Patterson, 292 F.3d 615, 626 (9th Cir. 2002).

Under Brady, the United States is obligated to produce exculpatory evidence. United States v. Nagra, 147 F.3d 875, 881 (9th Cir. 1998); Steinberg, 99 F.3d at 1489. "Failure to provide information as required by Brady is constitutional error only if the information is material, that is, only if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed." Amlani, 111 F.3d at 712; see also United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.") (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)); Mikaelian, 168 F.3d at 388; Nagra, 147 F.3d at 881. Note that in a collateral habeas review, "[t]he harmless error rule no longer applies to Brady violations." Singh v. Prunty, 142 F.3d 1157, 1159 n.5 (9th Cir. 1998) (citing Kyles, 514 U.S. at 535-36).

A district court's ruling on the prosecutor's duty to produce evidence under Brady is also reviewed de novo. United States v. Monroe, 943 F.2d 1007, 1011 (9th Cir. 1991). When, however, a district court rules on whether a defendant should have access to particular information in a government document that has been produced pursuant to Brady, this court reviews for clear error. Id.

Whether a defendant has waived Brady rights in a plea agreement is a question of law reviewed de novo. See United States v. Ruiz, 241 F.3d 1157, 1163 (9th Cir. 2001), rev'd on other grounds, 122 S. Ct. 2450 (2002).

5. **Confessions**

This court reviews de novo the voluntariness of a confession. See United States v. Male Juvenile (Pierre Y.), 280 F.3d 1008, 1014 (9th Cir. 2002); United States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999); United States v. Fisher, 137 F.3d 1158, 1165 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1110 (9th Cir. 1998); United States v. Benitz, 34 F.3d 1489, 1495 (9th Cir. 1994); United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993); see also Pollard v. Galaza, 290 F.3d 1030, 1032 (9th Cir. 2002) (habeas); United States v. Okafor, 285 F.3d 842, 846-47 (9th Cir. 2002) (voluntariness of statements); United States v. Coleman, 208 F.3d 786, 790 (9th Cir.

2000) (same); United States v. Andaverde, 64 F.3d 1305, 1310 (9th Cir. 1995) (same). The district court's factual findings underlying its determination of voluntariness are reviewed for clear error. Doe, 170 F.3d at 1168; Nelson, 137 F.3d at 1110; United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995). Special deference is owed to the trial court's credibility determinations. Nelson, 137 F.3d at 1110.

6. **Competency to Stand Trial**

A district court's determination that a defendant is competent to stand trial is reviewed for clear error. See United States v. Timbana, 222 F.3d 688, 700 (9th Cir. 2000); United States v. Chischilly, 30 F.3d 1144, 1150 (9th Cir. 1994); United States v. Hoskie, 950 F.2d 1388, 1391 (9th Cir. 1991); Guam v. Taitano, 849 F.2d 431, 432 (9th Cir. 1988); see also United States v. Timmins, ___ F.3d ___, No. 00-30224 (9th Cir. July 17, 2002) (noting that other standards may apply depending on the focus of the review). The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and a rational as well as factual understanding of the proceedings against him." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).

In a federal habeas proceeding, state court determinations of mental competency are given a presumption of correctness. Moran v. Godinez, 57 F.3d 690, 696 (9th Cir. 1994). A finding of competency will be overturned only if it is not fairly supported by the record. Id.

A court's decision to order a psychiatric or psychological examination is reviewed for an abuse of discretion. United States v. George, 85 F.3d 1433, 1347 (9th Cir. 1996). The court's decision whether to release a copy of the competency report to the media is also reviewed for an abuse of discretion. See United States v. Kaczynski, 154 F.3d 930, 931 (9th Cir. 1998). Whether a court is permitted under 18 U.S.C. § 4243(f) to order a psychiatric evaluation of an insanity acquittee is a question of statutory construction reviewed de novo. United States v. Phelps, 955 F.2d 1258, 1264 (9th Cir. 1992).

7. **Consolidation of Counts**

The trial court's decision whether to consolidate counts is reviewed de novo. United States v. Douglass, 780 F.2d 1472, 1477 (9th Cir. 1986) (rejecting abuse of discretion standard). The district court's order that two indictments be tried together

is reviewed, however, for an abuse of discretion. United States v. Nguyen, 88 F.3d 812, 815 (9th Cir. 1996).

8. **Continuances**

A district court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. See United States v. Nguyen, 262 F.3d 998, 1002 (9th Cir. 2001) (listing factors for appellate court to consider); United States v. Zamora-Hernandez, 222 F.3d 1046, 1049 (9th Cir. 2000); United States v. Garrett, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (en banc) (reaffirming that abuse of discretion is proper standard of review to review "a district court's ruling granting or denying a motion for a continuance"); United States v. Rude, 88 F.3d 1538, 1550 (9th Cir. 1996); United States v. Nguyen, 88 F.3d 812, 819 (9th Cir. 1996); United States v. Gonzalez-Rincon, 36 F.3d 859, 865 (9th Cir. 1994). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [the] defense." Gonzalez-Rincon, 36 F.3d at 865. "In determining whether the denial was fair and reasonable, several factors must be considered: whether the continuance would inconvenience witnesses, the court, counsel, or the parties; whether other continuances have been granted; whether legitimate reasons exist for the delay; whether the delay is the defendant's fault; and whether a denial would prejudice the defendant." United States v. Fowlie, 24 F.3d 1059, 1069 (9th Cir. 1994). There is no abuse of discretion unless the denial was arbitrary and unreasonable. Rude, 88 F.3d at 1550; United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996).

A trial court's refusal to grant a continuance of a sentencing hearing is also reviewed for an abuse of discretion. United States v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993); United States v. Monaco, 852 F.2d 1143, 1150 (9th Cir. 1988).

9. **Defenses**

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. See United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense); United States v. Arellano-Rivera, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity defense), cert. denied, 122 S. Ct. 1450 (2002); United States v. Ross, 206 F.3d 896, 898 (9th Cir. 2000) (motion in limine); United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996); United States v. de Cruz, 82 F.3d 856, 867 (9th Cir. 1996); United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995). Thus, the district court's failure to instruct on an appropriate defense theory is a question of law reviewed de novo.

United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999); United States v. McGeshick, 41 F.3d 419, 421 (9th Cir. 1994). Whether the court's instructions adequately cover the defendant's proffered is also reviewed de novo. See Pierre, 254 F.3d at 875. Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. See United States v. Fejes, 232 F.3d 696, 702 (9th Cir. 2000), cert. denied, 122 S. Ct. 38 (2001); United States v. Ripinsky, 109 F.3d 1436, 1440 (9th Cir. 1997), amended by 129 F.3d 518 (9th Cir. 1997); see also United States v. Hairston, 64 F.3d 491, 493-94 (9th Cir. 1995) (explaining various standards of review depending on focus of inquiry); United States v. Duran, 59 F.3d 938, 941 (9th Cir. 1995) (same). Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998); United States v. Amlani, 111 F.3d 705, 716 n.5 (9th Cir. 1997). Finally, a determination that a defendant has the burden of proving a defense is reviewed de novo. United States v. McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1998); United States v. Dominguez-Mestas, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress).

10. **Discovery**

A district court's discovery rulings are reviewed for an abuse of discretion. United States v. Chon, 210 F.3d 990, 994 (9th Cir. 2000); United States v. Fisher, 137 F.3d 1158, 1165 (9th Cir. 1998); United States v. Henson, 123 F.3d 1226, 1237 (9th Cir. 1997); United States v. Turner, 104 F.3d 1180, 1185 (9th Cir. 1997); United States v. de Cruz, 82 F.3d 856, 866 (9th Cir. 1996). The court's denial of discovery is reviewed for an abuse of discretion. See United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998) (denial of defendant's request to take depositions); United States v. Marshall, 56 F.3d 1210, 1211 (9th Cir. 1995); United States v. Khan, 35 F.3d 426, 431 (9th Cir. 1994). An order limiting the scope of discovery is reviewed for an abuse of discretion. See United States v. Candia-Veleta, 104 F.3d 243, 246 (9th Cir. 1996); United States v. Gomez-Lopez, 62 F.3d 304, 306-07 (9th Cir. 1995). "To reverse a conviction for a discovery violation, we must find not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights." United States v. Amlani, 111 F.3d 705, 712 (9th Cir. 1997) (internal quotations and citation omitted); see also United States v. Mikaelian, 168 F.3d 380, 389 (9th Cir.) (applying standard), amended by 180 F.3d 1091 (9th Cir. 1999). "To justify reversal of a sanction for a discovery violation, the defendant must show a likelihood that the verdict would have been different had the government complied with the discovery rules." de Cruz, 82 F.3d at 866 (internal quotations and citation omitted).

Although the district court's discovery rulings are reviewed for an abuse of discretion, the scope of the district court's authority to order discovery under Federal Rule of Criminal Procedure 16 is reviewed de novo. Mikaelian, 168 F.3d at 389; United States v. Hicks, 103 F.3d 837, 840 (9th Cir. 1996); United States v. Gonzalez-Rincon, 36 F.3d 859, 864 (9th Cir. 1994); but see Chon, 210 F.3d at 994-95 (discussing scope of Rule 16(a)(1)(c) but applying abuse of discretion standard). The court's conclusion on Rule 16 "materiality" is reviewed for an abuse of discretion. United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995).

a. **Bill of Particulars**

Denial of a motion for a bill of particulars is reviewed for an abuse of discretion. United States v. Robertson, 15 F.3d 862, 874 (9th Cir. 1994), rev'd on other grounds, 514 U.S. 669 (1995); United States v. Ayers, 924 F.2d 1468, 1483 (9th Cir. 1991); United States v. Calabrese, 825 F.2d 1342, 1347 (9th Cir. 1987). The scope and specificity of a bill of particulars rest within the sound discretion of the trial court. United States v. Long, 706 F.2d 1044, 1054 (9th Cir. 1983).

b. **Brady Materials**

Challenges to convictions based on alleged Brady violations are reviewed de novo. See United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002); United States v. Ciccone, 219 F.3d 1078, 1085 (9th Cir. 2000); United States v. Mikaelian, 168 F.3d 380, 388 (9th Cir.), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Amlani, 111 F.3d 705, 712 (9th Cir. 1997); United States v. Alvarez, 86 F.3d 901, 903 (9th Cir. 1996); United States v. Manning, 56 F.3d 1188, 1197-98 (9th Cir. 1995). A district court's denial of a new trial motion based on an alleged Brady violation is also reviewed de novo. See United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001); United States v. Steinberg, 99 F.3d 1486, 1489 (9th Cir. 1996). The denial of a motion for mistrial based on a Brady violation is reviewed de novo. See United States v. Howell, 231 F.3d 615, 624 (9th Cir. 2000), cert. denied, 122 S. Ct. 76 (2001). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed, however, for an abuse of discretion. See United States v. Patterson, 292 F.3d 615, 626 (9th Cir. 2002).

Under Brady, the United States is obligated to produce exculpatory evidence. United States v. Nagra, 147 F.3d 875, 881 (9th Cir. 1998); Steinberg, 99 F.3d at 1489. "Failure to provide information as required by Brady is constitutional error only if the

information is material, that is, only if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed." Amlani, 111 F.3d at 712; see also United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.") (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)); Mikaelian, 168 F.3d at 388; Nagra, 147 F.3d at 881. Recently, however, this court stated in a collateral habeas review that "[t]he harmless error rule no longer applies to Brady violations." Singh v. Prunty, 142 F.3d 1157, 1159 n.5 (9th Cir. 1998) (citing Kyles, 514 U.S. at 535-36).

A district court's ruling on the prosecutor's duty to produce evidence under Brady is also reviewed de novo. United States v. Monroe, 943 F.2d 1007, 1011 (9th Cir. 1991). When, however, a district court rules on whether a defendant should have access to particular information in a government document that has been produced pursuant to Brady, this court reviews for clear error. Id.

Whether a defendant has waived Brady rights in a plea agreement is a question of law reviewed de novo. See United States v. Ruiz, 241 F.3d 1157, 1163 (9th Cir. 2001), rev'd on other grounds, 122 S. Ct. 2450 (2002).

c. **Confidential Informants**

The decision whether to disclose the identity of a confidential informant is reviewed for an abuse of discretion. See United States v. Henderson, 241 F.3d 638, 646 (9th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Ramirez-Rangel, 103 F.3d 1501, 1505 (9th Cir. 1997); United States v. Gil, 58 F.3d 1414, 1421 (9th Cir. 1995); United States v. Staufer, 38 F.3d 1103, 1109 (9th Cir. 1994). The district court must balance the public interest in protecting the flow of information against the defendant's right to prepare a defense. See Ramirez-Rangel, 103 F.3d at 1505. Nondisclosure is an abuse of discretion only if disclosure is relevant and helpful to the defense of the accused, or essential to a fair determination of the defendant's cause. See Roviaro v. United States, 353 U.S. 53, 62 (1957).

The decision whether to hold an in camera hearing regarding disclosure of the informant's identity is reviewed for an abuse of discretion. See Henderson, 241 F.3d

at 646; United States v. Amador-Galvan, 9 F.3d 1414, 1417 (9th Cir. 1993); United States v. Spires, 3 F.3d 1234, 1238-39 (9th Cir. 1993). The district court's refusal to give an informant credibility jury instruction is also reviewed for an abuse of discretion. United States v. Holmes, 229 F.3d 782, 786 (9th Cir. 2000), cert. denied, 531 U.S. 1175 (2001).

d. **Depositions**

Denial of a motion to depose a witness pursuant to Federal Rule of Criminal Procedure 15 is reviewed for abuse of discretion. See United States v. Olafson, 213 F.3d 435, 442-43 (9th Cir. 2000); United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998); United States v. Zuno-Arce, 44 F.3d 1420, 1425 (9th Cir. 1995); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1569 (9th Cir. 1989).

e. **Jencks Act**

A district court's denial of a discovery motion made pursuant to the Jencks Act is reviewed for an abuse of discretion. See United States v. Guagliardo, 278 F.3d 868, 871 (9th Cir. 2002); United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997); United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996). The district court's decision regarding the imposition of sanctions for a Jencks Act violation is reviewed for an abuse of discretion. United States v. McKoy, 78 F.3d 446, 448 (9th Cir. 1996).

A conviction will be affirmed if the "Jencks error is more than likely harmless." United States v. Brumel-Alvarez, 991 F.2d 1452, 1457 (9th Cir. 1992); United States v. Span, 970 F.2d 573, 582 (9th Cir. 1992); see also Alvarez, 86 F.3d at 907 (harmless error doctrine applies to Jencks Act violations).

f. **Sanctions**

Discovery sanctions are generally reviewed for an abuse of discretion. See United States v. Fernandez, 231 F.3d 1240, 1245 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 972 (9th Cir. 1999). The applicability of Federal Rule of Criminal Procedure 16, however, is reviewed de novo, but once sanctions are imposed, their propriety is reviewed for an abuse of discretion. United States v. Mandel, 914 F.2d 1215, 1218 (9th Cir. 1990); United States v. Iglesias, 881 F.2d 1519, 1523 (9th Cir. 1989); see also United States v. Fernandez, 231 F.3d 1240, 1245 (9th Cir. 2000) (reviewing de novo whether district court had legal basis for its discovery order); United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992) ("We review de

novo the question whether the district court had any legal basis for its discovery order. If it did, we review for an abuse of discretion the court's choice of a sanction for a violation of its order."). The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. United States v. McKoy, 78 F.3d 446, 448 (9th Cir. 1996).

The district court's conclusion that specific attorney conduct violated local rules is reviewed de novo. United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993). The court's findings of fact in support of its imposition of sanctions are reviewed for clear error. Id. To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights. United States v. Amlani, 111 F.3d 705, 712 (9th Cir. 1997); United States v. de Cruz, 82 F.3d 856, 866 (9th Cir. 1996).

11. **Discriminatory or Selective Prosecution**

A district court's grant or denial of discovery relating to a claim of discriminatory prosecution is reviewed for an abuse of discretion. See United States v. Turner, 104 F.3d 1180, 1185 (9th Cir. 1997); United States v. Candia-Veleta, 104 F.3d 243, 246 (9th Cir. 1996). A district court's decision on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. Candia-Veleta, 104 F.3d at 246. The court's underlying factual determinations regarding a defendant's claim of discriminatory prosecution are reviewed for clear error. See United States v. Estrada-Plata, 57 F.3d 757, 760 (9th Cir. 1995).

Absent proof of discrimination based on suspect characteristics, i.e., race, religion, or gender, a court may not review a prosecutor's decision to charge a particular defendant. See United States v. Bauer, 84 F.3d 1549, 1560 (9th Cir. 1996); United States v. Oakes, 11 F.3d 897, 898 (9th Cir. 1993); United States v. Redondo-Lemos, 955 F.2d 1296, 1300-01 (9th Cir. 1992). A district court's ruling on selective prosecution is reviewed for clear error. Bauer, 84 F.3d at 1560; United States v. Gutierrez, 990 F.2d 472, 475 (9th Cir. 1993).

12. **Dismissals**

Generally, dismissal of an indictment based on legal error is reviewed de novo; dismissal based on discretionary authority is reviewed for an abuse of discretion. See United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991) (dismissal on due process ground is reviewed de novo; dismissal based on court's supervisory power is

reviewed for abuse of discretion); but see United States v. Miller, 4 F.3d 792, 794 (9th Cir. 1993) (electing not to decide appropriate standard to be applied to dismissal based on supervisory powers).

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed de novo. See United States v. Lam, 251 F.3d 852, 855 (9th Cir.) (Sixth Amendment), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); United States v. Muro-Inclan, 249 F.3d 1180, 1182 (9th Cir.) (due process), cert. denied, 122 S. Ct. 180 (2001); United States v. Hancock, 231 F.3d 557, 561 (9th Cir. 2000) (due process and equal protection), cert. denied, 532 U.S. 989 (2001); United States v. Haynes, 216 F.3d 789, 796 (9th Cir. 2000) (due process); United States v. Hinojosa-Perez, 206 F.3d 832, 835 (9th Cir. 2000) (information); United States v. Munsterman, 177 F.3d 1139, 1141 (9th Cir. 1999) (bills of attainder); United States v. Doe, 125 F.3d 1249, 1253 (9th Cir. 1997) (due process); United States v. Romeo, 114 F.3d 141, 142 (9th Cir. 1997) (collateral estoppel); United States v. James, 109 F.3d 597, 599 (9th Cir. 1997) (double jeopardy, collateral estoppel); United States v. Eshkol, 108 F.3d 1025, 1027 (9th Cir. 1997) (due process); United States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997); United States v. Nguyen, 88 F.3d 812, 820 (9th Cir. 1996) (commerce clause); United States v. Andaverde, 64 F.3d 1305, 1308-09 (9th Cir. 1995) (Fifth Amendment).

The district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed de novo. See United States v. Lualemaga, 280 F.3d 1260, 1263 (9th Cir.) (IAD), cert. denied, 122 S. Ct. 2641 (2002); United States v. Boren, 278 F.3d 911, 913 (9th Cir. 2002); United States v. Akins, 276 F.3d 1141, 1146 (9th Cir. 2002) (18 U.S.C. § 922(g)(9)); United States v. Hagberg, 207 F.3d 569, 571 (9th Cir. 2000) (33 U.S.C. § 1345); United States v. Fitzgerald, 147 F.3d 1101, 1102 (9th Cir. 1998) (Federal Employees Compensation Act); United States v. Gomez-Rodriguez, 96 F.3d 1262, 1264 (9th Cir. 1996) (en banc); United States v. Pena-Carrillo, 46 F.3d 879, 881 (9th Cir. 1995) (Speedy Trial Act); United States v. Riggins, 40 F.3d 1055, 1056 (9th Cir. 1994). The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. Hinojosa-Perez, 206 F.3d at 835; United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir. 1998); United States v. Armenta, 69 F.3d 304, 306 (9th Cir. 1995).

Whether to dismiss an indictment to remedy a violation of recognized rights, to deter illegal conduct, or to preserve judicial integrity is an exercise of the district court's supervisory powers reviewed for an abuse of discretion. See United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); United States v. Garza-Juarez, 992 F.2d

896, 905 (9th Cir. 1993). Thus, the trial court's decision on a defendant's motion to dismiss for impermissible preindictment delay is reviewed for an abuse of discretion. See United States v. Mills, 280 F.3d 915, 920 (9th Cir.), cert. denied, 122 S. Ct. 2347 (2002); United States v. Doe, 149 F.3d 945, 947 (9th Cir. 1998) (information); United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997); United States v. Bracy, 67 F.3d 1421, 1426 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1193 (9th Cir. 1995); see also United States v. Doe, 125 F.3d 1249, 1253 (9th Cir. 1997) (district court's refusal to dismiss an information in the exercise of its supervisory powers is reviewed for an abuse of discretion); United States v. Eaton, 31 F.3d 789, 791 (9th Cir. 1994) ("Whether to dismiss an indictment is an exercise of the district court's supervisory powers reviewed for abuse of discretion.").

The dismissal of an indictment without prejudice is reviewed for an abuse of discretion. United States v. Adrian, 978 F.2d 486, 493 (9th Cir. 1992).

A district court's ruling on the government's motion for leave to dismiss filed pursuant to Federal Rule of Criminal Procedure 48(a) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. See United States v. Garcia-Valenzuela, 232 F.3d 1003, 1007 (9th Cir. 2000); United States v. Gonzalez, 58 F.3d 459, 461 (9th Cir. 1995) ("there is a question as to whether a district court may ever deny an uncontested Rule 48(a) motion"). The court's decision to dismiss an information pursuant to Rule 48(b) for preindictment delay and pretrial delay is also limited and reviewed only for an abuse of discretion. See United States v. Jiang, 214 F.3d 1099, 1101 (9th Cir. 2000) (noting that dismissal "should be imposed only in extreme circumstances"); United States v. Talbot, 51 F.3d 183, 186 (9th Cir. 1995); United States v. Hutchison, 22 F.3d 846, 850 (9th Cir. 1993). "A Rule 48(b) dismissal should be imposed only in extreme circumstances, upon prosecutorial misconduct and demonstrable prejudice or substantial [threat] thereof." Hutchison, 22 F.3d at 850 (internal quotation omitted).

The district court's determination of a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. See United States v. Symington, 195 F.3d 1080, 1090-91 (9th Cir. 1999); United States v. Pena-Carrillo, 46 F.3d 879, 882 (9th Cir. 1995). In rendering a decision whether to dismiss with or without prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors, and in absence of compliance with these requirements, dismissal shall be entered with prejudice. See United States v. Delgado-Miranda, 951 F.2d 1063, 1065 (9th Cir. 1991); but see United States v. Clymer, 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide

whether indictment should be dismissed with or without prejudice). Note that the denial of a motion to dismiss based on preaccusation delay is reviewed for an abuse of discretion. United States v. Doe, 149 F.3d 945, 947 (9th Cir. 1998); United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992).

A motion to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir. 1998); United States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996); United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996); United States v. Dudden, 65 F.3d 1461, 1466 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. United States v. Cuellar, 96 F.3d 1179, 1182 (9th Cir. 1996).

The court's decision whether to dismissal based on allegations of prosecutorial misconduct before a grand jury is reviewed de novo. See United States v. Fuchs, 218 F.3d 957, 964 (9th Cir. 2000); United States v. Larrazolo, 869 F.2d 1354, 1355 (9th Cir. 1989); United States v. De Rosa, 783 F.2d 1401, 1404 (9th Cir. 1986); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 n.9 (9th Cir. 1983) (district court's decision that a defendant's Fifth Amendment rights were violated by prosecutorial misconduct before a grand jury).

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. United States v. James, 109 F.3d 597, 599 (9th Cir. 1997); United States v. Merriam, 108 F.3d 1162, 1163 (9th Cir. 1997); United States v. McClinton, 98 F.3d 1199, 1201 (9th Cir. 1996); United States v. Wright, 79 F.3d 112, 114 (9th Cir. 1996).

The trial court's refusal to dismiss for a violation of the Interstate Agreement on Detainers Act (IAD) is reviewed de novo. United States v. Lualemaga, 280 F.3d 1260, 1263 (9th Cir.), cert. denied, 122 S. Ct. 2641 (2002).

13. **Evidentiary Hearings**

A district court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. See United States v. Saya, 247 F.3d 929, 934 (9th Cir.) (post-verdict survey of jurors), cert. denied, 122 S. Ct. 493 (2001); United States v. Hayes, 231 F.3d 1132, 1135 (9th Cir. 2000) (Rule 35 motion); United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000) (motion to suppress), cert. denied, 122 S. Ct. 76

(2001); United States v. Houston, 217 F.3d 1204, 1206-07 (9th Cir. 2000) (sentencing); United States v. Smith, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997); United States v. Sarno, 73 F.3d 1470, 1502 (9th Cir. 1995); United States v. Montoya, 45 F.3d 1286, 1291 (9th Cir. 1995); see also United States v. Christakis, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255 motion); United States v. Zuno-Arce, 209 F.3d 1095, 1102 (9th Cir. 2000) (same); United States v. Chacon-Palomares, 208 F.3d 1157, 1158-59 (9th Cir. 2000) (same); United States v. Andrade-Larrios, 39 F.3d 986, 991 (9th Cir. 1994) (same)

The district court's timing of an evidentiary hearing is also reviewed for an abuse of discretion. United States v. Montilla, 870 F.2d 549, 551 (9th Cir. 1989), amended by 907 F.2d 115 (9th Cir. 1990). This court has held, however, that a district court's denial of a motion to conduct an evidentiary hearing on use immunity should be reviewed de novo. United States v. Young, 86 F.3d 944, 947 (9th Cir. 1996); see also Smith, 155 F.3d at 1063 n.18 (recognizing holding in Young).

14. **Ex Parte Hearings**

A trial court's decision to conduct an ex parte hearing is reviewed for an abuse of discretion. See United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996) (court did not abuse its discretion); United States v. Thompson, 827 F.2d 1254, 1260-61 (9th Cir. 1987) (court abused its discretion).

15. **Ex Post Facto**

Whether a sentence violates the prohibition in Article I of the United States Constitution against ex post facto laws is reviewed de novo. United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997) ("We review ex post facto challenges to sentencing decisions de novo."); United States v. DeSalvo, 41 F.3d 505, 511 (9th Cir. 1994). A district court's ruling that the ex post facto clause was not violated is also reviewed de novo. United States v. Collins, 118 F.3d 1394, 1395 n.2 (9th Cir. 1997); United States v. Canon, 66 F.3d 1073, 1077 (9th Cir. 1995); United States v. Walker, 27 F.3d 417, 419 (9th Cir. 1994).

16. **Extradition**

Whether there exists a valid extradition treaty is a question of law subject to de novo review. United States v. Merit, 962 F.2d 917, 919 (9th Cir. 1992); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 681 (9th Cir. 1983). Whether such an extradition treaty is in force is a legal question subject to de novo review. United States v. Tuttle, 966 F.2d 1316, 1316 (9th Cir. 1992). Whether the district court had jurisdiction if the treaty was violated is reviewed de novo. See United States v. Matta-Ballesteros, 71 F.3d 754, 762 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1344 (9th Cir. 1991), vacated on other grounds, 505 U.S. 1201 (1992). Interpretations of extradition treaties are reviewed de novo. See United States v. Artt, (In re Requested Extradition of Artt), 158 F.3d 462, 465 (9th Cir. 1998); United States v. Lazarevich, 147 F.3d 1061, 1063 (9th Cir. 1998); Clarey v. Gregg, 138 F.3d 764, 765 (9th Cir. 1998).

Whether an offense comes within an extradition treaty requires determination of whether the offense is listed as an extraditable crime and whether the conduct is illegal in both countries. Both are questions of law reviewed de novo. United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987); Quinn v. Robinson, 783 F.2d 776, 791-92 (9th Cir. 1986). "We review de novo whether extradition of a defendant satisfies the doctrines of 'dual criminality' and 'specialty.'" United States v. Khan, 993 F.2d 1368, 1372 (9th Cir. 1993). A district court's analysis of foreign law is reviewed de novo. United States v. Fowlie, 24 F.3d 1059, 1064 (9th Cir. 1994).

Factual determinations made by the extradition tribunal will be reviewed under the clearly erroneous standard of review. Artt, 158 F.3d at 465; Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1405 (9th Cir. 1988); Quinn, 783 F.2d at 792. Denials of requests for discovery in extradition matters are reviewed for an abuse of discretion. Quinn, 783 F.2d at 817 n.41.

"The scope of habeas review of an extradition order is severely limited." Marinero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999) (explaining limitations). Factual findings made by a magistrate judge in an extradition proceedings are reviewed for clear error. Id. A probable cause finding "must be upheld if there is any competent evidence in the record to support it." Id. (internal quotation omitted).

17. **Faretta Requests**

Faretta v. California, 422 U.S. 806, 835 (1975), states that before a district court may grant a defendant's request to proceed pro se, there must be a showing that the defendant "knowingly and intelligently" waived the right to counsel. Factual findings supporting the district court's decision are reviewed for clear error. See United States

v. George, 56 F.3d 1078, 1084 (9th Cir. 1995); United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994). This circuit has not settled whether to apply de novo or abuse of discretion review in determining whether the facts support the grant or denial of a Faretta request. See United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) ("[W]e have not yet clarified whether denial of a Faretta request is reviewed de novo or for abuse of discretion."), cert. denied, 122 S. Ct. 1309 (2002); George, 56 F.3d at 1084 (citing United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986)).

18. **Franks Hearing**

Where a defendant makes a substantial preliminary showing that a false statement was (1) deliberately or recklessly included in an affidavit submitted in support of a search warrant; and (2) material to the magistrate's finding of probable cause, the court must hold a hearing to investigate the veracity of the affiant. See United States v. Fisher, 137 F.3d 1158, 1164 (9th Cir. 1998); United States v. Meling, 47 F.3d 1546, 1553 (9th Cir. 1995) (applying Franks v. Delaware, 438 U.S. 154 (1978)); United States v. Motz, 936 F.2d 1021, 1023-24 (9th Cir. 1991) (same). The district court's refusal to conduct such a hearing is reviewed de novo. See United States v. Furrow, 229 F.3d 805, 815 (9th Cir. 2000); United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir. 2000); Meling, 47 F.3d at 1546; United States v. Fowlie, 24 F.3d 1059, 1067 (9th Cir. 1994); United States v. Homick, 964 F.2d 899, 904 (9th Cir. 1992).

The trial court's underlying finding whether false statements were made intentionally or recklessly is reviewed for clear error. See United States v. Jordan, 291 F.3d 1091, 1099 (9th Cir. 2002); United States v. Senchenko, 133 F.3d 1153, 1158 (9th Cir. 1998).

19. **Fugitive Status**

A district court's "ultimate" conclusion whether a defendant is a fugitive or is "fleeing from justice" is reviewed de novo. See United States v. Fowlie, 24 F.3d 1070, 1072 (9th Cir. 1994). The court's factual findings underlying that determination are reviewed under the clearly erroneous standard. Id.; United States v. Gonsalves, 675 F.2d 1050, 1052 (9th Cir. 1982). Whether an appeal should be dismissed under the fugitive disentitlement doctrine is a matter of discretion vested with the appellate court. United States v. Parretti, 143 F.3d 508, 510 (9th Cir. 1998) (en banc) (dismissing appeal).

20. **Guilty Pleas**

a. **Voluntariness**

The voluntariness of a guilty plea is subject to de novo review. See United States v. Gaither, 245 F.3d 1064, 1068 (9th Cir. 2001); United States v. Kaczynski, 239 F.3d 1108, 1114 (9th Cir. 2001), cert. denied, 122 S. Ct. 1309 (2002); United States v. Kikuyama, 109 F.3d 536, 537 (9th Cir. 1997); United States v. Ullyses-Salazar, 28 F.3d 932, 939 (9th Cir. 1994); United States v. Roberts, 5 F.3d 365, 368 (9th Cir. 1993); see also Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995) (applying standard in habeas appeal).

b. **Withdrawal**

A district court's decision whether to grant a motion for withdrawal of a guilty plea is reviewed for an abuse of discretion. See United States v. Reyna-Tapia, 294 F.3d 1192, 1196 (9th Cir. 2002); United States v. Ruiz, 257 F.3d 1030, 1032-33 (9th Cir. 2001) (en banc) (clarifying that "fair and just" rather than "manifest injustice" standard should be applied by district court); United States v. King, 257 F.3d 1013, 1022 (9th Cir. 2001); United States v. Nguyen, 235 F.3d 1179, 1182 (9th Cir. 2000); United States v. Turnipseed, 159 F.3d 383, 387 (9th Cir. 1998); United States v. Alber, 56 F.3d 1106, 1111 (9th Cir. 1995); United States v. Oliveros-Orosco, 942 F.2d 644, 645-46 (9th Cir. 1991).

c. **Rule 11**

The adequacy of a Rule 11 plea hearing is reviewed de novo. See United States v. Minore, 292 F.3d 1109, 1115 (9th Cir. 2002); United States v. Seesing, 234 F.3d 456, 459 (9th Cir. 2000); United States v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998); United States v. Alber, 56 F.3d 1106, 1109 (9th Cir. 1995). Whether the trial court's colloquy with the defendant satisfies the requirements of Rule 11 is also reviewed de novo. See United States v. King, 257 F.3d 1013, 1021 (9th Cir. 2001); United States v. Portillo-Cano, 192 F.3d 1246, 1249 (9th Cir. 1999); United States v. VanDoren, 182 F.3d 1077, 1080 (9th Cir. 1999); United States v. Crawford, 169 F.3d 590, 592 (9th Cir. 1999); United States v. Longoria, 113 F.3d 975, 976 (9th Cir. 1997); United States v. Smith, 60 F.3d 595, 597 n.1 (9th Cir. 1995); see also United States v. Barrios-Gutierrez, 255 F.3d 1024, 1027-28 (9th Cir.) (en banc) (discussing Rule 11's requirements), cert.

denied, 122 S. Ct. 567 (2001). When defendant failed to object, this court's review is limited to plain error. See United States v. Vonn, 122 S. Ct. 1043, 1046 (2002); United States v. Ma, 290 F.3d 1002, 1005 (9th Cir. 2002). The appellate court may review, however, "the entire record, from the defendant's first appearance to his plea colloquy." See United States v. Vonn, 294 F.3d 1093, 1093-94 (9th Cir. 2002) (on remand).

21. **Immunity Agreements**

"The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." United States v. Montoya, 945 F.2d 1068, 1078 (9th Cir. 1991) (internal quotation omitted). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. See United States v. Dudden, 65 F.3d 1461, 1467 (9th Cir. 1995); see also United States v. Gamez-Orduno, 235 F.3d 453, 465 (9th Cir. 2000) (reviewing immunity agreement de novo).

The denial of a Kastigar hearing is reviewed for an abuse of discretion. See Dudden, 65 F.3d at 1468; but see United States v. Young, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. Montoya, 45 F.3d at 1291; United States v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999).

22. **In Camera Proceedings**

The trial court's decision whether to conduct an in camera proceeding is reviewed for an abuse of discretion. See United States v. Henderson, 241 F.3d 638, 646 (9th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996); United States v. Spires, 3 F.3d 1234, 1239 (9th Cir. 1993). Whether the court erred by not allowing defense counsel to participate is also reviewed for an abuse of discretion. See United States v. Fowlie, 24 F.3d 1059, 1066 (9th Cir. 1994). The court's decision regarding the scope of in camera review of privileged

documents, however, is a mixed question of law and fact and is reviewed de novo. In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 829 (9th Cir. 1994).

23. **Indictments and Informations**

a. **Constructive Amendments**

Whether a district court constructively amended an indictment is reviewed de novo. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Howick, 263 F.3d 1056, 1063 (9th Cir. 2001), cert. denied, 122 S. Ct. 1339 (2002); United States v. Pisello, 877 F.2d 762, 764 (9th Cir. 1989). When the defendant fails to object, review is limited to plain error. See United States v. Shipsey, 190 F.3d 1081, 1085 (9th Cir. 1999).

b. **Dismissals**

Generally, dismissal of an indictment based on legal error is reviewed de novo; dismissal based on discretionary authority is reviewed for an abuse of discretion. See United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991) (dismissal on due process ground is reviewed de novo; dismissal based on court's supervisory power is reviewed for abuse of discretion); but see United States v. Miller, 4 F.3d 792, 794 (9th Cir. 1993) (electing not to decide appropriate standard to be applied to dismissal based on supervisory powers).

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed de novo. See United States v. Lam, 251 F.3d 852, 855 (9th Cir.) (Sixth Amendment), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); United States v. Muro-Inclan, 249 F.3d 1180, 1182 (9th Cir.) (due process), cert. denied, 122 S. Ct. 180 (2001); United States v. Hancock, 231 F.3d 557, 561 (9th Cir. 2000) (due process and equal protection), cert. denied, 532 U.S. 989 (2001); United States v. Haynes, 216 F.3d 789, 796 (9th Cir. 2000) (due process); United States v. Hinojosa-Perez, 206 F.3d 832, 835 (9th Cir. 2000) (information); United States v. Munsterman, 177 F.3d 1139, 1141 (9th Cir. 1999) (bills of attainder); United States v. Doe, 125 F.3d 1249, 1253 (9th Cir. 1997) (due process); United States v. Romeo, 114 F.3d 141, 142 (9th Cir. 1997) (collateral estoppel); United States v. James, 109 F.3d 597, 599 (9th Cir. 1997) (double jeopardy, collateral estoppel); United States v. Eshkol, 108 F.3d 1025, 1027 (9th Cir. 1997) (due process); United States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997); United States v. Nguyen, 88 F.3d 812, 820 (9th Cir. 1996)

(commerce clause); United States v. Andaverde, 64 F.3d 1305, 1308-09 (9th Cir. 1995) (Fifth Amendment).

The district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed de novo. See United States v. Lualemaga, 280 F.3d 1260, 1263 (9th Cir.) (IAD), cert. denied, 122 S. Ct. 2641 (2002); United States v. Boren, 278 F.3d 911, 913 (9th Cir. 2002) (18 U.S.C. § 1014); United States v. Akins, 276 F.3d 1141, 1146 (9th Cir. 2002) (18 U.S.C. § 922(g)(9)); United States v. Hagberg, 207 F.3d 569, 571 (9th Cir. 2000) (33 U.S.C. § 1345); United States v. Fitzgerald, 147 F.3d 1101, 1102 (9th Cir. 1998) (Federal Employees Compensation Act); United States v. Gomez-Rodriguez, 96 F.3d 1262, 1264 (9th Cir. 1996) (en banc); United States v. Pena-Carrillo, 46 F.3d 879, 881 (9th Cir. 1995) (Speedy Trial Act); United States v. Riggins, 40 F.3d 1055, 1056 (9th Cir. 1994). The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. Hinojosa-Perez, 206 F.3d at 835; United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir. 1998); United States v. Armenta, 69 F.3d 304, 306 (9th Cir. 1995).

Whether to dismiss an indictment to remedy a violation of recognized rights, to deter illegal conduct, or to preserve judicial integrity is an exercise of the district court's supervisory powers reviewed for an abuse of discretion. See United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); United States v. Garza-Juarez, 992 F.2d 896, 905 (9th Cir. 1993). Thus, the trial court's decision on a defendant's motion to dismiss for impermissible preindictment delay is reviewed for an abuse of discretion. See United States v. Mills, 280 F.3d 915, 920 (9th Cir.), cert. denied, 122 S. Ct. 2347 (2002); United States v. Doe, 149 F.3d 945, 947 (9th Cir. 1998) (information); United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997); United States v. Bracy, 67 F.3d 1421, 1426 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1193 (9th Cir. 1995); see also United States v. Doe, 125 F.3d 1249, 1253 (9th Cir. 1997) (district court's refusal to dismiss an information in the exercise of its supervisory powers is reviewed for an abuse of discretion); United States v. Eaton, 31 F.3d 789, 791 (9th Cir. 1994) ("Whether to dismiss an indictment is an exercise of the district court's supervisory powers reviewed for abuse of discretion.").

The dismissal of an indictment without prejudice is reviewed for an abuse of discretion. United States v. Adrian, 978 F.2d 486, 493 (9th Cir. 1992).

A district court's ruling on the government's motion for leave to dismiss filed pursuant to Federal Rule of Criminal Procedure 48(a) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. See United States

v. Garcia-Valenzuela, 232 F.3d 1003, 1007 (9th Cir. 2000); United States v. Gonzalez, 58 F.3d 459, 461 (9th Cir. 1995) ("there is a question as to whether a district court may ever deny an uncontested Rule 48(a) motion").

The court's decision to dismiss an information pursuant to Rule 48(b) is also reviewed for an abuse of discretion. See United States v. Jiang, 214 F.3d 1099, 1101 (9th Cir. 2000) (noting that dismissal "should be imposed only in extreme circumstances"); United States v. Talbot, 51 F.3d 183, 186 (9th Cir. 1995); United States v. Hutchison, 22 F.3d 846, 850 (9th Cir. 1993). "A Rule 48(b) dismissal should be imposed only in extreme circumstances, upon prosecutorial misconduct and demonstrable prejudice or substantial [threat] thereof." Hutchison, 22 F.3d at 850 (internal quotation omitted).

The district court's determination of a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. See United States v. Symington, 195 F.3d 1080, 1090-91 (9th Cir. 1999); United States v. Pena-Carrillo, 46 F.3d 879, 882 (9th Cir. 1995). In rendering a decision whether to dismiss with or without prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors, and in absence of compliance with these requirements, dismissal shall be entered with prejudice. See United States v. Delgado-Miranda, 951 F.2d 1063, 1065 (9th Cir. 1991); but see United States v. Clymer, 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide whether indictment should be dismissed with or without prejudice). Note that the denial of a motion to dismiss based on preaccusation delay is reviewed for an abuse of discretion. United States v. Doe, 149 F.3d 945, 947 (9th Cir. 1998); United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992).

A motion to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. See United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir. 1998); United States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996); United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996); United States v. Dudden, 65 F.3d 1461, 1466 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. United States v. Cuellar, 96 F.3d 1179, 1182 (9th Cir. 1996).

The court's decision whether to dismissal based on allegations of prosecutorial misconduct before a grand jury is reviewed de novo. See United States v. Fuchs, 218 F.3d 957, 964 (9th Cir. 2000); United States v. Larrazolo, 869 F.2d 1354, 1355 (9th Cir.

1989); United States v. De Rosa, 783 F.2d 1401, 1404 (9th Cir. 1986); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 n.9 (9th Cir. 1983) (district court's decision that a defendant's Fifth Amendment rights were violated by prosecutorial misconduct before a grand jury).

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. United States v. James, 109 F.3d 597, 599 (9th Cir. 1997); United States v. Merriam, 108 F.3d 1162, 1163 (9th Cir. 1997); United States v. McClinton, 98 F.3d 1199, 1201 (9th Cir. 1996); United States v. Wright, 79 F.3d 112, 114 (9th Cir. 1996).

c. **Duplicitous/Multiplicitous**

Whether an indictment is duplicitous is a question of law reviewed de novo. See United States v. Garlick, 240 F.3d 789, 791 (9th Cir. 2001); United States v. King, 200 F.3d 1207, 1212 (9th Cir. 1999); United States v. McKittrick, 142 F.3d 1170, 1176 (9th Cir. 1998) (multiplicitous); United States v. Martin, 4 F.3d 757, 759 (9th Cir. 1993) (duplicitous). "In reviewing an indictment for duplicity, our task is not to review the evidence presented at trial to determine whether it would support charging several crimes rather than one, but rather solely to assess whether the indictment itself can be read to charge only one violation in each count." Martin, 4 F.3d at 759 (internal quotation omitted). The court's decision not to dismiss an allegedly duplicitous indictment is reviewed de novo. See United States v. Ramirez-Martinez, 273 F.3d 903, 913 (9th Cir. 2001).

d. **Misjoinder**

Misjoinder of charges is an issue of law reviewed de novo. See United States v. Sarkisian, 197 F.3d 966, 975 (9th Cir. 1999); United States v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995); United States v. Vasquez-Velasco, 15 F.3d 833, 843 (9th Cir. 1994); United States v. Terry, 911 F.2d 272, 276 (9th Cir. 1990); United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989). Misjoinder of defendants is also a question of law reviewed de novo. United States v. Golb, 69 F.3d 1417, 1425 (9th Cir. 1995). Note that improper joinder is subject to harmless error review. See Sarkisian, 197 F.3d at 976.

The district court's order that two indictments be tried together is reviewed for an abuse of discretion. United States v. Nguyen, 88 F.3d 812, 815 (9th Cir. 1996).

e. **Prosecutorial Misconduct**

A motion to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. See United States v. Haynes, 216 F.3d 789, 796 (9th Cir. 2000); United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir. 1998); United States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996); United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996); United States v. Dudden, 65 F.3d 1461, 1466 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. United States v. Cuellar, 96 F.3d 1179, 1182 (9th Cir. 1996).

Allegations of prosecutorial misconduct before a grand jury are reviewed de novo. See United States v. Fuchs, 218 F.3d 957, 964 (9th Cir. 2000); United States v. Larrazolo, 869 F.2d 1354, 1355 (9th Cir. 1989); United States v. De Rosa, 783 F.2d 1401, 1404 (9th Cir. 1986); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 n.9 (9th Cir. 1983) (district court's decision that a defendant's Fifth Amendment rights were violated by prosecutorial misconduct before a grand jury).

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. United States v. Davis, 932 F.2d 752, 763 (9th Cir. 1991); United States v. Plesinski, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. **Sufficiency**

The sufficiency of an indictment is reviewed de novo. See United States v. Pernillo-Fuentes, 252 F.3d 1030, 1032 (9th Cir. 2001); United States v. Fleming, 215 F.3d 930, 935 (9th Cir. 2000); United States v. Neill, 166 F.3d 943, 947 (9th Cir. 1999); United States v. Ladum, 141 F.3d 1328, 1334 (9th Cir. 1998); United States v. Henson, 123 F.3d 1226, 1235 (9th Cir. 1997); United States v. Ruelas, 106 F.3d 1416, 1419 (9th Cir. 1997); United States v. Jackson, 72 F.3d 1370, 1380 (9th Cir. 1995); United States v. Alber, 56 F.3d 1106, 1111 (9th Cir. 1995). When defendant fails to object to the sufficiency of the indictment in the district court, review is for plain error. United States v. Godinez-Rabadan, 289 F.3d 630, 632 (9th Cir. 2002); United States v. Ross, 206 F.3d 896, 899 (9th Cir. 2000); but see United States v. Lo, 231 F.3d 471, 481 (9th Cir. 2000) (reviewing de novo when issue raised for the first time on appeal).

Whether a criminal information complies with constitutional requirements is examined de novo. Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986); cf. United States v. Morse, 785 F.2d 771 (9th Cir. 1986) (duplicity claims). Whether an

information is sufficient to charge a defendant in a particular situation is a question of law reviewed de novo. See United States v. Hamilton, 208 F.3d 1165, 1168 99th Cir. 2000); United States v. Linares, 921 F.2d 841, 843 (9th Cir. 1990).

g. **Validity**

The validity of an indictment is reviewed de novo. See United States v. Matsumaru, 244 F.3d 1092, 1099 (9th Cir. 2001); United States v. Rosi, 27 F.3d 409, 414 (9th Cir. 1994); United States v. Bernhardt, 840 F.2d 1441, 1445 (9th Cir. 1988). Note, however, that a defective indictment constitutes a deficiency that is not subject to harmless error analysis. See United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999).

24. **In Limine Orders**

This court generally reviews the district court's ruling on a motion in limine for an abuse of discretion. See United States v. Ross, 206 F.3d 896, 898 (9th Cir. 2000); United States v. Rude, 88 F.3d 1538, 1549 (9th Cir. 1996); United States v. Rambo, 74 F.3d 948, 955 (9th Cir. 1996). The trial court's decision to change an in limine ruling is also reviewed for an abuse of discretion. United States v. Bensimon, 172 F.3d 1121, 1127 (9th Cir. 1999). A district court's order precluding certain testimony is an evidentiary ruling subject to review for an abuse of discretion. United States v. Ravel, 930 F.2d 721, 726 (9th Cir. 1991). If the order precludes the presentation of a defense, however, review is de novo. See Ross, 206 F.3d at 898-99

25. **Interpreters**

"[T]he use of interpreters in the courtroom is a matter within the trial court's discretion, and . . . a trial court's ruling on such a matter will be reversed only for clear error." United States v. Mayans, 17 F.3d 1174, 1179 (9th Cir. 1994). The trial court's determination that a defendant needs an interpreter is also reviewed for an abuse of discretion. United States v. Petrosian, 126 F.3d 1232, 1234 n.3 (9th Cir. 1997).

26. **Investigators**

A district court's decision to deny funds for an investigator is reviewed for an abuse of discretion. See United States v. Croft, 124 F.3d 1109, 1125 n.7 (9th Cir. 1997).

27. **Judicial Estoppel**

The trial court's decision to invoke judicial estoppel in criminal proceedings is reviewed for an abuse of discretion. United States v. Ruiz, 73 F.3d 949, 953 (9th Cir. 1996); United States v. Garcia, 37 F.3d 1359, 1367 (9th Cir. 1994).

28. **Judicial Notice**

A district court's decision to take judicial notice is reviewed for an abuse of discretion. United States v. Chapel, 41 F.3d 1338, 1342 (9th Cir. 1994).

29. **Jurisdiction**

Jurisdictional issues are reviewed de novo. See United States v. Errol D. Jr., 292 F.3d 1159, 1161 (9th Cir. 2002); United States v. Garrett, 253 F.3d 443, 446 (9th Cir. 2001), cert. denied, 122 S. Ct. 1451 (2002). Whether a district court has jurisdiction is reviewed de novo. See United States v. Ruiz-Alvarez, 211 F.3d 1181, 1184 (9th Cir. 2000) (resentencing). The assumption of jurisdiction by a district court is reviewed de novo. See United States v. Gallaher, 275 F.3d 784, 788 (9th Cir. 2001); United States v. Bennet, 147 F.3d 912, 913 (9th Cir. 1998); United States v. Juvenile Male, 118 F.3d 1344, 1346 (9th Cir. 1997); United States v. Matta-Ballesteros, 71 F.3d 754, 762 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996); United States v. Lewis, 67 F.3d 225, 228 (9th Cir. 1995); United States v. Vasquez-Velasco, 15 F.3d 833, 838-39 (9th Cir. 1994). Note, however, that in instances where jurisdiction is intertwined with the merits and must be resolved by a jury, the appropriate standard of review is unsettled. See Juvenile Male, 118 F.3d at 1346; United States v. Gomez, 87 F.3d 1093, 1097 n.3 (9th Cir. 1996); United States v. Barone, 71 F.3d 1442, 1444 n.4 (9th Cir. 1995).

A magistrate judge's assertion of jurisdiction is reviewed de novo. United States v. Real Property, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

30. **Jury Demand**

A defendant's entitlement to a jury trial is a question of law reviewed de novo. United States v. Clavette, 135 F.3d 1308, 1309 (9th Cir. 1998).

31. **Jury Waiver**

The adequacy of a defendant's jury waiver presents a mixed question of law and fact reviewed de novo. United States v. Duarte-Higareda, 113 F.3d 1000, 1002 (9th Cir. 1997) (listing requirements for valid waiver); United States v. Christensen, 18 F.3d 822, 824 (9th Cir. 1994). Whether a district court should have allowed a defendant to waive trial by jury over the objection of the government is a question of law subject to de novo review. United States v. Reyes, 8 F.3d 1379, 1383 (9th Cir. 1993).

32. **Juvenile Certification**

To prosecute a juvenile in federal court, the government must follow the certification procedures required by 18 U.S.C. § 5032. See United States v. Doe, 170 F.3d 1162, 1165 (9th Cir. 1999). Certification is a jurisdictional requirement that is reviewed de novo. See Doe, 170 F.3d at 1165; United States v. Doe, 98 F.3d 459, 460 (9th Cir. 1996). Compliance with § 5032 is a question of statutory interpretation reviewed de novo. See United States v. Male Juvenile (Pierre Y.), 280 F.3d 1008, 1014 (9th Cir. 2002); United States v. Juvenile Male (Kenneth C.), 241 F.3d 684, 686 (9th Cir. 2001); United States v. Baker, 10 F.3d 1374, 1396 (9th Cir. 1993); see also United States v. F.S.J., 265 F.3d 764, 767 (9th Cir. 2001) (noting that whether there is judicial review of the certification decision is a question of law reviewed de novo). Questions regarding the constitutionality of § 5032 are also reviewed de novo. United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000), cert. denied, 531 U.S. 1174 (2001).

Section 5033 requires that federal law enforcement agents notify parents of a juvenile's rights "immediately" after the juvenile is taken into custody. See United States v. Female Juvenile (Wendy G.), 255 F.3d 761, 765 (9th Cir. 2001). Whether a juvenile's parents have been properly notified pursuant to § 5033 is a predominantly factual question that is reviewed for clear error. See United States v. Juvenile (RRA-A), 229 F.3d 737, 742 (9th Cir. 2000); United States v. Doe, 219 F.3d 1009, 1014 (9th Cir. 2000). The district court's ultimate determination that notification was immediate is reviewed de novo. Wendy G., 255 F.3d at 765. Whether a juvenile has been arraigned without unreasonable delay is a mixed question of law and fact reviewed de novo. Doe, 219 F.3d at 1014. Whether a juvenile is "in custody" is also a mixed question of law and fact reviewed de novo. Wendy G., 255 F.3d at 765.

33. **Lack of Prosecution**

The district court's denial of a motion to dismiss under Federal Rule of Criminal Procedure 48(b) is reviewed for an abuse of discretion. See United States v. Jiang, 214 F.3d 1099, 1101 (9th Cir. 2000) (noting that dismissal "should be imposed only in

extreme circumstances"); United States v. Talbot, 51 F.3d 183, 186 (9th Cir. 1995); United States v. Hutchison, 22 F.3d 846, 850 (9th Cir. 1993). "A Rule 48(b) dismissal should be imposed only in extreme circumstances, upon prosecutorial misconduct and demonstrable prejudice or substantial [threat] thereof." Hutchison, 22 F.3d at 850 (internal quotation omitted).

34. **Law of the Case**

A district court's decision whether to apply law-of-the-case doctrine is reviewed for an abuse of discretion. See United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) (listing factors for court to consider); United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (same).

35. **Lineups**

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. See United States v. Bowman, 215 F.3d 951, 965 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. United States v. Jones, 84 F.3d 1206, 1209 (9th Cir. 1996); United States v. Matta-Ballesteros, 71 F.3d 754, 769 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. United States v. Montgomery, 150 F.3d 983, 992 (9th Cir. 1998); United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996). Where the defendant fails to object to the admission of the identification by way of a pretrial suppression motion, however, he waives his right to challenge the identifications absent a showing of prejudice. Atcheson, 94 F.3d at 1246.

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994).

36. **Magistrate Judges**

The scope of authority and powers of a magistrate judge are questions of law reviewed de novo. See United States v. Reyna-Tapia, 294 F.3d 1192, 1198 (9th Cir. 2002) ("We review de novo the delegation of authority to a magistrate judge."); United

States v. Gomez-Lepe, 207 F.3d 623, 627 (9th Cir. 2000) (same); United States v. Colacurcio, 84 F.3d 326, 328 (9th Cir. 1996); United States v. Carr, 18 F.3d 738, 740 (9th Cir. 1994). Whether a magistrate judge has jurisdiction is reviewed de novo. United States v. Real Property, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture). Whether a magistrate judge's "precise formulation" of a jury instruction is sufficient is reviewed for an abuse of discretion. United States v. McKittrick, 142 F.3d 1170, 1176 (9th Cir. 1998). Factual findings made by a magistrate judge are reviewed for clear error. See Wildman v. Johnson, 261 F.3d 832, 836 (9th Cir. 2001) (habeas); Marinero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999) (extradition proceedings). A magistrate judge's decision whether to conduct an evidentiary hearing on a motion to suppress is reviewed for an abuse of discretion. United States v. Howell, 231 F.3d 615, 620-21 (9th Cir. 2000), cert. denied, 122 S. Ct. 76 (2001). A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed for an abuse of discretion. See Brown v. Roe, 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "clearly erroneous or contrary to law." See Osband v. Woodford, 290 F.3d 1036, 1041 (9th Cir. 2002) (habeas).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See United States v. Hay, 231 F.3d 630, 634 n.4 (9th Cir. 2000), cert. denied, 122 S. Ct. 135 (2001); United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 963 n.6 (9th Cir. 2000); see also United States v. Patterson, 292 F.3d 615, 625 (9th Cir. 2002) (noting that a magistrate judge's finding of probable cause is reviewed for clear error); United States v. Henson, 123 F.3d 1226, 1238 (9th Cir. 1997) (same). Thus, the magistrate judge's original determination of probable cause is accorded significant deference by the reviewing court. See Patterson, 292 F.3d at 625; United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995). The court of appeals "will not reverse a magistrate judge's determination of probable cause for the purposes of issuing a search warrant absent a finding of clear error." United States v. Perez, 67 F.3d 1371, 1382 (9th Cir. 1995), withdrawn in part, 116 F.3d 840 (9th Cir. 1997) (en banc); United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993); United States v. Schmidt, 947 F.2d 362, 371 (9th Cir. 1991). Thus, the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination." Pitts, 6 F.3d at 1369; United States v. Hernandez, 937 F.2d 1490, 1494 (9th Cir. 1991).

37. **Miranda Rights**

Whether a defendant was constitutionally entitled to Miranda warnings is an issue of law reviewed de novo. See United States v. Butler, 249 F.3d 1094, 1098 (9th Cir. 2001); United States v. Galindo-Gallegos, 244 F.3d 728, 730 (9th Cir.), amended by 255 F.3d 1154 (9th Cir. 2001); United States v. Coleman, 208 F.3d 786, 790 (9th Cir. 2000); United States v. Nieblas, 115 F.3d 703, 705 (9th Cir. 1997); United States v. Turner, 28 F.3d 981, 983 (9th Cir. 1994); see also United States v. Leasure, 122 F.3d 837, 839-40 (9th Cir. 1997) (whether Miranda warning is required is reviewed de novo). The trial court's decision to admit a statement that may have been obtained in violation of Miranda is also reviewed de novo. United States v. Soliz, 129 F.3d 499, 503 (9th Cir. 1997) (noting at n.4 that Miranda violation is subject to harmless error review).

The adequacy of a Miranda warning is a legal issue reviewed de novo. See Commonwealth of N. Mariana Islands v. Mendiola, 976 F.2d 475, 482 (9th Cir. 1992); United States v. Lares-Valdez, 939 F.2d 688, 689 (9th Cir. 1991); United States v. Connell, 869 F.2d 1349, 1351 (9th Cir. 1989) (explaining why de novo review is appropriate). Any factual findings underlying the adequacy challenge are reviewed for clear error. Lares-Valdez, 939 F.2d at 689.

The voluntariness of a waiver of Miranda rights is reviewed de novo. See United States v. Okafor, 285 F.3d 842, 846-47 (9th Cir. 2002); United States v. Amano, 229 F.3d 801, 803 (9th Cir. 2000); United States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999); United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc); United States v. Cazares, 121 F.3d 1241, 1243 (9th Cir. 1997); United States v. Doe, 60 F.3d 544, 546 (9th Cir. 1995). Whether the decision was knowing and intelligent is reviewed for clear error. See United States v. Banks, 282 F.3d 699, 703 (9th Cir. 2002) (noting review of legal issues is de novo); United States v. Vallejo, 237 F.3d 1008, 1014 (9th Cir.), amended by 246 F.3d 1150 (9th Cir. 2001); Doe, 170 F.3d at 1168; Doe, 155 F.3d at 1074; United States v. Garibay, 143 F.3d 534, 536 (9th Cir. 1998); Cazares, 121 F.3d at 1243; Doe, 60 F.3d at 546.

Whether a defendant was in custody for Miranda purposes is a mixed question of law and fact reviewed de novo. See United States v. Kim, 292 F.3d 969, 973 (9th Cir. 2002) (noting prior conflict and reaffirming de novo review); United States v. Coutchavlis, 260 F.3d 1149, 1157 (9th Cir. 2001); United States v. Foster, 227 F.3d 1096, 1102 (9th Cir. 2000); United States v. Mereno-Flores, 33 F.3d 1164, 1168 (9th Cir. 1994). The district court's factual findings underlying that decision, such as what a defendant was told, are reviewed for clear error. See Kim, 292 F.3d at 973; Butler, 249 F.3d at 1098; United States v. Andaverde, 64 F.3d 1305, 1313 (9th Cir. 1995); United States v. Bland, 908 F.2d 471, 472 (9th Cir. 1990).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to counsel is reviewed de novo. United States v. Williams, 291 F.3d 1180, 1190 (9th Cir. 2002); Doe, 170 F.3d at 1166; Doe, 60 F.3d at 546; Ogbuehi, 18 F.3d at 812. A district court's finding that a threat to public safety temporarily suspends the obligation to give Miranda warnings is a mixed question of fact and law reviewed de novo. See United States v. Reilly, 224 F.3d 986, 992 (9th Cir. 2000); United States v. Brady, 819 F.2d 884, 886 (9th Cir. 1987). Whether the prosecution's references to a defendant's counsel and to the defendant's silence violate the prohibition on the government's use against the defendant of the exercise of Miranda rights is reviewed de novo. United States v. Ross, 123 F.3d 1181, 1187 (9th Cir. 1997).

In habeas, the district court's decision that a defendant knowingly and voluntarily waived Miranda rights is a mixed question of law and fact reviewed de novo. Collazo v. Estelle, 940 F.2d 411, 415 (9th Cir. 1991) (en banc). Whether a defendant was "in custody" for purposes of Miranda is a mixed question of law and fact warranting independent review by the federal habeas court. Thompson v. Keohane, 516 U.S. 99, 112-13 (1995); Bains v. Cambra, 204 F.3d 964, 972 (9th Cir. 2000). Whether a defendant's "'mind was overborne -- i.e., was his waiver knowing and intelligent'" is reviewed for clear error. Collazo, 940 F.2d at 416 (quoting Derrick v. Peterson, 924 F.2d 813, 823 (9th Cir. 1990)).

38. **Motion to Quash**

A trial court's decision to grant the government's motion to quash a subpoena pursuant to Federal Rule of Criminal Procedure 17(c) is reviewed for an abuse of discretion. United States v. George, 883 F.2d 1407, 1418 (9th Cir. 1989). The district court's decision whether to quash a grand jury subpoena is reviewed for an abuse of discretion. United States v. Chen, 99 F.3d 1495, 1499 (9th Cir. 1996); In re Grand Jury Subpoena, 75 F.3d 446, 447 (9th Cir. 1996); Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1995); In re Grand Jury Proceedings, 45 F.3d 343, 346 (9th Cir. 1995); In re Subpoena to Testify Before Grand Jury, 39 F.3d 973, 976 (9th Cir. 1994).

A district court's decision whether to enforce an administrative subpoena is reviewed de novo. NLRB v. The Bakersfield Californian, 128 F.3d 1339, 1341 (9th Cir. 1997); FDIC v. Garner, 126 F.3d 1138, 1142 (9th Cir. 1997); Reich v. Montana Sulphur & Chem. Co., 32 F.3d 440, 443 (9th Cir. 1994). Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. United States v. Jose, 131 F.3d 1325, 1327 (9th Cir. 1997) (en

banc). A district court's decision to quash an IRS summons is reviewed, however, for clear error. David H. Tedder & Assocs. v. United States, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce a summons is also reviewed for clear error. United States v. Blackman, 72 F.3d 1418, 1422 (9th Cir. 1995); see also Fortney v. United States, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion); but see Crystal v. United States, 172 F.3d 1141, 1145 n.5 (9th Cir. 199) (reviewing de novo when appeal is from grant of summary judgment denying petition to squash IRS subpoena).

39. **Out-of-Court Identification**

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. See United States v. Bowman, 215 F.3d 951, 965 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. United States v. Jones, 84 F.3d 1206, 1209 (9th Cir. 1996); United States v. Matta-Ballesteros, 71 F.3d 754, 769 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. United States v. Montgomery, 150 F.3d 983, 992 (9th Cir. 1998); United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996). Where the defendant fails to object to the admission of the identification by way of a pretrial suppression motion, however, he waives his right to challenge the identifications absent a showing of prejudice. Atcheson, 94 F.3d at 1246.

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994).

40. **Plea Agreements**

a. **Breaches/Enforcement**

Alleged violations of plea agreements are reviewed de novo. See United States v. Camarillo-Tello, 236 F.3d 1024, 1026 (9th Cir. 2001); United States v. Coleman, 208 F.3d 786, 790 (9th Cir. 2000); United States v. Diamond, 53 F.3d 249, 252 (9th Cir. 1995). Whether the district court is required to enforce a plea agreement is a question of law reviewed de novo. United States v. Patterson, 292 F.3d 615, 622 (9th Cir. 2002); United States v. Fagan, 996 F.2d 1009, 1013 (9th Cir. 1993). Whether a district court is bound by the sentencing range provided by the plea agreement is also

reviewed de novo. See United States v. Perez-Corona, 295 F.3d 996, 1000 (9th Cir. 2002). The district court's denial of a defendant's motion to compel specific performance of a plea agreement is reviewed for an abuse of discretion. United States v. Anthony, 93 F.3d 614, 616 (9th Cir. 1996). A defendant's failure to argue breach of the plea agreement before the district court limits appellate review to plain error. See United States v. Maldonado, 215 F.3d 1046, 1051 (9th Cir. 2000).

Whether the government violated the terms of the agreement is reviewed de novo. See United States v. Anglin, 215 F.3d 1064, 1067-68 (9th Cir. 2000); United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997); United States v. Meyers, 32 F.3d 411, 413 (9th Cir. 1994). Whether the facts demonstrate that there was a breach of a plea agreement is reviewed for clear error. United States v. Martinez, 143 F.3d 1266, 1271 (9th Cir. 1998); United States v. Salemo, 81 F.3d 1453, 1460 (9th Cir. 1996); but see United States v. Mondragon, 228 F.3d 978, 979-80 (9th Cir. 2000) (noting possible inconsistency in prior cases); United States v. Johnson, 187 F.3d 1129, 1134 (9th Cir. 1999) (same). A district court has broad discretion in fashioning a remedy for breach of a plea agreement. United States v. Chiu, 109 F.3d 624, 626 (9th Cir. 1997).

b. **Negotiations**

Whether a district court judge improperly participated in plea negotiations is a legal question reviewed de novo. United States v. Torres, 999 F.2d 376, 378 (9th Cir. 1993).

c. **Terms of the Agreement**

The district court's interpretation of the terms of a plea agreement is reviewed for clear error, but the application of legal principles involved in this interpretation is reviewed de novo. United States v. Anthony, 93 F.3d 614, 616 (9th Cir. 1996); United States v. Ajugwo, 82 F.3d 925, 927 (9th Cir. 1996) ("The district court's interpretation and construction of a plea agreement is reviewed for clear error."). Whether language in a plea agreement is ambiguous is reviewed de novo. See United States v. Clark, 218 F.3d 1092, 1095 (9th Cir. 2000). Findings regarding the terms of a plea agreement are subject to the clearly erroneous standard of review. Id.; Ajugwo, 82 F.3d at 927; United States v. Sharp, 941 F.2d 811, 816 (9th Cir. 1991). Whether a defendant has waived his statutory right to appeal by entering into a plea agreement is reviewed de novo. See United States v. Portillo-Cano, 192 F.3d 1246, 1249 (9th Cir. 1999); United States v. Phillips, 174 F.3d 1074, 1075 (9th Cir. 1999); United States v. Blitz, 151 F.2d 1002, 1005 (9th Cir. 1998); United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997). The validity of a waiver in a plea agreement is reviewed de novo. See United

States v. Ruiz, 241 F.3d 1157, 1163 (9th Cir. 2001), rev'd on other grounds, 122 S. Ct. 2450 (2002).

41. **Preclusion of Defense**

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. See United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense); United States v. Arellano-Rivera, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity defense), cert. denied, 122 S. Ct. 1450 (2002); United States v. Ross, 206 F.3d 896, 898 (9th Cir. 2000) (motion in limine); United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996); United States v. de Cruz, 82 F.3d 856, 867 (9th Cir. 1996); United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995). Thus, the district court's failure to instruct on an appropriate defense theory is a question of law reviewed de novo. United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999); United States v. McGeshick, 41 F.3d 419, 421 (9th Cir. 1994). Whether the court's instructions adequately cover the defendant's proffered is also reviewed de novo. See Pierre, 254 F.3d at 875. Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. See United States v. Fejes, 232 F.3d 696, 702 (9th Cir. 2000), cert. denied, 122 S. Ct. 38 (2001); United States v. Ripinsky, 109 F.3d 1436, 1440 (9th Cir. 1997), amended by 129 F.3d 518 (9th Cir. 1997); see also United States v. Hairston, 64 F.3d 491, 493-94 (9th Cir. 1995) (explaining various standards of review depending on focus of inquiry); United States v. Duran, 59 F.3d 938, 941 (9th Cir. 1995) (same). Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998); United States v. Amlani, 111 F.3d 705, 716 n.5 (9th Cir. 1997). Finally, a determination that a defendant has the burden of proving a defense is reviewed de novo. United States v. McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1998); United States v. Dominguez-Mestas, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress).

42. **Preindictment Delay**

The trial court's decision on a defendant's motion to dismiss charges for preindictment delay is reviewed for an abuse of discretion. See United States v. Mills, 280 F.3d 915, 920 (9th Cir.), cert. denied, 122 S. Ct. 2347 (2002); United States v. Doe, 149 F.3d 945, 947 (9th Cir. 1998); United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997); United States v. Martinez, 77 F.3d 332, 335 (9th Cir. 1996); United States v.

Manning, 56 F.3d 1188, 1193 (9th Cir. 1995). A district court's decision whether to dismiss an indictment for violation of the constitutional right to a speedy trial is reviewed de novo. See United States v. Lam, 251 F.3d 852, 855 (9th Cir.), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); Manning, 56 F.3d at 1193; United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995); United States v. Pena-Carrillo, 46 F.3d 879, 882 (9th Cir. 1994). A finding of prejudice is reviewed under the clearly erroneous standard. Doe, 149 F.3d at 948; Martinez, 77 F.3d at 335.

43. **Pretrial Detention and Release**

Factual findings underlying a district court's detention order are reviewed under a deferential, clearly erroneous standard. See United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991); United States v. Walker, 808 F.2d 1309, 1311 (9th Cir. 1986). The court's finding of potential danger to the community is entitled to deference. Marino v. Vasquez, 812 F.2d 499, 509 (9th Cir. 1987). The court's finding that a defendant is a flight risk is also reviewed under the clearly erroneous standard. United States v. Donaghe, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." United States v. Fowlie, 24 F.3d 1070, 1072 (9th Cir. 1994).

44. **Pretrial Hearings**

A trial court's decision whether to hold a hearing on pretrial motions is reviewed for an abuse of discretion. See United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000) (suppression motion), cert. denied, 122 S. Ct. 76 (2001); United States v. Alatorre, 222 F.3d 1098, 1099 (9th Cir. 2000) (evidentiary ruling); United States v. Smith, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) (suppression motion); United States v. Alexander, 106 F.3d 874, 877 (9th Cir. 1997); United States v. Hernandez, 80 F.3d 1253, 1261 (9th Cir. 1996); United States v. Montoyo, 45 F.3d 1286, 1291 (9th Cir. 1995); see also United States v. Andrade-Larrious, 39 F.3d 986, 991 (9th Cir. 1994) (habeas). But see United States v. Young, 86 F.3d 944, 947 (9th Cir. 1996) (district court's decision to deny defense motion for evidentiary hearing on use immunity is reviewed de novo).

When an issue raised in a pretrial motion is "entirely segregable" from the evidence to be presented at trial, the district court must rule on it before trial. When it is "substantially founded upon and intertwined with" evidence that concerns the alleged offense, the court must defer to the ultimate finder of fact. United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986). When the evidence

is not entirely segregable from the evidence to be presented at trial, the court's decision to defer its decision in order to avoid lengthy duplication of testimony is reviewed for abuse of discretion. United States v. Montilla, 870 F.2d 549, 553 (9th Cir. 1989), amended by 907 F.2d 115 (9th Cir. 1990).

The trial court's decision whether to reopen a hearing is reviewed for an abuse of discretion. United States v. Hobbs, 31 F.3d 918, 923 (9th Cir. 1994).

45. **Pretrial Identifications**

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. See United States v. Bowman, 215 F.3d 951, 965 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. United States v. Jones, 84 F.3d 1206, 1209 (9th Cir. 1996); United States v. Matta-Ballesteros, 71 F.3d 754, 769 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. United States v. Montgomery, 150 F.3d 983, 992 (9th Cir. 1998); United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996). Where the defendant fails to object to the admission of the identification by way of a pretrial suppression motion, however, he waives his right to challenge the identifications absent a showing of prejudice. Atcheson, 94 F.3d at 1246.

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994).

46. **Probable Cause**

The determination of probable cause is a mixed question of law and fact in which the legal issues predominate, and it is therefore subject to de novo review. Ornelas v. United States, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); United States v. Carranza, 289 F.3d 634, 640 (9th Cir. 2002) (warrantless arrest); United States v. Valencia Amezcua, 278 F.3d 901, 906 (9th Cir. 2002) (warrantless arrest); United States v. Buckner, 179 F.3d 834, 837 (9th Cir. 1999) (warrantless arrest). Thus, probable cause rulings are reviewed de novo. See United States v. Parks, 285 F.3d 1133, 1138 (9th Cir. 2002) (vehicle search); United States v. Mills, 280 F.3d 915, 920

(9th Cir.) (warrantless arrest), cert. denied, 122 S. Ct. 2347 (2002); United States v. Rojas-Millan, 234 F.3d 464, 468 (9th Cir. 2000) (vehicle search); United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir. 2000) (search warrant); Picray v. Sealock, 138 F.3d 767, 770-71 (9th Cir. 1998) (warrantless arrest); Rohde v. City of Roseburg, 137 F.3d 1142, 1144 (9th Cir. 1998) (warrantless arrest); United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture); United States v. Jones, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest); United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996) (search warrant); see also United States v. Linn, 880 F.2d 209, 214 (9th Cir. 1989) (finding of probable cause for search is reviewed de novo while findings of fact are reviewed for clear error).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 963 n.6 (9th Cir. 2000); see also United States v. Patterson, 292 F.3d 615, 625 (9th Cir. 2002) (noting that magistrate judge's finding of probable cause is reviewed for clear error); United States v. Hay, 231 F.3d 630, 634 n.4 (9th Cir. 2000) (same), cert. denied, 122 S. Ct. 135 (2001); United States v. Henson, 123 F.3d 1226, 1238 (9th Cir. 1997) (same). Thus, the magistrate judge's original determination of probable cause is accorded deference by the reviewing court. See Patterson, 292 F.3d at 625 (noting "significant deference); Hay, 231 F.3d at 634 n.4 ("[W]e accord great deference to the magistrate's determination of probable cause."); United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995). The court of appeals "will not reverse a magistrate judge's determination of probable cause for the purposes of issuing a search warrant absent a finding of clear error." United States v. Perez, 67 F.3d 1371, 1382 (9th Cir. 1995), withdrawn in part, 116 F.3d 840 (9th Cir. 1997) (en banc); United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993); United States v. Schmidt, 947 F.2d 362, 371 (9th Cir. 1991). Thus, the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination." Pitts, 6 F.3d at 1369; United States v. Hernandez, 937 F.2d 1490, 1494 (9th Cir. 1991).

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. See United States v. Huguez-Ibarra, 954 F.2d 546, 551 (9th Cir. 1992); United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir. 1987) (probable cause for search warrant); see also United States v. Dozier, 844 F.2d 701, 706 (9th Cir. 1988); United States v. Castillo, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. See Bowman, 215 F.3d at 963 n.6; Reeves, 210 F.3d at 1044; United States v. Hernandez, 80 F.3d 1253, 1260 (9th Cir. 1996); United States v. Vaandering, 50 F.3d 696, 699 (9th Cir. 1995); see also Liston v. County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997) (civil rights action based on unlawful search).

47. **Recusal**

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. See United States v. Silver, 245 F.3d 1075, 1078 (9th Cir. 2001); United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999); United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997); United States v. Eshkol, 108 F.3d 1025, 1030 (9th Cir. 1997); United States v. Chischilly, 30 F.3d 1144, 1149-50 (9th Cir. 1994); see also United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (applying same standard to recusal in civil forfeiture action).

When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. United States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991).

48. **Regulations**

A district court's interpretation of a federal regulation is reviewed de novo. See United States v. Willfong, 274 F.3d 1297, 1300 (9th Cir. 2001); United States v. Coutchavlis, 260 F.3d 1149, 1154 (9th Cir. 2001); United States v. Albers, 226 F.3d 989, 994 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); United States v. Ani, 138 F.3d 390, 391 (9th Cir. 1998); United States v. Hoff, 22 F.3d 222, 223 (9th Cir. 1994); United States v. Gomez-Osorio, 957 F.2d 636, 639 (9th Cir. 1992). An agency's interpretation of regulations, however, is entitled to deference. United States v. Bowen, 172 F.3d 682, 685 (9th Cir. 1999); United States v. McKittrick, 142 F.3d 1170, 1173 (9th Cir. 1998). Whether a regulation is unconstitutionally vague is a question of law reviewed de novo. See United States v. Elias, 269 F.3d 1003, 1014 (9th Cir. 2001); Coutchavlis, 260 F.3d at 1155; Albers, 226 F.3d at 992; United States v. Erickson, 75 F.3d 470, 475 (9th Cir. 1996).

49. **Representation**

a. **Conflict-Free Representation**

This court reviews de novo whether a defendant was denied the right to conflict-free representation. See United States v. Baker, 256 F.3d 855, 859 (9th Cir. 2001) (§ 2255); United States v. Moore, 159 F.3d 1154, 1157 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997) (direct appeal); Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994) (habeas).

b. **Disqualification of Counsel**

District judges have "substantial latitude" in deciding whether counsel must be disqualified; review is for an abuse of discretion. See United States v. Stites, 56 F.3d 1020, 1024 (9th Cir. 1995).

c. **Hybrid Representation**

The decision whether to allow a pro se litigant to proceed with either form of hybrid representation (co-counsel or advisory counsel) is reviewed for abuse of discretion. United States v. George, 85 F.3d 1433, 1439 (9th Cir. 1996); United States v. Bergman, 813 F.2d 1027, 1030 (9th Cir. 1987). The court's denial of a request for hybrid representation is reviewed for an abuse of discretion. United States v. Olano, 62 F.3d 1180, 1193 (9th Cir. 1995); United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994).

d. **Ineffective Representation**

Whether a defendant received ineffective assistance of counsel is reviewed de novo. See Mancuso v. Olivarez, 292 F.3d 939, 949 (9th Cir. 2002) (habeas); Silva v. Woodward, 279 F.3d 825, 831 (9th Cir. 2002) (habeas); Bragg v. Galaza, 242 F.3d 1082, 1086 (9th Cir.) (habeas), amended by 253 F.3d 1150 (9th Cir. 2001); Anderson v. Calderon, 232 F.3d 1053, 1084 (9th Cir. 2000) (habeas), cert. denied, 122 S. Ct. 580 (2001); Jackson v. Calderon, 211 F.3d 1148, 1154 (9th Cir. 2000) (habeas); United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal); Aguilar v. Alexander, 125 F.3d 815, 817 (9th Cir. 1997) (habeas); United States v. Henson, 123 F.3d 1226, 1241 (9th Cir. 1997) (direct appeal); United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996) (habeas); United States v. Span, 75 F.3d 1383, 1387 (9th Cir. 1996) (habeas); United States v. Benlian, 63 F.3d 824, 826 (9th Cir. 1995) (direct appeal); Sanchez v. United States, 50 F.3d 1448, 1456 (9th Cir. 1995) (habeas); see also LaGrand v. Stewart, 133 F.3d 1253, 1269-70 (9th Cir. 1998) (noting that claim presents a mixed question of law and fact reviewed de novo); Dubria v. Smith, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc) (same); United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994) (same).

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. See Hoffman v. Arave, 236 F.3d 523, 530 n.7 (9th Cir.) (explaining rationale), cert. denied, 122 S. Ct. 323 (2001); United States v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining to review claim on direct appeal), cert. denied, 121 S. Ct. 821 (2001); United States v. Ross, 206 F.3d 896, 899 (9th Cir. 2000) (noting when direct review is permissible); United States v. Quintero-Barraza, 78 F.3d 1344, 1347 (9th Cir. 1995) (same).

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's actions were outside the wide range of professionally competent assistance, and (2) that defendant was prejudiced by reason of counsel's actions. Strickland v. Washington, 466 U.S. 668, 687-690 (1984); Anderson, 232 F.3d at 1084; Schell v. Witek, 218 F.3d 1017, 1028 (9th Cir. 2000) (en banc); Jones v. Wood, 207 F.3d 557, 562 (9th Cir. 2000); United States v. Allen, 157 F.3d 661, 665 (9th Cir. 1998); Smith v. Lewis, 140 F.3d 1263, 1268 (9th Cir. 1998); Johnson v. Baldwin, 114 F.3d 835, 837-38 (9th Cir. 1997); United States v. Baramdyka, 95 F.3d 840, 844 (9th Cir. 1996); United States v. Benlian, 63 F.3d 824, 826 (9th Cir. 1995); United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994). The district court's findings of fact are reviewed under the clearly erroneous standard. Anderson, 232 F.3d at 1084; United States v. Alvarez-Tautimez, 160 F.3d 573, 575 (9th Cir. 1998); United States v. Garcia, 997 F.2d 1273, 1283 (9th Cir. 1993). Whether the facts suffice to establish the performance and prejudice components of the ineffectiveness inquiry is a question reviewed de novo. See United States v. Layton, 855 F.2d 1388, 1415 (9th Cir. 1988).

Whether a defendant was denied Sixth Amendment rights to counsel is a question of law reviewed de novo. See United States v. Christakis, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (direct appeal); United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998) (direct appeal); United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996) (direct appeal); United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis); Frazer v. United States, 18 F.3d 778, 781 (9th Cir. 1994) (habeas); United States v. Mims, 928 F.2d 310, 312 (9th Cir. 1991) (direct appeal).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. See Christakis, 238 F.3d at 1168 (§ 2255); United States v. Chacon-Palomares, 208 F.3d 1157, 1158-59 (9th Cir. 2000) (habeas); McMullen, 98 F.3d at 1157; United States v. Blaylock, 20 F.3d 1458, 1464 (9th Cir. 1994).

e. **Pro Se Representation**

Factual findings supporting the district court's decision whether to allow a defendant to proceed pro se are are reviewed for clear error. See United States v. George, 56 F.3d 1078, 1084 (9th Cir. 1995); United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994). This circuit has not settled whether to use de novo review or abuse of discretion review in determining whether the facts support the grant or denial of the motion. See United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) ("[W]e have not yet clarified whether denial of a Faretta request is reviewed de novo or for abuse of discretion."), cert. denied, 122 S. Ct. 1309 (2002); George, 56 F.3d at 1084 (citing United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986)).

f. **Right to Counsel**

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994); United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992). Whether those words actually invoked the right to counsel is reviewed de novo. United States v. Williams, 291 F.3d 1180, 1190 (9th Cir. 2002); United States v. Doe, 170 F.3d 1162, 1166 (9th Cir. 1999); United States v. Doe, 60 F.3d 544, 546 (9th Cir. 1995); Ogbuehi, 18 F.3d at 812; De La Jara, 973 F.2d at 750.

g. **Substitution of Counsel**

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. See United States v. Smith, 282 F.3d 758, 763 (9th Cir. 2002); United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001); United States v. Nguyen, 262 F.3d 998, 1002 (9th Cir. 2001); United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000); United States v. Corona-Garcia, 210 F.3d 973, 976 (9th Cir. 2000); United States v. Moore, 159 F.3d 1154, 1159 n.3 (9th Cir. 1998); United States v. Gonzales, 113 F.3d 1026, 1028 (9th Cir. 1997); United States v. George, 85 F.3d 1433, 1438 (9th Cir. 1996); United States v. Fagan, 996 F.2d 1009, 1014 (9th Cir. 1993). In reviewing the district court's exercise of discretion, the court of appeals considers three factors: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the extent of conflict between the defendant and counsel; and (3) the timeliness of the motion and the extent of resulting inconvenience and delay. See Smith, 282 F.3d at 763; Adelzo-Gonzalez, 268 F.3d at 777; Nguyen, 262 F.3d at 1002; Musa, 220 F.3d at 1102; Corona-Garcia, 210 F.3d at 976; Moore, 159 F.3d at 1158-59; Gonzales, 113 F.3d at 1028; George, 85 F.3d at 1438

Note that this court clarified that, in habeas review of a state court's denial of a motion to substitute counsel, review is not for an abuse of discretion, but whether the error violated the defendant's constitutional rights. See Schell v. Witek, 218 F.3d 1017, 1024-25 (9th Cir. 2000) (en banc) (overruling Crandell v. Bunnell, 144 F.3d 1213, 1215 (9th Cir. 1998)).

h. **Waiver of Representation**

Whether a defendant has voluntarily waived the right to counsel and elected self-representation is a mixed question of law and fact reviewed de novo. See United States v. Percy, 250 F.3d 720, 725 (9th Cir.) (direct appeal), cert. denied, 122 S. Ct. 493 (2001); United States v. Lopez-Osuna, 242 F.3d 1191, 1198 (9th Cir. 2001) (direct appeal); Lopez v. Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (habeas). This court reviews de novo whether a defendant's waiver of the right to counsel was made knowingly, intelligently, and voluntarily. See United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995).

i. **Withdrawal of Counsel**

The trial court's decision to grant or deny an attorney's motion to withdraw as counsel is reviewed for an abuse of discretion. LaGrand v. Stewart, 133 F.3d 1253, 1269 (9th Cir. 1998); United States v. Roston, 986 F.2d 1287, 1292 (9th Cir. 1993) (substitution of new counsel).

50. **Search and Seizure**

The lawfulness of a search and seizure is a mixed question of law and fact reviewed de novo. See United States v. Morales, 252 F.3d 1070, 1073 (9th Cir. 2001); United States v. Hawkins, 249 F.3d 867, 871 (9th Cir. 2001); United States v. Nerber, 222 F.3d 597, 599 (9th Cir. 2000); United States v. Cervantes, 219 F.3d 882, 887 (9th Cir. 2000); United States v. Hudson, 100 F.3d 1409, 1414 (9th Cir. 1996); United States v. Ewain, 88 F.3d 689, 692 (9th Cir. 1996); United States v. Turner, 28 F.3d 981, 983 (9th. Cir. 1994). The trial court's underlying factual findings are reviewed for clear error. See Morales, 252 F.3d at 1073; Nerber, 222 F.3d at 599; Cervantes, 219 F.3d at 882; Hudson, 100 F.3d at 1414. "Where no findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it." United States v. Becker, 23 F.3d 1537, 1539 (9th Cir. 1994).

This court reviews de novo a district court's ultimate legal conclusion whether a defendant has standing to challenge a search and seizure. See United States v. Silva, 247 F.3d 1051, 1054 (9th Cir. 2001); United States v. Dorais, 241 F.3d 1124, 1128 (9th Cir. 2001) United States v. Sarkisian, 197 F.3d 966, 986 (9th Cir. 1999); United States v. Padilla, 111 F.3d 685, 687 (9th Cir. 1997); United States v. Armenta, 69 F.3d 304, 306-07 (9th Cir. 1995); see also United States v. Poulsen, 41 F.3d 1330, 1335 (9th Cir. 1994) (reviewing standing under a de novo standard). The district court's factual findings underlying its decision on standing are reviewed for clear error. Sarkisian, 197 F.3d at 986; Padilla, 111 F.3d at 687; Armenta, 69 F.3d at 307.

Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact reviewed by this court de novo. See United States v. Cormier, 220 F.3d 1103, 1110 (9th Cir. 2000); United States v. Stephens, 206 F.3d 914, 917 (9th Cir. 2000); United States v. Chan-Jimenez, 125 F.3d 1324, 1326 (9th Cir. 1997). Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers. Franklin v. Foxworth, 31 F.3d 873, 875 (9th Cir. 1994) (civil rights action). A district court's determination of "reasonableness" is reviewed de novo. Id.

a. **Abandonment**

Whether property has been abandoned within the meaning of the Fourth Amendment is an issue of fact reviewed for clear error. See United States v. Stephens, 206 F.3d 914, 916-17 (9th Cir. 2000); United States v. Gonzales, 979 F.2d 711, 712 (9th Cir. 1992).

b. **Border Searches**

Whether the government has conducted a legal border search is subject to de novo review. United States v. Ani, 138 F.3d 390, 391 (9th Cir. 1998) (international mail); United States v. Nates, 831 F.2d 860, 862 (9th Cir. 1987). Whether a border detention was based on reasonable suspicion is reviewed de novo. United States v. Gonzalez-Rincon, 36 F.3d 859, 863 (9th Cir. 1994). The district court's findings of fact are reviewed under the clearly erroneous standard. Id.

c. **Coast Guard Searches**

The lawfulness of a search and seizure by the Coast Guard, a mixed question of law and fact, is reviewed de novo. United States v. Dobson, 781 F.2d 1374, 1376 (9th Cir. 1986). Whether the continued detention of a vessel after completion of a safety inspection by the Coast Guard is permissible based on reasonable suspicion is a question of law reviewed de novo. United States v. Thompson, 282 F.3d 673, 676 (9th Cir. 2002).

d. **Consent to Search**

A district court's determination whether a defendant voluntarily consented to a search depends on the totality of circumstances and is a question of fact reviewed for clear error. See United States v. Jones, 286 F.3d 1146, 1150 (9th Cir. 2002); United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001), cert. denied, 122 S. Ct. 1342 (2002); United States v. Rojas-Millan, 234 F.3d 464, 468 (9th Cir. 2000); United States v. Cormier, 220 F.3d 1103, 1112 (9th Cir. 2000) (listing factors for court to consider); United States v. Corrales, 183 F.3d 1116, 1125 (9th Cir. 1999); United States v. Albrektsen, 151 F.3d 951, 953 (9th Cir. 1998); United States v. Chan-Jimenez, 125 F.3d 1324, 1327 (9th Cir. 1997); United States v. Sparks, 87 F.3d 276, 278 (9th Cir. 1996); United States v. Mejia, 69 F.3d 309, 314 n.4 (9th Cir. 1995); United States v. Morning, 64 F.3d 531, 532 (9th Cir. 1995); United States v. Chischilly, 30 F.3d 1144, 1151 (9th Cir. 1994). The question whether as a general rule certain types of action give rise to an inference of consent to search is a question of law reviewed de novo. Albrektsen, 151 F.3d at 953; United States v. Garcia, 997 F.2d 1273, 1281 (9th Cir. 1993); United States v. Mejia, 953 F.2d 461, 465 (9th Cir. 1992) (implied consent).

A trial court's findings on whether the scope of consent to a search has been exceeded will be upheld unless they are clearly erroneous. United States v. Perez, 37 F.3d 510, 515 (9th Cir. 1995); United States v. Cannon, 29 F.3d 472, 477 (9th Cir. 1994); United States v. Huffhines, 967 F.2d 314, 319 (9th Cir. 1992).

A district court's determination regarding authority to consent to a search is a mixed question of fact and law reviewed de novo. United States v. Kim, 105 F.3d 1579, 1581 (9th Cir. 1997) (resolving previously undecided standard of review). A determination of apparent authority to consent is a mixed question of law and fact reviewed de novo. United States v. Reid, 226 F.3d 1020, 1025 (9th Cir. 2000); United States v. Fiorillo, 186 F.3d 1136, 1145 (9th Cir. 1999) (describing three-part analysis).

e. **Exigent Circumstances**

Exigent circumstances present a mixed question of law and fact reviewed de novo. See United States v. Banks, 282 F.3d 699, 704 n.3 (9th Cir. 2002); United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996); United States v. Zermeno, 66 F.3d 1058, 1063 n.2 (9th Cir. 1995); United States v. VonWillie, 59 F.3d 922, 925 (9th Cir. 1995). Findings of fact underlying the district court's determination are reviewed for clear error. VonWillie, 59 F.3d at 925.

f. **Expectation of Privacy**

Whether an individual had a reasonable expectation of privacy in property is a question of law reviewed de novo. See United States v. Nerber, 222 F.3d 597, 599 (9th Cir. 2000); United States v. Fultz, 146 F.3d 1102, 1104 (9th Cir. 1998).

g. **Governmental Conduct**

"This court reviews the district court's determination that a particular search involves governmental conduct de novo." United States v. Ross, 32 F.3d 1411, 1413 (9th Cir. 1994) (per curiam).

h. **Inevitable Discovery**

Rulings regarding inevitable discovery present mixed questions of fact and law that are reviewed for clear error. See United States v. Reilly, 224 F.3d 986, 994 (9th Cir. 2000); United States v. Lang, 149 F.3d 1044, 1048 (9th Cir. 1998) (resolving prior unsettled standard).

i. **Investigatory Stops**

Whether an encounter between an individual and law enforcement authorities constitutes an investigatory stop is a mixed question of law and fact subject to de novo review. See United States v. Michael R., 90 F.3d 340, 345 (9th Cir. 1996); United States v. Kim, 25 F.3d 1426, 1430 (9th Cir. 1994). Factual determinations underlying this inquiry are reviewed for clear error. United States v. Garcia-Acuna, 175 F.3d 1143, 1146 (9th Cir. 1999); Michael R., 90 F.3d at 345; Kim, 25 F.3d at 1430.

The specific question of whether reasonable suspicion existed under given facts is a legal conclusion subject to de novo review. See United States v. Arvizu, 122 S. Ct. 744, 755 (2002) (reaffirming de novo standard); Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Mariscal, 285 F.3d 1127, 1129 (9th Cir. 2002); United States v. Thompson, 282 F.3d 673, 678 (9th Cir. 2002); United States v. Chavez-

Valenzuela, 268 F.3d 719, 723 (9th Cir. 2001), amended by 279 F.3d 1062 (9th Cir. 2002); United States v. Tong, 224 F.3d 1136, 1139 (9th Cir. 2000); United States v. Smith, 217 F.3d 746, 749 (9th Cir. 2000); United States v. Thomas, 211 F.3d 1186, 1189 (9th Cir. 2000); United States v. Osborn, 203 F.3d 1176, 1180 (9th Cir. 2000); United States v. Fuentes, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a Terry stop is reviewed de novo); Michael R., 90 F.3d at 345-46; United States v. Garcia-Camacho, 53 F.3d 244, 245 (9th Cir. 1995); see also Gonzalez-Rivera v. INS, 22 F.3d 1441, 1445 (9th Cir. 1994) (immigration law). Any underlying factual findings are reviewed for clear error. See Chavez-Valenzuela, 268 F.3d at 723; Rojas-Millan, 234 F.3d at 468; United States v. Lopez-Soto, 205 F.3d 1101, 1103 (9th Cir. 2000).

Whether a seizure exceeds the bounds of a valid investigatory stop and becomes a de facto arrest is reviewed de novo. See United States v. Thompson, 282 F.3d 673, 676 (9th Cir. 2002); United States v. Torres-Sanchez, 83 F.3d 1123, 1127 (9th Cir. 1996). Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact reviewed by this court de novo. See United States v. Stephens, 206 F.3d 914, 917 (9th Cir. 2000); United States v. Chan-Jimenez, 125 F.3d 1324, 1326 (9th Cir. 1997). A district court's determination that a police officer lawfully crossed the threshold of a dwelling to effect an arrest is reviewed de novo. United States v. Albrektsen, 151 F.3d 951, 953 (9th Cir. 1998).

j. **Issuance of a Search Warrant**

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 963 n.6 (9th Cir. 2000); see also United States v. Patterson, 292 F.3d 615, 625 (9th Cir. 2002) (noting that magistrate judge's finding of probable cause is reviewed for clear error); United States v. Hay, 231 F.3d 630, 634 n.4 (9th Cir. 2000) (same), cert. denied, 122 S. Ct. 135 (2001); United States v. Henson, 123 F.3d 1226, 1238 (9th Cir. 1997) (same). Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. See Patterson, 292 F.3d at 625 (noting "significant deference"); Hay, 231 F.3d at 634 n.4 ("[W]e accord great deference to the magistrate's determination of probable cause."); United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995). The court of appeals "will not reverse a magistrate judge's determination of probable cause for the purposes of issuing a search warrant absent a finding of clear error." United States v. Perez, 67 F.3d 1371, 1382 (9th Cir. 1995), withdrawn in part, 116 F.3d 840 (9th Cir. 1997) (en banc); United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993); United States v. Schmidt, 947 F.2d 362, 371 (9th Cir. 1991). Thus, the standard of review is "less probing than de novo review and shows

deference to the issuing magistrate's determination." Pitts, 6 F.3d at 1369; United States v. Hernandez, 937 F.2d 1490, 1494 (9th Cir. 1991).

A determination of probable cause in a case with a redacted affidavit is reviewed de novo. United States v. Huguez-Ibarra, 954 F.2d 546, 551 (9th Cir. 1992); United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir. 1987) (probable cause for search warrant); see also United States v. Dozier, 844 F.2d 701, 706 (9th Cir. 1988); United States v. Castillo, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. Bowman, 215 F.3d at 963 n.6; Reeves, 210 F.3d at 1044; United States v. Hernandez, 80 F.3d 1253, 1260 (9th Cir. 1996); United States v. Vaandering, 50 F.3d 696, 699 (9th Cir. 1995); see also Liston v. County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997) (civil rights action based on unlawful search).

k. **Knock and Announce**

This court reviews de novo a trial court's determination of the validity of a protective sweep, including compliance with "knock and announce" requirements established by statute. See United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996); United States v. Arias, 923 F.2d 1387, 1389 (9th Cir. 1991); see also United States v. Banks, 282 F.3d 699, 703 (9th Cir. 2002) (noting review of legal issues is de novo); United States v. Granville, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting that legal conclusion that "knock and announce" statute was violated is reviewed de novo, while findings regarding historical facts underlying conclusion are reviewed for clear error; United States v. Zermeno, 66 F.3d 1058, 1062-63 (9th Cir. 1995) (same). Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. See United States v. Reilly, 224 F.3d 986, 991 (9th Cir. 2000); Hudson, 100 F.3d at 1417; United States v. Ramirez, 91 F.3d 1297, 1299 (9th Cir. 1996) (same), rev'd on other grounds, 523 U.S. 65 (1998).

l. **Private Searches**

A district court's conclusion that a search did not violate the Fourth Amendment because it was a private search is reviewed de novo as a question of law. United States v. Reed, 15 F.3d 928, 930 (9th Cir. 1994).

m. **Probable Cause**

The determination of probable cause is a mixed question of law and fact in which the legal issues predominate, and it is therefore subject to de novo review. Ornelas v. United States, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); United States v. Carranza, 289 F.3d 634, 640 (9th Cir. 2002) (warrantless arrest); United States v. Valencia Amezcua, 278 F.3d 901, 906 (9th Cir. 2002) (warrantless arrest); United States v. Buckner, 179 F.3d 834, 837 (9th Cir. 1999) (warrantless arrest). Thus, probable cause rulings are reviewed de novo. See United States v. Parks, 285 F.3d 1133, 1138 (9th Cir. 2002) (vehicle search); United States v. Mills, 280 F.3d 915, 920 (9th Cir.) (warrantless arrest), cert. denied, 122 S. Ct. 2347 (2002); United States v. Rojas-Millan, 234 F.3d 464, 468 (9th Cir. 2000) (vehicle search); United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir. 2000) (search warrant); Picray v. Sealock, 138 F.3d 767, 770-71 (9th Cir. 1998) (warrantless arrest); Rohde v. City of Roseburg, 137 F.3d 1142, 1144 (9th Cir. 1998) (warrantless arrest); United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture); United States v. Jones, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest); United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996) (search warrant); see also United States v. Linn, 880 F.2d 209, 214 (9th Cir. 1989) (finding of probable cause for search is reviewed de novo while findings of fact are reviewed for clear error).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 963 n.6 (9th Cir. 2000); see also United States v. Patterson, 292 F.3d 615, 625 (9th Cir. 2002) (noting that magistrate judge's finding of probable cause is reviewed for clear error); United States v. Hay, 231 F.3d 630, 634 n.4 (9th Cir. 2000) (same), cert. denied, 122 S. Ct. 135 (2001); United States v. Henson, 123 F.3d 1226, 1238 (9th Cir. 1997) (same). Thus, the magistrate judge's original determination of probable cause is accorded deference by the reviewing court. See Patterson, 292 F.3d at 625 (noting "significant deference"); Hay, 231 F.3d at 634 n.4 ("[W]e accord great deference to the magistrate's determination of probable cause."); United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995). The court of appeals "will not reverse a magistrate judge's determination of probable cause for the purposes of issuing a search warrant absent a finding of clear error." United States v. Perez, 67 F.3d 1371, 1382 (9th Cir. 1995), withdrawn in part, 116 F.3d 840 (9th Cir. 1997) (en banc); United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993); United States v. Schmidt, 947 F.2d 362, 371 (9th Cir. 1991). Thus, the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination." Pitts, 6 F.3d at 1369; United States v. Hernandez, 937 F.2d 1490, 1494 (9th Cir. 1991).

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. United States v. Huguez-Ibarra, 954 F.2d 546, 551 (9th Cir. 1992); United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir. 1987) (probable cause for search warrant); see also United States v. Dozier, 844 F.2d 701, 706 (9th Cir. 1988); United States v. Castillo, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. Bowman, 215 F.3d at 963 n.6; Reeves, 210 F.3d at 1044; United States v. Hernandez, 80 F.3d 1253, 1260 (9th Cir. 1996); United States v. Vaandering, 50 F.3d 696, 699 (9th Cir. 1995); see also Liston v. County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997) (civil rights action based on unlawful search).

n. **Probation Searches**

The district court's factual determination that a probation search was not impermissible is reviewed for clear error. United States v. Watts, 67 F.3d 790, 794 (9th Cir. 1995), rev'd on other grounds, 519 U.S. 148 (1997). The district court's determination of the reasonable scope of a probation search is a mixed question of fact and law reviewed de novo. United States v. Davis, 932 F.2d 752, 756 (9th Cir. 1991). Whether a probation search was a subterfuge for a criminal investigation is a factual determination that is reviewed for clear error. See United States v. Knights, 219 F.3d 1138, 1141 (9th Cir. 2000), rev'd on other grounds, 122 S. Ct. 587 (2001).

o. **Protective Sweeps**

This court reviews de novo a trial court's determination of the validity of a protective sweep, including compliance with "knock and announce" requirements established by statute. See United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996); United States v. Arias, 923 F.2d 1387, 1389 (9th Cir. 1991); see also United States v. Banks, 282 F.3d 699, 703 (9th Cir. 2002) (noting review of legal issues is de novo); United States v. Granville, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting that legal conclusion that "knock and announce" statute was violated is reviewed de novo, while findings regarding historical facts underlying conclusion are reviewed for clear error; United States v. Zermeno, 66 F.3d 1058, 1062-63 (9th Cir. 1995) (same). Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. See United

States v. Reilly, 224 F.3d 986, 991 (9th Cir. 2000); Hudson, 100 F.3d at 1417; United States v. Ramirez, 91 F.3d 1297, 1299 (9th Cir. 1996) (same), rev'd on other grounds, 523 U.S. 65 (1998).

p. **Reasonable Suspicion**

The specific question of whether reasonable suspicion existed under given facts is a legal conclusion subject to de novo review. See United States v. Arvizu, 122 S. Ct. 744, 755 (2002) (reaffirming de novo standard); Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Thompson, 282 F.3d 673, 678 (9th Cir. 2002); United States v. Chavez-Valenzuela, 268 F.3d 719, 723 (9th Cir. 2001), amended by 279 F.3d 1062 (9th Cir. 2002); United States v. Rojas-Millan, 234 F.3d 464, 468 (9th Cir. 2000); United States v. Smith, 217 F.3d 746, 749 (9th Cir. 2000); United States v. Thomas, 211 F.3d 1186, 1189 (9th Cir. 2000); United States v. Osborn, 203 F.3d 1176, 1180 (9th Cir. 2000); United States v. Fuentes, 105 F.3d 487, 490 (9th Cir. 1997). Any underlying factual findings are reviewed for clear error. See Chavez-Valenzuela, 268 F.3d at 723; Rojas-Millan, 234 F.3d at 468; United States v. Lopez-Soto, 205 F.3d 1101, 1103 (9th Cir. 2000).

q. **Rule 41(e) Motions**

A district court's interpretation of Federal Rule of Criminal Procedure 41(e) is reviewed de novo. J.B. Manning Corp. v. United States, 86 F.3d 926, 927 (9th Cir. 1996). The denial of a motion for return of property pursuant to Rule 41(e) is reviewed de novo. See United States v. Marolf, 173 F.3d 1213, 1216 (9th Cir. 1999); In re Grand Jury Investigation Concerning Solid State Devices, Inc., 130 F.3d 853, 855 (9th Cir. 1997); but see Ramsden v. United States, 2 F.3d 322, 324 (9th Cir. 1993) (district court's decision to exercise its equitable jurisdiction under Rule 41(e) is reviewed for an abuse of discretion). The trial court's decision not to conduct an evidentiary hearing on a Rule 41(e) motion is reviewed for an abuse of discretion. Center Art Galleries -- Haw., Inc. v. United States, 875 F.2d 747, 753 (9th Cir. 1989).

r. **Suppression Motions**

Motions to suppress are reviewed de novo. See United States v. Jones, 286 F.3d 1146, 1150 (9th Cir. 2002); United States v. Summers, 268 F.3d 683, 686 (9th Cir. 2001), cert. denied, 122 S. Ct. 1182 (2002); United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001), cert. denied, 122 S. Ct. 1342 (2002); United States v. Percy, 250 F.3d 720, 725 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Silva, 247 F.3d 1051, 1054 (9th Cir. 2000); United States v. Wright, 215 F.3d 1020, 1025 (9th Cir.

2000); United States v. Kemmish, 120 F.3d 937, 939 (9th Cir. 1997); United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996); United States v. Noushfar, 78 F.3d 1442, 1447 (9th Cir. 1996); United States v. Scott, 74 F.3d 175, 176 (9th Cir. 1996). The trial court's factual findings are reviewed for clear error. See Jones, 286 at 1150; Summers, 286 F.3d at 686; Murrillo, 255 F.3d at 1174; Percy, 250 F.3d at 725; Silva, 247 F.3d at 1054; United States v. Mattarolo, 209 F.3d 1153, 1155-56 (9th Cir. 2000); Kemmish, 120 F.3d at 937; Noushfar, 78 F.3d at 1447; Scott, 74 F.3d at 176. Mixed questions of law and fact in a motion to suppress evidence obtained from a warrantless search are reviewed de novo. United States v. Litteral, 910 F.2d 547, 553 (9th Cir. 1990); United States v. Johnson, 820 F.2d 1065, 1072 (9th Cir. 1987). If, however, the case involves unusual facts that required the district court to weigh and evaluate live testimony given at a suppression hearing, this court will review for clear error. United States v. Rosi, 27 F.3d 409, 411 n.1 (9th Cir. 1994).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. United States v. Smith, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998); United States v. Alexander, 106 F.3d 874, 877 (9th Cir. 1997); United States v. Wilson, 7 F.3d 828, 833 (9th Cir. 1993). Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. United States v. Mejia, 69 F.3d 309, 314 (9th Cir. 1995).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. United States v. Buffington, 815 F.2d 1292, 1298 (9th Cir. 1987). Failure to apply the doctrine of law of the case to the motion for reconsideration absent one of the requisite conditions of that doctrine constitutes an abuse of discretion. Alexander, 106 F.3d at 876. The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. See United States v. Jordan, 291 F.3d 1091, 1100 (9th Cir. 2002) (no abuse); United States v. Hobbs, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

s. **Terry Stops**

The propriety of a Terry stop is reviewed de novo. United States v. $109,179 in U.S. Currency, 228 F.3d 1080, 1083-84 (9th Cir. 2000); United States v. Fuentes, 105 F.3d 487, 490 (9th Cir. 1997). The determination whether an investigatory stop is a warrantless arrest or a Terry stop, a mixed question of law and fact, is reviewed de novo. See United States v. Miles, 247 F.3d 1009, 1012 (9th Cir. 2001); $109,179 in U.S. Currency, 228 F.3d at 1084; United States v. Torres-Sanchez, 83 F.3d 1123, 1127 (9th Cir. 1996); United States v. Harrington, 923 F.2d 1371, 1773 (9th Cir. 1991). A trial judge's finding of founded suspicion to stop based on specific, articulated facts

is reviewed de novo. United States v. Hall, 974 F.2d 1201, 1204 (9th Cir. 1992); United States v. Carrillo, 902 F.2d 1405, 1410-11 (9th Cir. 1990); United States v. Sanchez-Vargas, 878 F.2d 1163, 1166 (9th Cir. 1989); United States v. Sutton, 794 F.2d 1415, 1426 (9th Cir. 1986) (totality of circumstances used to determine whether founded suspicion justifies an investigatory stop).

t. Warrantless Searches and Seizures

The validity of a warrantless search is reviewed de novo. See United States v. Johnson, 256 F.3d 895, 905 (9th Cir. 2001) (en banc); United States v. Hinton, 222 F.3d 664, 673 (9th Cir. 2000); United States v. Depew, 210 F.3d 1061, 1066 (9th Cir. 2000); United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996); United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994). Underlying factual findings are reviewed for clear error. Depew, 210 F.3d at 1066.

The validity of a warrantless entry into a residence is reviewed de novo. United States v. Huguez-Ibarra, 954 F.2d 546, 551 (9th Cir. 1992). Whether an area is within the protected curtilage of a home is also reviewed de novo. See United States v. Cannon, 264 F.3d 875, 879 (9th Cir. 2001), cert. denied, 122 S. Ct. 1097 (2002); United States v. Johnson, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard).

The validity of a warrantless seizure is reviewed de novo. See United States v. Gill, 280 F.3d 923, 928 (9th Cir. 2002) (seizure of mail); United States v. Aldaz, 921 F.2d 227, 229 (9th Cir. 1990) (same); United States v. Howard, 828 F.2d 552, 554 (9th Cir. 1987) (exigent circumstances and consent); United States v. Sarkissian, 841 F.2d 959, 962 (9th Cir. 1988) (exigent circumstances); United States v. Vasey, 834 F.2d 782, 785 (9th Cir. 1987) (incident to arrest); United States v. Linn, 880 F.2d 209, 214 (9th Cir. 1989) (automobile exception).

In United States v. Rosi, 27 F.3d 409, 411 (9th Cir. 1994), this court applied the clearly erroneous standard to "the validity of the warrantless entry and warrantless search." Id. The court reasoned that unlike other cases applying a de novo standard to "the formulation of a general rule . . . applicable to a wide class of cases," this case involved "an unusual set of factual circumstances that required the district court to weigh and evaluate various live testimony given at the suppression hearing." Id. at 411 n.1.

Whether exigent circumstances justify a warrantless search or seizure is a question of law reviewed de novo. See United States v. Furrow, 229 F.3d 805, 811

(9th Cir. 2000); United States v. Gooch, 6 F.3d 673, 679 (9th Cir. 1993). Whether probable cause supports a warrantless search of an automobile is a question of law reviewed de novo. Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Dunn, 946 F.2d 615, 619 (9th Cir. 1991). Whether probable cause supports a warrantless arrest is also reviewed de novo. See United States v. Carranza, 289 F.3d 634, 640 (9th Cir. 2002); United States v. Juvenile (RRA-A), 229 F.3d 737, 742 (9th Cir. 2000).

51. **Selective Prosecution**

The denial of a motion to dismiss for selective prosecution is reviewed under a clearly erroneous standard. United States v. Davis, 36 F.3d 1424, 1432 (9th Cir. 1994); United States v. Gutierrez, 990 F.2d 472, 475 (9th Cir. 1993). This standard was chosen because "selective prosecution, more than vindictive prosecution, lends itself to the factfinding standard." United States v. Wilson, 639 F.2d 500, 503 n.2 (9th Cir. 1981); see also United States v. Leidendeker, 779 F.2d 1417, 1418 (9th Cir. 1986) ("The facts upon which a district court bases its denial of a motion to dismiss for selective prosecution are reviewed under the clearly erroneous standard.").

The district court's decision whether to grant discovery related to a selective prosecution claim is reviewed for an abuse of discretion. United States v. Candia-Veleta, 104 F.3d 243, 246 (9th Cir. 1996); United States v. Reese, 60 F.3d 660, 661 (9th Cir. 1995); United States v. Marshall, 56 F.3d 1210, 1211 (9th Cir. 1995). Discovery should be permitted when the defendant is able to offer "some evidence tending to show the existence of the discriminatory effect element." United States v. Armstrong, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)).

52. **Severance**

A district court's decision on a motion for severance is reviewed for an abuse of discretion. See United States v. Parks, 285 F.3d 1133, 1140 (9th Cir. 2002); United States v. Angwin, 271 F.3d 786, 794 (9th Cir. 2001), cert. denied, 122 S. Ct. 1385 (2002); United States v. Rousseau, 257 F.3d 925, 931, n.5 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); United States v. Sarkisian, 197 F.3d 966, 978 (9th Cir. 1999); United States v. Mayfield, 189 F.3d 895, 899 (9th Cir. 1999); United States v. Gillam, 167 F.3d 1273, 1276 (9th Cir. 1999); United States v. Nelson, 137 F.3d 1094, 1108 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 798 (9th Cir. 1997); United States v. Atcheson, 94 F.3d 1237, 1244 (9th Cir. 1996); United States v. Matta-Ballesteros, 71 F.3d 754, 770 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996); United States

v. Ponce, 51 F.3d 820, 831 (9th Cir. 1995). "The test for abuse of discretion by the district court is whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." Nelson, 137 F.3d at 1108 (quoting Atcheson, 94 F.3d at 1244); see also Mayfield, 189 F.3d at 899; Gillam, 167 F.3d at 1276. Defendants must meet a heavy burden to show such an abuse, and the trial judge's decision will seldom be disturbed. Ponce, 51 F.3d at 831. The defendant must prove that prejudice from the joint trial was so "clear, manifest or undue" that he or she was denied a fair trial. United States v. Throckmorton, 87 F.3d 1069, 1071-72 (9th Cir. 1996).

53. **Sixth Amendment Rights**

Whether a defendant was denied a Sixth Amendment right to counsel is a question of law reviewed de novo. See United States v. Christakis, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (direct appeal); United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998) (direct appeal); United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996) (§ 2255); United States v. Benlian, 63 F.3d 824, 826 (9th Cir. 1995) (ineffective assistance of counsel claim); Frazer v. United States, 18 F.3d 778, 781 (9th Cir. 1994) (habeas); United States v. Mims, 928 F.2d 310, 312 (9th Cir. 1991) (direct appeal). Whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. See United States v. Percy, 250 F.3d 720, 725 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Lopez-Osuna, 242 F.3d 1191, 1198 (9th Cir. 2001); United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994); United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992). Whether those words actually invoked the right to counsel is reviewed de novo. United States v. Williams, 291 F.3d 1180, 1190 (9th Cir. 2002); United States v. Doe, 170 F.3d 1162, 1166 (9th Cir. 1999); United States v. Doe, 60 F.3d 544, 546 (9th Cir. 1995); United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994); De La Jara, 973 F.2d at 750.

Whether a trial court's suppression of a defendant's testimony violates the Sixth Amendment right to testify is reviewed de novo. United States v. Moreno, 102 F.3d 994, 998 (9th Cir. 1996).

The district court's denial of a motion to substitute counsel is reviewed for an abuse of discretion, but that discretion must be exercised within the limitations of the Sixth Amendment. See United States v. Moore, 159 F.3d 1154, 1159 n.3 (9th Cir. 1998); United States v. Gonzales, 113 F.3d 1026, 1028 (9th Cir. 1997); United States v. D'Amore, 56 F.3d 1202, 1204 (9th Cir. 1995). A district court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. See United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000). Whether a defendant has a Sixth Amendment right to counsel in a civil forfeiture proceeding is reviewed de novo. United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999); United States v. Murillo, 288 F.3d 1126, 1137 (9th Cir. 2002); United States v. Saya, 247 F.3d 929, 937 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Boone, 229 F.3d 1231, 1233 (9th Cir. 2000), cert. denied, 121 S. Ct. 1747 (2001); United States v. Pena-Gutierrez, 222 F.3d 1080, 1086 n.3 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 960 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Shannon, 137 F.3d 1112, 1118 (9th Cir. 1998); United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997); United States v. Miguel, 111 F.3d 666, 669 (9th Cir. 1997); see also Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); Paradis v. Arave, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

Whether limitations on cross-examination are so severe as to violate the Confrontation Clause is a question of law reviewed de novo. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2000); Ortega, 203 F.3d at 682; United States v. James, 139 F.3d 709, 713 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997); United States v. Ripinsky, 109 F.3d 1436, 1455 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997); United States v. Marbella, 73 F.3d 1508, 1513 (9th Cir. 1996); see also United States v. Lo, 231 F.3d 471, 482 (9th Cir. 2000) (applying abuse of discretion standard); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999) ("The district court, however, has considerable discretion in restricting cross-examination, and this court will find error only when that discretion has been abused.").

Confrontation Clause violations are subject, however, to harmless error analysis. See United States v. Orellana-Blanco, 294 F.3d 1143, 1148 (9th Cir. 2002); Pena-Gutierrez, 222 F.3d at 1089; Ortega, 203 F.3d at 682; United States v. Comito, 177 F.3d 1166, 1170 (9th Cir. 1999); Miguel, 111 F.3d at 671-72; United States v. Vargas, 933

F.2d 701, 704-05 (9th Cir. 1991); see also Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); Whelchel v. Washington, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas); Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (habeas).

54. **Speedy Trial**

A district court's application of the Speedy Trial Act is reviewed de novo. See United States v. Brickey, 289 F.3d 1144, 1150 (9th Cir. 2002); United States v. Lam, 251 F.3d 852, 855 (9th Cir.), amended by 262 F.3d 1033 (9th Cir.), cert. denied, 122 S. Ct. 503 (2001); United States v. Arellano-Rivera, 244 F.3d 1119, 1122 (9th Cir. 2001), cert. denied, 122 S. Ct. 1450 (2002); United States v. Ramirez-Cortez, 213 F.3d 1149, 1153 (9th Cir. 2000); United States v. Hall, 181 F.3d 1057, 1061 (9th Cir. 1999); United States v. Nelson, 137 F.3d 1094, 1108 (9th Cir. 1998); United States v. Shetty, 130 F.3d 1324, 1327 (9th Cir. 1997); United States v. George, 85 F.3d 1433, 1436 (9th Cir. 1996); United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995).

The court's interpretation of the Act is also reviewed de novo. United States v. Boyd, 214 F.3d 1052, 1054 (9th Cir. 2000); United States v. Ortiz-Lopez, 24 F.3d 53, 54 (9th Cir. 1994). Whether a juvenile's speedy trial rights were violated is reviewed de novo. See United States v. Juvenile (RRA-A), 229 F.3d 737, 742 (9th Cir. 2000) (applying speedy arraignment provision of Juvenile Delinquency Act); United States v. Doe, 149 F.3d 945, 948 (9th Cir. 1998); United States v. Eric B., 86 F.3d 869, 872 (9th Cir. 1996).

The court's factual findings under the Speedy Trial Act are reviewed for clear error. See Brickey, 289 F.3d at 1150; Lam, 251 F.3d at 855; Nelson, 137 F.3d at 1108; United States v. Contreras, 63 F.3d 852, 855 (9th Cir. 1995); United States v. Benitez, 34 F.3d 1489, 1493 (9th Cir. 1994); Ortiz-Lopez, 24 F.3d at 54. A district court's finding of an "ends of justice" exception will be reversed only if there is clear error. Ramirez-Cortez, 213 F.3d at 1153; Nelson, 137 F.3d at 1108-09; United States v. Paschall, 988 F.2d 972, 974 (9th Cir. 1993); United States v. Murray, 771 F.2d 1324, 1327 (9th Cir. 1985). A judge may revoke a time extension previously made in the same case by another judge. Such a revocation will be upheld only if the second judge makes a specific finding that the factual findings of the judge granting the continuance were clearly in error. Murray, 771 F.2d at 1327.

The district court's decision on a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. See Lam, 251 F.3d at 855; United States v.

Symington, 195 F.3d 1080, 1090-91 (9th Cir. 1999); United States v. Pena-Carrillo, 46 F.3d 879, 882 (9th Cir. 1995). In rendering a decision whether to dismiss with or without prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors, and in absence of compliance with these requirements, dismissal shall be entered with prejudice. See United States v. Delgado-Miranda, 951 F.2d 1063, 1065 (9th Cir. 1991); but see United States v. Clymer, 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide whether indictment should be dismissed with or without prejudice). Note that the denial of a motion to dismiss based on preaccusation delay is reviewed for an abuse of discretion. United States v. Doe, 149 F.3d 945, 947 (9th Cir. 1998); United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992).

Whether a defendant was brought to trial within the speedy trial period of the Interstate Agreement on Detainers Act is a question of law reviewed de novo. United States v. Collins, 90 F.3d 1420, 1425 (9th Cir. 1996).

55. **Statutes of Limitation**

The district court's conclusion that a particular statute of limitation applies is reviewed de novo. United States v. Workinger, 90 F.3d 1409, 1412 (9th Cir. 1996); United States v. Manning, 56 F.3d 1188, 1195 (9th Cir. 1995).

56. **Statutes**

The construction or interpretation of a statute is reviewed de novo. See United States v. Carranza, 289 F.3d 634, 642 (9th Cir. 2002) (criminal statute); United States v. Lincoln, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA); United States v. Pluff, 253 F.3d 490, 492 (9th Cir. 2001) (Major Crimes Act); United States v. Davidson, 246 F.3d 1240, 1246 (9th Cir. 2001) (state law); United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000) (Sentencing Guidelines); United States v. Kaluna, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc) (three-strikes law); United States v. Frega, 179 F.3d 793, 802 n.6 (9th Cir. 1999) (mail fraud statute); United States v. Doe, 136 F.3d 631, 634 (9th Cir. 1998) (federal arson statute); United States v. DeLaCorte, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking statute); United States v. Hunter, 101 F.3d 82, 84 (9th Cir. 1996) (sentencing statute); United States v. Willett, 90 F.3d 404, 406 (9th Cir. 1996) (sentencing guidelines); United States v. Salemo, 81 F.3d 1453, 1457 (9th Cir. 1996) (Criminal Justice Act); United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (Omnibus Crime Control and Safe Streets Act); United States v. Bailey, 41 F.3d 413, 416 (9th Cir. 1994) (statute defining "access device"); United States v. Ramos, 39 F.3d 219, 220 (9th Cir. 1994) (state law). The applicability of a statute to a particular case

is a question of law reviewed de novo. See United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000) (AEDPA).

The constitutionality of a statute is a question of law reviewed de novo. See United States v. Stokes, 292 F.3d 964, 966 (9th Cir. 2002); United States v. Carranza, 289 F.3d 634, 643 (9th Cir. 2002); United States v. Parks, 285 F.3d 1133, 1142 (9th Cir. 2002); United States v. Jones, 231 F.3d 508, 513 (9th Cir. 2000); Kaluna, 192 F.3d at 1193; Frega, 179 F.3d at 802 n.6; United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999); United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996); United States v. Kim, 94 F.3d 1247, 1249 (9th Cir. 1996); United States v. Rambo, 74 F.3d 948, 956 (9th Cir. 1996); United States v. Sahhar, 56 F.2d 1026, 1028 (9th Cir. 1995); see also United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture). Whether a statute is void for vagueness is a question of law reviewed de novo. United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999); United States v. Hockings, 129 F.3d 1069, 1070 (9th Cir. 1997); United States v. Woodley, 9 F.3d 774, 778 (9th Cir. 1993). Whether a statute violates a defendant's right to due process is reviewed de novo. United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999). A district court's refusal to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. See United States v. Akins, 276 F.3d 1141, 1146 (9th Cir. 2002).

57. **Suppression**

Motions to suppress are reviewed de novo. See United States v. Jones, 286 F.3d 1146, 1150 (9th Cir. 2002); United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001), cert. denied, 122 S. Ct. 1342 (2002); United States v. Percy, 250 F.3d 720, 725 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Silva, 247 F.3d 1051, 1054 (9th Cir. 2000); United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Kemmish, 120 F.3d 937, 939 (9th Cir. 1997); United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996); United States v. Noushfar, 78 F.3d 1442, 1447 (9th Cir. 1996); United States v. Scott, 74 F.3d 175, 176 (9th Cir. 1996). The trial court's factual findings are reviewed for clear error. See Jones, 286 at 1150; Murrillo, 255 F.3d at 1174; Percy, 250 F.3d at 725; Silva, 247 F.3d at 1054; United States v. Mattarolo, 209 F.3d 1153, 1155-56 (9th Cir. 2000); Kemmish, 120 F.3d at 937; Noushfar, 78 F.3d at 1447; Scott, 74 F.3d at 176. Mixed questions of law and fact in a motion to suppress evidence obtained from a warrantless search are reviewed de novo. United States v. Litteral, 910 F.2d 547, 553 (9th Cir. 1990); United States v. Johnson, 820 F.2d 1065, 1072 (9th Cir. 1987). If, however, the case involves unusual facts that required the district court to weigh and evaluate live testimony given at a

suppression hearing, this court will review for clear error. United States v. Rosi, 27 F.3d 409, 411 n.1 (9th Cir. 1994).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. United States v. Smith, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998); United States v. Alexander, 106 F.3d 874, 877 (9th Cir. 1997); United States v. Wilson, 7 F.3d 828, 833 (9th Cir. 1993). Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. United States v. Mejia, 69 F.3d 309, 314 (9th Cir. 1995).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. United States v. Buffington, 815 F.2d 1292, 1298 (9th Cir. 1987). Failure to apply the doctrine of law of the case to the motion for reconsideration absent one of the requisite conditions of that doctrine constitutes an abuse of discretion. Alexander, 106 F.3d at 876. The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. United States v. Hobbs, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

58. **Transfer of Trial**

The district court's denial of a motion to transfer trial pursuant to Federal Rule of Criminal Procedure 18 is reviewed for an abuse of discretion. United States v. Scholl, 166 F.3d 964, 969 (9th Cir. 1999); United States v. Etsitty, 130 F.3d 420, 424 (9th Cir. 1997), amended by 140 F.3d 1274 (9th Cir. 1998); United States v. Herbert, 698 F.2d 981, 984 (9th Cir. 1984).

59. **Venue**

Venue is a question of law reviewed de novo. See United States v. Williams, 291 F.3d 1180, 1188 (9th Cir. 2002); United States v. Feng, 277 F.3d 1151, 1154 (9th Cir. 2002); United States v. Liang, 224 F.3d 1057, 1059 (9th Cir. 2000); United States v. Ruelas-Arreguin, 219 F.3d 1056, 1059 (9th Cir. 2000); United States v. Hernandez, 189 F.3d 785, 787 (9th Cir. 1999); United States v. Angotti, 105 F.3d 539, 541 (9th Cir. 1997); United States v. Childs, 5 F.3d 1328, 1331 (9th Cir. 1993). The trial court's ruling on a motion for change of venue, however, is reviewed for an abuse of discretion. United States v. Croft, 124 F.3d 1109, 1115 n.2 (9th Cir. 1997); United States v. Collins, 109 F.3d 1413, 1416 (9th Cir. 1997); United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996); United States v. Corona, 34 F.3d 876, 878 (9th Cir. 1994).

60. **Vindictive Prosecution**

The standard of review in a vindictive prosecution case remains unsettled in this circuit. See United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 (9th Cir. 2001); United States v. Frega, 179 F.3d 793, 801 (9th Cir. 1999); United States v. Hernandez, 80 F.3d 1253, 1260 (9th Cir. 1996); United States v. Noushfar, 78 F.3d 1442, 1446 (9th Cir. 1996); United States v. VonWillie, 59 F.3d 922, 927 (9th Cir. 1995); United States v. Montoya, 45 F.3d 1286, 1291 (9th Cir. 1995); United States v. Kinsey, 994 F.2d 699, 701 n.5 (9th Cir. 1993). This circuit has variously applied abuse of discretion, clearly erroneous, and de novo standards. See Hernandez-Herrera, 273 F.3d at 1217; Frega, 179 F.3d at 801; Montoya, 45 F.3d at 1291; United States v. Gann, 732 F.2d 714, 724 (9th Cir. 1984).

A de novo standard was advocated in United States v. Martinez, 785 F.2d 663, 666 (9th Cir. 1988). Subsequent cases appear to have considered the evidence de novo without stating that standard was being used. See, e.g., United States v. Edmonds, 103 F.3d 822, 826 (9th Cir. 1997); Kolek v. Engen, 869 F.2d 1281, 1287-88 (9th Cir. 1989); Adamson v. Ricketts, 865 F.2d 1011, 1017-20 (9th Cir. 1988). Most cases simply decline to decide what standard of review applies because the "claim of prosecutorial vindictiveness fails regardless of which standard is applied." See Hernandez-Herrera, 273 F.3d at 1217; see also Frega, 179 F.3d at 801 (declining to decide).

61. **Voluntariness of a Confession**

This court reviews de novo the voluntariness of a confession. See United States v. Male Juvenile (Pierre Y.), 280 F.3d 1008, 1014 (9th Cir. 2002); United States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999); United States v. Fisher, 137 F.3d 1158, 1165 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1110 (9th Cir. 1998); United States v. Benitz, 34 F.3d 1489, 1495 (9th Cir. 1994); United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993); see also Pollard v. Galaza, 290 F.3d 1030, 1032 (9th Cir. 2002) (habeas); United States v. Okafor, 285 F.3d 842, 846-47 (9th Cir. 2002) (voluntariness of statements); United States v. Coleman, 208 F.3d 786, 790 (9th Cir. 2000) (same). The district court's factual findings underlying its determination of voluntariness are reviewed for clear error. Doe, 170 F.3d at 1168; Nelson, 137 F.3d at 1110; United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995). Special deference is owed to the trial court's credibility determinations. Nelson, 137 F.3d at 1110.

62. **Waiver of Rights**

Issues of waiver are reviewed de novo. See United States v. Ruiz, 241 F.3d 1157, 1163 (9th Cir. 2001) (waiver of Brady rights), rev'd on other grounds, 122 S. Ct. 2450 (2002); United States v. Garza-Sanchez, 217 F.3d 806, 808 (9th Cir. 2000) (waiver of appellate rights); United States v. Portillo-Cano, 192 F.3d 1246, 1249 (9th Cir. 1999) (same); United States v. Johnson, 67 F.3d 200, 202 n.3 (9th Cir. 1995). Whether a waiver is voluntary is reviewed de novo. See United States v. Amano, 229 F.3d 801, 803 (9th Cir. 2000); United States v. Anglin, 215 F.3d 1064, 1066 (9th Cir. 2000); United States v. Aguilar-Muniz, 156 F.3d 974, 978 (9th Cir. 1998); United States v. Stocks, 104 F.3d 308, 312 (9th Cir. 1997); United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993). Whether a waiver was knowing and intelligent, however, is reviewed for clear error. See Amano, 229 F.3d at 803; United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc); Stocks, 104 F.3d at 312; United States v. Doe, 60 F.3d 544, 546 (9th Cir. 1995); Bautista-Avila, 6 F.3d at 1364.

In habeas, the finding of a knowing and voluntary waiver is a mixed question of law and fact reviewed de novo. Campbell v. Wood, 18 F.3d 662, 672 (9th Cir. 1994) (en banc). "The ultimate issue of voluntariness is a legal question requiring independent federal determination." Id.

Whether a defendant has knowingly and intelligently waived the Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. See United States v. Percy, 250 F.3d 720, 725 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Lopez-Osuna, 242 F.3d 1191, 1198 (9th Cir. 2001); United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995).

The adequacy of a jury trial waiver is a mixed question of fact and law reviewed de novo. United States v. Duane-Higareda, 113 F.3d 1000, 1002 (9th Cir. 1997); United States v. Christensen, 18 F.3d 822, 824 (9th Cir. 1994). Whether a district court should have allowed a defendant to waive trial by jury over the objection of the government is a question of law subject to de novo review. United States v. Reyes, 8 F.3d 1379, 1383 (9th Cir. 1993).

The voluntariness of a waiver of Miranda rights is reviewed de novo. See United States v. Amano, 229 F.3d 801, 803 (9th Cir. 2000); United States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999); United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc); United States v. Cazares, 121 F.3d 1241, 1243 (9th Cir. 1997); United States v. Doe, 60 F.3d 544, 546 (9th Cir. 1995). Whether the decision was knowing and intelligent is reviewed for clear error. See United States v. Banks, 282 F.3d 699, 705 (9th Cir. 2002); Amano, 229 F.3d at 803; Doe, 155 F.3d at 1074; United States v. Garibay, 143 F.3d 534, 536 (9th Cir. 1998); Cazares, 121 F.3d at 1243; Doe, 60 F.3d at

546. In habeas, the district court's decision that a defendant knowingly and voluntarily waived Miranda rights is a mixed question of law and fact reviewed de novo. Collazo v. Estelle, 940 F.2d 411, 415 (9th Cir. 1991) (en banc).

This court reviews de novo whether a defendant's waiver of the Fifth Amendment privilege against self-incrimination was compelled. United States v. Anderson, 79 F.3d 1522, 1525 (9th Cir. 1996).

Whether a defendant has waived the statutory right to appeal is reviewed de novo. See United States v. Nguyen, 235 F.3d 1179, 1182 (9th Cir. 2000); United States v. Nunez, 223 F.3d 956, 958 (9th Cir. 2000); United States v. Phillips, 174 F.3d 1074, 1075 (9th Cir. 1999); United States v. Martinez, 143 F.3d 1266, 1270 (9th Cir. 1998); United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997). The validity of a waiver of the right to appeal is reviewed de novo. See United States v. Littlejohn, 224 F.3d 960, 964 (9th Cir. 2000); United States v. Garza-Sanchez, 217 F.3d 806, 808 (9th Cir. 2000); United States v. Portillo-Cano, 192 F.3d 1246, 1249 (9th Cir. 1999); United States v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998); United States v. Zink, 107 F.3d 716, 717 (9th Cir. 1997); United States v. Ruelas, 106 F.3d 1416, 1418 (9th Cir. 1997); United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996); United States v. Petty, 80 F.3d 1384, 1386 (9th Cir. 1996).

A district court's denial of a defendant's motion to waive his or her presence at trial is reviewed for abuse of discretion. United States v. Lumitap, 111 F.3d 81, 83 (9th Cir. 1997). A trial court's factual finding that a defendant has knowingly and voluntarily failed to appear for trial is reviewed for clear error. United States v. Houtchens, 926 F.2d 824, 826 (9th Cir. 1991). A defendant's failure to object to proceedings held outside his or her presence is reviewed for plain error. See United States v. Romero, 282 F.3d 683, 689 (9th Cir. 2002).

A district court's determination that there has been a waiver of the attorney-client privilege is reviewed de novo. United States v. Amlani, 169 F.3d 1189, 1194 (9th Cir. 1999); United States v. Ortland, 109 F.3d 539, 542 (9th Cir. 1997).

63. **Warrants**

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 963 n.6 (9th Cir. 2000); see also United States v. Patterson, 292 F.3d 615, 625 (9th Cir. 2002) (noting that magistrate judge's finding of probable cause is reviewed for clear error); United States v. Hay, 231 F.3d 630, 634 n.4 (9th Cir.

2000) (same), cert. denied, 122 S. Ct. 135 (2001); United States v. Furrow, 229 F.3d 805, 815 (9th Cir. 2000); United States v. Henson, 123 F.3d 1226, 1238 (9th Cir. 1997) (same). Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. See Patterson, 292 F.3d at 625 (noting "significantly deference"); Hay, 231 F.3d at 634 n.4 ("[W]e accord great deference to the magistrate's determination of probable cause."); United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995). The court of appeals "will not reverse a magistrate judge's determination of probable cause for the purposes of issuing a search warrant absent a finding of clear error." United States v. Perez, 67 F.3d 1371, 1382 (9th Cir. 1995), withdrawn in part, 116 F.3d 840 (9th Cir. 1997) (en banc); United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993); United States v. Schmidt, 947 F.2d 362, 371 (9th Cir. 1991).

The scope of a warrant is an question of law reviewed de novo. See United States v. Cannon, 264 F.3d 875, 878 (9th Cir. 2001), cert. denied, 122 S. Ct. 1097 (2002); United States v. Gorman, 104 F.3d 272, 274 (9th Cir. 1996); but see United States v. Chen, 979 F.2d 714, 716 (9th Cir. 1992) (noting that standard of review of a district court's determination that government agents flagrantly disregarded the terms of a search warrant is unclear)

Whether an area is within the protected curtilage of a home is reviewed de novo. See United States v. Cannon, 264 F.3d 875, 879 (9th Cir. 2001), cert. denied, 122 S. Ct. 1097 (2002); United States v. Johnson, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard).

Whether a warrant is sufficiently specific is reviewed de novo. See United States v. Noushfar, 78 F.3d 1442, 1447 (9th Cir. 1996). The assessment of the legal sufficiency of a redacted affidavit is reviewed de novo. See United States v. Huguez-Ibarra, 954 F.2d 546, 551 (9th Cir. 1992); United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir. 1987). Whether a warrant describes the items to be seized with sufficient particularity is also reviewed de novo. United States v. Baldwin, 987 F.2d 1432, 1435 (9th Cir. 1993).

Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. United States v. Kurt, 986 F.2d 309, 311 (9th Cir. 1993); United States v. Negrete-Gonzales, 966 F.2d 1277, 1282 (9th Cir. 1992). Whether officers could in objective good faith rely on a warrant not supported by probable cause is reviewed de novo. United States v. Fowlie, 24 F.3d 1059, 1066 (9th Cir. 1994).

64. **Wiretaps**

A district court's authorization of a wiretap is reviewed for an abuse of discretion. See United States v. Blackmon, 273 F.3d 1204, 1207 (9th Cir. 2001); United States v. Robertson, 15 F.3d 862, 874 (9th Cir.), rev'd on other grounds, 514 U.S. 669 (1995); United States v. Echavarria-Olarte, 904 F.2d 1391, 1395 (9th Cir. 1990); United States v. Carneiro, 861 F.2d 1171, 1177 (9th Cir. 1988). Nevertheless, this court reviews de novo whether the requisite full and complete statement of facts was submitted in compliance with 18 U.S.C. § 2518(1)(c). See Blackmon, 273 F.3d at 1207; Robertson, 15 F.3d at 874; United States v. Khan, 993 F.2d 1368, 1375 (9th Cir. 1993); Carneiro, 861 F.2d at 1176.

The court's decision to deny a motion to suppress wiretap evidence is reviewed de novo. See United States v. Reyna, 218 F.3d 1108, 1110 (9th Cir. 2000); United States v. Duran, 189 F.3d 1071, 1083 (9th Cir. 1999). The ultimate question whether a false statement or omission is necessary to a finding of probable cause is a mixed question of law and fact reviewed de novo. United States v. Tham, 960 F.2d 1391, 1395 (9th Cir. 1992). This court reviews de novo a district court's denial of a Franks hearing challenging the veracity of an affidavit supporting a wiretap application. United States v. Meling, 47 F.3d 1546, 1553 (9th Cir. 1995). The district court's underlying factual determinations are reviewed for clear error. Tham, 960 F.2d at 1395.

A trial court's decision to allow use of wiretap transcripts during trial and to permit such exhibits in the jury room is reviewed for an abuse of discretion. United States v. Rrapi, 175 F.3d 742, 746 (9th Cir. 1999); United States v. Fuentes-Montijo, 68 F.3d 352, 354 (9th Cir. 1995).

C. Trial Decisions in Criminal Cases

1. Acquittals

A trial court's ruling on a motion for acquittal is reviewed de novo. See United States v. Hardy, 289 F.3d 608, 612 (9th Cir. 2002); United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001); United States v. Ruiz-Lopez, 234 F.3d 445, 447 (9th Cir. 2001); United States v. Egge, 223 F.3d 1128, 1131 (9th Cir. 2000); United States v. Pacheco-Medina, 212 F.3d 1162, 1163 (9th Cir. 2000); United States v. Sarkisian, 197 F.3d 966, 984 (9th Cir. 1999); United States v. Yossunthorn, 167 F.3d 1267, 1270 (9th Cir. 1999); United States v. Neill, 166 F.3d 943, 948 (9th Cir. 1999); United States v. Tubiolo, 134 F.3d 989, 991 (9th Cir. 1998); United States v. Tucker,

133 F.3d 1208, 1214 (9th Cir. 1998); United States v. Clayton, 108 F.3d 1114, 1116 (9th Cir. 1997); United States v. Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997); United States v. Bahena-Cardenas, 70 F.3d 1071, 1072 (9th Cir. 1995); United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994). The test to be applied is the same as a challenge to the sufficiency of the evidence. See United States v. Mendez-Casillas, 272 F.3d 1199, 1202-03 (9th Cir. 2001); United States v. Stoddard, 150 F.3d 1140, 1144 (9th Cir. 1998); Clayton, 108 F.3d at 1116; Bahena-Cardenas, 70 F.3d at 1072; Riggins, 40 F.3d at 1057. Consequently, this court must review the evidence presented against the defendant in a light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Hernandez-Herrera, 273 F.3d at 1218; Mendez-Casillas, 272 F.3d at 1203; Pacheco-Medina, 212 F.3d at 1163; Yossunthorn, 167 F.3d at 1270; Stoddard, 150 F.3d at 1144; Tubiolo, 134 F.3d at 991; Riggins, 40 F.3d at 1057.

The denial of a motion for judgment of acquittal based on the untimeliness of the motion involves factual findings reviewed under the clearly erroneous standard. United States v. Mullins, 992 F.2d 1472, 1478 (9th Cir. 1993); United States v. Stauffer, 922 F.2d 508, 516 (9th Cir. 1990). When a defendant fails to renew a motion for judgment of acquittal at the close of all evidence in a jury trial, this court reviews only for plain error to prevent a miscarriage of justice. See United States v. Timmins, ___ F.3d ___, No. 00-30224 (9th Cir. July 17, 2002) (noting that "any practical difference between the standards is irrelevant"); United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1200 (9th Cir. 2000); Yossunthorn, 167 F.3d at 1270 n.4 (explaining how defendant may preserve de novo review); United States v. Carpenter, 95 F.3d 773, 775 (9th Cir. 1996); United States v. Quintero-Barraza, 78 F.3d 1344, 1351 (9th Cir. 1996); United States v. Winslow, 962 F.2d 845, 850 (9th Cir. 1992). But see United States v. Jackson, 72 F.3d 1370, 1381 n.6 (9th Cir. 1995) (noting an exception). No such motion is required, however, in a bench trial to preserve for appeal a challenge to the sufficiency of the evidence. See United States v. Atkinson, 990 F.2d 501, 503 (9th Cir. 1993) (en banc). When a claim of sufficiency of the evidence is preserved by a motion for acquittal at the close of the evidence, the appellate court reviews the district court's denial of the motion de novo. See United States v. Carranza, 289 F.3d 634, 641 (9th Cir. 2002).

2. **Admission of Evidence**

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. See United States v. Williams, 291 F.3d 1180, 1189 (9th Cir. 2002) (Rule 404(b)); Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 939 (9th Cir. 2001) (Rule 702); United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000) (expert testimony);

United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000) (DNA evidence); United States v. Castillo, 181 F.3d 1129, 1134 (9th Cir. 1999) (Rule 404); United States v. Leon-Reyes, 177 F.3d 816, 819 (9th Cir. 1999) (no abuse); United States v. Hernandez, 109 F.3d 1450, 1452 (9th Cir. 1997) (abuse of discretion); United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997) (no abuse). Such decisions will be reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. See United States v. Edwards, 235 F.3d 1173, 1178 (9th Cir. 2000); United States v. Ramirez, 176 F.3d 1179, 1182 (9th Cir. 1999); United States v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); United States v. Workinger, 90 F.3d 1409, 1412 (9th Cir. 1996); United States v. Karterman, 60 F.3d 576, 578 (9th Cir. 1995). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed for an abuse of discretion. See United States v. Patterson, 292 F.3d 615, 626 (9th Cir. 2002).

The district court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. See United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000); United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999) (Rule 609); United States v. Walker, 117 F.3d 417, 419 (9th Cir. 1997); United States v. Collicott, 92 F.3d 973, 978 (9th Cir. 1996); United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995).

Questions of the admissibility of evidence that involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000); United States v. Murphy, 65 F.3d 758, 761 (9th Cir. 1995); United States v. Wood, 943 F.2d 1048, 1055 n.9 (9th Cir. 1991). When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then deference is given to the decision of the district court; otherwise, review is de novo. See Mateo-Mendez, 215 F.3d at 1042; United States v. Marbella, 73 F.3d 1508, 1515 (9th Cir. 1996); United States v. Yin, 935 F.2d 990, 994 (9th Cir. 1991); see also United States v. James, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc) (standard of review of discretionary evidentiary rulings is abuse of discretion); United States v. Thompson, 37 F.3d 450, 452 (9th Cir. 1994) (evidentiary ruling that raises predominantly legal question is reviewed de novo).

3. **Allen Charges**

The trial court's decision to instruct the jury with an Allen charge is reviewed for an abuse of discretion. See United States v. Daas, 198 F.3d 1167, 1178 (9th Cir. 1999)

(modified charge); United States v. Nelson, 137 F.3d 1094, 1109 (9th Cir. 1998); United States v. Hernandez, 105 F.3d 1330, 1333 (9th Cir. 1997); United States v. Wills, 88 F.3d 704, 717 (9th Cir. 1996). The trial court's delivery of an Allen charge must be upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury. Daas, 198 F.3d at 1178; Nelson, 137 F.3d at 1109; Hernandez, 105 F.3d at 1333. Note, however, that whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact reviewed de novo. See Rodriguez v. Marshall, 125 F.3d 739, 748 (9th Cir. 1997) (habeas).

4. **Authenticity**

A trial court's decision regarding the authenticity of evidence is reviewed for an abuse of discretion. United States v. Workinger, 90 F.3d 1409, 1415 (9th Cir. 1996); United States v. Childs, 5 F.3d 1328, 1335 (9th Cir. 1993). Authentication of evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a); Workinger, 90 F.3d at 1409; United States v. Harrington, 923 F.2d 1371, 1373 (9th Cir. 1991). The trial court's conclusion that evidence is supported by a proper foundations is also reviewed for an abuse of discretion. See United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000).

5. **Batson Claims**

The trial court's "remedy" for a Batson violation is reviewed for an abuse of discretion. See United States v. Ramirez-Martinez, 273 F.3d 903, 910 (9th Cir. 2001). Whether a particular jury satisfies the "representative jury" required by Batson is a question of law reviewed de novo. See United States v. Bishop, 959 F.2d 820, 827 (9th Cir. 1992); see also Cooperwood v. Cambra, 245 F.3d 1042, 1047 (9th Cir.) (habeas) (reviewing de novo the state court's ruling on the Batson prima facie issue), cert. denied, 122 S. Ct. 228 (2001). When defense counsel fails to preserve a Batson claim, review is limited to plain error. United States v. Contreras-Contreras, 83 F.3d 1103, 1105 (9th Cir. 1996). The district court's findings of fact as to the racially discriminatory use of peremptory challenges are reviewed for clear error. See United States v. Annigoni, 96 F.3d 1132, 1136 n.3 (9th Cir. 1996) (en banc); see also United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001) (reviewing for clear error whether defendant established prima facie showing that challenge was race-based); Tolbert v. Page, 182 F.3d 677, 685 (9th Cir. 1999) (en banc) (holding that state trial court's ruling on whether a criminal defendant has established a prima facie case of prosecutorial discrimination in the exercise of peremptory challenge is reviewed under deferential standard); United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir.

1999) ("The district court's determination on intent to discriminate is reviewed under a deferential standard.").

6. **Bruton Violations**

An alleged Bruton violation is reviewed de novo. See United States v. Angwin, 271 F.3d 786, 795 (9th Cir. 2001), cert. denied, 122 S. Ct. 1385 (2002); United States v. Hoac, 990 F.3d 1099, 1105 (9th Cir. 1993). When there is no objection at trial, review is limited to plain error. See United States v. Arias-Villanueva, 998 F.2d 1491, 1507 (9th Cir. 1993).

7. **Burden of Proof**

Whether a district court properly applied the correct burden of proof is a question of law reviewed de novo. See United States v. Gill, 280 F.3d 923, 930 (9th Cir. 2002) (sentencing). Whether the court improperly shifted the burden of proof is reviewed de novo. See United States v. Coutchavlis, 260 F.3d 1149, 1156 (9th Cir. 2001). The trial court's determination that a defendant has the burden of proving a defense is reviewed de novo. See United States v. Hernandez-Franco, 189 F.3d 1151, 1157 (9th Cir. 1999); United States v. McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1998); United States v. Meraz-Solomon, 3 F.3d 298, 299 (9th Cir. 1993) (per curiam); United States v. Dominguez-Mestas, 929 F.2d 1379, 1381 (9th Cir. 1991) (same). The trial court's allocation of the burden of proof is also reviewed de novo. See United States v. Pisello, 877 F.2d 762, 764 (9th Cir. 1989); see also United States v. Phelps, 955 F.2d 1258, 1266 (9th Cir. 1992) (denial of release).

8. **Chain of Custody**

The trial court's ruling on a chain-of-custody challenge to evidence is reviewed for an abuse of discretion. See United States v. Matta-Ballestros, 71 F.3d 754, 768 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996).

9. **Character Evidence**

Admission of character evidence is reviewed for an abuse of discretion. See United States v. Cervantes, 219 F.3d 882, 884 (9th Cir. 2000); United States v. Castillo, 181 F.3d 1129, 1132 (9th Cir. 1999); United States v. Bracy, 67 F.3d 1421, 1432 (9th Cir. 1995). If no objection was raised, the court's decision to admit the evidence is reviewed for plain error. Bracy, 67 F.3d at 1432.

10. **Closing Arguments**

The district court's decision to allow a jury to consider comments made in closing argument to which one party objects is reviewed for an abuse of discretion. See United States v. Tam, 240 F.3d 797, 801 (9th Cir. 2001); United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999); United States v. Etsitty, 130 F.3d 420, 424 (9th Cir. 1997), amended by 140 F.3d 1274 (9th Cir. 1998); United States v. Chastain, 84 F.3d 321, 323 (9th Cir. 1996); United States v. Diaz, 961 F.2d 1417, 1418 (9th Cir. 1992). The plain error standard applies when there is no objection. See United States v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999); Cooper, 173 F.3d at 1203; United States v. Senchenko, 133 F.3d 1153, 1156 (9th Cir. 1998); Etsitty, 130 F.3d at 424; United States v. Jones, 84 F.3d 1206, 1211 (9th Cir. 1996); United States v. Manning, 56 F.3d 1188, 1199 (9th Cir. 1995).

Prosecutors are forbidden from commenting on a defendant's decision not to testify. Griffin v. California, 380 U.S. 609, 615 (1985); United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996). Claimed violations are reviewed de novo. See United States v. Smith, 282 F.3d 758, 769 (9th Cir. 2002). When there is no objection, review is limited to plain error. See United States v. Tam, 240 F.3d 797, 801 (9th Cir. 2001); Cooper, 173 F.3d at 1203; United States v. Amlani, 111 F.3d 705, 714 (9th Cir. 1997); Atcheson, 94 F.3d at 1245; United States v. Mayans, 17 F.3d 1174, 1185 (9th Cir. 1994).

11. **Credibility Determinations**

A trial court's ruling on the credibility of a witness is reviewed for clear error. See United States v. Reid, 226 F.3d 1020, 1029 (9th Cir. 2000); United States v. Cervantes, 219 F.3d 882, 891 (9th Cir. 2000); United States v. Hanley, 190 F.3d 1017, 1031 (9th Cir. 1999); United States v. Matta-Ballesteros, 71 F.3d 754, 766 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996). "[W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Matta-Ballesteros, 71 F.3d at 766 (internal quotation omitted).

Claims that a prosecutor improperly vouched for the credibility of witnesses is reviewed for plain error when no objection was made by the defendant. See United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999); United States v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999); United States v. Garcia-Guizar, 160 F.3d 511, 521 (9th Cir. 1998); United States v. Rudberg, 122 F.3d 1199, 1206 (9th Cir. 1997).

12. **Coconspirator Statements**

A trial court's decision to admit coconspirator statements is reviewed for an abuse discretion, while its underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy are reviewed for clear error. See United States v. Bowman, 215 F.3d 951, 960 (9th Cir. 2000); United States v. Gil, 58 F.3d 1414, 1419 (9th Cir. 1995). In United States v. Pena-Espinoza, 47 F.3d 356, 360-61 (9th Cir. 1995), however, the court stated that "[w]e review de novo the legal question of whether the government established a prima facie showing of conspiracy but apply a clearly erroneous standard in reviewing whether a challenged statement was made in the course and furtherance of the conspiracy." The court noted that "[t]he standard for reviewing the prima facie showing is . . . unsettled in this circuit." Id. at 361 n.3.

Prior to Bourjaily v. United States, 483 U.S. 171 (1987), this circuit reviewed de novo the district court's legal conclusion that a conspiracy existed. See United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988) (reviewing development of standard of review). In Bourjaily, the Supreme Court noted that the district court's factfinding regarding the existence of a conspiracy and the defendant's involvement in it was not clearly erroneous. Bourjaily, 483 U.S. at 181. After Bourjaily, this court has generally stated that it reviews for clear error the district court's findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy. See United States v. Torres, 908 F.2d 1417, 1425 (9th Cir. 1990). Notwithstanding, some decisions state that the circuit's standard of review is "unclear." See Pena-Espinoza, 47 F.3d at 361 n.3; United States v. Castaneda, 16 F.3d 1504, 1507 (9th Cir. 1994).

In some instances, this court has simply stated that "[w]e review for abuse of discretion the district court's decision to admit evidence of a co-conspirator's statement." United States v. Garza, 980 F.2d 546, 553 (9th Cir. 1992). This is the correct standard if review is limited to the trial court's discretionary decision to admit evidence. In United States v. Peralta, 941 F.2d 1003, 1006 (9th Cir. 1991), the court noted that the abuse of discretion standard applied to the trial court's decision to admit the statements but the trial court's underlying findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy are reviewed for clear error. The correct standard is probably that this court reviews for abuse of discretion the district court's decision to admit coconspirator statements and for clear error the underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy. See United States v. Segura-Gallegos, 41 F.3d 1266, 1271 (9th Cir. 1994); United States v. Arambula-Ruiz, 987 F.2d 599, 607 (9th Cir. 1993). There remain some instances, however, where this court reviews de novo the

trial court's conclusion regarding the existence of a conspiracy. See United States v. Pena-Espinoza, 47 F.3d 356, 360-61 (9th Cir. 1995); United States v. Vowiell, 869 F.2d 1264, 1267 (9th Cir. 1989).

A claim that the admission of a non-testifying codefendant's out-of-court statement violates Bruton v. United States, 391 U.S. 123 (1968), is reviewed de novo. See United States v. Angwin, 271 F.3d 786, 795 (9th Cir. 2001), cert. denied, 122 S. Ct. 1385 (2002); United States v. Hoac, 990 F.3d 1099, 1105 (9th Cir. 1993). When there is no objection at trial, review is limited to plain error. See United States v. Arias-Villanueva, 998 F.2d 1491, 1507 (9th Cir. 1993).

13. **Comments on the Evidence**

A trial court has discretion to comment on the evidence, as long as it makes clear that the jury must ultimately decide all questions of fact. People of Guam v. McGravey, 14 F.3d 1344, 1348 (9th Cir. 1994). Whether a judge's comment on a defendant's decision not to testify violates the right against self-incrimination is reviewed de novo. See United States v. Coutchavlis, 260 F.3d 1149, 1156 (9th Cir. 2001).

14. **Confrontation Clause**

Alleged violations of the Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999); United States v. Murillo, 288 F.3d 1126, 1137 (9th Cir. 2002); United States v. Saya, 247 F.3d 929, 937 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Boone, 229 F.3d 1231, 1232 (9th Cir. 2000); United States v. Bowman, 215 F.3d 951, 960 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Shannon, 137 F.3d 1112, 1118 (9th Cir. 1998); United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997); United States v. Miguel, 111 F.3d 666, 669 (9th Cir. 1997); see also Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); Paradis v. Arave, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

Whether limitations on cross-examination are so severe as to violate the Confrontation Clause is a question of law reviewed de novo. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Munoz, 233 F.3d 1117,

1134 (9th Cir. 2000) (describing two-part inquiry); Ortega, 203 F.3d at 682; United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999) (noting, however, that trial court has considerable discretion in restricting cross-examination, and error is present only when that discretion has been abused); United States v. James, 139 F.3d 709, 713 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997); United States v. Ripinsky, 109 F.3d 1436, 1455 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997); United States v. Marbella, 73 F.3d 1508, 1513 (9th Cir. 1996); United States v. Gil, 58 F.3d 1414, 1421 (9th Cir. 1995).

Confrontation Clause violations are also subject to harmless error analysis. See United States v. Orellana-Blanco, 294 F.3d 1143, 1148 (9th Cir. 2002); United States v. Pena-Gutierrez, 222 F.3d 1080, 1089 (9th Cir. 2000); Ortega, 203 F.3d at 682; United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999); Miguel, 111 F.3d at 671-72; United States v. Vargas, 933 F.2d 701, 704-05 (9th Cir. 1991); see also Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); Whelchel v. Washington, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas); Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (habeas).

15. **Constitutionality of Regulations and Statutes**

Whether a regulation is unconstitutional is a question of law reviewed de novo. See United States v. Elias, 269 F.3d 1003, 1014 (9th Cir. 2001) (vagueness); United States v. Coutchavlis, 260 F.3d 1149, 1155 (9th Cir. 2001) (same); United States v. Albers, 226 F.3d 989, 992 (9th Cir. 2000) (same), cert. denied, 531 U.S. 1114 (2001); United States v. Erickson, 75 F.3d 470, 475 (9th Cir. 1996) (vagueness, overbroadness and "prior restraint"); United States v. Woodley, 9 F.3d 774, 778 (9th Cir. 1993) (vagueness). Note that the district court's interpretation of a regulation is reviewed de novo. See United States v. Willfong, 274 F.3d 1297, 1300 (9th Cir. 2001); United States v. Albers, 226 F.3d 989, 994 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); United States v. Ani, 138 F.3d 390, 391 (9th Cir. 1998); United States v. Hoff, 22 F.3d 222, 223 (9th Cir. 1994); United States v. Gomez-Osorio, 957 F.2d 636, 639 (9th Cir. 1992). An agency's interpretation of regulations, however, is entitled to deference. United States v. McKittrick, 142 F.3d 1170, 1173 (9th Cir. 1998).

The constitutionality of a statute is a question of law reviewed de novo. See United States v. Stokes, 292 F.3d 964, 966 (9th Cir. 2002); United States v. Carranza, 289 F.3d 634, 643 (9th Cir. 2002); United States v. Parks, 285 F.3d 1133, 1142 (9th Cir. 2002); United States v. Jones, 231 F.3d 508, 513 (9th Cir. 2000); United States v. Kafka, 222 F.3d 1129, 1130 (9th Cir. 2000); United States v. Kaluna, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc); United States v. Frega, 179 F.3d 793, 802 n.6 (9th Cir. 1999);

United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999); United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996); United States v. Kim, 94 F.3d 1247, 1249 (9th Cir. 1996); United States v. Rambo, 74 F.3d 948, 956 (9th Cir. 1996); United States v. Sahhar, 56 F.2d 1026, 1028 (9th Cir. 1995); see also United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture). Whether a statute is void for vagueness is a question of law reviewed de novo. United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015, 1019 (9th Cir. 1998); United States v. Hockings, 129 F.3d 1069, 1070 (9th Cir. 1997); United States v. Woodley, 9 F.3d 774, 778 (9th Cir. 1993). Whether a statute violates a defendant's right to due process is reviewed de novo. United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999).

The construction or interpretation of a statute is reviewed de novo. See United States v. Carranza, 289 F.3d 634, 642 (9th Cir. 2002) (criminal statute); Gilmore v. People of the State of California, 220 F.3d 987, 997 (9th Cir. 2000); United States v. Deeb, 175 F.3d 1163, 1166-67 (9th Cir. 1999) (money laundering statute); Mack, 164 F.3d at 471 (National Firearms Act); United States v. Doe, 136 F.3d 631, 634 (9th Cir. 1998) (federal arson statute); United States v. DeLaCorte, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking statute); United States v. Hunter, 101 F.3d 82, 84 (9th Cir. 1996) (sentencing statute); United States v. Willett, 90 F.3d 404, 406 (9th Cir. 1996) (sentencing guidelines); United States v. Salemo, 81 F.3d 1453, 1457 (9th Cir. 1996) (Criminal Justice Act); United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (Omnibus Crime Control and Safe Streets Act); United States v. Bailey, 41 F.3d 413, 416 (9th Cir. 1994) (statute defining "access device"); United States v. Ramos, 39 F.3d 219, 220 (9th Cir. 1994) (state law). The scope of conduct covered by a criminal statute is also a question of law reviewed de novo. See Deeb, 175 F.3d at 1167.

16. **Contempt**

The district court's decision to invoke summary contempt procedures, including its consideration of the need for immediate action, is reviewed for an abuse of discretion. United States v. Rrapi, 175 F.3d 742, 753 (9th Cir. 1999); United States v. Engstrom, 16 F.3d 1006, 1009 (9th Cir. 1994).

A district court's findings of fact in support of a disciplinary order are reviewed for clear error. United States Dist. Court v. Sandlin, 12 F.3d 861, 864-65 (9th Cir. 1993). The terms and conditions of a disciplinary order are reviewed for abuse of discretion. Engstrom, 16 F.3d at 1011.

The legality of a sentence imposed for criminal contempt is reviewed de novo. United States v. Carpenter, 91 F.3d 1282, 1283 (9th Cir. 1996). Whether a magistrate judge has jurisdiction to impose criminal contempt sanctions is a question of law reviewed de novo. Bingman v. Ward, 100 F.3d 653, 656 (9th Cir. 1996).

A district court's civil contempt order is reviewed for an abuse of discretion. United States v. Ayres, 166 F.3d 991, 995 (9th Cir. 1999); Hook v. Arizona Dep't of Corrections, 107 F.3d 1397, 1403 (9th Cir. 1997); United States v. Bodwell, 66 F.3d 1000, 1001 (9th Cir. 1995).

17. **Continuances**

A trial court's ruling on a request for a continuance of trial is reviewed for an abuse of discretion. See United States v. Zamora-Hernandez, 222 F.3d 1046, 1049 (9th Cir. 2000); United States v. Garrett, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (en banc); United States v. Rude, 88 F.3d 1538, 1550 (9th Cir. 1996). The court's decision to grant or deny a motion for continuance made during trial is also reviewed for an abuse of discretion. See United States v. Nguyen, 88 F.3d 812, 819 (9th Cir. 1996); United States v. Gonzalez-Rincon, 36 F.3d 859, 865 (9th Cir. 1994). The decision to deny a motion for continuance made on the first day of trial is also reviewed for an abuse of discretion. United States v. Torres-Rodriguez, 930 F.2d 1375, 1383 (9th Cir. 1991). A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. United States v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993).

"To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [her] defense." Gonzalez-Rincon, 36 F.3d at 865 (internal quotation omitted). A trial court abuses its discretion only if its denial of a continuance was arbitrary or unreasonable. Rude, 88 F.3d at 1538; United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996).

18. **Cross-Examination**

A trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. See United States v. Castellanos-Garcia, 270 F.3d 773, 775 (9th Cir. 2001), cert. denied, 122 S. Ct. 1939 (2002); United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2000); United States v. Lo, 231 F.3d 471, 482 (9th Cir. 2000); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999); United States v. James, 139 F.3d 709, 713 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997); United States v. Colbert, 116 F.3d 395, 396 (9th Cir. 1997); United States v. Ripinsky, 109 F.3d 1436, 1445 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997); United States

v. Dudden, 65 F.3d 1461, 1469 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1197 (9th Cir. 1995). "The trial court does not abuse its discretion as long as the jury receives sufficient information to appraise the biases and motivations of the witnesses." Manning, 56 F.3d at 1197 (internal quotation omitted). The trial court's decision to permit cross-examination is reviewed for abuse of discretion. United States v. Senchenko, 133 F.3d 1153, 1158-59 (9th Cir. 1998).

Whether limitations on cross-examination violated a defendant's right of confrontation is reviewed de novo. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000); Bensimon, 172 F.3d at 1128; James, 139 F.3d at 713; Cruz, 127 F.3d at 801; United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997); Ripinsky, 109 F.3d at 1445; United States v. Marbella, 73 F.3d 1508, 1513 (9th Cir. 1996). The district court's decision to admit evidence for impeachment purposes on cross-examination is reviewed for a abuse of discretion. United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996). Violations of the constitutional right to cross-examine are subject to harmless error analysis. Ortega, 203 F.3d at 682; Amlani, 111 F.3d at 716; Ripinsky, 109 F.3d at 1445.

Whether a court's limitation on recross-examination constitutes a violation of the Confrontation Clause is also reviewed de novo. United States v. Baker, 10 F.3d 1374, 1405 (9th Cir. 1993); United States v. Vargas, 933 F.2d 701, 704 (9th Cir. 1991). Within the bounds of constitutionality, review of the court's limitations on recross is for an abuse of discretion. Baker, 10 F.3d at 1405.

In habeas review, a state trial court has "considerable discretion to limit cross-examination." Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (internal quotation omitted).

19. **Documentary Evidence**

A district court's ruling on the admission of documentary evidence is reviewed for abuse of discretion. United States v. Blitz, 151 F.3d 1002, 1007 (9th Cir. 1998) (bank records); United States v. Bachsian, 4 F.3d 796, 799 (9th Cir. 1993) (shipping documents); United States v. Hernandez, 876 F.2d 774, 778 (9th Cir. 1989) (police reports); United States v. Miller, 874 F.2d 1255, 1275 (9th Cir. 1989) (classified documents); United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985) (confirmation sale slips).

20. **Double Jeopardy**

Double jeopardy claims are reviewed de novo. See United States v. Patterson, 292 F.3d 615, 622 (9th Cir. 2002); United States v. Williams, 291 F.3d 1180, 1186 (9th Cir. 2002); United States v. Male Juvenile (Pierre Y.), 280 F.3d 1008, 1014 (9th Cir. 2002) (noting review applies to both statutory and constitutional claims). Whether a defendant's double jeopardy rights have been violated is a question of law reviewed de novo. See United States v. Williams, 291 F.3d 1180, 1186 (9th Cir. 2002); United States v. Pluff, 253 F.3d 490, 492 (9th Cir. 2001); United States v. Byrne, 203 F.3d 671, 673 (9th Cir. 2000); United States v. Ruiz-Alvarez, 211 F.3d 1181, 1185 (9th Cir. 2000); United States v. McClain, 133 F.3d 1191, 1193 (9th Cir. 1998); United States v. Stoddard, 111 F.3d 1450, 1454 (9th Cir. 1997); United States v. Scarano, 76 F.3d 1471, 1474 (9th Cir. 1996).

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. United States v. James, 109 F.3d 597, 599 (9th Cir. 1997); United States v. Merriam, 108 F.3d 1162, 1163 (9th Cir. 1997); United States v. McClinton, 98 F.3d 1199, 1201 (9th Cir. 1996); United States v. Wright, 79 F.3d 112, 114 (9th Cir. 1996).

The district court's denial of a motion for a hearing on the issue of double jeopardy is reviewed for an abuse of discretion. United States v. Hernandez, 80 F.3d 1253, 1261 (9th Cir. 1996).

Whether a trial court's correction of a verdict form violates double jeopardy is reviewed de novo. United States v. Stauffer, 922 F.2d 508, 513 (9th Cir. 1990). "Whether the Double Jeopardy Clause bars appeal and retrial is reviewed de novo." United States v. Affinito, 873 F.2d 1261, 1263 (9th Cir. 1989); but see United States v. Martinez, 122 F.3d 1161, 1163 n.2 (9th Cir. 1997) (noting that de novo review is a misnomer when the district court has not been presented with the issue). The applicability of collateral estoppel and its relationship to double jeopardy involve questions of law reviewed de novo. United States v. Seley, 957 F.2d 717, 720 (9th Cir. 1992).

Whether sentencing violates a defendant's double jeopardy rights is reviewed de novo. See United States v. Salemo, 81 F.3d 1453, 1462 (9th Cir. 1996); United States v. Jernigan, 60 F.3d 562, 563 (9th Cir. 1995); United States v. Campbell, 42 F.3d 1199, 1206 (9th Cir. 1994). Whether resentencing violates a defendant's double jeopardy

rights is also reviewed de novo. See United States v. Ruiz-Alvarez, 211 F.3d 1181, 1184 (9th Cir. 2000); United States v. McClain, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas); United States v. Caterino, 29 F.3d 1390, 1394 (9th Cir. 1994); United States v. Kinsey, 994 F.2d 699, 702 (9th Cir. 1993) (habeas).

It is unclear whether a double jeopardy claim that was not raised in the district court is subject to plain error review or is deemed to have been waived. See United States v. Kearns, 61 F.3d 1422, 1427-28 (9th Cir. 1995) (assuming that plain error standard applies); United States v. Lorenzo, 995 F.3d 1448, 1457-58 (9th Cir. 1993) (same). But see United States v. Freeman, 6 F.3d 586, 600-01 (9th Cir. 1993) (rejecting waiver and reviewing for plain error).

21. **Entrapment**

A defendant's entrapment argument is reviewed de novo as a matter of law. United States v. Tucker, 133 F.3d 1208, 1214 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 797 (9th Cir. 1997); United States v. Figueroa-Lopez, 125 F.3d 1241, 1244 (9th Cir. 1997); United States v. Thickstun, 110 F.3d 1394, 1396 (9th Cir. 1997). A trial court's decision to exclude evidence of an entrapment defense is reviewed de novo. See United States v. Hancock, 231 F.3d 557, 560 (9th Cir. 2000), cert. denied, 532 U.S. 989 (2001); United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000); United States v. Brebner, 951 F.2d 1017, 1024 (9th Cir. 1990). Whether a jury instruction properly states the law of entrapment is a question of law subject to de novo review. United States v. LaRizza, 72 F.3d 775, 778 (9th Cir. 1995); United States v. Reese, 60 F.3d 660, 661 (9th Cir. 1995); United States v. Lorenzo, 43 F.3d 1303, 1306 (9th Cir. 1995).

22. **Evidentiary Rulings**

A district court's evidentiary rulings during trial are generally reviewed for an abuse of discretion. See Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997); United States v. Parks, 285 F.3d 1133, 1138 (9th Cir. 2002); United States v. Nguyen, 284 F.3d 1086, 1089 (9th Cir. 2002); United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001), cert. denied, 122 S. Ct. 1342 (2002); United States v. Mendoza, 244 F.3d 1037, 1046 (9th Cir.), cert. denied, 122 S. Ct. 221 (2001); United States v. Crawford, 239 F.3d 1086, 1090 (9th Cir. 2000), cert. denied, 122 S. Ct. 393 (2001); United States v. Fleming, 215 F.3d 930, 938 (9th Cir. 2000); United States v. Hankey, 203 F.3d 1160, 1166 (9th Cir. 2000); United States v. Castillo, 181 F.3d 1129, 1134 (9th Cir. 1999); United States v. Ramirez, 176 F.3d 1179, 1182 (9th Cir. 1999); United States v. Senchenko, 133 F.3d 1153, 1158 (9th Cir. 1998); United States v. Figueroa-Lopez, 125

F.3d 1241, 1244 (9th Cir. 1997); United States v. Gallager, 99 F.3d 329, 331 (9th Cir. 1996); United States v. Steinberg, 99 F.3d 1486, 1492 (9th Cir. 1996); United States v. Sarno, 73 F.3d 1470, 1488 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995). "Evidentiary rulings will be reversed for abuse of discretion only if such nonconstitutional error more likely than not affected the verdict." Nguyen, 284 F.3d at 1089; Hankey, 203 F.3d at 1166; Ramirez, 176 F.3d at 1182; United States v. Workinger, 90 F.3d 1409, 1412 (9th Cir. 1996). When no objection is made, this court may review for plain error, but may reverse only if the defendant persuades this court that the error was prejudicial in that it "affected the outcome of the district court proceeding." United States v. Tisor, 96 F.3d 370, 376 (9th Cir. 1996); see also United States v. Flores, 172 F.3d 695, 698 (9th Cir. 1999); United States v. Serang, 156 F.3d 910, 915 (9th Cir. 1998).

Although review of evidentiary rulings is generally for abuse of discretion, this court has recognized that such issues may present issues of law which are reviewed de novo. See United States v. Angwin, 271 F.3d 786, 798 (9th Cir. 2001) (noting that "rulings which raise predominantly legal questions" are reviewed de novo), cert. denied, 122 S. Ct. 1385 (2002); United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000) (noting that de novo review applies whenever issues of law predominated in the district court's evidentiary analysis); United States v. James, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc) (noting when de novo review may apply to district court's evidentiary ruling); United States v. Thompson, 37 F.3d 450, 452 (9th Cir. 1994) (evidentiary ruling that raises predominantly legal question is reviewed de novo); see also United States v. Hardy, 289 F.3d 608, 612 (9th Cir. 2002) (reviewing denial of relevance objection de novo); United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999) (reviewing de novo whether evidence is relevant to crime charged or relevant only to other crimes); United States v. Keiser, 57 F.3d 847, 852 n.6 (9th Cir. 1995) (reviewing whether character evidence unknown to the defendant at the time of an assault can, as a matter of law, be relevant to the claim of self-defense, and whether, as a matter of law, such evidence is admissible in a form other than reputation or opinion). The district court's interpretations of the Federal Rules of Evidence are reviewed de novo. United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999); United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995).

A district court's ruling on the relevance of evidence is reviewed for an abuse of discretion. United States v. Bensimon, 172 F.3d 1121, 1130 (9th Cir. 1999); United States v. Hicks, 103 F.3d 837, 842 (9th Cir. 1996); United States v. Easter, 66 F.3d 1018, 1020 (9th Cir. 1995); United States v. Vaandering, 50 F.3d 696, 704 (9th Cir. 1995). Note, however, that legal issues regarding whether evidence is relevant to other acts or to the crime charged is reviewed de novo. See Hardy, 289 F.3d at 612; United

States v. Castillo, 181 F.3d 1129, 1134 (9th Cir. 1999); United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999).

A district court has broad discretion whether to admit extrinsic evidence in a criminal case. United States v. Higa, 55 F.3d 448, 452 (9th Cir. 1995). A district court's ruling on the admissibility and relevance of DNA evidence is reviewed for an abuse of discretion. Hicks, 103 F.3d at 844.

The district court's decision to admit impeachment evidence is reviewed for an abuse of discretion. See United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); United States v. Beltran, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements); United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996) (cross-examination); United States v. Scott, 74 F.3d 175, 177 (9th Cir. 1996) (prior criminal convictions); Higa, 55 F.3d at 452 (prior inconsistent statement). The trial court's refusal to allow impeachment evidence is also reviewed for an abuse of discretion. United States v. Rowe, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

The trial court's conclusion that evidence is supported by a proper foundations is reviewed for an abuse of discretion. See United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000); United States v. Santiago, 46 F.3d 885, 888 (9th Cir. 1995).

A district court's ruling on whether proffered evidence qualifies as habit evidence under Federal Rule of Evidence 406 is reviewed for an abuse. United States v. Angwin, 271 F.3d 786, 798 (9th Cir. 2001), cert. denied, 122 S. Ct. 1385 (2002).

23. **Expert Testimony**

A district court's decision to admit expert opinion testimony is reviewed for abuse of discretion. See United States v. Hanna, 293 F.3d 1080, 1085 (9th Cir. 2002); United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000); United States v. Campos, 217 F.3d 707, 710 (9th Cir. 2000); United States v. Burdeau, 168 F.3d 352, 357 (9th Cir. 1999); United States v. Cruz, 127 F.3d 791, 800 (9th Cir. 1997); United States v. Webb, 115 F.3d 711, 713 (9th Cir. 1997); United States v. Ortland, 109 F.3d 539, 542 (9th Cir. 1997); United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); see also United States v. Varela-Rivera, 279 F.3d 1174, 1177-78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error); United States v. VonWillie, 59 F.3d 922, 928 (9th Cir. 1995) (noting that court has characterized the standard of review in different ways).

The trial court's decision to exclude expert testimony is also reviewed for an abuse of discretion. See United States v. Benavidez-Benavidez, 217 F.3d 720, 723 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 971-72 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015, 1021 (9th Cir. 1998); United States v. Croft, 124 F.3d 1109, 1120 n.3 (9th Cir. 1997); United States v. Morales, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc) (expressly noting that review is for an abuse of discretion, not "manifest error"). When no objection is made, review is limited to plain error analysis; reversal is mandated only if the district court committed a clear or obvious error that affected substantial rights or was prejudicial. United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996).

This court reviews for an abuse of discretion the trial court's refusal to allow an expert to testify regarding a witness's psychiatric condition. United States v. Marsh, 26 F.3d 1496, 1502 (9th Cir. 1994). This court also reviews for an abuse of discretion the district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identifications. United States v. Hicks, 103 F.3d 837, 842 (9th Cir. 1996); United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994); United States v. Amador-Galvan, 9 F.3d 1414, 1417 (9th Cir. 1993).

"The trial court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results." United States v. Gillespie, 852 F.2d 475, 480 (9th Cir. 1988) (citations omitted); accord United States v. Sinigaglio, 942 F.2d 581, 584 (9th Cir. 1991) ("district court has wide latitude to exclude expert testimony"); United States v. Aguon, 851 F.2d 1158, 1171 (9th Cir. 1988) (en banc) ("trial court has broad discretion to admit or exclude expert testimony"), overruled on other grounds by Evans v. United States, 504 U.S. 255 (1992).

The determination whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. See Benavidez-Benavidez, 217 F.3d at 723; United States v. Garcia, 7 F.3d 885, 889 (9th Cir. 1993) (internal quotation omitted).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. United States v. Nelson, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. See United States v. Depew, 210 F.3d 1061, 1065 (9th Cir. 2000).

24. **Extrinsic Evidence**

A district court has broad discretion to decide whether to admit extrinsic evidence in a criminal case. United States v. Higa, 55 F.3d 448, 452 (9th Cir. 1995). The court's decision to admit evidence of extrinsic acts is reviewed for an abuse of discretion. United States v. Blackstone, 56 F.3d 1143, 1145 (9th Cir. 1995).

25. **Fifth Amendment Rights**

Whether there has been a violation of a defendant's Fifth Amendment right is reviewed de novo. See United States v. Bushyhead, 270 F.3d 905, 911 (9th Cir. 2001) (references to defendant's silence), cert. denied, 122 S. Ct. 1586 (2002); United States v. Velarde-Gomez, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (evidence of defendant's physical or emotional reaction); United States v. Coutchavlis, 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's comment on defendant's decision not to testify); United States v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999) (testimony regarding defendant's silence); United States v. Ross, 123 F.3d 1181, 1187 (9th Cir. 1997) (comment on defendant's silence); United States v. Anderson, 79 F.3d 1522, 1525 (9th Cir. 1996) (waiver of Fifth Amendment privilege); United States v. Mende, 43 F.3d 1298, 1301 (9th Cir. 1995) (comment on defendant's silence); United States v. Mares, 940 F.2d 455, 461 (9th Cir. 1991) (prosecutor's closing argument); United States v. Hill, 953 F.2d 452, 455 (9th Cir. 1991) (right not to testify); United States v. Gray, 876 F.2d 1411, 1416 (9th Cir. 1989) (impermissible rebuttal comments). A witness's claim of Fifth Amendment privilege is reviewed de novo. United States v. Rubio-Topete, 999 F.2d 1334 1338 (9th Cir. 1993). Note that Fifth Amendment violations are subject to harmless error review. See Velarde-Gomez, 269 F.3d at 1034-35.

A trial court's decision to exclude a witness's testimony based on an anticipated invocation of the Fifth Amendment privilege against self-incrimination is reviewed for an abuse of discretion. United States v. Klinger, 128 F.3d 705, 709 (9th Cir. 1997). The court's denial of an evidentiary hearing on the issue is also reviewed for an abuse of discretion. Id.

The district court's refusal to hold a Kastigar hearing is reviewed for an abuse of discretion. United States v. Anderson, 79 F.3d 1522, 1525 (9th Cir. 1996). If a hearing is held, the district court's findings of fact are reviewed for clear error. Id. at 1525 n.4. Whether a defendant's testimony is immunized is a question of law reviewed de novo. Id. at 1525.

26. **Hearsay**

a. **Admitting Hearsay**

Whether the district court correctly construed the hearsay rule is a question of law reviewable de novo. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002); United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 (9th Cir. 2001); United States v. Pena-Gutierrez, 222 F.3d 1080, 1086 (9th Cir. 2000); United States v. Olafson, 213 F.3d 435, 441 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000); United States v. Collicott, 92 F.3d 973, 978 (9th Cir. 1996); United States v. Erickson, 75 F.3d 470, 478 (9th Cir. 1996); United States v. Gilbert, 57 F.3d 709, 711 (9th Cir. 1995). The district court's decisions to admit evidence under exceptions to the hearsay rule are reviewed for an abuse of discretion. See Hernandez-Herrera, 273 F.3d at 1217; Olafson, 213 F.3d at 441; United States v. Scholl, 166 F.3d 964, 978 (9th Cir. 1999); United States v. Ramos-Oseguera, 120 F.3d 1028, 1034 (9th Cir. 1997); Collicott, 92 F.3d at 978; Gilbert, 57 F.3d at 711; accord United States v. Contreras, 63 F.3d 852, 857 (9th Cir. 1995) (Rule 803(8)(B)); United States v. Valdez-Soto, 31 F.3d 1467, 1469 (9th Cir. 1994) (Rule 803(24)). The trial court's decision to consider hearsay at sentencing is also reviewed for an abuse of discretion. See United States v. Berry, 258 F.3d 971, 976 (9th Cir. 2001); United States v. Chee, 110 F.3d 1489, 1492 (9th Cir. 1997); United States v. Casterline, 103 F.3d 76, 80 (9th Cir. 1996).

Exclusion of evidence under the hearsay rule is also reviewed for an abuse of discretion. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Bishop, 291 F.3d 1100, 1108 (9th Cir. 2002); Orr, 285 F.3d at 778; Ortega, 203 F.3d at 682; United States v. Matta-Ballesteros, 71 F.3d 754, 767 (9th Cir. 1995) (Rule 803(4)), amended by 98 F.3d 1100 (9th Cir. 1996).

b. **Right of Confrontation**

Alleged violations of the Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999) (habeas); United States v. Murillo, 288 F.3d 1126, 1139 (9th Cir. 2002) (direct appeal); United States v. Parks, 285 F.3d 1133, 1138 (9th Cir. 2002) (direct appeal); United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 (9th Cir. 2001) (direct appeal); United States v. Saya, 247 F.3d 929, 937 (9th Cir.) (direct appeal), cert. denied, 122 S. Ct. 493 (2001); United States v. Boone, 229 F.3d 1231, 1232 (9th Cir. 2000) (direct appeal), cert. denied, 121 S. Ct. 1747 (2001); United States v. Bowman, 215 F.3d 951, 960 (9th Cir. 2000) (direct appeal); United States v. Miguel, 111 F.3d 666, 669 (9th Cir. 1997) (direct appeal); United States v. Contreras, 63 F.3d 852, 857 (9th Cir. 1995) (direct appeal); United States v. Yazzie, 59 F.3d 807,

812 (9th Cir. 1995) (direct appeal); Paradis v. Arave, 20 F.3d 950, 956 (9th Cir. 1994) (habeas); United States v. Garcia, 16 F.3d 341, 342 (9th Cir. 1994) (direct appeal); see also United States v. Payne, 944 F.2d 1458, 1468 n.9 (9th Cir. 1991) (noting that trial court's admission of evidence is generally reviewed for abuse of discretion but that violation of Confrontation Clause is reviewed de novo).

Whether limitations on cross-examination are so severe as to violate the Confrontation Clause is a question of law reviewed de novo. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997); United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997); United States v. Ripinsky, 109 F.3d 1436, 1445 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997).

Confrontation Clause violations are also subject to harmless error analysis. See United States v. Orellana-Blanco, 294 F.3d 1143, 1148 (9th Cir. 2002); United States v. Pena-Gutierrez, 222 F.3d 1080, 1089 (9th Cir. 2000); Ortega, 203 F.3d at 682; United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999); Miguel, 111 F.3d at 671-72; United States v. Vargas, 933 F.2d 701, 704-05 (9th Cir. 1991); see also Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); Whelchel v. Washington, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas); Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (habeas).

c. **Unavailability of a Witness**

A decision that a witness is unavailable is reviewed for an abuse of discretion. See United States v. Magana-Olvera, 917 F.2d 401, 407 (9th Cir. 1990). If a witness is deemed unavailable, the court's decision to admit that witness's statement is also reviewed for an abuse of discretion. Id. at 407. The denial of a continuance based upon the absence of a witness is reviewed for an abuse of discretion. United States v. Foster, 985 F.2d 466, 469 (9th Cir.), amended by 995 F.2d 882 (9th Cir. 1993), and 17 F.3d 1256 (9th Cir. 1994). In collateral proceedings, however, "[a] state trial court's decision that a witness is constitutionally 'unavailable' is an evidentiary question we review de novo, rather than for a abuse of discretion." Acosta-Huerta v. Estelle, 7 F.3d 139, 143 (9th Cir. 1992); see also Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir. 1998) (explaining that de novo review applies to determining whether the Supreme Court's standards for unavailability have been met).

27. **Immunity from Prosecution**

"The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." United States v. Montoya, 945 F.2d 1068, 1078 (9th Cir. 1991) (internal quotation omitted). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. United States v. Dudden, 65 F.3d 1461, 1467 (9th Cir. 1995). The denial of a Kastigar hearing is reviewed for an abuse of discretion. Id. at 1468; but see United States v. Young, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. United States v. Montoya, 45 F.3d 1286, 1291 (9th Cir. 1995); United States v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999).

28. **Impeachment Evidence**

The district court's decision to admit impeachment evidence is reviewed for an abuse of discretion. See United States v. Munoz, 233 F.3d 1117, 1135 (9th Cir. 2000) United States v. Castillo, 181 F.3d 1129, 1132 (9th Cir. 1999) (prior criminal activity); United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); United States v. Beltran, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements); United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996) (cross-examination); United States v. Scott, 74 F.3d 175, 177 (9th Cir. 1996) (prior criminal convictions); United States v. Higa, 55 F.3d 448, 452 (9th Cir. 1995) (prior inconsistent statement). The trial court's refusal to allow impeachment evidence is also reviewed for an abuse of discretion. United States v. Rowe, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

29. **In Absentia Proceedings**

"Whether a judge has the power to try a defendant in absentia is an issue of law, which we consider de novo." United States v. Houtchens, 926 F.2d 824, 826 (9th Cir. 1991). "The judge's factual finding that a defendant has knowingly and voluntarily failed to appear at trial is reviewable for clear error." Id.

30. **In-Court Identification**

Decisions involving in-court identification are reviewed for an abuse of discretion. See United States v. Lumitap, 111 F.3d 81, 83-84 (9th Cir. 1997); United States v. Duran, 4 F.3d 800, 802 (9th Cir. 1993). The trial court's decision to conduct an in-court identification is reviewed for an abuse of discretion. United States v. Burdeau, 168 F.3d 352, 358 (9th Cir. 1999); United States v. Carbajal, 956 F.2d 924, 929 (9th Cir. 1992); United States v. Walitwarangkul, 808 F.2d 1352, 1353 (9th Cir. 1987). The admission of in-court identification testimony is reviewed for an abuse of discretion. United States v. Dixon, 201 F.3d 1223, 1229 (9th Cir. 2000); United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989). The denial of a request for an in-court lineup is also reviewed for an abuse of discretion. Dixon, 201 F.3d at 1229; Lumitap, 111 F.3d at 83.

31. **Ineffective Assistance of Counsel**

Whether a defendant received ineffective assistance of counsel is reviewed de novo. See Mancuso v. Olivarez, 292 F.3d 939, 949 (9th Cir. 2002) (habeas); Silva v. Woodward, 279 F.3d 825, 831 (9th Cir. 2002) (habeas); Bragg v. Galaza, 242 F.3d 1082, 1086 (9th Cir.) (habeas), amended by 253 F.3d 1150 (9th Cir. 2001); Anderson v. Calderon, 232 F.3d 1053, 1084 (9th Cir. 2000) (habeas), cert. denied, 122 S. Ct. 580 (2001); Jackson v. Calderon, 211 F.3d 1148, 1154 (9th Cir. 2000) (habeas); United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal); Aguilar v. Alexander, 125 F.3d 815, 817 (9th Cir. 1997) (habeas); United States v. Henson, 123 F.3d 1226, 1241 (9th Cir. 1997) (direct appeal); United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996) (habeas); United States v. Span, 75 F.3d 1383, 1387 (9th Cir. 1996) (habeas); United States v. Benlian, 63 F.3d 824, 826 (9th Cir. 1995) (direct appeal); Sanchez v. United States, 50 F.3d 1448, 1456 (9th Cir. 1995) (habeas); see also LaGrand v. Stewart, 133 F.3d 1253, 1269-70 (9th Cir. 1998) (noting that claim presents a mixed question of law and fact reviewed de novo); Dubria v. Smith, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc) (same); United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994) (same).

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. See Hoffman v. Arave, 236 F.3d 523, 530 n.7 (9th Cir.) (explaining rationale), cert. denied, 122 S. Ct. 323 (2001); United States v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining to review claim on direct appeal), cert. denied, 121 S. Ct. 821 (2001); United States v. Ross, 206 F.3d 896, 899 (9th Cir. 2000) (noting when

direct review is permissible); United States v. Quintero-Barraza, 78 F.3d 1344, 1347 (9th Cir. 1995) (same).

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's actions were outside the wide range of professionally competent assistance, and (2) that defendant was prejudiced by reason of counsel's actions. Strickland v. Washington, 466 U.S. 668, 687-690 (1984); Mancuso v. Olivarez, 292 F.3d 939, 953-54 (9th Cir. 2002) (explaining standards); Anderson, 232 F.3d at 1084; Schell v. Witek, 218 F.3d 1017, 1028 (9th Cir. 2000) (en banc); Jones v. Wood, 207 F.3d 557, 562 (9th Cir. 2000); United States v. Allen, 157 F.3d 661, 665 (9th Cir. 1998); Smith v. Lewis, 140 F.3d 1263, 1268 (9th Cir. 1998); Johnson v. Baldwin, 114 F.3d 835, 837-38 (9th Cir. 1997); United States v. Baramdyka, 95 F.3d 840, 844 (9th Cir. 1996); United States v. Benlian, 63 F.3d 824, 826 (9th Cir. 1995); United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994). The district court's findings of fact are reviewed under the clearly erroneous standard. Anderson, 232 F.3d at 1084; United States v. Alvarez-Tautimez, 160 F.3d 573, 575 (9th Cir. 1998); United States v. Garcia, 997 F.2d 1273, 1283 (9th Cir. 1993). Whether the facts suffice to establish the performance and prejudice components of the ineffectiveness inquiry is a question reviewed de novo. See United States v. Layton, 855 F.2d 1388, 1415 (9th Cir. 1988).

Whether a defendant was denied Sixth Amendment rights to counsel is a question of law reviewed de novo. See United States v. Christakis, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (direct appeal); United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998) (direct appeal); United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996) (direct appeal); United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis); Frazer v. United States, 18 F.3d 778, 781 (9th Cir. 1994) (habeas); United States v. Mims, 928 F.2d 310, 312 (9th Cir. 1991) (direct appeal).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. See Christakis, 238 F.3d at 1168 (§ 2255); United States v. Chacon-Palomares, 208 F.3d 1157, 1158-59 (9th Cir. 2000) (habeas); McMullen, 98 F.3d at 1157; United States v. Blaylock, 20 F.3d 1458, 1464 (9th Cir. 1994).

32. **Jewell Instruction**

A district court's decision to give a "deliberate ignorance" or Jewell instruction is reviewed de novo. United States v. Shannon, 137 F.3d 1112, 1117 (9th Cir. 1998);

United States v. Fulbright, 105 F.3d 443, 446-47 (9th Cir. 1997); United States v. de Cruz, 82 F.3d 856, 865 (9th Cir. 1996).

33. **Judge's Conduct**

"A federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if [he or she] abuses that discretion. A trial judge is more than an umpire, and may participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition. A judge's participation justifies a new trial only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." United States v. Laurins, 857 F.2d 529, 537 (9th Cir. 1988) (citations omitted). Accord United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999) (reciting standard); United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997); United States v. Wilson, 16 F.3d 1027, 1031 (9th Cir. 1994) (same). Allegations of judicial misconduct are reviewed for plain error when a defendant fails to object at trial. See United States v. Springer, 51 F.3d 861, 864 n.1 (9th Cir. 1995).

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. See United States v. Martin, 278 F.3d 988, 1005 (9th Cir. 2002); United States v. Silver, 245 F.3d 1075, 1078 (9th Cir. 2001); United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); Scholl, 166 F.3d at 977; United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997); United States v. Eshkol, 108 F.3d 1025, 1030 (9th Cir. 1997); see also United States v. Rogers, 119 F.3d 1377, 1380 (9th Cir. 1997) (motion to disqualify); United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action). When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. United States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991).

34. **Juror Misconduct**

The standard of review of a trial court's decisions regarding jury incidents is abuse of discretion. See United States v. Beard, 161 F.3d 1190, 1194 (9th Cir. 1998); United States v. Olano, 62 F.3d 1180, 1192 (9th Cir. 1995). The court has considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct or bias and in defining its nature and extent. Olano, 62 F.3d at 1192. "Our review ultimately is limited to determining whether the district court, in view of all the circumstances, so abused its discretion that [the defendant] must be deemed to have been deprived of his Fifth Amendment due-process or Sixth Amendment impartial-jury guarantees." Id. (internal quotation omitted). Note that the presence of

a biased juror cannot be harmless; the error requires a new trial without the showing of prejudice. Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc).

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. United States v. Alexander, 48 F.3d 1477, 1485 (9th Cir. 1995). The trial court's decision to excuse a juror after deliberations have commenced is also reviewed for abuse of discretion. United States v. Symington, 195 F.3d 1080, 1085 (9th Cir. 1999); United States v. Mullins, 992 F.2d 1472, 1477 (9th Cir. 1993); United States v. Egbuniwe, 969 F.2d 757, 760 (9th Cir. 1992). Deference is paid to the trial judge, since the trial judge is uniquely qualified to appraise the probable effect of misconduct upon the jury, such as the materiality of extraneous material and its prejudicial nature. See United States v. Madrid, 842 F.2d 1090, 1092 (9th Cir. 1988); see also United States v. LaFleur, 971 F.2d 200, 206 (9th Cir. 1991) (same standard); United States v. Hernandez, 952 F.2d 1110, 1117 (9th Cir. 1991) (review is independent but reviewing court must "remain mindful of the trial court's conclusions"); but see Symington, 195 F.3d at 1085 (noting that district court's discretion is not unbounded).

A district court's decision to excuse a juror for just cause is reviewed for an abuse of discretion. See United States v. Gonzalez, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo); United States v. Padilla-Mendoza, 157 F.3d 730, 733 (9th Cir. 1998); United States v. Annigoni, 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc); United States v. McFarland, 34 F.3d 1508, 1511 (9th Cir. 1994). The court's decision not to excuse a juror is also reviewed for an abuse of discretion. United States v. Miguel, 111 F.3d 666, 673 (9th Cir. 1997); United States v. Alexander, 48 F.3d 1477, 1484-85 (9th Cir. 1995); see also United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

A district court's order granting a new trial based on juror misconduct is reviewed for an abuse of discretion. United States v. Edmond, 43 F.3d 472, 473 (9th Cir. 1994); but see United States v. Keating, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review).

The court's denial of a motion for a new trial based on allegations of juror misconduct is also reviewed for an abuse of discretion. See United States v. Mills, 280 F.3d 915, 921 (9th Cir.), cert. denied, 122 S. Ct. 2347 (2002); United States v. Saya, 247 F.3d 929, 935 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. Hanley,

190 F.3d 1017, 1031 (9th Cir. 1999). The district court's findings relating to the issue of juror misconduct are reviewed for clear error. United States v. Matta-Ballesteros, 71 F.3d 754, 766 (9th Cir. 1995).

In habeas, whether an instance of juror misconduct was prejudicial to the defendant presents a mixed question of law and fact reviewed de novo. See Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir. 1997); see also Mancuso v. Olivarez, 292 F.3d 939, 949 (9th Cir. 2002) (noting that issues of juror misconduct are reviewed de novo); Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir. 2000) (noting that allegations of juror misconduct present mixed questions of law and fact reviewed de novo).

35. **Jury Examination of Evidence**

The trial court's decision to allow a jury to have transcripts during deliberations is reviewed for an abuse of discretion. See United States v. Montgomery, 150 F.3d 983, 999 (9th Cir. 1998); United States v. Tisor, 96 F.3d 370, 377 (9th Cir. 1996) (during trial); United States v. Fuentes-Montijo, 68 F.3d 352, 353 (9th Cir. 1995); United States v. Pena-Espinoza, 47 F.3d 356, 359 (9th Cir. 1995); United States v. Taghipour, 964 F.2d 908, 910 (9th Cir. 1992). The court's decision to replay tape-recorded conversation evidence to the jury is reviewed for an abuse of discretion. United States v. Rrapi, 175 F.3d 742, 746 (9th Cir. 1999); United States v. Felix-Rodriguez, 22 F.3d 964, 966 (9th Cir. 1994). The trial court's decision to reread testimony to the jury or permit the jury to have excerpts of the testimony is also reviewed for an abuse of discretion. Montgomery, 150 F.3d at 999; United States v. Hernandez, 27 F.3d 1403, 1408 (9th Cir. 1994); United States v. Nickell, 883 F.2d 824, 829 (9th Cir. 1989). "[I]t is within the trial court's discretion to replay tapes or have the court reporter reread portions of testimony at the jury's request during deliberations." United States v. Guess, 745 F.2d 1286, 1288 (9th Cir. 1984); see also United States v. Ponce, 51 F.3d 820, 832-33 (9th Cir. 1995) (no error in court's decision to reread transcripts to jury); United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985) (decision to replay testimony during jury deliberations will not be reversed absent an abuse of discretion).

A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. United States v. Carrillo, 902 F.2d 1405, 1410 (9th Cir. 1990). A court's decision to allow a jury to have English translations is reviewed for an abuse of discretion. See United States v. Abonce-Barrera, 257 F.3d 959, 963 (9th Cir. 2001); Rrapi, 175 F.3d at 746; United States v. Fuentes-Montijo, 68 F.3d 352, 353 (9th Cir. 1995).

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. Eslaminia v. White, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas); but see United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996) (allowing unplayed audio tapes into the jury room is structural error); see also United States v. Keating, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review).

The trial court decision whether to allow jurors to take notes during trial is reviewed for an abuse of discretion. United States v. Baker, 10 F.3d 1374, 1403 (9th Cir. 1993).

36. **Jury Inquiries**

A district court's response to a jury's inquiry is reviewed for an abuse of discretion. See United States v. Romero-Avila, 210 F.3d 1017, 1024 (9th Cir. 2000); United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997). The court's decision whether to give supplemental instructions is also reviewed for an abuse of discretion. See United States v. Dorri, 15 F.3d 888, 892 (9th Cir. 1994); United States v. Solomon, 825 F.2d 1292, 1295 (9th Cir. 1987) ("[N]ecessity, extent and character of supplemental instructions lies within the discretion of the trial court."). When defendant does not specifically challenge the supplemental instruction, review is limited to plain error. See United States v. Stapleton, 293 F.3d 1111, 1118 n.3 (9th Cir. 2002).

37. **Jury Instructions**

A district court's formulation of jury instructions is reviewed for an abuse of discretion. See United States v. Stapleton, 293 F.3d 1111, 1114 (9th Cir. 2002); United States v. Summers, 268 F.3d 683, 687 (9th Cir. 2001), cert. denied, 122 S. Ct. 1182 (2002); United States v. Vallejo, 237 F.3d 1008, 1024 (9th Cir.), amended by 246 F.3d 1150 (9th Cir. 2001); United States v. Middleton, 231 F.3d 1207, 1213 (9th Cir. 2000); United States v. Hicks, 217 F.3d 1038, 1045 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 684 (9th Cir. 2000); United States v. Beltran-Garcia, 179 F.3d 1200, 1205 (9th Cir. 1999); United States v. Service Deli, Inc., 151 F.3d 938, 942 (9th Cir. 1998); United States v. Houser, 130 F.3d 867, 869 n.1 (9th Cir. 1997); United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997); United States v. Chastain, 84 F.3d 321, 323 (9th Cir. 1996); United States v. de Cruz, 82 F.3d 856, 864 (9th Cir. 1996); United States v. Vaandering, 50 F.3d 696, 702 (9th Cir. 1995).

Whether a jury instruction misstates elements of a statutory crime is a question of law and is reviewed de novo. See United States v. Patterson, 292 F.3d 615, 629-30 (9th Cir. 2002); United States v. Carranza, 289 F.3d 634, 643 (9th Cir. 2002); United States v. Garcia-Paz, 282 F.3d 1212, 1215 (9th Cir. 2002); United States v. Romo-Romo, 246 F.3d 1272, 1274 (9th Cir. 2001); United States v. Henderson, 243 F.3d 1168, 1170 (9th Cir. 2001); United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1191 (9th Cir. 2000); Vallegjo, 237 F.3d at 1024; United States v. Frega, 179 F.3d 793, 807 n.16 (9th Cir. 1999); United States v. Gergen, 172 F.3d 719, 724 (9th Cir. 1999); United States v. Petrosian, 126 F.3d 1232, 1233 n.1 (9th Cir. 1997); United States v. Knapp, 120 F.3d 928, 930 (9th Cir. 1997); United States v. Loaiza-Diaz, 96 F.3d 1335, 1336 (9th Cir. 1996); United States v. English, 92 F.3d 909, 914 (9th Cir. 1996); United States v. Tagalicud, 84 F.3d 1180, 1183 (9th Cir. 1996).

Whether a trial court's instructions adequately covered a defendant's proffered defense is reviewed de novo. See Patterson, 292 F.3d at 629; United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001); Hicks, 217 F.3d at 1045; United States v. Fleming, 215 F.3d 930, 936 (9th Cir. 2000); United States v. Hopper, 177 F.3d 824, 831 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998); United States v. Amlani, 111 F.3d 705, 716 n.5 (9th Cir. 1997); United States v. Ripinsky, 109 F.3d 1436, 1440 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997); see also United States v. Leyva, 282 F.3d 623, 625 (9th Cir.) (reviewing rejected instruction), cert. denied, 122 S. Ct. 2374 (2002); United States v. Castaneda, 94 F.3d 592, 596 (9th Cir. 1996) (same).

This court reviews de novo a district court's refusal to give a lesser-included offense instruction. United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001); see also United States v. Anderson, 201 F.3d 1145, 1148 (9th Cir. 2000) (reviewing de novo lesser included offense instruction); United States v. Sterner, 23 F.3d 250, 252 (9th Cir. 1994) ("Whether a jury instruction properly states the law of entrapment is a pure question of law subject to de novo review.").

Whether an instruction violates due process by creating an unconstitutional presumption or inference is reviewed de novo. Tapia v. Roe, 189 F.3d 1052, 1056 (9th Cir. 1999) (habeas); Warren, 25 F.3d at 897; see also Hanna v. Riveland, 87 F.3d 1034, 1036-37 (9th Cir. 1996) (habeas); United States v. Amparo, 68 F.3d 1222, 1224 (9th Cir. 1995) ("whether a jury instruction violated due process is reviewed de novo."). Whether a constitutionally deficient jury instruction is harmless error is reviewed de novo. Tapia, 189 F.3d at 1055-56.

In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. United States v. Vallejo, 237 F.3d 1008, 1024 (9th Cir.), amended by 246 F.3d 1150 (9th Cir. 2001); United States v. Dixon, 201 F.3d 1223, 1230 (9th Cir. 2000); Frega, 179 F.3d at 807 n.16; United States v. Marin-Cuevas, 147 F.3d 889, 893 (9th Cir. 1998); United States v. Moore, 109 F.3d 1456, 1465 (9th Cir. 1997) (en banc); United States v. de Cruz, 82 F.3d 856, 864 (9th Cir. 1996); United States v. Nordbrock, 38 F.3d 440, 445 (9th Cir. 1994). The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. Hicks, 217 F.3d at 1045; Frega, 179 F.3d at 807 n.16; United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998); United States v. Garcia, 37 F.3d 1359, 1364 (9th Cir. 1993); United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992). A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Dixon, 201 F.3d at 1230; Frega, 179 F.3d at 807 n.16; United States v. Harrison, 34 F.3d 886, 889 (9th Cir. 1994). Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the trial court's discretion. See Frega, 179 F.3d at 807 n.16; de Cruz, 82 F.3d at 864.

Note that a district court's failure to instruct the jury on an element of a crime may be harmless if the appellate court concludes that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." See United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc) (internal quotation omitted). When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. See Jones v. United States, 527 U.S. 373, 388 (1999); United States v. Smith, 282 F.3d 758, 765 (9th Cir. 2002); United States v. Romero, 282 F.3d 683, 689 (9th Cir. 2002); United States v. Anderson, 201 F.3d 1145, 1148 (9th Cir. 2000); United States v. Garcia-Guizar, 160 F.3d 511, 522-23 (9th Cir. 1998); United States v. Marin-Cuevas, 147 F.3d 889, 892-93 (9th Cir. 1998); United States v. Klinger, 128 F.3d 705, 710 (9th Cir. 1997); United States v. Otis, 127 F.3d 829, 832 (9th Cir. 1997); United States v. English, 92 F.3d 909, 914 (9th Cir. 1996); United States v. Bracy, 67 F.3d 1421, 1431 (9th Cir. 1995); United States v. Ponce, 51 F.3d 820, 830 (9th Cir. 1995). "Plain error is 'error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection.'" Klinger, 128 F.3d at 712 (quoting United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997)). Plain error is a highly prejudicial error affecting substantial rights. Garcia-Guizar, 160 F.3d at 516; United States v. Payne, 944 F.2d 1458, 1463 (9th Cir. 1991); see also United States v. Lacy, 119 F.3d 742, 749 (9th Cir. 1997) (plain error does not require reversal unless error seriously affected the fairness, integrity, or public reputation of the judicial proceeding). Such error will be found

only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. Garcia-Guizar, 160 F.3d at 516; Ponce, 51 F.3d at 830.

If the district court gives jury instructions requested by the defendant, those instructions are nonreviewable under the invited error doctrine. See United States v. Burt, 143 F.3d 1215, 1217 (9th Cir. 1998); United States v. Perez, 116 F.3d 840, 844 (9th Cir. 1997) (en banc); United States v. Butler, 74 F.3d 916, 918 n.1 (9th Cir. 1996); United States v. Staufer, 38 F.3d 1103, 1109 (9th Cir. 1994). In Perez, however, this court limited that rule to situations where the defendant has "waived" his rights in contrast to "forfeited." Burt, 143 F.3d at 1217; Perez, 116 F.3d at 845-86. Thus, where a defendant submits flawed instructions, but neither defendant, government, nor the court is aware of the mistake, the error is not waived, but merely forfeited, and may be reviewed under the plain error standard. Burt, 143 F.3d at 1217-18; Perez, 116 F.3d at 846; see also United States v. Johnson, 132 F.3d 1279, 1284-85 (9th Cir. 1997) (applying plain error in same circumstances).

The standard of review of the district court's denial of a proposed jury instruction turns on the nature of the error alleged. See United States v. Dixon, 201 F.3d 1223, 1230 (9th Cir. 2000); United States v. Knapp, 120 F.3d 928, 930 (9th Cir. 1997). This court reviews de novo whether the district court's instructions adequately presented the defendant's theory of the case. See United States v. Smith, 217 F.3d 746, 750 (9th Cir. 2000); Dixon, 201 F.3d at 1230; Knapp, 120 F.3d at 930. The court's "precise formulation" of the instructions is reviewed, however, for an abuse of discretion. See Dixon, 201 F.3d at 1230; Knapp, 120 F.3d at 930. Whether a jury instruction misstates elements of the crime is a question of law reviewed de novo. Knapp, 120 F.3d at 930 (citing United States v. Duran, 59 F.3d 938, 941 (9th Cir. 1995) (noting prior confusion in circuit)); United States v. Wiseman, 274 F.3d 1235, 1240 (9th Cir. 2001) ("We review de novo a denial of a defendant's jury instruction based on a question of law."), cert. denied, 122 S. Ct. 2666 (2002); United States v. Eshkol, 108 F.3d 1025, 1028 (9th Cir. 1997) (same); United States v. Wills, 88 F.3d 704, 715 (9th Cir. 1996) (noting clarification of standard); United States v. Sarno, 73 F.3d 1470, 1485 n.8 (9th Cir. 1995) (same); but see United States v. Vgeri, 51 F.3d 876, 881 (9th Cir. 1995) (court's refusal to give an addict-informer instruction is reviewed for an abuse of discretion).

The trial court's decision to instruct the jury with an Allen charge is reviewed for an abuse of discretion. See United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999) (modified charge); United States v. Nelson, 137 F.3d 1094, 1109 (9th Cir. 1998); United States v. Hernandez, 105 F.3d 1330, 1333 (9th Cir. 1997); United States v. Wills, 88 F.3d 704, 717 (9th Cir. 1996). The trial court's delivery of an Allen charge must be

upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury. Daas, 198 F.3d at 1174; Nelson, 137 F.3d at 1109; Hernandez, 105 F.3d at 1333.

A district court's decision to give a "deliberate ignorance" or Jewell instruction is reviewed de novo. United States v. Shannon, 137 F.3d 1112, 1117 (9th Cir. 1998); United States v. Fulbright, 105 F.3d 443, 446-47 (9th Cir. 1997); United States v. de Cruz, 82 F.3d 856, 865 (9th Cir. 1996).

The court's decision whether to give supplemental instructions is reviewed for an abuse of discretion. See United States v. McIver, 186 F.3d 1119, 1130 (9th Cir. 1999); United States v. Dorri, 15 F.3d 888, 892 (9th Cir. 1994); United States v. Solomon, 825 F.3d 1292, 1295 (9th Cir. 1987) ("[N]ecessity, extent and character of supplemental instructions lies within the discretion of the trial court."). When defendant does not specifically challenge the supplemental instruction, review is limited to plain error. See United States v. Stapleton, 293 F.3d 1111, 1118 n.3 (9th Cir. 2002).

38. **Jury Selection**

a. **Challenges for Cause**

A district court's decision to excuse a juror for just cause is reviewed for an abuse of discretion. See United States v. Gonzalez, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo); United States v. Padilla-Mendoza, 157 F.3d 730, 733 (9th Cir. 1998); United States v. Annigoni, 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc); United States v. McFarland, 34 F.3d 1508, 1511 (9th Cir. 1994).

The court's decision not to excuse a juror is also reviewed for an abuse of discretion. See United States v. Miguel, 111 F.3d 666, 673 (9th Cir. 1997); United States v. Alexander, 48 F.3d 1477, 1484-85 (9th Cir. 1995); see also United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

b. **Jury Composition**

A challenged to the composition of a jury is reviewed de novo. See United States v. Bushyhead, 270 F.3d 905, 909 (9th Cir. 2001), cert. denied, 122 S. Ct. 1586 (2002); Thomas v. Borg, 159 F.3d 1147, 1149 (9th Cir. 1998) (habeas). Whether a particular jury satisfies the "representative jury" standard of Batson v. Kentucky, 476 U.S. 79 (1986), is a question of law reviewed de novo. United States v. Bishop, 959 F.2d 820, 827 (9th Cir. 1992). The trial court's factual findings regarding purposeful discrimination in jury selection are entitled, however, to "great deference" and will not be set aside unless clearly erroneous. See Hernandez v. New York, 500 U.S. 352, 364-65 (1991); United States v. Collins, 90 F.3d 1420, 1430 (9th Cir. 1996); United States v. Wills, 88 F.3d 704, 714 (9th Cir. 1996); United States v. Ponce, 51 F.3d 820, 830 (9th Cir. 1995). When defense counsel fails to preserve a Batson claim, review is limited to plain error. United States v. Contreras-Contreras, 83 F.3d 1103, 1105 (9th Cir. 1996). The district court's "remedy" for a Batson violation is reviewed for an abuse of discretion. See United States v. Ramirez-Martinez, 273 F.3d 903, 910 (9th Cir. 2001).

Whether equal protection principles prohibit a party from peremptorily striking venire persons on the basis of gender is a question of law reviewed de novo. See United States v. De Gross, 960 F.2d 1433, 1436 (9th Cir. 1992) (en banc). The district court's findings of fact as to racially discriminatory use of peremptory challenges is reviewed for clear error. See United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001) (reviewing for clear error whether defendant established prima facie showing that challenge was race-based); United States v. Annigoni, 96 F.3d 1132, 1136 n.3 (9th Cir. 1996) (en banc); see also Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997) (habeas).

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. United States v. Alexander, 48 F.3d 1477, 1485 (9th Cir. 1995); United States v. Gay, 967 F.2d 322, 325 (9th Cir. 1992).

c. **Peremptory Challenges**

Trial courts have broad discretion in devising procedures for parties to exercise peremptory challenges. See United States v. Annigoni, 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc); see also United States v. Warren, 25 F.3d 890, 894 (9th Cir. 1994) ("The district court's selection of procedures for the exercise of peremptory challenges is reviewed for an abuse of discretion."). The number of peremptory challenges permitted by the Federal Rules of Criminal Procedure presents a question of law reviewed de novo. See United States v. Machado, 195 F.3d 454, 456 (9th Cir. 1999).

"Although a trial court has considerable discretionary authority in administering peremptory strikes, a trial court commits reversible error if its procedures effect an impairment or an outright denial of a party's right of peremptory challenge." Annigoni, 96 F.3d at 1139; see also United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

The court's findings of fact as to racially discriminatory use of peremptory challenges are reviewed for clear error. See United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001) (reviewing for clear error whether defendant established prima facie showing that challenge was race-based); Annigoni, 96 F.3d at 1136 n.3; see also Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997) (habeas).

d. **Voir Dire**

A district court's voir dire procedures are reviewed for an abuse of discretion. United States v. Howell, 231 F.3d 615, 627 (9th Cir. 2000), cert. denied, 122 S. Ct. 76 (2001); United States v. Padilla-Mendoza, 157 F.3d 730, 733 (9th Cir. 1998); United States v. Sherwood, 98 F.3d 402, 407 (9th Cir. 1996); United States v. Baker, 10 F.3d 1374, 1403 (9th Cir. 1993). The trial court has considerable control over the scope of questioning permitted during voir dire. United States v. Annigoni, 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc). The sufficiency of voir dire questions asked by the trial court is also reviewed for an abuse of discretion. United States v. Dischner, 974 F.2d 1502, 1522 (9th Cir. 1992); United States v. Payne, 944 F.2d 1458, 1474 (9th Cir. 1991). The court's refusal to ask defendant's requested voir dire questions is reviewed for an abuse of discretion. United States v. Sarkisian, 197 F.3d 966, 978 (9th Cir. 1999). The court may abuse its discretion by failing to ask questions reasonably sufficient to test jurors for bias or partiality. Dischner, 974 F.2d at 1522; Payne, 944 F.2d at 1474. Although the court of appeals reviews the district court's voir dire for abuse of discretion, whether a defendant was deprived of a fair trial by the nature of the voir dire is a legal question reviewed de novo. United States v. Milner, 962 F.2d 908, 911 (9th Cir. 1992).

Where the district court conducted voir dire and neither party objected to the scope of the court's questions, this court reviews the conduct of the voir dire only to determine whether there was plain error. United States v. Anzalone, 886 F.2d 229, 234 (9th Cir. 1989). The trial court's failure to sua sponte conduct supplemental voir dire is reviewed for plain error. United States v. Gay, 967 F.2d 322, 325 (9th Cir. 1992).

39. **Materiality of a False Statement**

In prosecutions under 18 U.S.C. § 1001 (false statements), the element of materiality is a mixed question of law and fact to be submitted to the jury. United States v. Gaudin, 28 F.3d 943, 951 (9th Cir. 1994) (en banc), aff'd, 515 U.S. 506 (1995); see also Johnson v. United States, 520 U.S. 461, 465 (1997) (materiality is an element of perjury); United States v. Service Deli, Inc., 151 F.3d 938, 941 (9th Cir. 1998). The application of Gaudin to other statutes is a question of law reviewed de novo. United States v. Uchimura, 125 F.3d 1282, 1284 (9th Cir. 1997) (26 U.S.C. § 7206(1)).

A trial court's error in not charging a jury on the element of materiality in a tax fraud case is subject to harmless error analysis. See Neder v. United States, 527 U.S. 8-15 (1999). Such error not asserted at trial is reviewed for plain error. See United States v. Keys, 133 F.3d 1282, 1286 (9th Cir.) (en banc), amended by 143 F.3d 479 (9th Cir. 1998); United States v. Knapp, 120 F.3d 928, 932 (9th Cir. 1997); United States v. Nash, 115 F.3d 1431, 1437 (9th Cir. 1997); see also United States v. Scholl, 166 F.3d 964, 980-81 (9th Cir. 1999) (discussing need for instruction). If materiality is not an element of the crime, however, it need not be submitted to the jury. See United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995) (false claims against the United States); see also United States v. Wells, 519 U.S. 482, 489-95 (1997) (materiality is not an element of making a false statement to a federally insured bank).

40. **Opening Statements**

A trial court's decision to order parties to deliver opening statements before voir dire is reviewed for an abuse of discretion. United States v. Goode, 814 F.2d 1353, 1354-55 (9th Cir. 1987). The court's "broad discretion is to be limited only when a party's rights are somehow prejudiced." Id. at 1354.

41. **Opinion Evidence**

a. **Expert Opinion Evidence**

A district court's decision to admit expert opinion evidence is reviewed for abuse of discretion. See United States v. Hanna, 293 F.3d 1080, 1085 (9th Cir. 2002); United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000); United States v. Campos, 217 F.3d 707, 710 (9th Cir. 2000); United States v. Burdeau, 168 F.3d 352, 357 (9th Cir. 1999); United States v. Cruz, 127 F.3d 791, 800 (9th Cir. 1997); United States v. Webb, 115 F.3d 711, 713 (9th Cir. 1997); United States v. Ortland, 109 F.3d 539, 542 (9th Cir. 1997); United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997);

see also United States v. VonWillie, 59 F.3d 922, 928 (9th Cir. 1995) (noting that court has characterized the standard of review in different ways).

The trial court's decision to exclude expert testimony is also reviewed for an abuse of discretion. See United States v. Benavidez-Benavidez, 217 F.3d 720, 723 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 971-72 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015, 1021 (9th Cir. 1998); United States v. Croft, 124 F.3d 1109, 1120 n.3 (9th Cir. 1997); United States v. Morales, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc) (expressly noting that review is for an abuse of discretion, not "manifest error"). When no objection is made, review is limited to plain error analysis; reversal is mandated only if the district court committed a clear or obvious error that affected substantial rights or was prejudicial. United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996).

This court reviews for an abuse of discretion the trial court's refusal to allow an expert to testify regarding a witness's psychiatric condition. United States v. Marsh, 26 F.3d 1496, 1502 (9th Cir. 1994). This court also reviews for an abuse of discretion the district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identifications. United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994); United States v. Amador-Galvan, 9 F.3d 1414, 1417 (9th Cir. 1993).

"The trial court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results." United States v. Gillespie, 852 F.2d 475, 480 (9th Cir. 1988) (citations omitted); accord United States v. Sinigaglio, 942 F.2d 581, 584 (9th Cir. 1991) ("district court has wide latitude to exclude expert testimony"); United States v. Aguon, 851 F.2d 1158, 1171 (9th Cir. 1988) (en banc) ("trial court has broad discretion to admit or exclude expert testimony"), overruled on other grounds, Evans v. United States, 504 U.S. 255 (1992).

The determination whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. See Benavidez-Benavidez, 217 F.3d at 723; United States v. Garcia, 7 F.3d 885, 889 (9th Cir. 1993) (internal quotation omitted).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. United States v. Nelson, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996).

b. **Lay Opinion Testimony**

This court reviews for abuse of discretion a district court's admission of lay opinion testimony. United States v. Matsumaru, 244 F.3d 1092, 1101 (9th Cir. 2001); United States v. Holmes, 229 F.3d 782, 788 (9th Cir. 2000), cert. denied, 531 U.S. 1175 (2001); United States v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995) (noting that this court has characterized the standard of review in different ways); accord United States v. Henderson, 68 F.3d 323, 325 (9th Cir. 1995); United States v. Meling, 47 F.3d 1546, 1556 (9th Cir. 1995); United States v. Jones, 24 F.3d 1177, 1180 (9th Cir. 1994).

42. **Photographs**

A district court's ruling on the admission of photographs into evidence is reviewed for an abuse of discretion. United States v. Campbell, 42 F.3d 1199, 1204 (9th Cir. 1994); United States v. Chambers, 918 F.2d 1455, 1467 (9th Cir. 1990); United States v. Boise, 916 F.2d 497, 504 (9th Cir. 1990).

43. **Prior Crimes, Wrongs, or Acts**

The trial court's decision to admit evidence of prior crimes or bad acts pursuant to Federal Rule of Evidence 404(b) is reviewed for an abuse of discretion. See United States v. Williams, 291 F.3d 1180, 1189 (9th Cir. 2002); United States v. Smith, 282 F.3d 758, 768 (9th Cir. 2002); United States v. Romero, 282 F.3d 683, 688 (9th Cir. 2002); United States v. Carrasco, 257 F.3d 1045, 1048 (9th Cir.), cert. denied, 122 S. Ct. 658 (2001); United States v. Chea, 231 F.3d 531, 534 (9th Cir. 2000); United States v. Howell, 231 F.3d 615, 628 (9th Cir. 2000), cert. denied, 122 S. Ct. 76 (2001); United States v. Hicks, 217 F.3d 1038, 1046 (9th Cir. 2000); United States v. Castillo, 181 F.3d 1129, 1134 (9th Cir. 1999); United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015, 1027 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1106 (9th Cir. 1998) (listing factors); United States v. Johnson, 132 F.3d 1279, 1282-83 (9th Cir. 1997) (applying factors); United States v. Jackson, 84 F.3d 1154, 1158 (9th Cir. 1996).

Whether evidence falls within the scope of Rule 404(b) is a question of law reviewed de novo. See Williams, 291 F.3d at 1189; Smith, 282 F.3d at 768 (9th Cir. 2002). Whether such evidence is directly relevant to the crime charged or relevant only to "other crimes" is a question of law reviewed de novo. Castillo, 181 F.3d at 1134; Rrapi, 175 F.3d at 748; Jackson, 84 F.3d at 1158-59. Whether certain conduct constitutes "other crimes" is also a question of law reviewed de novo. United States

v. Serang, 156 F.3d 910, 915 (9th Cir. 1998); United States v. Andaverde, 64 F.3d 1305, 1314 (9th Cir. 1995); United States v. Kearns, 61 F.3d 1422, 1427 (9th Cir. 1995); United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994).

Admission of prior criminal activity pursuant to Federal Rule of Evidence 609 (impeachment) is also reviewed for an abuse of discretion. See United States v. Jimenez, 214 F.3d 1095, 1097-98 (9th Cir. 2000); Castillo, 181 F.3d at 1132; United States v. Bensimon, 172 F.3d 1121, 1125 (9th Cir. 1999); United States v. Rowe, 92 F.3d 928, 933 (9th Cir. 1996); United States v. Scott, 74 F.3d 175, 177 (9th Cir. 1996); United States v. Perkins, 937 F.2d 1397, 1406 (9th Cir. 1991). This court reviews the district court's interpretation of Rule 609 de novo. United States v. Foster, 227 F.3d 1096, 1099 (9th Cir. 2000).

The use of prior crimes for purposes of sentencing enhancement is reviewed de novo. United States v. Phillips, 149 F.3d 1026, 1031 (9th Cir. 1998) (Armed Career Criminal Act); United States v. Young, 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

44. **Presence of Defendant**

A district court's denial of a defendant's motion to waive his or her presence at trial is reviewed for abuse of discretion. United States v. Lumitap, 111 F.3d 81, 83 (9th Cir. 1997). A trial court's factual finding that a defendant has knowingly and voluntarily failed to appear for trial is reviewed for clear error. United States v. Houtchens, 926 F.2d 824, 826 (9th Cir. 1991). A defendant's failure to object to proceedings held outside his or her presence is reviewed for plain error. See United States v. Romero, 282 F.3d 683, 689 (9th Cir. 2002).

45. **Privileges**

A district court's attorney-client privilege determinations are reviewed de novo. See United States v. Alexander, 287 F.3d 811, 816 (9th Cir. 2002); United States v. Wiseman, 274 F.3d 1235, 1240 (9th Cir. 2001), cert. denied, 122 S. Ct. 2666 (2002); United States v. Munoz, 233 F.3d 1117, 1128 (9th Cir. 2000); United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997); Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1995). The court's rulings on the scope of the privilege are also reviewed de novo. United States v. Mett, 178 F.3d 1058, 1061-62 (9th Cir. 1999); Bauer, 132 F.3d at 507; United States v. Blackman, 72 F.3d 1418, 1423 (9th Cir. 1995). The attorney-client privilege may be waived by voluntary disclosure; whether such waiver has occurred is reviewed de novo. United States v. Amlani, 169 F.3d 1189, 1194 (9th Cir. 1999); United States v. Plache, 913 F.2d 1375, 1379 (9th Cir. 1990). Whether an alleged

attorney-client relationship exists is reviewed de novo. United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997); In re Subpoena to Testify Before Grand Jury, 39 F.3d 973, 976 (9th Cir. 1994). Courts have discretion to fashion appropriate remedies whenever prosecutors subvert the attorney-client relationship. United States v. Chen, 99 F.3d 1495, 1504 (9th Cir. 1996).

The attorney-client privilege does not extend to "communications which solicit or offer advice for the commission of a crime or fraud." In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 829 (9th Cir. 1994) (internal quotation omitted). The standard of review of whether the government has made a prima facie showing that this "crime-fraud" exception applies is unclear in this circuit. See Bauer, 132 F.3d at 509 n.3 (electing not to resolve uncertainty); In re Grand Jury Proceedings, 87 F.3d 377, 380 (9th Cir. 1996) (electing not to decide between de novo and abuse of discretion).

A trial court's findings regarding the marital communications privilege are reviewed for clear error. United States v. Murphy, 65 F.3d 758, 761 (9th Cir. 1995).

The scope of the Fifth Amendment privilege is reviewed de novo. See United States v. Rubio-Topete, 999 F.2d 1334, 1338 (9th Cir. 1993) (witness). Whether a defendant's waiver of Fifth Amendment privilege was compelled is reviewed de novo. United States v. Anderson, 79 F.3d 1522, 1525 (9th Cir. 1996). Whether a trial court's suppression of a defendant's testimony violates the constitutional right to testify is a question of law reviewed de novo. United States v. Moreno, 102 F.3d 994, 998 (9th Cir. 1996). When a defendant fails to object to the admission of testimony that may violate his Fifth Amendment privilege, review is limited to plain error. United States v. Thompson, 82 F.3d 849, 854-55 (9th Cir. 1996). Whether there has been a violation of a defendant's Fifth Amendment right is reviewed de novo. See United States v. Bushyhead, 270 F.3d 905, 911 (9th Cir. 2001) (references to defendant's silence), cert. denied, 122 S. Ct. 1586 (2002); United States v. Velarde-Gomez, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (evidence of defendant's physical or emotional reaction); United States v. Coutchavlis, 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's comment on defendant's decision not to testify); United States v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999) (testimony regarding defendant's silence); United States v. Ross, 123 F.3d 1181, 1187 (9th Cir. 1997) (comment on defendant's silence); United States v. Anderson, 79 F.3d 1522, 1525 (9th Cir. 1996) (waiver of Fifth Amendment privilege); United States v. Mende, 43 F.3d 1298, 1301 (9th Cir. 1995) (comment on defendant's silence); United States v. Mares, 940 F.2d 455, 461 (9th Cir. 1991) (prosecutor's closing argument); United States v. Hill, 953 F.2d 452, 455 (9th Cir. 1991) (right not to testify); United States v. Gray, 876 F.2d 1411, 1416 (9th Cir. 1989) (impermissible rebuttal comments).

46. **Prosecutorial Misconduct**

A district court's rulings on objections to alleged prosecutorial misconduct are reviewed for an abuse of discretion. See United States v. Sarkisian, 197 F.3d 966, 988 (9th Cir. 1999). A trial court's denial of a motion for new trial based on prosecutorial misconduct is reviewed for an abuse of discretion. United States v. Murillo, 288 F.3d 1126, 1140 (9th Cir. 2002); United States v. Scholl, 166 F.3d 964, 974 (9th Cir. 1999); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1106 (9th Cir. 1998). A trial court's ruling on prosecutorial comments is reviewed for an abuse of discretion. See United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999); United States v. Sayetsitty, 107 F.3d 1405, 1408 (9th Cir. 1997) (denial of motion for new trial); United States v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995). Whether such comments constitute improper "bolstering" is a mixed question of law and fact reviewed de novo. Santiago, 46 F.3d at 891. Claims that a prosecutor improperly vouched for the credibility of witnesses is reviewed for plain error when no objection was made by the defendant. See United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999); United States v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999); United States v. Garcia-Guizar, 160 F.3d 511, 521 (9th Cir. 1998); United States v. Rudberg, 122 F.3d 1199, 1206 (9th Cir. 1997).

A motion to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. See United States v. Haynes, 216 F.3d 789, 796 (9th Cir. 2000); United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir. 1998); United States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996); United States v. Wills, 88 F.3d 704, 711 (9th Cir. 1996); United States v. Dudden, 65 F.3d 1461, 1466 (9th Cir. 1995); United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. United States v. Cuellar, 96 F.3d 1179, 1182 (9th Cir. 1996).

Allegations of prosecutorial misconduct before a grand jury are reviewed de novo. See United States v. Fuchs, 218 F.3d 957, 964 (9th Cir. 2000); United States v. Larrazolo, 869 F.2d 1354, 1355 (9th Cir. 1989); United States v. De Rosa, 783 F.2d 1401, 1404 (9th Cir. 1986); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 n.9 (9th Cir. 1983) (district court's decision that a defendant's Fifth Amendment rights were violated by prosecutorial misconduct before a grand jury).

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. United States v. Davis, 932 F.2d 752, 763 (9th Cir. 1991); United States v. Plesinski, 912 F.2d 1033, 1035 (9th Cir. 1990).

Prosecutors are forbidden from commenting on a defendant's decision not to testify. Griffin v. California, 380 U.S. 609, 615 (1985); Garcia-Guizar, 160 F.3d at 522; United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996). Griffin claims are reviewed de novo. See United States v. Smith, 282 F.3d 758, 769 (9th Cir. 2002); United States v. Mende, 43 F.3d 1298, 1301 (9th Cir. 1995). Whether a prosecutor's reference to defendant's counsel and silence violates the Fifth Amendment is a question of law reviewed de novo. See United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997); see also United States v. Velarde-Gomez, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (government's evidence of defendant's physical or emotional reaction). When there is no objection to the prosecutor's comments, review is for plain error. See United States v. Tam, 240 F.3d 797, 801 (9th Cir. 2001); Cooper, 173 F.3d at 1203; Garcia-Guizar, 160 F.3d at 522; United States v. Amlani, 111 F.3d 705, 714 (9th Cir. 1997); Atcheson, 94 F.3d at 1244; United States v. Mayans, 17 F.3d 1174, 1185 (9th Cir. 1994). When the defendant does object, harmless error applies. See Velarde-Gomez, 269 F.3d at 1034-35.

Whether the prosecutor has improperly suppressed exculpatory evidence is a question of law reviewed de novo. United States v. Hernandez, 109 F.3d 1450, 1454 (9th Cir. 1997). The district court's underlying factual findings are reviewed for clear error. Id. The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed for an abuse of discretion. See United States v. Patterson, 292 F.3d 615, 626 (9th Cir. 2002).

Whether a prosecutor's alleged misconduct before a grand jury warrants dismissal of the indictment is reviewed de novo. See United States v. Fuchs, 218 F.3d 957, 964 (9th Cir. 2000); United States v. Larrazolo, 869 F.2d 1354, 1355 (9th Cir. 1989); see also United States v. Spillone, 879 F.3d 514, 520 (9th Cir. 1989) (explaining why standard is de novo).

Trial courts have discretion to fashion an appropriate remedy when a prosecutor subverts the attorney-client relationship. United States v. Chen, 99 F.3d 1495, 1504 (9th Cir. 1996).

47. **Probative Value vs. Prejudicial Harm**

The district court's decision balancing the probative value of evidence against its prejudicial effect is reviewed for an abuse of discretion. See United States v. Murillo, 288 F.3d 1126, 1139 (9th Cir. 2002); United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001), cert. denied, 122 S. Ct. 1181 (2002); United States v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999); United States v. Neill, 166 F.3d 943, 946 (9th Cir. 1999); United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); United States v. Hicks, 103 F.3d 837, 844 (9th Cir. 1996); United States v. Erickson, 75 F.3d 470, 476 (9th Cir. 1996); United States v. Easter, 66 F.3d 1018, 1021 (9th Cir. 1996); see also Old Chief v. United States, 519 U.S. 172, 183 n.7 (1997) ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely on."); United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002) ("We review for an abuse of discretion the district court's decision to exclude evidence under Rule 403."); United States v. Hankey, 203 F.3d 1160, 1166 (9th Cir. 2000) (noting that trial court has "considerable discretion). The district court need not, however, recite the Rule 403 test when deciding whether to admit evidence. Hicks, 103 F.3d at 844 n.6.

48. **Rebuttal and Surrebuttal Evidence**

Admission of rebuttal evidence is reviewed for an abuse of discretion. See United States v. Antonakeas, 255 F.3d 714, 724 (9th Cir. 2001); Jackson v. Calderon, 211 F.3d 1148, 1165 n.9 (9th Cir. 2000) (habeas). A district court's decision regarding the order of proof is also reviewed for an abuse of discretion. Fed. R. Evid. 611(a); Geders v. United States, 425 U.S. 80, 86 (1976); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1993). The trial court's determination regarding the proper scope of rebuttal is reviewed for an abuse of discretion. United States v. Koon, 34 F.3d 1416, 1428 (9th Cir. 1994), rev'd in part on other grounds, 518 U.S. 81 (1996); United States v. Goland, 959 F.2d 1449, 1454 (9th Cir. 1992). A district court's ruling on the admission or exclusion of surrebuttal evidence is also reviewed for an abuse of discretion. United States v. Blackstone, 56 F.3d 1143, 1146 (9th Cir. 1995); United States v. Butcher, 926 F.2d 811, 817 (9th Cir. 1991).

A trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. United States v. Lo, 231 F.3d 471, 482 (9th Cir. 2000); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1998); United States v. James, 139 F.3d 709, 713 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997); United States v. Colbert, 116 F.3d 395, 396 (9th Cir. 1997); United States v. Manning, 56 F.3d 1188, 1197 (9th Cir. 1995). "The trial court does not abuse its discretion as long as the jury receives sufficient information to appraise the biases and motivations

of the witnesses." Lo, 231 F.3d at 482; Manning, 56 F.3d at 1197 (internal quotation omitted).

Whether limitations on cross-examination violated a defendant's right of confrontation is reviewed de novo. See United States v. Adamson, 291 F.3d 606, 612 (9th Cir. 2002); United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2000); United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000); Bensimon, 172 F.3d at 1128; United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997); United States v. Marbella, 73 F.3d 1508, 1513 (9th Cir. 1996). The district court's decision to admit evidence for impeachment purposes on cross-examination is reviewed for a abuse of discretion. United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996). Violations of the constitutional right to cross-examine are subject to harmless error analysis. See United States v. Amlani, 111 F.3d 705, 716 (9th Cir. 1997).

Whether a court's limitation on recross-examination constitutes a violation of the Confrontation Clause is also reviewed de novo. United States v. Baker, 10 F.3d 1374, 1405 (9th Cir. 1993); United States v. Vargas, 933 F.2d 701, 704 (9th Cir. 1991). Within the bounds of constitutionality, review of the court's limitations on recross is for an abuse of discretion. Baker, 10 F.3d at 1405.

49. **Recess**

A trial court's decision to take recess during trial is reviewed for an abuse of discretion. United States v. Hay, 122 F.3d 1233, 1235 (9th Cir. 1997) (holding that forty-eight day recess between close of evidence and closing arguments is an abuse of discretion).

50. **Recusal and Disqualification of Judge**

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. See United States v. Martin, 278 F.3d 988, 1005 (9th Cir. 2002); United States v. Silver, 245 F.3d 1075, 1078 (9th Cir. 2001); United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999); United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997); United States v. Eshkol, 108 F.3d 1025, 1030 (9th Cir. 1997); United States v. Chischilly, 30 F.3d 1144, 1149-50 (9th Cir. 1994); see also United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action). When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. United States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991). A judge's decision not to

disqualify herself is also reviewed for an abuse of discretion. See United States v. Rogers, 119 F.3d 1377, 1380 (9th Cir. 1997).

"A federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if [he or she] abuses that discretion. A trial judge is more than an umpire, and may participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition. A judge's participation justifies a new trial only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." United States v. Laurins, 857 F.2d 529, 537 (9th Cir. 1988). Accord United States v. Sager, 227 F.3d 1138, 1145 (9th Cir. 2000), cert. denied, 121 S. Ct. 821 (2001); Scholl, 166 F.3d at 977 (reciting standard); United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997) (same); United States v. Wilson, 16 F.3d 1027, 1031 (9th Cir. 1994) (same).

Allegations of judicial misconduct are reviewed for plain error when the defendant fails to object at trial. See United States v. Springer, 51 F.3d 861, 864 n.1 (9th Cir. 1995).

51. **Relevancy of Evidence**

The district court's decisions regarding the relevancy of evidence are reviewed for abuse of discretion. United States v. Bensimon, 172 F.3d 1121, 1128-29 (9th Cir. 1999); United States v. Hicks, 103 F.3d 837, 843 (9th Cir. 1996); United States v. Easter, 66 F.3d 1018, 1020 (9th Cir. 1995); United States v. Vaandering, 50 F.3d 696, 704 (9th Cir. 1995); United States v. Rice, 38 F.3d 1536, 1542 (9th Cir. 1994). Note, however, that legal issues regarding whether evidence is relevant to other acts or to the crime charged is reviewed de novo. See United States v. Hardy, 289 F.3d 608, 612 (9th Cir. 2002); United States v. Castillo, 181 F.3d 1129, 1134 (9th Cir. 1999); United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999); see also United States v. Keiser, 57 F.3d 847, 852 n.6 (9th Cir. 1995) (reviewing whether character evidence unknown to the defendant at the time of an assault can, as a matter of law, be relevant to the claim of self-defense, and whether, as a matter of law, such evidence is admissible in a form other than reputation or opinion).

52. **Reopening**

The decision whether to reopen a case is reviewed for an abuse of discretion. See United States v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir. 1999) (defendant's motion); United States v. Tisor, 96 F.3d 370, 380 (9th Cir. 1996) (government's

motion); United States v. Simtob, 901 F.2d 799, 804 (9th Cir. 1990); United States v. Kelm, 827 F.2d 1319, 1323 (9th Cir. 1987) ("The court may refuse to permit an accused to reopen his case, and present additional evidence, where there is insufficient reason for the accused's failure to offer evidence at the proper time.").

A trial court's refusal to reconsider and reopen a suppression hearing is also reviewed for an abuse of discretion. United States v. Hobbs, 31 F.3d 918, 923 (9th Cir. 1994) (trial court abused its discretion).

53. **Rule of Completeness**

The trial judge's decision to admit evidence pursuant to the rule of completeness is reviewed for an abuse of discretion. United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996); United States v. Dorrell, 758 F.2d 427, 434 (9th Cir. 1985) ("Application of rule of completeness is a matter for the trial judge's discretion.").

54. **Sanctions**

The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed for an abuse of discretion. See United States v. Patterson, 292 F.3d 615, 626 (9th Cir. 2002).

Discovery sanctions are generally reviewed for an abuse of discretion. See United States v. Fernandez, 231 F.3d 1240, 1245 (9th Cir. 2000); United States v. Scholl, 166 F.3d 964, 972 (9th Cir. 1999). The applicability of Federal Rule of Criminal Procedure 16, however, is reviewed de novo, but once sanctions are imposed, their propriety is reviewed for an abuse of discretion. United States v. Mandel, 914 F.2d 1215, 1218 (9th Cir. 1990); United States v. Iglesias, 881 F.2d 1519, 1523 (9th Cir. 1989); see also United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992) ("We review de novo the question whether the district court had any legal basis for its discovery order. If it did, we review for an abuse of discretion the court's choice of a sanction for a violation of its order."). To reverse a conviction for a discovery violation, the reviewing court must conclude that not only did the district court abuse its discretion, but that the error resulted in prejudice to substantial rights. United States v. Mikaelian, 168 F.3d 380, 389 (9th Cir.), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Basinger, 60 F.3d 1400, 1407 (9th Cir. 1995); United States v. Baker, 10 F.3d 1374, 1398 (9th Cir. 1993).

The district court's decision regarding the imposition of sanctions for a Jencks Act violation is reviewed for an abuse of discretion. United States v. McKoy, 78 F.3d 446, 449 (9th Cir. 1996).

The district court's determination that a defendant is unable to pay a fine is reviewed for clear error. United States v. Haggard, 41 F.3d 1320, 1329 (9th Cir. 1994).

55. **Shackling**

The district court's decision to shackle a defendant is reviewed for an abuse of discretion. United States v. Collins, 109 F.3d 1413, 1417 (9th Cir. 1997) (noting limitations); Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994) (same); United States v. Baker, 10 F.3d 1374, 1401 (9th Cir. 1993).

56. **Supplemental Jury Instructions**

The court's decision whether to give supplemental instructions is reviewed for an abuse of discretion. See United States v. McIver, 186 F.3d 1119, 1130 (9th Cir. 1999); United States v. Dorri, 15 F.3d 888, 892 (9th Cir. 1994); United States v. Solomon, 825 F.3d 1292, 1295 (9th Cir. 1987) ("[N]ecessity, extent and character of supplemental instructions lies within the discretion of the trial court."). When defendant does not specifically challenge the supplemental instruction, review is limited to plain error. See United States v. Stapleton, 293 F.3d 1111, 1118 n.3 (9th Cir. 2002).

57. **Verdict Forms**

The district court's decision to use a special verdict form over a defendant's objection is reviewed for an abuse of discretion. See United States v. Patterson, 292 F.3d 615, 630 (9th Cir. 2002); United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998). Any error is subject, however, to a harmless error review. See United States v. Perez, 129 F.3d 1340, 1342 (9th Cir. 1997) (concluding that court's error was not harmless). When a defendant does not object, review is for plain error. See United States v. Garcia, 37 F.3d 1359, 1369-70 (9th Cir. 1994). In some instances, however, when the information sought in a special verdict is relevant to the sentence imposed, the government has a duty to request a special verdict, and review of the sentence imposed is reviewed de novo. Id. at 1370.

58. **Vouching**

Claims that a prosecutor improperly vouched for the credibility of witnesses are reviewed for plain error when no objection was made by the defendant. See United States v. Parker, 241 F.3d 1114, 1119 (9th Cir. 2001); United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999); United States v. Garcia-Guizar, 160 F.3d 511, 521 (9th Cir. 1998); United States v. Rudberg, 122 F.3d 1199, 1206 (9th Cir. 1997); United States v. Frederick, 78 F.3d 1370, 1379 (9th Cir. 1996).

59. **Witnesses**

The trial court's decision to grant an exception to the witness disclosure requirements of Federal Rule of Criminal Procedure 12.1(e) is reviewed for an abuse of discretion. United States v. Wills, 88 F.3d 704, 708 (9th Cir. 1996). The court's denial of a motion to produce witness's statements pursuant to the Jencks Act is reviewed for an abuse of discretion. United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997).

A court's control over the questioning of witnesses at trial is reviewed for an abuse of discretion. See United States v. Pearson, 274 F.3d 1225, 1233 (9th Cir. 2001) (disallowing leading questions); United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2001) (limiting cross-examination); United States v. Archdale, 229 F.3d 861, 865 (9th Cir. 2000) (permitting leading questions); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999) (limiting cross-examination); United States v. Hay, 122 F.3d 1233, 1235 (9th Cir. 1997) (limiting defendant's testimony); United States v. Rutgard, 116 F.3d 1270, 1279 (9th Cir. 1997) (imposing time restraints on examination of witnesses); United States v. Colbert, 116 F.3d 395, 396 (9th Cir. 1997) (limiting cross-examination); United States v. English, 92 F.3d 909, 913 (9th Cir. 1996) (permitting witness to testify notwithstanding violation of the court's witness sequestration order); United States v. Frederick, 78 F.3d 1370, 1376 (9th Cir. 1996) (allowing witness to "refresh her recollection"); United States v. Erickson, 75 F.3d 470, 480 (9th Cir. 1996) (allowing witness to be recalled); United States v. Marbella, 73 F.3d 1508, 1513 (9th Cir. 1996) (restricting cross-examination); United States v. Manning, 56 F.3d 1188, 1197 (9th Cir. 1995) (limiting cross-examination); United States v. Higa, 55 F.3d 448, 452 (9th Cir. 1995) (decision to admit extrinsic evidence to rebut a witness's direct testimony); United States v. Castro-Romero, 964 F.2d 942, 943 (9th Cir. 1992) (en banc) (permitting leading questions of witness); United States v. Torres-Rodriguez, 930 F.2d 1375, 1384 (9th Cir. 1991) (refusing defendant's request to recall witness).

The trial court’s refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. See Walker v.

Sumner, 14 F.3d 14145, 1422 (9th Cir. 1994); United States v. Smith, 924 F.2d 889, 896 (9th Cir. 1991). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. See Wiggins v. County of Alameda, 717 F.2d 466, 468 (9th Cir. 1983).

A trial judge has broad discretion in supervising the trial and may participate in the examination of witnesses to clarify issues and call the jury's attention to important evidence. United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997); United States v. Wilson, 16 F.3d 1027, 1031 (9th Cir. 1994); see also United States v. Moorehead, 57 F.3d 875, 878 (9th Cir. 1995) ("[Defendant] does not dispute the broad authority of the district court to examine witnesses.").

A trial court's determination of the appropriate sanction for a violation of a witness sequestration order is generally reviewed for an abuse of discretion. See English, 92 F.3d at 913; United States v. Hobbs, 31 F.3d 918, 921 (9th Cir. 1994) (applying plain error when there was no contemporaneous objection).

"The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." United States v. Montoya, 945 F.2d 1068, 1078 (9th Cir. 1991) (internal quotation omitted). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. United States v. Dudden, 65 F.3d 1461, 1467 (9th Cir. 1995). The denial of a Kastigar hearing is reviewed for an abuse of discretion. Id. at 1468; but see United States v. Young, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. United States v. Montoya, 45 F.3d 1286, 1291 (9th Cir. 1995); United States v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999). The district court's interpretation of the witness tampering provisions of 18 U.S.C. § 1512(b) is reviewed de novo. United States v. Khatami, 280 F.3d 907, 910 (9th Cir.), cert. denied, 122 S. Ct. 1940 (2002).

D. **Post-Trial Decisions in Criminal Cases**

1. **Allocution**

The court's failure to allow a defendant his or her right of allocution is reviewed to determine if the error is harmless. See United States v. Mack, 200 F.3d 653, 657 (9th Cir. 2000); United States v. Leasure, 122 F.3d 837, 840 (9th Cir. 1997); United States v. Carper, 24 F.3d 1157, 1162 (9th Cir. 1994); United States v. Mejia, 953 F.2d 461, 465 (9th Cir. 1991). The denial of allocution is not harmless when the district court has the discretion to sentence the defendant to a shorter sentence than given. Mack, 200 F.3d at 657; United States v. Sarno, 73 F.3d 1470, 1503-04 (9th Cir. 1995).

2. **Appeals**

Whether a defendant has waived the statutory right to appeal by entering into a plea agreement is reviewed de novo. See United States v. Nguyen, 235 F.3d 1179, 1182 (9th Cir. 2000); United States v. Nunez, 223 F.3d 956, 958 (9th Cir. 2000); United States v. Phillips, 174 F.3d 1074, 1075 (9th Cir. 1999); United States v. Martinez, 143 F.3d 1266, 1270 (9th Cir. 1998); United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997). The validity of a waiver of the right to appeal is reviewed de novo. See United States v. Littlejohn, 224 F.3d 960, 964 (9th Cir. 2000); United States v. Garza-Sanchez, 217 F.3d 806, 808 (9th Cir. 2000); United States v. Portillo-Cano, 192 F.3d 1246, 1249 (9th Cir. 1999); United States v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998); United States v. Zink, 107 F.3d 716, 717 (9th Cir. 1997); United States v. Ruelas, 106 F.3d 1416, 1418 (9th Cir. 1997); United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996); United States v. Petty, 80 F.3d 1384, 1386 (9th Cir. 1996).

A district court's determination whether a defendant has shown excusable neglect in failing to file a timely notice of appeal is reviewed for an abuse of discretion. United States v. Green, 89 F.3d 657, 660 (9th Cir. 1996); United States v. Smith, 60 F.3d 595, 596-97 (9th Cir. 1995). A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. See United States v. Garcia, 997 F.2d 1273, 1276 n.1 (9th Cir. 1993).

3. **Apprendi Violations**

A claim that a defendant's sentence violates Apprendi v. New Jersey, 530 U.S. 466 (2000), is reviewed de novo. See United States v. Smith, 282 F.3d 758, 771 (9th Cir. 2002); United States v. Martin, 278 F.3d 988, 1005 (9th Cir. 2002). Whether a district court correctly applied Apprendi at sentencing is a question of law reviewed

de novo. See United States v. Gill, 280 F.3d 923, 928 (9th Cir. 2002). The district court's interpretation of the constitutional rule in Apprendi is reviewed de novo. See United States v. Maria-Gonzalez, 268 F.3d 664, 667 (9th Cir. 2001), cert. denied, 122 S. Ct. 1382 (2002). Apprendi violations are subject to harmless error review. See United States v. Jordan, 291 F.3d 1091, 1095 (9th Cir. 2002). A defendant's failure, however, to raise an Apprendi claim before the district court limits appellate review to plain error. See United States v. Buckland, 289 F.3d 558, 563 (9th Cir.) (en banc), cert. denied, 122 S. Ct. 2314 (2002); United States v. Rodriguez, 285 F.3d 759, 763 (9th Cir. 2002); United States v. Johansson, 249 F.3d 848, 861 (9th Cir. 2001). Note that Apprendi claims cannot not be raised by habeas review. See United States v. Sanchez-Cervantes, 282 F.3d 664, 667 (9th Cir. 2002).

4. **Arrest of Judgment**

The district court's denial of a motion for arrest of judgment is reviewed for an abuse of discretion. United States v. Baker, 63 F.3d 1478, 1499 (9th Cir. 1995).

5. **Attorneys Fees**

Attorneys fees may be awarded to a prevailing criminal defendant whenever the government's position is vexatious, frivolous, or in bad faith. See 18 U.S.C. § 3006A (Hyde Amendment). Such an award of fees is reviewed for an abuse of discretion. See United States v. Braunstein, 281 F.3d 982, 992 (9th Cir. 2002). The denial of fees under the Hyde Amendment is also reviewed for an abuse of discretion. See United States v. Campbell, 291 F.3d 1169, 1170 (9th Cir. 2002); United States v. Tucor Int'l, Inc., 238 F.3d 1171, 1175 (9th Cir. 2001); United States v. Lindberg, 220 F.3d 1120, 1124 (9th Cir. 2000).

6. **Bail Pending Sentence and Appeal**

Post-trial release is governed by the standards set forth in 18 U.S.C. § 3143, Federal Rule of Criminal Procedure 46, and Federal Rule of Appellate Procedure 9. This circuit has not established a standard of review of a district court's denial of release. Other circuits review de novo orders releasing a defendant pending appeal. See United States v. Eaken, 995 F.2d 740, 741 (7th Cir. 1993); United States v. Bayko, 774 F.2d 516, 519 (1st Cir. 1985) (review is "independent").

When a district court refuses release pending appeal or imposes conditions of release, the court must state in writing the reasons for the action taken. Fed. R. App. P. 9(b). The district court satisfies this requirement by issuing written findings or by stating the reasons for the decision orally and providing a transcript. United States v. Cordero, 992 F.2d 985, 986 n.1 (9th Cir. 1993). Absent written findings or a transcript of the bail hearing, remand is required. Id.

The district court's interpretation of its statutory authority is reviewed de novo. See United States v. Handy, 761 F.2d 1279, 1281-84 (9th Cir. 1985) (defining meaning of "substantial question"); see also United States v. Montoya, 908 F.2d 450, 450 (9th Cir. 1990). Findings by the trial court whether a defendant is likely to flee or pose a danger to the safety of the community are likely reviewed for clear error. See Handy, 761 F.2d at 1283 (calling such conclusions "findings"); see also United States v. Reynolds, 956 F.2d 192, 192 (9th Cir. 1992) (same).

The district court's denial of a motion for relief from bond forfeiture is reviewed for an abuse of discretion. See United States v. Nguyen, 279 F.3d 1112, 1115 (9th Cir. 2002); United States v. Amwest Sur. Ins. Co., 54 F.3d 601, 602 (9th Cir. 1995).

7. **Disciplinary Orders**

Terms and conditions of a disciplinary order are reviewed for abuse of discretion. United States v. Engstrom, 16 F.3d 1006, 1011 (9th Cir. 1994).

8. **Excusable Neglect**

A district court's determination whether a defendant has shown excusable neglect in failing to file a timely notice of appeal is reviewed for an abuse of discretion. United States v. Green, 89 F.3d 657, 660 (9th Cir. 1996); United States v. Smith, 60 F.3d 595, 596-97 (9th Cir. 1995). A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. See United States v. Garcia, 997 F.2d 1273, 1276 n.1 (9th Cir. 1993).

9. **Expungement**

This court reviews de novo whether a district court has the authority to order expungement of a record of conviction. See United States v. Sumner, 226 F.3d 1005, 1009 (9th Cir. 2000).

10. **Fines**

The district court's determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. See United States v. Brickey, 289 F.3d 1144, 1152 (9th Cir. 2002) (noting limited review when defendant fails to object); United States v. Sager, 227 F.3d 1138, 1147 (9th Cir. 2000), cert. denied, 121 S. Ct. 821 (2001); United States v. Scrivener, 189 F.3d 944, 953 (9th Cir. 1999); United States v. Ladum, 141 F.3d 1328, 1344 (9th Cir. 1998); United States v. Haggard, 41 F.3d 1320, 1329 (9th Cir. 1994); United States v. Favorito, 5 F.3d 1338, 1339 (9th Cir. 1993). The legality of a fine imposed is a question of law reviewed de novo. See United States v. Portin, 20 F.3d 1028, 1029-30 (9th Cir. 1994). Whether a fine is constitutionally excessive is reviewed de novo. See United States v. Bajakajian, 524 U.S. 321, 336 & n.10 (1998). Whether a district court has the authority to modify a fine is a question of law reviewed de novo. United States v. Lopez-Soto, 205 F.3d 1098, 1100 (9th Cir. 2000).

11. **Forfeiture**

A district court's interpretation of the federal forfeiture laws is reviewed de novo. United States v. Real Property Located at 25445 Via Dona Christa, Valencia, Cal., 138 F.3d 403, 407 (9th Cir. 1998), amended by 170 F.3d 1161 (9th Cir. 1999); United States v. $46,588.00 in U.S. Currency and $20.00 in Canadian Currency, 103 F.3d 902, 903 (9th Cir. 1996); United States v. Kim, 94 F.3d 1247, 1249 (9th Cir. 1996); United States v. 1980 Lear Jet, 38 F.3d 398, 400 (9th Cir. 1994).

Standing to contest a forfeiture action is a question of law reviewed de novo. See United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1057 n.10 (9th Cir. 1994). Whether a delay in the initiation of civil forfeiture proceedings is unconstitutional is a question of law reviewed de novo. United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995); United States v. $874,938.00 U.S. Currency, 999 F.2d 1323, 1325 (9th Cir. 1993).

The district court's determination of probable cause in civil forfeiture proceedings is reviewed de novo as a question of law. See United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997); United States v. $405,089.23 U.S. Currency, 122 F.3d 1285, 1289 (9th Cir. 1997); United States v. One 1986 Ford Pickup, 56 F.3d 1181, 1186 (9th Cir. 1995); United States v. U.S. Currency, $30,060, 39 F.3d 1039, 1041 (9th Cir. 1994).

12. **Mistrial**

The district court's denial of a motion for mistrial is reviewed for an abuse of discretion. See United States v. Mills, 280 F.3d 915, 921 (9th Cir.), cert. denied, 122 S. Ct. 2347 (2002); United States v. Sarkisian, 197 F.3d 966, 981 (9th Cir. 1999; United States v. Ramirez, 176 F.3d 1179, 1183 (9th Cir. 1999); United States v. Randall, 162 F.3d 557, 559 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1106 (9th Cir. 1998); United States v. English, 92 F.3d 909, 912 (9th Cir. 1996); United States v. Wills, 88 F.3d 704, 712 (9th Cir. 1996); United States v. Frederick, 78 F.3d 1370, 1375 (9th Cir. 1996); United States v. George, 56 F.3d 1078, 1082 (9th Cir. 1995). Note, however, that the district court's denial of a mistrial based on Brady violations is reviewed do novo. See United States v. Howell, 231 F.3d 615, 624 (9th Cir. 2000), cert. denied, 122 S. Ct. 76 (2001).

13. **Motion to Correct or Reduce Sentence**

A trial court's denial of a motion to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range) is reviewed for an abuse of discretion. See United States v. Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998); United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996).

Rule 35(c) permits corrections of sentences which are clearly erroneous under the Sentencing Guidelines. See United States v. Aguirre, 214 F.3d 1122, 1126 (9th Cir. 2000). Issues of law raised in a Rule 35(c) motion are reviewed de novo. See United States v. Zakhor, 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act). Whether a court has jurisdiction under Rule 35(c) to amend a sentence presents a question of law reviewed de novo. See Aguirre, 214 F.3d at 1124; United States v. Barragan-Mendoza, 174 F.3d 1024, 1027 (9th Cir. 1999). Note that a district court decision denying a Rule 35 motion in a case involving pre-November 1, 1987 conduct is "reviewed for illegality or gross abuse of discretion." See United States v. Hayes, 231 F.3d 1132, 1135 (9th Cir. 2000).

14. **New Trial**

The denial of a defendant's motion for a new trial is reviewed for an abuse of discretion. See United States v. Hursh, 217 F.3d 761, 769 (9th Cir. 2000); United States v. Jackson, 209 F.3d 1103, 1106 (9th Cir. 2000); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Henson, 123 F.3d 1226, 1240 (9th Cir. 1997); United States v. Alvarez, 86 F.3d 901, 906 (9th Cir. 1996); United States v. George, 56 F.3d 1078, 1083 (9th Cir. 1995); United States v. Ponce, 51 F.3d 820, 832 (9th Cir. 1995). The defendant carries a significant burden to show the district court abused its

discretion in denying the motion for a new trial. United States v. Endicott, 869 F.2d 452, 454 (9th Cir. 1989).

Denial of a motion for a new trial based on newly discovered evidence is reviewed for an abuse of discretion. United States v. Sarno, 73 F.3d 1470, 1507 (9th Cir. 1995); United States v. Bischel, 61 F.3d 1429, 1436 (9th Cir. 1995); United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992). Rejection of a motion for a new trial predicated on alleged juror misconduct is reviewed for an abuse of discretion. See United States v. Mills, 280 F.3d 915, 921 (9th Cir.), cert. denied, 122 S. Ct. 2347 (2002); United States v. Saya, 247 F.3d 929, 935 (9th Cir.), cert. denied, 122 S. Ct. 493 (2001); United States v. George, 56 F.3d 1078, 1083 (9th Cir. 1995). Denial based on alleged prosecutorial misconduct is also reviewed for an abuse of discretion. United States v. Murillo, 288 F.3d 1126, 1140 (9th Cir. 2002); Peterson, 140 F.3d at 821; United States v. Sayetsitty, 107 F.3d 1405, 1408 (9th Cir. 1997). This court has stated, however, that the denial of a new trial based on a Brady violation is reviewed de novo. United States v. Steinberg, 99 F.3d 1486, 1489 (9th Cir. 1996); United States v. Zuno-Arce, 44 F.3d 1420, 1425 (9th Cir. 1995). The denial of a motion for a new trial based on a theory of entrapment is reviewed de novo. United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997). The decision to grant a new trial based on a claim that jurors were improperly exposed to extrinsic evidence is subject to "independent" review. United States v. Keating, 147 F.3d 895, 899 (9th Cir. 1998).

The district court's decision to hold an evidentiary hearing on a motion for new trial is reviewed for abuse of discretion. United States v. Del Muro, 87 F.3d 1078, 1080 n.3 (9th Cir. 1996).

15. **Parole**

The legality of a sentence and its impact on parole are issues reviewed de novo. See United States v. Manning, 56 F.3d 1188, 1200 (9th Cir. 1995).

Whether a parole or probation officer is acting as a "stalking horse" is a question of fact reviewed for clear error. United States v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995).

This court reviews the Parole Commission's interpretations of law de novo and its factual findings for clear error. Kleeman v. United States Parole Comm'n, 125 F.3d 725, 730 (9th Cir. 1997). The Commissioner's discretionary decisions to grant or deny parole are not reviewable by this court except for the claim that "the Commission acted beyond the scope of discretion granted by Congress." See DeLancy v. Crabtree, 131

F.3d 780, 787 (9th Cir. 1997) (internal quotation omitted); see also Benny v. United States Parole Comm'n, 295 F.3d 977, 981 (9th Cir. 2002) (noting that review is limited to "whether the Commission exceeded its authority or acted so arbitrarily as to violate due process").

16. **Probation**

A district court may lack discretion to impose probation as a sentence. See United States v. Green, 105 F.3d 1321, 1323 (9th Cir. 1997); United States v. Roth, 32 F.3d 437, 440 (9th Cir. 1994). If probation is available, the "task of line-drawing in probation matters is best left to the discretion of the sentencing judge." United States v. Juvenile Male #1, 38 F.3d 470, 473 (9th Cir. 1994) (internal quotation omitted).

The decision to revoke probation is reviewed for an abuse of discretion. United States v. Shampang, 987 F.2d 1439, 1441 (9th Cir. 1993); United States v. Laughlin, 933 F.2d 786, 788 (9th Cir. 1991); United States v. Tham, 884 F.2d 1262, 1263 (9th Cir. 1989). Whether a district court can properly delegate authority to a magistrate judge to conduct a probation revocation hearing is a question of law reviewed de novo. United States v. Colacurcio, 84 F.3d 326, 328 (9th Cir. 1996). Whether a probation officer exceeds her statutory authority by submitting a petition on supervised release to the district court is an issue of law reviewed de novo. United States v. Mejia-Sanchez, 172 F.3d 1172, 1174 (9th Cir. 1999). This court reviews the district court's application of the supervised release statute de novo. United States v. Cade, 236 F.3d 463, 465 (9th Cir. 2000), cert. denied, 533 U.S. 937 (2001).

The district court's choice of conditions of probation is reviewed for an abuse of discretion. See Juvenile Male #1, 38 F.3d at 473; United States v. Parrott, 992 F.2d 914, 920 (9th Cir. 1993) (noting that review is de novo if defendant challenges the court's authority to impose condition); United States v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988) (noting that district court has "broad discretion in setting probation conditions").

17. **Resentencing**

Whether a court has jurisdiction to resentence a defendant is a question of law reviewed de novo. See United States v. Aguirre, 214 F.3d 1122, 1124 (9th Cir. 2000); United States v. Ruiz-Alvarez, 211 F.3d 1181, 1184 (9th Cir. 2000); United States v. Barragan-Mendoza, 174 F.3d 1024, 1027 (9th Cir. 1999). Whether double jeopardy

bars resentencing is also reviewed de novo. Ruiz-Alvarez, 211 F.3d at 1185; United States v. McClain, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas); United States v. Caterino, 29 F.3d 1390, 1394 (9th Cir. 1994); United States v. Kinsey, 994 F.2d 699, 702 (9th Cir. 1993) (habeas). Whether resentencing violates a defendant's due process rights is reviewed de novo. See United States v. Garcia-Guizar, 234 F.3d 483, 489 (9th Cir. 2000), cert. denied, 532 U.S. 984 (2001). Note that generally a district court's discretion on remand to resentence a defendant is not limited to the prior record. See United States v. Matthews, 278 F.3d 880, 885 (9th Cir.) (en banc), cert. denied, 122 S. Ct. 2345 (2002).

18. **Restitution**

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. See United States v. Pizzichiello, 272 F.3d 1232, 1240 (9th Cir. 2001); United States v. Najjor, 255 F.3d 979, 984 (9th Cir. 2001), cert. denied, 122 S. Ct. 2667 (2002); United States v. Matsumaru, 244 F.3d 1092, 1108 (9th Cir. 2001); United States v. Rodrigues, 229 F.3d 842, 844 (9th Cir. 2000); United States v. Lawrence, 189 F.3d 838, 846 (9th Cir. 1999); United States v. Mikaelian, 168 F.3d 380, 390 (9th Cir.), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998); United States v. Nash, 115 F.3d 1431, 1441 (9th Cir. 1997); United States v. Pappadopoulos, 64 F.3d 522, 530 (9th Cir. 1995); United States v. Rice, 38 F.3d 1536, 1540 (9th Cir. 1994). Factual findings supporting such orders are reviewed for clear error. Pizzichiello, 272 F.3d at 1240; Lawrence, 189 F.3d at 846; United States v. Allen, 153 F.3d 1037, 1044-45 (9th Cir. 1998); Stoddard, 150 F.3d at 1147; United States v. Peterson, 98 F.3d 502, 510 n.7 (9th Cir. 1996).

The legality of a restitution order, however, is reviewed de novo. See Pizzichiello, 272 F.3d at 1240; United States v. Follet, 269 F.3d 996, 999 (9th Cir. 2001); United States v. King, 257 F.3d 1013, 1028 (9th Cir. 2001); United States v. Laney, 189 F.3d 954, 964-65 (9th Cir. 1999); United States v. Craig, 181 F.3d 1124, 1126 (9th Cir. 1999); United States v. Meksian, 170 F.3d 1260, 1262 (9th Cir. 1999); United States v. Crawford, 169 F.3d 590, 592 (9th Cir. 1999); Stoddard, 150 F.3d at 1147; United States v. Baggett, 125 F.3d 1319, 1321 (9th Cir. 1997); United States v. Rutgard, 116 F.3d 1270, 1294 (9th Cir. 1997); United States v. Dayea, 73 F.3d 229, 230 (9th Cir. 1995).

A court has broad discretion in ordering restitution. See Laney, 189 F.3d at 966; United States v. Miguel, 49 F.3d 505, 511 (9th Cir. 1995). The amount of restitution ordered is reviewed for an abuse of discretion. Laney, 189 F.3d at 966; Stoddard, 150 F.3d at 1147; United States v. Johnson, 132 F.3d 1279, 1286 (9th Cir. 1997); United

States v. Zink, 107 F.3d 716, 718 (9th Cir. 1997); United States v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996); United States v. Catherine, 55 F.3d 1462, 1465 (9th Cir. 1995). The court's "valuation methodology" is reviewed, however, de novo. See United States v. Lomow, 266 F.3d 1013, 1020 (9th Cir. 2001).

19. **Rule 32**

The sentencing court's compliance with Federal Rule of Criminal Procedure 32 is reviewed de novo. See United States v. Herrera-Rojas, 243 F.3d 1139, 1142 (9th Cir. 2001); United States v. Houston, 217 F.3d 1204, 1206 (9th Cir. 2000); United States v. Standard, 207 F.3d 1136, 1140 (9th Cir. 2000); United States v. Havier, 155 F.3d 1090, 1092 (9th Cir. 1998); United States v. Stein, 127 F.3d 777, 780 (9th Cir. 1997); Karterman, 60 F.3d 576, 583 (9th Cir. 1995); see also United States v. Ruiz, 257 F.3d 1030, 1031 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test).

The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. Houston, 217 F.3d at 1206-07; Stein, 127 F.3d at 780. If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. See United States v. Berry, 258 F.3d 971, 976 (9th Cir. 2001).

20. **Sentencing**

a. **Pre-Guidelines**

The Sentencing Guidelines apply only to defendants who committed offenses on or after November 1, 1987. See United States v. Molinaro, 11 F.3d 853, 864 (9th Cir. 1993). Prior to the guidelines, a district court had "virtually unfettered discretion in imposing sentence." United States v. Baker, 10 F.3d 1374, 1420 (9th Cir. 1993) (internal quotation omitted).

The legality of a pre-guideline sentence is reviewed de novo. United States v. Pomazi, 851 F.2d 244, 247 (9th Cir. 1988), overruled on other grounds by Hughey v. United States, 495 U.S. 411 (1990). Sentencing that falls within statutory limits is left to the sound discretion of the district court and is reviewed only for abuse of discretion. Pomazi, 851 F.2d at 247. If the sentence raises constitutional issues, however, review is more searching. Id.; see also United States v. Tucker, 404 U.S. 443, 447 (1972) (sentence within statutory limits generally not reviewable absent constitutional concerns). There are two exceptions to this general bar of appellate

review: (1) when the sentencing judge refuses to exercise discretion (e.g., the judge has a rigid policy of imposing the maximum sentence for a given offense), and (2) when the judge relies solely on confidential memoranda not made available to a defendant's counsel. United States v. Branco, 798 F.2d 1302, 1305-06 (9th Cir. 1986). Appellate review of sentencing under the Dangerous Special Offender Act, 18 U.S.C. §§ 3575-3576, is broader than review of usual sentencing. United States v. Burt, 802 F.2d 330, 333-34 (9th Cir. 1986).

The decision by a district court judge who was not the trial judge to proceed with sentencing pursuant to Federal Rule of Criminal Procedure 25(b) is reviewed for an abuse of discretion. United States v. Edwards, 800 F.2d 878, 884 (9th Cir. 1986); United States v. Spinney, 795 F.2d 1410, 1413 (9th Cir. 1986). There is no abuse of discretion when the sentencing judge is familiar with the case and uses informed discretion in sentencing. Spinney, 795 F.2d at 1413.

Federal Rule of Criminal Procedure 35 was also modified in 1987 to conform with the Sentencing Guidelines. See United States v. Barragan-Mendoza, 174 F.3d 1024, 1027 (9th Cir. 1999); United States v. Hardesty, 958 F.2d 910, 911 n.1 (9th Cir.), aff'd, 977 F.2d 1347 (9th Cir. 1992) (en banc). Review of a trial court's decision under the former rule may arise, however, if the criminal conduct occurred prior to November 1, 1987. The district court's assumption of jurisdiction to resentence or modify a defendant's sentence pursuant to former Rule 35 is reviewed de novo. United States v. Stump, 914 F.2d 170, 172 (9th Cir. 1990). The district court's ruling on a Rule 35 motion is reviewed for "illegality or gross abuse of discretion." See United States v. Hayes, 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct); Stump, 914 F.3d at 172 (same). The trial court's decision not to hold an evidentiary hearing on a Rule 35 motion is reviewed for an abuse of discretion. See Hayes, 231 F.3d at 1135; United States v. Gonzales, 765 F.2d 1393, 1396 (9th Cir. 1985). The district court's decision to impose pre-Guidelines and Guidelines sentences consecutively is reviewed for an abuse of discretion. United States v. Scarano, 76 F.3d 1471, 1474 (9th Cir. 1996).

b. **Guidelines**

The legality of a guideline sentence is reviewed de novo. See United States v. Williams, 291 F.3d 1180, 1191 (9th Cir. 2002); United States v. Tighe, 266 F.3d 1187, 1190 (9th Cir. 2001); United States v. Reyes-Pacheco, 248 F.3d 942, 945 (9th Cir. 2001); United States v. Tam, 240 F.3d 797, 803 (9th Cir. 2001); United States v. Carter, 219 F.3d 863, 866 (9th Cir. 2000); United States v. Hankey, 203 F.3d 1160, 1166 (9th Cir. 2000); United States v. Bahe, 201 F.3d 1124, 1127 (9th Cir. 2000); United States v.

Jackson, 176 F.3d 1175, 1176 (9th Cir. 1999) (per curiam); United States v. Neill, 166 F.3d 943, 949 (9th Cir. 1999); United States v. Garcia, 112 F.3d 395, 397 (9th Cir. 1997); United States v. Carpenter, 91 F.3d 1282, 1283 (9th Cir. 1996); United States v. Reed, 80 F.3d 1419, 1421 (9th Cir. 1996); United States v. Redmond, 69 F.3d 979, 980 (9th Cir. 1995).

The constitutionality of the Sentencing Guidelines is a question of law reviewed de novo. See United States v. Mezas de Jesus, 217 F.3d 638, 642 (9th Cir. 2000); United States v. Lara-Aceves, 183 F.3d 1007, 1009 (9th Cir. 1999), overruled on other grounds by United States v. Rivera-Sanchez, 247 F.3d 905 909 (9th Cir. 2001) (en banc); United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997). The constitutionality of a sentence imposed under the Sentencing Guidelines is reviewed de novo. See United States v. Patterson, 292 F.3d 615, 631 (9th Cir. 2002); United States v. Mezas de Jesus, 217 F.3d 638, 642 (9th Cir. 2000); United States v. Estrada-Plata, 57 F.3d 757, 762 (9th Cir. 1995). A claim that a defendant's sentence violates Apprendi v. New Jersey, 530 U.S. 466 (2000), is also reviewed de novo. See United States v. Smith, 282 F.3d 758, 771 (9th Cir. 2002); but see United States v. Sanchez-Cervantes, 282 F.3d 664, 671 (9th Cir. 2002) (holding that Apprendi claim cannot be raised in habeas petition).

The district court's interpretation of the Sentencing Guidelines is reviewed de novo. See United States v. Alexander, 287 F.3d 811, 818 (9th Cir. 2002); United States v. Hughes, 282 F.3d 1228, 1230 (9th Cir. 2002); United States v. Jordan, 256 F.3d 922, 926 (9th Cir. 2001); United States v. Montano, 250 F.3d 709, 712 (9th Cir. 2001); Reyes-Pacheco, 248 F.3d at 945; United States v. Castillo-Rivera, 244 F.3d 1020, 1021 (9th Cir.), cert. denied, 122 S. Ct. 294 (2001); United States v. Jeter, 236 F.3d 1032, 1034 (9th Cir. 2001); United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000); United States v. Johnson, 205 F.3d 1197, 1199 (9th Cir. 2000); United States v. Castillo, 181 F.3d 1129, 1134-35 (9th Cir. 1999); United States v. Smith, 175 F.3d 1147, 1148 (9th Cir. 1999); United States v. Randall, 162 F.3d 557, 560 (9th Cir. 1998); United States v. Bailey, 139 F.3d 667, 667 (9th Cir. 1998); United States v. Garcia, 135 F.3d 667, 669 (9th Cir. 1998); United States v. Newland, 116 F.3d 400, 402 (9th Cir. 1997); United States v. Nieblas, 115 F.3d 703, 705 (9th Cir. 1997); United States v. Kimble, 107 F.3d 712, 714 (9th Cir. 1997).

The legality of a fine imposed is a question of law reviewed de novo. See United States v. Portin, 20 F.3d 1028, 1029-30 (9th Cir. 1994). Whether a fine is constitutionally excessive is also reviewed de novo. See United States v. Bajakajian, 524 U.S. 321, 336 & n.10 (1998). Whether a district court has the authority to modify a fine is a question of law reviewed de novo. United States v. Lopez-Soto, 205 F.3d

1098, 1100 (9th Cir. 2000). Note, however, that a district court's determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. See United States v. Brickey, 289 F.3d 1144, 1152 (9th Cir. 2002) (noting limited review when defendant fails to object); United States v. Sager, 227 F.3d 1138, 1147 (9th Cir. 2000), cert. denied, 121 S. Ct. 821 (2001); United States v. Scrivener, 189 F.3d 944, 953 (9th Cir. 1999); United States v. Ladum, 141 F.3d 1328, 1344 (9th Cir. 1998); United States v. Haggard, 41 F.3d 1320, 1329 (9th Cir. 1994); United States v. Favorito, 5 F.3d 1338, 1339 (9th Cir. 1993)

The district court's application of the abuse of trust enhancement is a mixed question of law and fact reviewed de novo. See Brickey, 289 F.3d at 1153; United States v. Hoskins, 282 F.3d 772, 776 (9th Cir.), cert. denied, 122 S. Ct. 2610 (2002). The court's conclusion that a prior conviction may be used for purposes of sentencing enhancement is also reviewed de novo. See United States v. Gallaher, 275 F.3d 784, 790 (9th Cir. 2001) (Armed Career Criminal Act); United States v. Phillips, 149 F.3d 1026, 1031 (9th Cir. 1998) (same); United States v. Young, 988 F.2d 1002, 1003 (9th Cir. 1993) (same). Whether the aggravated felony provisions of the guidelines apply to a conviction is reviewed de novo. See United States v. Hernandez-Castellanos, 287 F.3d 876, 878 (9th Cir. 2002); United States v. Robles-Rodriguez, 281 F.3d 900, 902 (9th Cir. 2002); United States v. Rivera-Sanchez, 247 F.3d 905, 907 (9th Cir. 2001) (en banc). The trial court's "grouping of offenses" for purposes of applying the Sentencing Guidelines is also reviewed de novo. See United States v. Seesing, 234 F.3d 456, 458 (9th Cir. 2001); United States v. Boos, 127 F.3d 1207, 1209 (9th Cir. 1997). Note, however, that whether prior convictions are "related" for purposes of sentencing enhancement is a factual inquiry reviewed for clear error. See United States v. Woodard, 172 F.3d 717, 719 (9th Cir. 1999); see also Buford v. United States, 532 U.S. 59, 60 (2001) (clarifying that standard is a deferential search for clear error).

The sentencing court's compliance with Federal Rule of Criminal Procedure 32 is reviewed de novo. See United States v. Herrera-Rojas, 243 F.3d 1139, 1142 (9th Cir. 2001); United States v. Houston, 217 F.3d 1204, 1206 (9th Cir. 2000); United States v. Standard, 207 F.3d 1136, 1140 (9th Cir. 2000); United States v. Havier, 155 F.3d 1090, 1092 (9th Cir. 1998); United States v. Stein, 127 F.3d 777, 780 (9th Cir. 1997); Karterman, 60 F.3d 576, 583 (9th Cir. 1995); see also United States v. Ruiz, 257 F.3d 1030, 1031 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test). The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. Houston, 217 F.3d at 1206-07; Stein, 127 F.3d at 780. If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. See United States v. Berry, 258 F.3d 971, 976 (9th Cir. 2001).

The sufficiency of the government's compliance with 21 U.S.C. § 851 is a question of law reviewed de novo. See United States v. Hamilton, 208 F.3d 1165, 1168 (9th Cir. 2000).

Whether the district court can grant prison credit time is a question of law reviewed de novo. See United States v. Lualemaga, 280 F.3d 1260, 1265 (9th Cir.), cert. denied, 122 S. Ct. 2641 (2002); United States v. Checchini, 967 F.2d 348, 349 (9th Cir. 1992).

The district court's factual findings in the sentencing phase are reviewed for clear error. See United States v. Williams, 291 F.3d 1180, 1196 (9th Cir. 2002) (victim vulnerability); United States v. Smith, 282 F.3d 758, 772 (9th Cir. 2002) (minor or minimal role); United States v. Hughes, 282 F.3d 1228, 1230 (9th Cir. 2002) (secondary purpose); United States v. Pizzichiello, 272 F.3d 1232, 1236 (9th Cir. 2001) (role adjustment/obstruction of justice); United States v. Caperna, 251 F.3d 827, 830 (9th Cir. 2001) (relative culpability); United States v. Montano, 250 F.3d 709, 712 (9th Cir. 2001) (sophisticated concealment); United States v. Ellis, 241 F.3d 1096, 1099 (9th Cir. 2001) (firearm possession); United States v. Mezas de Jesus, 217 F.3d 638, 642 (9th Cir. 2000) (firearm possession); United States v. Maldonado, 215 F.3d 1046, 1050 (9th Cir. 2000) (role adjustment); United States v. Fleming, 215 F.3d 930, 939 (9th Cir. 2000) (acceptance of responsibility); United States v. Wetchie, 207 F.3d 632, 633 n.1 (9th Cir. 2000) (victim vulnerability); United States v. Scrivener, 189 F.3d 944, 953 (9th Cir. 1999) (ability to pay fine); United States v. Frega, 179 F.3d 793, 811 n.22 (9th Cir. 1999) (organizer or leader); United States v. Cooper, 173 F.3d 1192, 1204 (9th Cir. 1999) (obstruction of justice); United States v. Neill, 166 F.3d 943, 949 (9th Cir. 1999) (use of a dangerous weapon); United States v. Ladum, 141 F.3d 1328, 1344 (9th Cir. 1998) (ability to pay fine); United States v. James, 139 F.3d 709, 713 (9th Cir. 1998) (victim vulnerability); United States v. Fisher, 137 F.3d 1158, 1165 (9th Cir. 1998) (acceptance of responsibility); United States v. Shannon, 137 F.3d 1112, 1119 (9th Cir. 1998) (obstruction of justice); United States v. Washman, 128 F.3d 1305, 1307 (9th Cir. 1997) (safety valve provisions); United States v. Barnes, 125 F.3d 1287, 1290 (9th Cir. 1997) (amount of loss); United States v. Parrilla, 114 F.3d 124, 126 (9th Cir. 1997) (entrapment); United States v. Kohli, 110 F.3d 1475, 1476 (9th Cir. 1997) (proceeds from offense); United States v. Clayton, 108 F.3d 1114, 1118 (9th Cir. 1997) (monetary loss to victims); United States v. Sherwood, 98 F.3d 402, 415 (9th Cir. 1996) (false statements); United States v. Sablan, 92 F.3d 865, 869 (9th Cir. 1996) (amount of loss); United States v. Asagba, 77 F.3d 324, 325 (9th Cir. 1996) (quantity of drugs); United States v. Sarno, 73 F.3d 1470, 1503 (9th Cir. 1995) (restitution); United States v. Basinger, 60 F.3d 1400, 1409 (9th Cir. 1995) (capability of drug operation); United States v. Karterman, 60 F.3d 576, 580 (9th Cir. 1995) (criminal activity); United States

v. France, 57 F.3d 865, 866, 868 (9th Cir. 1995) (express threats of death); United States v. Fuentes-Mendoza, 56 F.3d 1113, 1116-17 (9th Cir. 1995) (quantity of drugs, possession of firearm, supervisorial role); United States v. Ponce, 51 F.3d 820, 826 (9th Cir. 1995) (leader or organizer); United States v. Vaandering, 50 F.3d 696, 704 (9th Cir. 1995) (member of conspiracy); United States v. Pinkney, 15 F.3d 825, 827 (9th Cir. 1994) (minor participant); but see United States v. Lee, 296 F.3d 792, 795 (9th Cir. 2002) (reviewing "special skills" adjustment for abuse of discretion and de novo); United States v. Peterson, 98 F.3d 502, 506 n.4 (9th Cir. 1996) (discussing whether a finding of "special skill" should be reviewed for clear error, de novo or for abuse of discretion).

Factual findings by the court must be supported by a preponderance of the evidence. See United States v. Montano, 250 F.3d 709, 713 (9th Cir. 2001); United States v. Johansson, 249 F.3d 848, 853 (9th Cir. 2001); United States v. Medrano, 241 F.3d 740, 745 (9th Cir.), cert. denied, 533 U.S. Ct. 963 (2001); Frega, 179 F.3d at 811 n.22; United States v. Collins, 109 F.3d 1413, 1420 (9th Cir. 1997). The preponderance of the evidence standard is met by a showing that the relevant fact is more likely true than not. See Montano, 250 F.3d at 713; Collins, 109 F.3d at 1420. Note that in some instances, however, the district court is not required to make "specific" findings of fact. See United States v. Lopez-Sandoval, 146 F.3d 712, 716 (9th Cir. 1998) ("The district court need not make specific findings of fact in support of an upward role adjustment); United States v. Govan, 152 F.3d 1088, 1096 (9th Cir. 1998) (specific findings of fact not required to support upward role adjustment); United States v. Castellanos, 81 F.3d 108, 110 (9th Cir. 1996) (victim-related adjustment may be supported by generalized findings); United States v. Ponce, 51 F.3d 820, 826 (9th Cir. 1995) ("The district court need not make specific findings of fact in support of an upward role adjustment."); United States v. Lueng, 35 F.3d 1402, 1406 (9th Cir. 1994) (district court is encouraged but not required to make specific findings of fact in support of its sentencing decisions). But see United States v. Parilla, 114 F.3d 124, 125 (9th Cir. 1997) (remanding for findings); United States v. Ing, 70 F.3d 553, 556 (9th Cir. 1995) (same); United States v. Robinson, 63 F.3d 889, 891-92 (9th Cir. 1995) (same); United States v. Naranjo, 52 F.3d 245, 251 (9th Cir. 1995) (same).

The district court's application of the guidelines to the facts of a particular case is reviewed for an abuse of discretion. See United States v. Alexander, 287 F.3d 811, 818 (9th Cir. 2002); United States v. Antonakeas, 255 F.3d 714, 727 (9th Cir. 2001); United States v. Johansson, 249 F.3d 848, 858 (9th Cir. 2001); United States v. Reyes-Pacheco, 248 F.3d 942, 945 (9th Cir. 2001); Frega, 179 F.3d at 811 n.22; United States v. Leon-Reyes, 177 F.3d 816, 824 (9th Cir. 1999); United States v. Garcia-Guizar, 160 F.3d 511, 524 (9th Cir. 1998); United States v. Aguilar-Ayala, 120 F.3d 176, 177-78 (9th

Cir. 1997) (citing Koon v. United States, 518 U.S. 81, 99 (1996)); United States v. Parrilla, 114 F.3d 124, 126 (9th Cir. 1997); United States v. Reyes-Oseguera, 106 F.3d 1481, 1483 (9th Cir. 1997); United States v. Petersen, 98 F.3d 502, 505 (9th Cir. 1996); see also United States v. Robinson, 94 F.3d 1325, 1327 n.1 (9th Cir. 1996) (explaining standard). Thus, this court gives "due deference to the district court's application of the Sentencing Guidelines to the facts." United States v. Edmonds, 103 F.3d 822, 826 (9th Cir. 1996); see also United States v. Shabani, 48 F.3d 401, 404 (9th Cir. 1995); United States v. Van Krieken, 39 F.3d 227, 230 (9th Cir. 1994). "Although the [Sentencing Guidelines] established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court." Williams v. United States, 503 U.S. 193, 205 (1992) (citing USSG § 5K2.0 p.s.); see also Frega, 179 F.3d at 811 n.22 (same); United States v. Redman, 35 F.3d 437, 439 (9th Cir. 1994) (Guidelines did not alter appellate courts' traditional deference to district court's sentencing.). Accordingly, "[p]urely discretionary decisions authorized by the Guidelines, such as the refusal to depart . . . or the choice of sentence within the guidelines range, are not reviewable on appeal." United States v. Khaton, 40 F.3d 309, 311 (9th Cir. 1994) (citing Williams, 503 U.S. at 204-05); see also Frega, 179 F.3d at 811 n.22.

A district court's evaluation of the reliability of evidence used for sentencing purposes is reviewed for an abuse of discretion. See United States v. Berry, 258 F.3d 971, 976 (9th Cir. 2001); United States v. Shetty, 130 F.3d 1324, 1331 (9th Cir. 1997); United States v. Ponce, 51 F.3d 820, 828 (9th Cir. 1995). The district court's determination whether a particular item of evidence is sufficiently reliable to be considered at sentencing is reviewed under an abuse of discretion standard. See United States v. Blitz, 151 F.3d 1002, 1009 (9th Cir. 1998); United States v. Marin-Cuevas, 147 F.3d 889, 895 (9th Cir. 1998); United States v. Pinto, 48 F.3d 384, 389 (9th Cir. 1995). What evidence a district court will consider in sentencing is also subject to an abuse of discretion review. United States v. Ramos-Oseguera, 120 F.3d 1028, 1039 (9th Cir. 1997); United States v. Ayers, 924 F.2d 1468, 1481 (9th Cir. 1991); United States v. Messer, 785 F.2d 832, 834 (9th Cir. 1986). Reliance on materially false or unreliable information is an abuse of discretion. Ayers, 924 F.2d at 1481; Messer, 785 F.2d at 834.

A district court's decision to depart from the Guidelines is reviewed under the abuse of discretion standard. See Koon v. United States, 518 U.S. 81, 99 (1996); United States v. Williams, 291 F.3d 1180, 1191 (9th Cir. 2002); United States v. Martin,

278 F.3d 988, 1001 (9th Cir. 2002); United States v. Davis, 264 F.3d 813, 815 (9th Cir. 2001) (noting "unitary" standard); United States v. Caperna, 251 F.3d 827, 830 (9th Cir. 2001); United States v. Salcido-Corrales, 249 F.3d 1151, 1155 (9th Cir. 2001) (explaining Koon); United States v. Working, 224 F.3d 1093, 1099 (9th Cir. 2000) (en banc) (explaining Koon); United States v. Banuelos-Rodriguez, 215 F.3d 969, 972 (9th Cir. 2000) (en banc); Frega, 179 F.3d at 811 n.22; United States v. Roston, 168 F.3d 377, 378 (9th Cir. 1999); United States v. Lipman, 133 F.3d 726, 729 (9th Cir. 1998) (describing the "unitary abuse of discretion standard"); United States v. Mendoza, 121 F.3d 510, 513 (9th Cir. 1997) (same); United States v. Sablan, 114 F.3d 913, 916 (9th Cir. 1997) (en banc); United States v. Collins, 109 F.3d 1413, 1422 (9th Cir. 1997); United States v. Green, 105 F.3d 1321, 1322 (9th Cir. 1997).

The extent of a district court's downward departure is also reviewed for abuse of discretion. See United States v. Working, 287 F.3d 801, 806 (9th Cir. 2002) (noting that extent of departure must be "reasonable"); United States v. Rodriguez-Cruz, 255 F.3d 1054, 1060 (9th Cir. 2001) (noting that extent of departure cannot be "grossly disproportionate to objective criteria").

Note that a district court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. See United States v. Romero, 293 F.3d 1120, 1126 (9th Cir. 2002); United States v. Ruiz, 241 F.3d 1157, 1161-62 (9th Cir. 2001) (noting exceptions), rev'd on other grounds, 122 S. Ct. 2450 (2002); United States v. Tam, 240 F.3d 797, 805 (9th Cir. 2001); United States v. Wetchie, 207 F.3d 632, 633 n.1 (9th Cir. 2000); United States v. Daas, 198 F.3d 1167, 1182 (9th Cir. 1999); Frega, 179 F.3d at 811 n.22; United States v. Hanousek, 176 F.3d 1116, 1126 (9th Cir. 1999); United States v. Turnipseed, 159 F.3d 383, 386 (9th Cir. 1998); United States v. Tucker, 133 F.3d 1208, 1214 (9th Cir. 1998); United States v. Calozza, 125 F.3d 687, 693 (9th Cir. 1997); United States v. Webster, 108 F.3d 1156, 1158 (9th Cir. 1997); United States v. Ruelas, 106 F.3d 1416, 1420 (9th Cir. 1997); United States v. Berger, 103 F.3d 67, 69 (9th Cir. 1996); United States v. Eaton, 31 F.3d 789, 792 (9th Cir. 1994). If the trial court indicates, however, that it did not have the discretion under the guidelines to depart, that determination is reviewed de novo. See Romero, 293 F.3d at 1126; United States v. Davoudi, 172 F.3d 1130, 1133 (9th Cir. 1999); Tucker, 133 F.3d at 1214; Berger, 103 F.3d at 69; United States v. Brownstein, 79 F.3d 121, 122 (9th Cir. 1996); Eaton, 31 F.3d at 793; but see Calozza, 125 F.3d at 693 (stating that review is for abuse of discretion when district court indicates that it believes it lacks the authority to depart); Mendoza, 121 F.3d at 513 (same). Whether a particular factor is a permissible basis for departure is also an issue of law reviewed de novo. See United States v. Martinez-Martinez, 295 F.3d 1041, 1043 (9th Cir. 2002); United States v. Lipman, 133 F.3d 716, 729 (9th Cir. 1998).

A trial court's decision to depart upward based on "unusual circumstances" is reviewed for abuse of discretion. See United States v. Collins, 109 F.3d 1413, 1421-22 (9th Cir. 1997).

A claim of disparate sentencing is reviewed under the abuse of discretion standard. See United States v. Bischel, 61 F.3d 1429, 1437 (9th Cir. 1996).

A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. United States v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993); United States v. Monaco, 852 F.2d 1143, 1150 (9th Cir. 1988).

A trial court's denial of a motion to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range) is reviewed for an abuse of discretion. United States v. Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998); United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996).

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. See United States v. Pizzichiello, 272 F.3d 1232, 1240 (9th Cir. 2001); United States v. Najjor, 255 F.3d 979, 984 (9th Cir. 2001), cert. denied, 122 S. Ct. 2667 (2002); United States v. Matsumaru, 244 F.3d 1092, 1108 (9th Cir. 2001); United States v. Rodrigues, 229 F.3d 842, 844 (9th Cir. 2000); United States v. Lawrence, 189 F.3d 838, 846 (9th Cir. 1999); United States v. Mikaelian, 168 F.3d 380, 390 (9th Cir.), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998); United States v. Nash, 115 F.3d 1431, 1441 (9th Cir. 1997); United States v. Pappadopoulos, 64 F.3d 522, 530 (9th Cir. 1995); United States v. Rice, 38 F.3d 1536, 1540 (9th Cir. 1994). Factual findings supporting such orders are reviewed for clear error. Pizzichiello, 272 F.3d at 1240; Lawrence, 189 F.3d at 846; United States v. Allen, 153 F.3d 1037, 1044-45 (9th Cir. 1998); Stoddard, 150 F.3d at 1147; United States v. Peterson, 98 F.3d 502, 510 n.7 (9th Cir. 1996).

The legality of a restitution order, however, is reviewed de novo. See Pizzichiello, 272 F.3d at 1240; United States v. Follet, 269 F.3d 996, 999 (9th Cir. 2001); United States v. King, 257 F.3d 1013, 1028 (9th Cir. 2001); United States v. Laney, 189 F.3d 954, 964-65 (9th Cir. 1999); United States v. Craig, 181 F.3d 1124, 1126 (9th Cir. 1999); United States v. Meksian, 170 F.3d 1260, 1262 (9th Cir. 1999); United States v. Crawford, 169 F.3d 590, 592 (9th Cir. 1999); Stoddard, 150 F.3d at 1147; United States v. Baggett, 125 F.3d 1319, 1321 (9th Cir. 1997); United States v. Rutgard, 116 F.3d 1270, 1294 (9th Cir. 1997); United States v. Dayea, 73 F.3d 229, 230 (9th Cir. 1995).

A court has broad discretion in ordering restitution. See Laney, 189 F.3d at 966; United States v. Miguel, 49 F.3d 505, 511 (9th Cir. 1995). The amount of restitution ordered is reviewed for an abuse of discretion. Laney, 189 F.3d at 966; Stoddard, 150 F.3d at 1147; United States v. Johnson, 132 F.3d 1279, 1286 (9th Cir. 1997); United States v. Zink, 107 F.3d 716, 718 (9th Cir. 1997); United States v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996); United States v. Catherine, 55 F.3d 1462, 1465 (9th Cir. 1995). The court's "valuation methodology" is reviewed, however, de novo. See United States v. Lomow, 266 F.3d 1013, 1020 (9th Cir. 2001).

21. **Sufficiency of the Evidence**

Claims of insufficient evidence are reviewed de novo. See United States v. Carranza, 289 F.3d 634, 641 (9th Cir. 2002); United States v. Leveque, 283 F.3d 1098, 1102 (9th Cir. 2002); United States v. Hoskins, 282 F.3d 772, 776 (9th Cir.), cert. denied, 122 S. Ct. 2610 (2002); United States v. Antonakeas, 255 F.3d 714, 783 (9th Cir. 2001). There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Carranza, 289 F.3d at 641-42; Leveque, 283 F.3d at 1102; Hoskins, 282 F.3d at 776; United States v. Crawford, 239 F.3d 1086, 1092 (9th Cir. 2000), cert. denied, 122 S. Ct. 393 (2001); United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000); United States v. Coleman, 208 F.3d 786, 792-93 (9th Cir. 2000); United States v. Symington, 195 F.3d 1080, 1088-89 (9th Cir. 1999); United States v. Deeb, 175 F.3d 1163, 1168 (9th Cir. 1999); United States v. Nelson, 137 F.3d 1094, 1103 (9th Cir. 1998); United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997); United States v. Bancalari, 110 F.3d 1425, 1428 (9th Cir. 1997). The same test applies to both jury and bench trials. United States v. Doe, 136 F.3d 631, 636 (9th Cir. 1998); United States v. Mayberry, 913 F.2d 719, 721 (9th Cir. 1990).

When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this court reviews the district court's denial of the motion de novo. See Carranza, 289 F.3d at 641; United States v. Munoz, 233 F.3d 1117, 1129 (9th Cir. 2000); United States v. Tucker, 133 F.3d 1208, 1214 (9th Cir. 1998); United States v. Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997); United States v. Bahena-Cardenas, 70 F.3d 1071, 1072 (9th Cir. 1995).

The defendant's failure to move for acquittal means that appellate review is for plain error. See United States v. Romero, 282 F.3d 683, 687 (9th Cir. 2002); United States v. Barragan, 263 F.3d 919, 922 (9th Cir. 2001); United States v. Morgan, 238 F.3d 1180, 1186 (9th Cir.), cert. denied, 122 S. Ct. 146 (2001); Yossunthorn, 167 F.3d

at 1270; United States v. Morphin, 151 F.3d 1149, 1151 (9th Cir. 1998); Carpenter, 95 F.3d at 775; Oliver, 60 F.3d at 551; United States v. Quintero-Barraza, 78 F.3d 1344, 1351 (9th Cir. 1996) (review is for plain error or to prevent manifest injustice); United States v. Vizcarra-Martinez, 66 F.3d 1006, 1010 (9th Cir. 1995) (review is to prevent a miscarriage of justice). In Vizcarra-Martinez, the court questions, however, application of any standard other than the test usually applied to test the sufficiency of the evidence. Vizcarra-Martinez, 66 F.3d at 1010 (noting that court should always be reluctant to affirm a conviction and send a defendant to prison or death if the record showed that there was insufficient evidence to sustain the conviction regardless of the standard of review to be applied); see also Garcia-Guizar, 160 F.3d at 517 (same).

22. **Supervised Release**

District courts have wide discretion in fashioning a defendant's obligations during terms of supervised release. See United States v. Lopez, 258 F.3d 1053, 1056 (9th Cir. 2001), cert. denied, 122 S. Ct. 1376 (2002); United States v. Bee, 162 F.3d 1232, 1234 (9th Cir. 1998); United States v. Soto-Olivas, 44 F.3d 788, 790 (9th Cir. 1995). A district court's decision to impose an available condition of supervised release is typically reviewed for an abuse of discretion. See United States v. Gallaher, 275 F.3d 784, 793 (9th Cir. 2001); United States v. Lakatos, 241 F.3d 690, 692 (9th Cir. 2001); United States v. Bahe, 201 F.3d 1124, 1127 (9th Cir. 2000); Bee, 162 F.3d at 1234; United States v. Carter, 159 F.3d 397, 399 (9th Cir. 1998); United States v. Fellows, 157 F.3d 1197, 1203 (9th Cir. 1998); United States v. Johnson, 998 F.2d 696, 697 (9th Cir. 1993). Review is de novo, however, when this court reviews the district court's application of the supervised release statute. See United States v. Cade, 236 F.3d 463, 465 (9th Cir. 2000), cert. denied, 533 U.S. 937 (2001); United States v. Lomayoama, 86 F.3d 142, 146 (9th Cir. 1996); Johnson, 998 F.2d at 697. Jurisdictional issues are also reviewed de novo. See United States v. Morales-Alejo, 193 F.3d 1102, 1104 (9th Cir. 1999); United States v. Malandrini, 177 F.3d 771, 772 (9th Cir. 1999); United States v. Vallejo, 69 F.3d 992, 994 (9th Cir. 1995). Similarly, whether a district court has the authority to reinstate an original term of supervised release is a question of law reviewed de novo. See United States v. Trenter, 201 F.3d 1262, 1263 (9th Cir. 2000). Whether a district court has the authority to modify a fine when it is an express condition of supervised released is also a question of law reviewed de novo. United States v. Lopez-Soto, 205 F.3d 1098, 1100 (9th Cir. 2000).

It is plain error to sentence a defendant to a term of supervised release that exceeds the statutory maximum. United States v. Guzman-Bruno, 27 F.3d 420, 423 (9th Cir. 1994).

A district court's decision to revoke a term of supervised release is reviewed for an abuse of discretion. United States v. Musa, 220 F.3d 1096, 1100 (9th Cir. 2000); United States v. Daniel, 209 F.3d 1091, 1094 (9th Cir.), amended by 216 F.3d 1201 (9th Cir. 2000). Whether a defendant has received sufficient due process at a revocation proceeding is a mixed question of law and fact that is reviewed de novo. See United States v. Havier, 155 F.3d 1090, 1092 (9th Cir. 1998). Any such due process violation is subject to harmless error analysis. Daniel, 209 F.3d at 1094; Havier, 155 F.3d at 1090. A court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. See Musa, 220 F.3d at 1102.

23. **Transcripts**

A criminal defendant has a right to a record on appeal that includes a complete transcript of the proceedings at trial. United States v. Wilson, 16 F.3d 1027, 1031 (9th Cir. 1994); United States v. Carrillo, 902 F.2d 1405, 1409 (9th Cir. 1990). A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. Carrillo, 902 F.2d at 1410. A court's decision to allow a jury to have English translations of Spanish wiretap tape recordings is reviewed for an abuse of discretion. See United States v. Fuentes-Montijo, 68 F.3d 352, 353 (9th Cir. 1995); see also United States v. Rrapi, 175 F.3d 742, 746 (9th Cir. 1999) (English translation of Albanian wiretap tape recordings).

A claim that the district court violated a defendant's constitutional right to prepare an adequate defense by refusing to provide free transcripts of a prior proceeding is reviewed de novo. United States v. Devlin, 13 F.3d 1361, 1363 (9th Cir. 1994).

The district court's decision to use transcripts as an aid in listening to tape recordings is reviewed for an abuse of discretion. See United States v. Abonce-Barrera, 257 F.3d 959, 963 (9th Cir. 2001); Rrapi, 175 F.3d at 746; United States v. Tisor, 96 F.3d 370, 377 (9th Cir. 1996); United States v. Armijo, 5 F.3d 1229, 1234 (9th Cir. 1993). Where there is no dispute as to accuracy, this court reviews for an abuse of discretion the trial court's decision to allow the use of transcripts during trial and to allow them into the jury room. Rrapi, 175 F.3d at 746; United States v. Montgomery, 150 F.3d 983, 999 (9th Cir. 1998); Tisor, 96 F.3d at 377; United States v. Fuentes-Montijo, 68 F.3d 352, 354 (9th Cir. 1995); United States v. Pena-Espinoza, 47 F.3d 356, 359 (9th Cir. 1995); United States v. Hernandez, 27 F.3d 1403, 1408 (9th Cir. 1994) ("We review a decision to allow the jury to reread transcripts in the jury room for an abuse of discretion."). A district court is not, however, required as a matter of

law to determine whether a transcript is accurate before permitting a jury to look at it. Tisor, 96 F.3d at 377.

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. Eslaminia v. White, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas); but see United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996) (allowing unplayed audio tapes into the jury room is structural error).

The trial court's decision whether to release grand jury transcripts is reviewed for an abuse of discretion. United States v. Perez, 67 F.3d 1371, 1380 (9th Cir. 1995), withdrawn in part on other grounds, 116 F.3d 840 (9th Cir. 1997) (en banc).

24. **Writ Ad Testificandum**

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. See Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994); United States v. Smith, 924 F.2d 889, 896 (9th Cir. 1991). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. See Wiggins v. County of Alameda, 717 F.2d 466, 468 (9th Cir. 1983).

25. **Writ of Audita Querela**

This court reviews de novo the question whether a federal prisoner challenging a conviction and sentence may properly file a petition for a writ of audita querela. United States v. Valdez-Pacheco, 237 F.3d 1077, 1079 (9th Cir. 2000); United States v. Fonseca-Martinez, 36 F.3d 62, 63 (9th Cir. 1994). The effectiveness of such a writ for purposes of immigration is also a pure legal issue reviewed de novo. Beltran-Leon v. INS, 134 F.3d 1379, 1380 (9th Cir. 1998).

26. **Writ of Coram Nobis**

The denial of a writ of error coram nobis is reviewed de novo. See Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002); United States v. Walgren, 885 F.2d 1417, 1420 (9th Cir. 1989).

E. **Habeas Corpus Petitions**

The district court's decision to grant or deny a federal prisoner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 is reviewed de novo. See Angulo-Dominguez v. Ashcroft, 290 F.3d 1147, 1149 (9th Cir. 2002); Taylor v. Sawyer, 284 F.3d 1143, 1147 (9th Cir. 2002); Bowen v. Hood, 202 F.3d 1211, 1218 (9th Cir. 2000); Zitto v. Crabtree, 185 F.3d 930, 931 (9th Cir. 1999); McLean v. Crabtree, 173 F.3d 1176, 1180 (9th Cir. 1999); Allen v. Crabtree, 153 F.3d 1030, 1032 (9th Cir. 1998); Boyden v. Reno, 106 F.3d 267, 268 (9th Cir. 1997). The court's dismissal of a § 2241 petition is also reviewed de novo. See Miranda v. Reno, 238 F.3d 1156, 1158 (9th Cir.), cert. denied, 122 S. Ct. 541 (2001); Nakaranurack v. United States, 231 F.3d 568, 570 (9th Cir. 2000); United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997). Whether a district court has jurisdiction over a § 2241 petition is reviewed de novo. See Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000); Barapind v. Reno, 225 F.3d 1100, 1109-10 (9th Cir. 2000). A district court's decision to stay § 2241 proceedings is reviewed for an abuse of discretion. See Yong v. INS, 208 F.3d 1116, 1119 (9th Cir. 2000) (noting that standard to be applied is "somewhat less deferential" than usual abuse of discretion).

Note that prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, a petition for a writ of habeas corpus could be brought in federal district court pursuant to the Immigration and Naturalization Act, 8 U.S.C. § 1105a(b). The grant or denial of habeas relief under § 1105a(b) was reviewed de novo. See Singh v. Reno, 113 F.3d 1512, 1514 (9th Cir. 1997); Mosa v. Rogers, 89 F.3d 601, 603 (9th Cir. 1996); Singh v. Ilchert, 69 F.3d 375, 378 (9th Cir. 1995). Section 1105a was repealed by the IIRIRA. See Hose v. INS, 180 F.3d 992, 994 & n.1 (9th Cir. 1999) (en banc) (noting that IIRIRA merged deportation and exclusion proceedings into a broader category called "removal proceedings). IIRIRA did not repeal, however, the statutory habeas corpus remedy provided by § 2241. See INS v. St. Cyr, 121 S. Ct. 2271 (2001); Angulo-Dominguez v. Ashcroft, 290 F.3d at 1147, 1149 (9th Cir. 2002); Cruz-Aguilera v. INS, 245 F.3d 1070, 1073 (9th Cir. 2001); Dearinger, 232 F.3d at 1044; Barapind, 225 F.3d at 1110; Sulit v. Schiltgen, 213 F.3d 449, 453 (9th Cir. 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1136 (9th Cir. 2000); Magana-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 1999). Similarly, "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." See Zadvydas v. Davis, 121 S. Ct. 2491, 2498 (2001); see also Gutierrez-Chavez v. INS, 298 F.3d 824, 827-28 (9th Cir. 2002) (noting limitations on scope of habeas jurisdiction).

The district court's decision to grant or deny a federal prisoner's 28 U.S.C. § 2255 motion is reviewed de novo. See United States v. Day, 285 F.3d 1167, 1169 (9th

Cir. 2002) (denial); United States v. Sanchez-Cervantes, 282 F.3d 664, 667 (9th Cir. 2002) (denial); United States v. Christakis, 238 F.3d 1164, 1168 (9th Cir. 2001) (denial); United States v. Seesing, 234 F.3d 456, 459 (9th Cir. 2000) (denial); United States v. Chancon-Palomares, 208 F.3d 1157, 1158 (9th Cir. 2000) (denial); United States v. Guess, 203 F.3d 1143, 1145 (9th Cir. 2000); United States v. Navarro, 160 F.3d 1254, 1255 (9th Cir. 1998) (denial); United States v. Benboe, 157 F.3d 1181, 1183 (9th Cir. 1998) (denial); United States v. Cruz-Mendoza, 147 F.3d 1069, 1072-73 (9th Cir.), amended by 163 F.3d 1149 (9th Cir. 1998); United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997); United States v. Span, 75 F.3d 1383, 1386 (9th Cir. 1996); United States v. Stearns, 68 F.3d 328, 329 (9th Cir. 1995); United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995). Whether a district court has jurisdiction to reconsider its decision on a § 2255 motion is reviewed de novo. See United States v. Martin, 226 F.3d 1042, 1045 (9th Cir. 2000), cert. denied, 532 U.S. 1002 (2001).

Findings underlying the court's decision on a § 2255 motion are reviewed for clear error. See Christakis, 238 F.3d at 1168; Guess, 203 F.3d at 1145; Navarro, 160 F.3d at 1255; Benboe, 157 F.3d at 1183; Span, 75 F.3d at 1386; Stearns, 68 F.3d at 329; Sanchez v. United States, 50 F.3d 1448, 1452 (9th Cir. 1995). The district court's decision to grant or deny an evidentiary hearing is reviewed for an abuse of discretion. See Christakis, 238 F.3d at 1168; United States v. Zuno-Arce, 209 F.3d 1095, 1102 (9th Cir. 2000); Chancon-Palomares, 208 F.3d at 1158-59; United States v. Andrade-Larrios, 39 F.3d 986, 991 (9th Cir. 1994); see also United States v. Chacon-Palomares, 208 F.3d 1157, 1158-59 (9th Cir. 2000) (reviewing denial of hearing).

The district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition is reviewed de novo. See Benn v. Lambert, 283 F.3d 1040, 1051 (9th Cir. 2002) (granting); Killian v. Poole, 282 F.3d 1204, 1207 (9th Cir. 2002) (denying); Alvarado v. Hill, 252 F.3d 1066, 1068 (9th Cir. 2001) (denying); Lockhart v. Terhune, 250 F.3d 1223, 1228 (9th Cir. 2001) (denying); Paradis v. Arave, 240 F.3d 1169, 1175 (9th Cir. 2001) (granting); Dubria v. Smith, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc) (denying); Bribiesca v. Galaza, 215 F.3d 1015, 1018 (9th Cir. 2000) (granting); Dows v. Wood, 211 F.3d 480, 484 (9th Cir. 2000) (denying); Jones v. Wood, 207 F.3d 557, 559 (9th Cir. 2000) (granting); Lopez v. Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (denying); Lambright v. Stewart, 191 F.3d 1181, 1183 (9th Cir. 1999) (en banc); Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999) (denying); McNab v. Kok, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); Bean v. Calderon, 163 F.3d 1073, 1077 (9th Cir. 1998); Eslaminia v. White, 136 F.3d 1234, 1236 (9th Cir. 1998); Santamaria v. Horsley, 133 F.3d 1242, 1244 (9th Cir.) (en banc) (reversing grant of writ), amended by 138 F.3d 1280 (9th Cir. 1998); Bonillas v. Hill, 134 F.3d 1414, 1416 (9th Cir. 1998); Aguilar v. Alexander, 125 F.3d 815, 817 (9th Cir. 1997); Gretzler v.

Stewart, 112 F.3d 992, 998 (9th Cir. 1997); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305 (9th Cir. 1996); see also Lucky v. Calderon, 86 F.3d 923, 925 (9th Cir. 1996) (summary dismissal on jurisdictional ground is reviewed de novo).

Dismissals based on state procedural default present issues of law reviewed de novo. See Reese v. Baldwin, 282 F.3d 1184, 1190 (9th Cir. 2002); Zichko v. Idaho, 247 F.3d 1015, 1019 (9th Cir. 2001); La Cross v. Kernan, 244 F.3d 702, 704 (9th Cir. 2000); Hoffman v. Arave, 236 F.3d 523, 529 (9th Cir.), cert. denied, 122 S. Ct. 323 (2001); Washington v. Cambra, 208 F.3d 832, 833 (9th Cir. 2000); Manning v. Foster,1132 (9th Cir. 2000); Fields v. Calderon, 125 F.3d 757, 759-60 (9th Cir. 1997); Morales v. Calderon, 85 F.3d 1387, 1389 n.6 (9th Cir. 1996). Whether a prisoner has exhausted state remedies is a question of law reviewed de novo. See Greene v. Lampert, 288 F.3d 1081, 1086 (9th Cir. 2002). Whether such remedies must be exhausted is also reviewed de novo. See Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997).

Dismissals based on statutes of limitations are also reviewed de novo. See Malcom v. Payne, 281 F.3d 951, 955-56 (9th Cir. 2002); Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002); Hasan v. Galaza, 254 F.3d 1150, 1153 (9th Cir. 2001); Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999). The court's determination regarding equitable tolling is also reviewed de novo. Malcom, 281 F.3d at 956; Corjasso, 278 F.3d at 877.

A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. See Pagtalunan v. Gulaza, 291 F.3d 639, 640 (9th Cir. 2002).

Findings of fact made by the district court are reviewed for clear error. See Killian, 282 F.3d at 1207; Silva v. Woodward, 279 F.3d 825, 835 (9th Cir. 2002) (noting that review is "significantly deferential"); Zichko, 247 F.3d at 1019; Paradis, 240 F.3d at 1175; Dubria, 224 F.3d at 1000; Solis v. Garcia, 219 F.3d 922, 926 (9th Cir. 2000); Lopez, 202 F.3d at 1116; Henry v. Kernan, 197 F.3d 1021, 1026 (9th Cir. 1999); Weaver v. Thompson, 197 F.3d 359, 362 (9th Cir. 1999); Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999); Moran v. McDaniel, 80 F.3d 1261, 1268 (9th Cir. 1996); Bonin v. Calderon, 59 F.3d 815, 823 (9th Cir. 1995). This court may affirm on any ground supported by the record even if it differs from the rationale of the district court. See Paradis, 240 F.3d at 1175-76; Downs v. Hoyt, 232 F.3d 1031, 1036 (9th Cir. 2000), cert. denied, 532 U.S. 999 (2001); Martinez-Villareal, 80 F.3d at 1305; Bonin, 59 F.3d at 823.

Note that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) altered habeas review of state convictions brought under § 2254. The Act does not apply, however, to the merits of petitions filed before the effective date of the Act. See, e.g., Ghent v. Woodford, 279 F.3d 1121, 1125 n.1 (9th Cir. 2002); Mayfield v. Woodford, 270 F.3d 915, 922 (9th Cir. 2001) (en banc) (noting that pre-AEDPA standards of review apply when petition was filed prior to effective date); Cooper v. Calderon, 255 F.3d 1104, 1107 (9th Cir. 2001); Whelchel v. Washington, 232 F.3d 1197, 1202 (9th Cir. 2000); Lopez, 202 F.3d at 1116 n.5; Tapia v. Roe, 189 F.3d 1052, 1055 (9th Cir. 1999); Bean, 163 F.3d at 1077 (9th Cir. 1998); Boyd v. Thompson, 147 F.3d 1124, 1127 n.4 (9th Cir. 1998); Smith v. Stewart, 140 F.3d 1263, 1273 n.3 (9th Cir. 1998); see also Smith v. Robbins, 528 U.S. 259, 268 n.3 (2000) (noting that AEDPA does not apply to petitions filed before the effective date of April 24, 1996); Jeffries v. Wood, 103 F.3d 827, 827 (9th Cir. 1996) (en banc) (same).

Although this court applies pre-AEDPA law to such petitions, post-AEDPA law governs the right of the petitioner to appeal. See Slack v. McDaniel, 529 U.S. 473, 482 (2000) (holding that AEDPA's requirements regarding certificates of appealability apply to petition filed prior to effective date of act); see also Turner v. Calderon, 281 F.3d 851, 864 (9th Cir. 2002) (applying Slack); Silva v. Woodward, 279 F.3d 825, 831 (9th Cir. 2002) (same); Cooper, 255 F.3d at 1107 (same); Solis v. Garcia, 219 F.3d 922, 926 (9th Cir. 2000) (same); Nevius v. McDaniel, 218 F.3d 940, 942 (9th Cir. 2000) (noting that § 2253(c), provides that petitioner cannot appeal unless a circuit justice or judge issues a certificate of appealability).

For pre-AEDPA § 2254 cases, the standard for determining whether habeas relief should be granted is whether the alleged errors '"had substantial and injurious effect or influence in determining the jury's verdict.'" See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); see also Calderon v. Coleman, 525 U.S. 141, 147 (1998) (noting that not all constitutional errors entitle petitioner to relief; rather the "court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict."); California v. Roy, 519 U.S. 2, 5-6 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the Brecht standard); Turner v. Calderon, 281 F.3d 851, 864 (9th Cir. 2002) (reciting standard) Murtishaw v. Woodford, 255 F.3d 926, 973 (9th Cir. 2001) (same), cert. denied, 122 S. Ct. 1313 (2002); Lopez v. Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (same); Spivey v. Rocha, 194 F.3d 971, 975 (9th Cir. 1999); Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc); Stanton v. Benzler, 146 F.3d 726, 728 (9th Cir. 1998). Trial errors that do not meet this test are deemed harmless. See Spivey, 194 F.3d at 975; Eslaminia v. White, 136 F.3d 1234, 1237 (9th Cir. 1998); Rice v. Wood, 77 F.3d

1138, 1144 (9th Cir. 1996) (en banc). Note that a state court's conclusion that a constitutional error was harmless is reviewed de novo. See Ghent, 279 F.3d at 1126.

Under the AEDPA, a petitioner must demonstrate that the state court's adjudication of the merits "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." See Penry v. Johnson, 121 S. Ct. 1910 (2001) (explaining two-prong standard); Williams v. Taylor, 529 U.S. 362, 403-04 (2000) (same); see also Killian v. Poole, 282 F.3d 1204, 1207-08 (9th Cir. 2002) (applying standard); Alvarado v. Hill, 252 F.3d 1066, 1068 (9th Cir. 2001) (explaining standard); Lockhart v. Terhune, 250 F.3d 1223, 1228 (9th Cir. 2001) (same); Tamalini v. Stewart, 249 F.3d 895, 898 (9th Cir. 2001) (reciting standard); Wilcox v. McGee, 241 F.3d 1242, 1244 (9th Cir. 2001) (explaining standard); Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (reciting standard); Dows v. Wood, 211 F.3d 480, 484 (9th Cir. 2000) (noting "limited scope of review). Note, however, that an error may be determined to be harmless. See Dillard v. Roe, 244 F.3d 758, 773-74 (9th Cir.) (applying harmless error analysis), cert. denied, 122 S. Ct. 238 (2001); DePetris v. Kuykendall, 239 F.3d 1057, 1061 (9th Cir. 2001) (noting that harmless error applies to AEDPA).

Under the AEDPA, state court findings of fact are to be presumed correct unless the petitioner rebuts the presumption with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Zichko v. Idaho, 247 F.3d 1015, 1019 (9th Cir. 2001); Bragg v. Galaza, 242 F.3d 1082, 1087 (9th Cir.), amended by 253 F.3d 1150 (9th Cir. 2001); Solis v. Garcia, 219 F.3d 922, 926 (9th Cir. 2000); Bains v. Cambra, 204 F.3d 964, 972 (9th Cir. 2000); Weaver v. Thompson, 197 F.3d 359, 363 (9th Cir. 1999); Bean v. Calderon, 163 F.3d 1073, 1087 n.3 (9th Cir. 1998); Vargas v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998). This presumption applies even if the finding was made by a state court of appeals rather than by the state trial court. See Bragg, 242 F.3d at 1087. Where the state court fails to make findings of fact, however, the reviewing court grants less deference to the state court's decision. See Weaver, 197 F.3d at 363 (noting that trial judge made no factual determinations entitled to deference); Delgado, 181 F.3d at 1091 n.3 ("Although AEDPA ordinarily requires federal courts to defer to state court factual findings, we have, in a number of cases in which the state court did not make findings of fact, granted less deference to the state court decision.").

The AEDPA also places limitations on the district court decision to conduct evidentiary hearings in § 2254 proceedings. See 28 U.S.C. § 2254(e)(2); see also Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (reviewing limitations); Bragg v. Galza, 242 F.3d 1082, 1089-90 (9th Cir.) (noting that AEDPA precludes remand for an evidentiary hearing), amended by 253 F.3d 1150 (9th Cir. 2001); Downs

v. Hoyt, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting that AEDPA limits district court's discretion), cert. denied, 532 U.S. 999 (2001); Baja v. Ducharme, 187 F.3d 1075, 1077 (9th Cir. 1999) (noting that AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing"). If the petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. §2254(e)(2). The district court's application of these standards in determining whether it is entitled to conduct an evidentiary hearing is reviewed de novo. See Baja, 187 F.3d at 1077. Findings of fact relevant to its decision are reviewed for clear error. Id.

In cases not under AEDPA, a state habeas petitioner is entitled to an evidentiary hearing if she alleged facts that, if proven, would entitle her to relief, and she did not receive a full and fair evidentiary hearing in a state court. See Karis v. Calderon, 283 F.3d 1117, 1126-27 & n.1 (9th Cir. 2002); Laboa v. Calderon, 224 F.3d 972, 981 n.7 (9th Cir. 2000); Young v. Weston, 192 F.3d 870, 874 (9th Cir. 1999); Tapia v. Roe, 189 F.3d 1052, 1056 (9th Cir. 1999); Rich v. Calderon, 187 F.3d 1064, 1067-68 (9th Cir. 1999); Babbitt v. Calderon, 151 F.3d 1170, 1177 (9th Cir. 1998). The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. See Karris, 283 F.3d at 1126; Tapia, 189 F.3d at 1056; Caro v. Calderon, 165 F.3d 1223, 1225-26 (9th Cir. 1999); Seidel v. Merkle, 146 F.3d 750, 753 (9th Cir. 1998); Villafuerte v. Stewart, 111 F.3d 616, 633 (9th Cir. 1997); see also United States v. Zuno-Arce, 209 F.3d 1095, 1102 (9th Cir. 2000) (§ 2255). The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. Lawson v. Borg, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. See Wade v. Calderon, 29 F.3d 1312, 1325-26 (9th Cir. 1994). The scope of an evidentiary hearing is reviewed for an abuse of discretion. See LaGrand v. Stewart, 133 F.3d 1253, 1270 (9th Cir. 1998).

The AEDPA also made significant changes to 28 U.S.C. § 2244, which sets out the requirements for filing a second of successive habeas petition. See Barapind v. Reno, 225 F.3d 1100, 1111 (9th Cir. 2000) (noting that provision does not apply to § 2241 petitions); Calderon v. United States Dist. Court for the Cent. Dist. of Cal., 163 F.3d 530, 538 (9th Cir. 1998) (en banc) (discussing AEDPA). A district court's determination that petitioner failed to establish eligibility under § 2244 to file a successive petition is reviewed de novo. See United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc). A district court's refusal to review abusive claims is reviewed for an abuse of discretion. See Barapind, 225 F.3d at 1110; Turner v. Duncan, 158 F.3d 449, 455

(9th Cir. 1998); Paradis v. Arave, 130 F.3d 385, 390 (9th Cir. 1997); United States v. Gutierrez, 116 F.3d 412, 415 (9th Cir. 1997); Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996).

A petition for habeas relief based on an alleged violation of the Interstate Agreement of Detainers Act is reviewed de novo. See King v. Brown, 8 F.3d 1403, 1409 (9th Cir. 1993); Snyder v. Sumner, 960 F.2d 1448, 1452 (9th Cir. 1992).

The denial of a writ of error coram nobis is reviewed de novo. See Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002); United States v. Walgren, 885 F.2d 1417, 1420 (9th Cir. 1989).

Allegations of juror misconduct in habeas present mixed questions of law and fact reviewed de novo. See Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir. 2000); Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir. 1997); see also Mancuso v. Olivarez, 292 F.3d 939, 949 (9th Cir. 2002) (noting that issues of juror misconduct are reviewed de novo).

The court's decision to permit discovery in habeas proceedings is reviewed for an abuse of discretion. See Anderson v. Calderon, 232 F.3d 1053, 1099 (9th Cir. 2000) (§ 2254), cert. denied, 122 S. Ct. 580 (2001); Rich v. Calderon, 187 F.3d 1064, 1068 (9th Cir. 1999), (§ 2254) (noting that discovery is available only in the discretion of the court); Jones v. Woods, 114 F.3d 1002, 1009 (9th Cir. 1997) (§ 2254); Christian v. Rhode, 41 F.3d 461, 470 (9th Cir. 1994) (§ 2254); Shah v. United States, 878 F.2d 1156, 1159 (9th Cir. 1989) (§ 2255).

The district court's denial of a motion to reconsider is reviewed for an abuse of discretion. See Herbst v. Cook, 260 F.3d 1039, 1044 (9th Cir. 2001); McDowell v. Calderon, 197 F.3d 1253, 1256 (9th Cir. 1999) (en banc).

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. See Walker v. Sumner, 14 F.3d 14145, 1422 (9th Cir. 1994); United States v. Smith, 924 F.2d 889, 896 (9th Cir. 1991). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. See Wiggins v. County of Alameda, 717 F.2d 466, 468 (9th Cir. 1983).

III. CIVIL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

The district court's findings of fact are reviewed for clear error. See Paige v. California, 291 F.3d 1141, 1145 n.3 (9th Cir. 2002); Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th Cir. 2001); Troutt v. Colorado Western Ins. Co., 246 F.3d 1150, 1156 (9th Cir. 2001) (bench trial); Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000); Alder v. Federal Republic of Nigeria, 219 F.3d 869, 876 (9th Cir. 2000); Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1044 (9th Cir. 1999); Valley Eng'rs, Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1052 (9th Cir. 1998); Russian River Watershed Protection Comm. v. Santa Rosa, 142 F.3d 1136, 1140 (9th Cir. 1998); In re Pintlar Corp., 133 F.3d 1141, 1144 (9th Cir. 1997); Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1213 (9th Cir. 1997); see also La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001) (admiralty); In re Harmon, 250 F.3d 1240, 1245 (9th Cir. 2001) (bankruptcy court); Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113 (9th Cir. 1998) (admiralty); In re Video Depot, Ltd., 127 F.3d 1195, 1197 (9th Cir. 1997) (bankruptcy court). The court's decision to adopt findings proposed by a party does not alter this standard. Russian River, 142 F.3d at 1141.

The district court's conclusions of law are reviewed de novo. See United States v. Orr Water Ditch Co., 256 F.3d 935, 945 (9th Cir. 2001), cert. denied, 122 S. Ct. 2292 (2002); In re Cybernetic Servs., Inc., 252 F.3d 1039, 1045 (9th Cir. 2001), cert. denied, 122 S. Ct. 1069 (2002); Gonzalez-Caballero v. Mena, 251 F.3d 789, 792 (9th Cir. 2001); Troutt, 246 F.3d at 1156; Lim v. City of Long Beach, 217 F.3d 1050, 1054 (9th Cir. 2000); Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 418 (9th Cir. 1998); Fireman's Fund Ins. Cos. v. Big Blue Fisheries, Inc., 143 F.3d 1172, 1175 (9th Cir. 1998); Russian River, 142 F.3d at 1141; see also In re Cool Fuel, Inc., 210 F.3d 999, 1001 (9th Cir. 2000) (BAP); Cacique, Inc. v. Robert Reiser & Co., 169 F.3d 619, 622 (9th Cir. 1998) (state law); In re Weisberg, 136 F.3d 655, 657 (9th Cir. 1998) (BAP).

2. Affirming on Alternative Grounds

In reviewing decisions of the district court, the court of appeals may affirm on any ground supported by the record. See Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002); Papa v. United States, 281 F.3d 1004, 1009 (9th Cir. 2002); Tanaka v. University of S. California, 252 F.3d 1059, 1062 (9th Cir. 2001); Groten v. California, 251 F.3d 844, 851 (9th Cir. 2001); Franklin v. Terr, 201 F.3d 1098, 1100 n.2 (9th Cir. 2000); Recording Indus. Ass'n v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1077, n.3 (9th Cir. 1999); Interstate Fire & Cas. Co. v. Underwriters at Lloyd's, London, 139 F.3d 1234, 1239 (9th Cir. 1998); Tyler v. Cisneros, 136 F.3d 603, 607 (9th Cir. 1998); R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1063 n.1 (9th Cir. 1997); Broadcast Music, Inc. v. Hirsch, 104 F.3d 1163, 1165 (9th Cir. 1997). Summary judgment may be affirmed on any ground supported by the record, even if not relied upon by the district court. See Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750 (9th Cir. 2001); Guidroz-Brault v. Missouri Pac. R.R. Co., 254 F.3d 825, 829 (9th Cir. 2001); Pritikin v. Department of Energy, 254 F.3d 791, 796 (9th Cir. 2001), cert. denied, 122 S. Ct. 1076 (2002); Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000); Lujan v. Pacific Maritime Ass'n, 165 F.3d 738, 741 (9th Cir. 1999); Far W. Fed. Bank v. Thrift Supervision-Dir., 119 F.3d 1358, 1364 (9th Cir. 1997). When the decision below is correct, it may be affirmed, even if the district court relied on the wrong grounds or wrong reasoning. See Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 418 (9th Cir. 1998); Evans v. Chater, 110 F.3d 1480, 1481 (9th Cir. 1997); Claar v. Burlington N. R.R., 29 F.3d 499, 501 n.1 (9th Cir. 1994).

B. Pretrial Decisions in Civil Cases

1. Abstention

This court reviews de novo whether abstention is required. See Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir.) (en banc) (overruling prior cases applying abuse of discretion standard to district court's decision whether to abstain), cert. dismissed, 533 U.S. 966 (2001). Accordingly, "[w]hen a case falls within the proscription of Younger, a district court must dismiss the federal action." Id. at 1092. Note, however, that Green may not apply to other abstention doctrines. See id. at 1093 n.10; see also City of Tucson v. U.S. West Communications, Inc., 284 F.3d 1128, 1132 (9th Cir. 2002) (applying de novo review to the availability of Buford abstention and abuse of discretion review to trial court's decision to abstain); United States v. Morros, 268 F.3d 695, 703 (9th Cir. 2001) (applying de novo review to whether Pullman, Burford or Colorado River abstention is permissible and abuse of discretion standard to district court's decision to abstain on those grounds); Fireman's Fund Ins. Co. v. Quakenbush, 87 F.3d 290, 294 (9th Cir. 1996) (Burford and Colorado River

abstention); O'Neill v. United States, 50 F.3d 677, 688 n.6 (9th Cir. 1995) (describing requirements for different types of abstention).

2. **Affirmative Defenses**

"[A] district court's decisions with regard to the treatment of affirmative defenses [are] reviewed for an abuse of discretion." 389 Orange St. Part. v. Arnold, 179 F.3d 656, 664 (9th Cir. 1999). Whether an affirmative defense is waived, however, is a question of law reviewed de novo. See Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001); Sheet Metal Workers' Int'l Ass'n, Local Union 150 v. Air Sys. Eng'g, Inc., 831 F.2d 1509, 1510 (9th Cir. 1987); Harbeson v. Parke Davis, Inc., 746 F.2d 517, 520 (9th Cir. 1984). The district court's decision, however, to strike certain affirmative defenses pursuant to Federal Rule of Civil Procedure 12(f) is reviewed for an abuse of discretion. Federal Sav. & Loan Ins. Corp. v. Gemini Management, 921 F.2d 241, 243 (9th Cir. 1990); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1155 (9th Cir. 1988). The court's decision not to instruct the jury on affirmative defenses is also reviewed for an abuse of discretion. See McClaran v. Plastic Indus., Inc., 97 F.3d 347, 356 (9th Cir. 1996).

3. **Amended Complaints**

The trial court's denial of a request to amend a complaint is reviewed for an abuse of discretion. See Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (en banc); Adam v. Hawaii, 235 F.3d 1160, 1164 (9th Cir. 2000); Chappel v. Laboratory Corp., 232 F.3d 719, 725 (9th Cir. 2000); Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000), amended by 234 F.3d 428 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001); Griggs v. Pace Amer. Group, Inc., 170 F.3d 877, 879 (9th Cir. 1999); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1189 (9th Cir. 1998); Keams v. Tempe Tech. Inst. Inc., 110 F.3d 44, 46 (9th Cir. 1997); Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326, 1331 (9th Cir. 1996); Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 355 (9th Cir. 1996). The discretion is particularly broad where a plaintiff has previously been permitted leave to amend. See Simon, 208 F.3d at 1084; Griggs, 170 F.3d at 879; Sisseton-Wahpeton, 90 F.3d at 355.

Dismissal without leave to amend, however, is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. See Lee v. City of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1296 (9th Cir. 1998) (quoting Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)); see also Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038 (9th Cir. 2002) (reviewing denial of leave to amend for abuse of discretion); Lopez v. Smith,

203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (reviewing dismissal of complaint without leave to amend for an abuse of discretion).

A district court's order denying a Rule 15(b) motion to conform the pleadings to the evidence is reviewed for an abuse of discretion. Martinez v. Newport Beach City, 125 F.3d 777, 785 (9th Cir. 1997); Campbell v. Trustees of Leland Stanford Jr. Univ., 817 F.2d 499, 506 (9th Cir. 1987). The court's decision to grant a Rule 15(b) motion is also reviewed for an abuse of discretion. See Galindo v. Stoody Co., 793 F.2d 1502, 1512-13 (9th Cir. 1986).

The district court's dismissal of the complaint with prejudice for failure to comply with the court's order to amend the complaint is reviewed for an abuse of discretion. See Ordonez v. Johnson, 254 F.3d 814, 815 (9th Cir. 2001); McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996).

A district court's decision to grant or deny a party's request to supplement a complaint pursuant to Federal Rule of Civil Procedure 15(d) is reviewed for an abuse of discretion. Planned Parenthood of S. Ariz. v. Neely, 130 F.3d 400, 402 (9th Cir. 1997); Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988).

A district court's decision to permit a party to amend its answer is also reviewed for an abuse of discretion. See Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001).

4. **Appointment of Counsel**

"The decision to appoint counsel is left to the sound discretion of the district court." Johnson v. United States Treasury Dep't, 27 F.3d 415, 416-17 (9th Cir. 1994) (employment discrimination) (listing factors for court to consider). The trial court's refusal to appoint counsel is reviewed for an abuse of discretion. See Campbell v. Burt, 141 F.3d 927, 931 (9th Cir. 1998) (civil rights); United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture). The trial court's decision on a motion for appointment of counsel pursuant to 28 U.S.C. § 1915 is also reviewed for an abuse of discretion. Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), vacated on other grounds, 154 F.3d 952 (9th Cir. 1998) (en banc); $292,888.04, 54 F.3d at 566 (civil forfeiture); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991).

5. **Appointment of Guardian Ad Litem**

A district court's appointment of a guardian ad litem is reviewed for an abuse of discretion. United States v. 30.64 Acres of Land, 795 F.2d 796, 798 (9th Cir. 1986); Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir. 1955) (concurring opinion). The court's determination that a guardian ad litem cannot represent a child without retaining a lawyer is a question of law reviewed de novo. Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997).

6. **Arbitration**

The district court's decision to compel arbitration is reviewed de novo. See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 n.2 (9th Cir.), cert. denied, 122 S. Ct. 2329 (2002); Bradley v. Harris Research, Inc., 275 F.3d 884, 888 (9th Cir. 2001); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001); Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000); Circuit City Stores, Inc. v. Ahmed, 195 F.3d 1131, 1132 (9th Cir. 1999); Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1380 (9th Cir. 1997). The denial of a motion to compel arbitration is also reviewed de novo. See Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 937 (9th Cir. 2001), cert. denied, 122 S. Ct. 1075 (2002); United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co., 13 F.3d 1365, 1368 (9th Cir. 1994). Thus, the decision of the district court concerning whether a dispute should be referred to arbitration is a question of law reviewed de novo. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 213 (1985) (Arbitration Act, by its terms, leaves no place for the exercise of discretion by a district court); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999) (same); Quackenbush, 121 F.3d at 1380 (same); Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1049 (9th Cir. 1996); Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994). Nevertheless, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Ticknor, 265 F.3d at 936 (quoting Moses H. Cone Mem'l Hosp.); Quackenbush, 121 F.3d at 1380 (same); Wagner, 83 F.2d at 1049 (resolving any ambiguities as to the scope of arbitration in favor of arbitration); Bennett v. Liberty Nat'l Fire Ins. Co., 968 F.2d 969, 971 (9th Cir. 1992). The meaning of an agreement to arbitrate is a question of law reviewed de novo. See Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1211 (9th Cir. 1998).

The validity and scope of an arbitration clause is reviewed de novo. McCarthy v. Providential Corp., 122 F.3d 1242, 1243 (9th Cir. 1997); Moore v. Local 569 of Int'l Bhd. of Elec. Workers, 53 F.3d 1054, 1055 (9th Cir. 1995); Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. General Bldg. Contractor, Inc., 952 F.2d 1073, 1076 (9th Cir.

1991). Whether a party has waived its right to sue by agreeing to arbitrate is reviewed de novo. See Kummetz v. Tech Mold, Inc., 152 F.3d 1153, 1154 (9th Cir. 1998).

Confirmation or vacation of an arbitration award is reviewed de novo. See First Options, Inc. v. Kaplan, 514 U.S. 938, 948 (1995); Grammar v. Artists Agency, 287 F.3d 886, 890 (9th Cir. 2002) (affirming award and noting "nearly unparalleled" deference afforded to labor arbitration awards); Southern California Gas Co. v. Utility Workers Union, 265 F.3d 787, 792 (9th Cir. 2001) (confirming); Teamsters Local Union 58 v. BOC Gases, Inc., 249 F.3d 1089, 1093 (9th Cir. 2001) (vacating); Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177, 1180 (9th Cir. 2001) (confirming); Portland General Elec. Co. v. U.S. Bank Trust Nat. Ass'n., 218 F.3d 1085, 1089 (9th Cir. 2000) (confirming); Line Drivers, Pickup and Delivery, Local No. 81 v. Roadway Express, Inc., 152 F.3d 1098, 1099 (9th Cir. 1998) (confirming); Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997) (confirming); International Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1411 (9th Cir. 1997) (confirming); Sheet Metal Workers' Int'l Ass'n v. Madison Indus., Inc., 84 F.3d 1186, 1190 (9th Cir. 1996) (confirming); Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 830 (9th Cir. 1995) (confirming); but see Apusento Garden (Guam) Inc. v. Superior Court, 94 F.3d 1346, 1352 (9th Cir. 1996) (reviewing commonwealth court's decision to vacate an arbitration award under an abuse of discretion standard).

The Supreme Court has stated that "ordinary, not special standards" should be applied in reviewing the trial court's decision upholding arbitration awards. First Options, 514 U.S. at 948. Nonetheless, a labor arbitrator's award is entitled to "nearly unparalleled degree of deference." See Teamsters Local Union 58 v. BOC Gases, 249 F.3d 1089, 1093 (9th Cir. 2001) (internal quotation omitted); see also Grammar v. Artists Agency, 287 F.3d 886, 890 (9th Cir. 2002) (noting "nearly unparalleled . . . deference" afforded to labor arbitration awards). Courts must defer "as long as the arbitrator even arguably construed or applied the contract." See Teamsters Local Union 58, 249 F.3d at 1093 (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)); see also Hawaii Teamsters, Local 996, 241 F.3d at 1180-81 (noting that review is "extremely deferential"); Association of Western Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc., 221 F.3d 1085, 1093 (9th Cir. 2000) (noting "broad deference"); Garvey v. Roberts, 203 F.3d 580, 588 (9th Cir. 2000) (noting "extremely limited" review); FIC Properties, Inc. v. International Ass'n of Machinists, Local 311, 103 F.3d 923, 924 (9th Cir. 1996) ("extremely narrow").

An arbitrator's factual findings are presumed correct, rebuttable only by a clear preponderance of the evidence. Carpenters Pension Trust Fund v. Underground

Constr. Co., 31 F.3d 776, 778 (9th Cir. 1994). Factual findings underlying the district court's decision are reviewed for clear error. Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996). The court's adoption of a standard of impartiality for arbitration is reviewed de novo. Id.

Review of a foreign arbitration award is circumscribed. Ministry of Defense v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992) ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.").

7. **Bifurcation**

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. See Jinro America Inc. v. Secure Inv., Inc., 266 F.3d 993, 998 (9th Cir.), amended by 272 F.3d 1289 (9th Cir. 2001); Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996) (trifurcation); Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 (9th Cir. 1995); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 575 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996). The court has broad discretion to order separate trials under Federal Rule of Civil Procedure 42(b). Davis v. Mason County, 927 F.2d 1473, 1479 (9th Cir. 1991). The court will set aside a severance order only for an abuse of discretion. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001); Davis, 927 F.2d at 1479; Davis & Cox v. Summa Corp., 751 F.2d 1507, 1517 (9th Cir. 1985).

8. **Burden of Proof**

The district's court's allocation of the burden of proof is a conclusion of law reviewed de novo. See Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 555 (9th Cir. 1991); People's Ins. Co. of China v. M/V Damodar Tanabe, 903 F.2d 675, 682 (9th Cir. 1990); Taisho Marine & Fire Ins. Co. v. M/V Sea-Land Endurance, 815 F.2d 1270, 1274 (9th Cir. 1987); see also Estate of Mitchell v. Commissioner, 250 F.3d 696, 701 (9th Cir. 2001) (reviewing de novo tax court's decision to shift burden of proof).

9. **Case Management**

The trial court's decisions regarding management of litigation are reviewed only for an abuse of discretion. See Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000) (concluding that court abused its discretion by denying plaintiffs permission to proceed anonymously); Gilbrook v. City of Westminster, 177

F.3d 839, 864 (9th Cir. 1999); Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1358 (9th Cir. 1998). District courts have inherent power to control their dockets as long as exercise of that discretion does not nullify the procedural choices reserved to parties under the federal rules. See The Atchison, Topeka & Santa Fe Ry. Co. v. Hercules, Inc., 146 F.3d 1071, 1074 (9th Cir. 1998); see also Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) (noting that district courts "have inherent power to control their dockets"); Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995) (district courts "must have ample discretion to control their dockets"). A trial court's decision regarding time limits on a trial is also reviewed for an abuse of discretion. See Navellier v. Sletten, 262 F.3d 923, 941-42 (9th Cir. 2001), cert. denied, 122 S. Ct. 2623 (2002); Amarel v. Connell, 102 F.3d 1494, 1513 (9th Cir. 1996). A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. Pagtalunan v. Gulaza, 291 F.3d 639, 640 (9th Cir. 2002) (habeas).

10. **Certification to State Court**

Certification of a legal issue to a state court lies within the discretion of the federal court. See Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974); Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1063 (9th Cir. 1997); Micomonaco v. Washington, 45 F.3d 316, 322 (9th Cir. 1995). Review of the district court's decision whether to certify is for an abuse of discretion. Louie v. United States, 776 F.2d 819, 824 (9th Cir. 1985). Note also that this court has discretion to certify questions to state courts. See Ashumus v. Woodford, 202 F.3d 1160, 1164 n.6 (9th Cir. 2000) (declining to certify).

11. **Claim Preclusion**

The trial court's determination that claim preclusion (res judicata) applies is reviewed de novo. See Albano v. Norwest Financial Hawaii, Inc., 244 F.3d 1061, 1063 (9th Cir.), cert. denied, 122 S. Ct. 505 (2001); Frank v. United Airlines, 216 F.3d 845, 849-50 (9th Cir. 2000); Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998); In re Russell, 76 F.3d 242, 244 (9th Cir. 1996); Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994). The district court's dismissal on that ground is subject to de novo review. See Cabrera v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998); In re Schimmels, 127 F.3d 875, 880 (9th Cir. 1997); Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1193 (9th Cir. 1997); United Parcel Serv., Inc. v. California Pub. Utils. Comm'n, 77 F.3d 1178, 1182 (9th Cir. 1996). A trial court's grant of summary judgment on res judicata grounds is also reviewed de novo. See Akootchook v. United States, 271 F.3d 1160, 1164 (9th Cir. 2001); Albano, 244 F.3d at 1063; Ross v. Alaska, 189 F.3d 1107, 1110 (9th Cir. 1999); Sunkist Growers, Inc. v.

Fisher, 104 F.3d 280, 283 (9th Cir. 1997); Hiser v. Franklin, 94 F.3d 1287, 1290 (9th Cir. 1996). Whether a party has waived its right to invoke the defense is also reviewed de novo. See Kern Oil & Refining Co. v. Tenneco Oil Co., 840 F.2d 730, 735 (9th Cir. 1988) (res judicata).

12. **Class Actions**

A district court's decision regarding class certification is reviewed for an abuse of discretion. See Armstrong v. Davis, 275 F.3d 849, 867 (9th Cir. 2001); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001); Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1237 (9th Cir. 2001); Smith v. University of Washington Law School, 233 F.3d 1188, 1193 (9th Cir. 2000), cert. denied, 532 U.S. 1051 (2001); Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 811 (9th Cir. 1997); Wade v. Kirkland, 118 F.3d 667, 669 (9th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233-34 (9th Cir. 1996); Barber v. Hawaii, 42 F.3d 1185, 1197 (9th Cir. 1994). A court abuses its discretion if it applies an impermissible legal criterion. See Hawkins, 251 F.3d at 1237; Valentino, 97 F.3d at 1234; Barber, 42 F.3d at 1197. Moreover, the district court's decision must be supported by sufficient findings to be entitled to "the traditional deference given to such a determination." Local Joint Executive Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1153 (9th Cir.), cert. denied, 122 S. Ct. 395 (2001). Whether an ERISA claim may be brought as a class action is a question of law reviewed de novo. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1462 (9th Cir. 1995).

Review of the district court's rulings regarding notice is de novo. Silber v. Mabon, 18 F.3d 1449, 1453 (9th Cir. 1994). Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo. Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1374 (9th Cir. 1993). The denial of a motion to opt out of a class action is reviewed for an abuse of discretion. Silber, 18 F.3d at 1455.

Review of the district court's decision to approve a class action settlement is extremely limited. In re Mego Financial Corp. Sec. Lit. (Dunleavy v. Nadler), 213 F.3d 454, 458 (9th Cir. 2000); Linney v. Cellular Alaska Part., 151 F.3d 1234, 1238 (9th Cir. 1998); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). The district court's decision to approve or reject a proposed settlement in a class action is committed to the sound discretion of that court. See In re Mego Financial Corp., 213 F.3d at 458; Linney, 151 F.3d at 1238; Class Plaintiffs, 955 F.2d at 1276.

The district court's approval of an allocation plan for a settlement in a class action is reviewed for an abuse of discretion. See In re Exxon Valdez, 229 F.3d 790, 795 (9th Cir. 2000); In re Mego Financial Corp., 213 F.3d at 460; Class Plaintiffs, 955 F.2d at 1284. Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo. Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1374 (9th Cir. 1993). Whether the court has jurisdiction to enforce a class settlement is a question of law reviewed de novo. Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1268 (9th Cir. 1996).

The district court has broad authority over awards of attorneys fees in class actions and review is accordingly limited to abuse of discretion. See Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998); In re FPI/Agretech Sec. Litig., 105 F.3d 469, 472 (9th Cir. 1997). This deference extends to the court's choice of method -- lodestar or percentage recovery -- for calculating the award. See Powers, 229 F.3d at 1256; Hanlon, 150 F.3d at 1029; In Re FPI/Agretech Sec. Litig., 105 F.3d at 472.

13. **Collateral Estoppel**

Issues regarding collateral estoppel (issue preclusion) are reviewed de novo. See United States v. Real Prop. Located at 22 Santa Barbara Dr., 264 F.3d 860, 868 (9th Cir. 2001); In re Harmon, 250 F.3d 1240, 1245 (9th Cir. 2001) (bankruptcy court); Far Out Prod., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001); In re Dunbar, 245 F.3d 1058, 1061 (9th Cir. 2001) (BAP); Frank v. United Airlines, Inc., 216 F.3d 845, 849-50 (9th Cir. 2000); In re Palmer, 207 F.3d 566, 567-68 (9th Cir. 2000) (bankruptcy court); Hydranautics v. Filmtec Corp., 204 F.3d 880, 885 (9th Cir. 2000); Zamarripa v. City of Mesa, 125 F.3d 792, 793 (9th Cir. 1997); Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997); Trevino v. Gates, 99 F.3d 911, 923 (9th Cir. 1996); In re Russell, 76 F.3d 242, 244 (9th Cir. 1996); Pardo v. Olson & Sons, Inc., 40 F.3d 1063, 1066 (9th Cir. 1994); Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994); Haupt v. Dillard, 17 F.3d 285, 288 (9th Cir. 1994); Town of N. Bonneville v. Callaway, 10 F.3d 1505, 1508 (9th Cir. 1993). The preclusive effect of a prior judgment is a question of law reviewed de novo. See Jacobs v. CBS Broadcasting, Inc., 291 F.3d 1173, 1176 (9th Cir. 2002); Far Out Prod., 247 F.3d at 993; Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525, 528 (9th Cir. 1998); Santamaria v. Horsley, 133 F.3d 1242, 1244 (9th Cir. 1998) (en banc) (state jury verdict) (citing Schiro v. Farley, 510 U.S. 222, 232 (1994)), amended by 138 F.3d 1280 (9th Cir. 1998).

14. **Consolidation**

A district court has broad discretion to consolidate cases pending within the same district. Investors Research Co. v. United States Dist. Court, 877 F.2d 777, 777 (9th Cir. 1989). The court's decision to deny a motion for consolidation is reviewed for an abuse of discretion. See Washington v. Daley, 173 F.3d 1158, 1169 n.13 (9th Cir. 1999).

A district court's discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is "very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence." Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988) (internal quotation omitted). Ordinarily, when the district court does so, its findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. See Gentala v. City of Tucson, 244 F.3d 1065, 1071 (9th Cir.) (en banc), vacated on other grounds, 122 S. Ct. 340 (2001). When the facts are undisputed, however, review is de novo. Id.

The district court's consolidation of bankruptcy proceedings is reviewed for an abuse of discretion. See In re Bonham, 229 F.3d 750, 769 (9th Cir. 2000); In re Corey, 892 F.2d 829, 836 (9th Cir. 1989). The NLRB's refusal to consolidate separate proceedings is also reviewed for an abuse of discretion. See NLRB v. Kolkka, 170 F.3d 937, 942-43 (9th Cir. 1999).

15. **Constitutionality of Regulations**

The constitutionality of a regulation is a question of law reviewed de novo. See Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999); International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1298 (9th Cir. 1991).

16. **Constitutionality of Statutes**

A challenge to the constitutionality of a federal statute is reviewed de novo. See Eunique v. Powell, 281 F.3d 940, 943 (9th Cir. 2002); Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002) (PLRA); Crawford v. Commissioner, 266 F.3d 1120, 1122 (9th Cir. 2001), cert. denied, 122 S. Ct. 1080 (2002); Free Speech Coalition v. Reno, 198 F.3d 1083, 1090 (9th Cir. 1999); United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997); Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 693 (9th Cir. 1997); Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1437 (9th Cir. 1996); Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995); Association of Nat'l Advertisers, Inc. v.

Lungren, 44 F.3d 726, 731 (9th Cir. 1994). When the district court upholds a restriction on speech, this court conducts an independent, de novo examination of the facts. See Gentala v. City of Tucson, 244 F.3d 1065, 1071 (9th Cir.) (en banc), vacated on other grounds, 122 S. Ct. 340 (2001); Tucker v. California Dep't of Educ., 97 F.3d 1204, 1209 n.9 (9th Cir. 1996); Jacobsen, 993 F.2d at 653; see also Nunez v. Davis, 169 F.3d 1222, 1226 (9th Cir. 1999) ("The determination whether speech involves a matter of public concern is a question of law.").

A district court's ruling on the constitutionality of a state statute is reviewed de novo. See Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1054 (9th Cir. 2000), cert. denied, 122 S. Ct. 46 (2001); Dittman v. California, 191 F.3d 1020, 1024-25 (9th Cir. 1999); Glauner v. Miller, 184 F.3d 1053, 1054 (9th Cir. 1999); Tri-State Dev., Ltd. v. Johnston, 160 F.3d 528, 529 (9th Cir. 1998); California First Amendment Coalition v. Calderon, 150 F.3d 976, 980 (9th Cir. 1998); Bland v. Fessler, 88 F.3d 729, 732 (9th Cir. 1996); NCAA v. Miller, 10 F.3d 633, 637 (9th Cir. 1993).

17. **Contempt**

A district court's civil contempt order is reviewed for an abuse of discretion. FTC v. Affordable Media, 179 F.3d 1228, 1239 (9th Cir. 1999); Peterson v. Highland Music, Inc., 140 F.3d 1313, 1323 (9th Cir. 1998); Hook v. Arizona Dep't of Corrections, 107 F.3d 1397, 1403 (9th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 762, 764 (9th Cir. 1996); United States v. Bodwell, 66 F.3d 1000, 1001 (9th Cir. 1995); Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir. 1995).

Any findings made in connection with the order of civil contempt are reviewed for clear error. Affordable Media, 179 F.3d at 1239. The trial court's decision to impose sanctions or punishment for contempt is also reviewed for abuse of discretion. Hook, 107 F.3d at 1403; Reebok, 49 F.3d at 1390. An award of attorneys fees for civil contempt is within the discretion of the district court. Harcourt Brace Jovanovich Legal & Professional Publications, Inc. v. Multistate Legal Studies, Inc., 26 F.3d 948, 953 (9th Cir. 1994). Whether the district court provided the alleged contemnor due process, however, is a legal question subject to de novo review. Thomas, Head & Greisen Employees Trust v. Buster, 95 F.3d 1449, 1458 (9th Cir. 1996).

The district court's "finding" of contempt under 28 U.S.C. § 1826 is reviewed for an abuse of discretion. In re Grand Jury Proceedings, 40 F.3d 959, 961 (9th Cir. 1994).

18. **Continuances**

The decision to grant or deny a continuance is reviewed for an abuse of discretion. See Orr v. Bank of America, 285 F.3d 764, 783 (9th Cir. 2002); Danjaq LLC v. Sony Corp., 263 F.3d 942, 961 (9th Cir. 2001); Defenders of Wildlife v. Bernal, 204 F.3d 920, 929-30 (9th Cir. 2000); Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1102 (9th Cir. 1998); Columbia Pictures Television v. Krypton Broad., Inc., 106 F.3d 284, 296 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 340 (1998); Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996); Ticor Title Ins. Co. v. Florida, 937 F.2d 447, 451 (9th Cir. 1991). Whether a denial of a continuance constitutes an abuse of discretion depends on a consideration of the facts of each case. Hawaiian Rock Prods. Corp. v. A.E. Lopez Enters., Ltd., 74 F.3d 972, 976 (9th Cir. 1996); Martel v. City of Los Angeles, 56 F.3d 993, 995 n.3 (9th Cir. 1995) (en banc).

The denial of a motion for a continuance of summary judgment pending further discovery is reviewed for an abuse of discretion. See Weinberg v. Whatcom County, 241 F.3d 746, 750-51 (9th Cir. 2001); Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999); Citicorp Real Estate, 155 F.3d at 1102; Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921-22 (9th Cir. 1996); Hawaiian Rock, 74 F.3d at 975; McCormick v. Fund Am. Cos., 26 F.3d 869, 885 (9th Cir. 1994). A district court abuses its discretion only if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment. See Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001); Byrd v. Guess, 137 F.3d 1126, 1135 (9th Cir. 1998). Note that when a trial judge fails to address a Rule 56(f) motion before granting summary judgment, the omission is reviewed de novo. Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Byrd, 137 F.3d at 1135.

A district court's decision to stay a civil trial is reviewed for an abuse of discretion. Clinton v. Jones, 520 U.S. 681, 706 (1997).

19. **Declaratory Relief**

The trial court's decision whether to exercise jurisdiction over a declaratory judgment action is reviewed for an abuse of discretion. See Wilton v. Seven Falls Co., 515 U.S. 277, 289-90 (1995); Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1192 & n.51

(9th Cir. 2000); American Casualty Co. v. Krieger, 181 F.3d 1113, 1117-18 (9th Cir. 1999); Snodgrass v. Provident Life and Accident Ins. Co., 147 F.3d 1163, 1164 (9th Cir. 1998); Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc); see also United Nat'l Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 918-19 (9th Cir. 1998) (explaining discretionary jurisdiction). A trial court may abuse its discretion by failing to provide a party an adequate opportunity to be heard when the court contemplates granting an unrequested declaratory judgment ruling. See Fordyce v. City of Seattle, 55 F.3d 436, 442 (9th Cir. 1995).

Review of the court's decision to grant or deny declaratory relief is de novo. See DP Aviation v. Smiths Indus. Aerospace and Defense Sys., Ltd., 268 F.3d 829, 840 (9th Cir. 2001); Kassbaum v. Steppenwolf Prods., Inc., 236 F.3d 487, 490 (9th Cir. 2000), cert. denied, 122 S. Ct. 41 (2001); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1212 (9th Cir. 1999); Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996); Ablang v. Reno, 52 F.3d 801, 803 (9th Cir. 1995); Tashima v. Administrative Office, 967 F.2d 1264, 1273 (9th Cir. 1992); Fireman's Fund Ins. Co. v. Ignacio, 860 F.2d 353, 354 (9th Cir. 1988).

20. **Discovery**

The court of appeals reviews the district court's rulings concerning discovery for an abuse of discretion. See Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th Cir. 2002); Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001); Kulas v. Flores, 255 F.3d 780, 783 (9th Cir. 2001), cert. denied, 122 S. Ct. 1557 (2002); Mabe v. San Bernardino County, 237 F.3d 1101, 1112 (9th Cir. 2001); Lobaz v. U.S. West Cellular of California, Inc., 222 F.3d 1142, 1147 (9th Cir. 2000); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir. 1999); Ingram v. United States, 167 F.3d 1240, 1246 (9th Cir. 1999); Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir. 1998); Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996); Blackburn v. United States, 100 F.3d 1426, 1436 (9th Cir. 1996); Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995); Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1441 (9th Cir. 1993). An order compelling a party to comply with discovery requests is also reviewed for an abuse of discretion. Epstein v. MCA, Inc., 54 F.3d 1422, 1423 (9th Cir. 1995) (per curiam). Whether information sought by discovery is relevant may, however, involve an interpretation of law that is reviewed de novo. See Cacique, Inc. v. Robert Reiser & Co., 169 F.3d 619, 622 (9th Cir. 1998) (state law). "Enforcing a discovery request for irrelevant information is a per se abuse of discretion." Id.

The imposition of discovery sanctions is reviewed for an abuse of discretion. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002) (striking

answer and entering default); Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1022 (9th Cir. 2002) (entering default); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001); Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997); Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 762, 764 (9th Cir. 1996); Dahl v. City of Huntington Beach, 84 F.3d 363, 367 (9th Cir. 1996). Findings of fact underlying the motion for discovery sanctions are reviewed for clear error. Payne, 121 F.3d at 507; Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1408 (9th Cir. 1990); Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988). If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo. Adriana, 913 F.2d at 1408. The court's refusal to impose discovery sanctions is reviewed for an abuse of discretion. See Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1200 (9th Cir. 1999). Whether discovery sanctions against the government are barred by sovereign immunity is a question of law reviewed de novo. United States v. Woodley, 9 F.3d 774, 781 (9th Cir. 1993).

The district court's decision not to permit additional discovery pursuant to Federal Rule of Civil Procedure 56(f) is reviewed for an abuse of discretion. See Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th Cir. 2002) (denying request to reopen discovery); U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 933 (9th Cir. 2002); Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001); DeGrassi v. City of Glendora, 207 F.3d 636, 641 (9th Cir. 2000); Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999); Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1102 (9th Cir. 1998); Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Martinez v. Newport Beach City, 125 F.3d 777, 786 (9th Cir. 1997); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 920 (9th Cir. 1996); Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 887 (9th Cir. 1996); Qualls v. Blue Cross, Inc., 22 F.3d 839, 844 (9th Cir. 1994). "We will only find that the district court abused its discretion if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." Byrd v. Guess, 137 F.3d 1126, 1135 (9th Cir. 1998) (quoting Qualls, 22 F.3d at 844); see also Panatronic USA, 287 F.3d at 846 (reciting standard); U.S. Cellular Inv., 281 F.3d at 934 (same); Bank of Am., 175 F.3d at 1118; Nidds, 113 F.3d at 921; Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995). If a trial judge fails to address a Rule 56(f) motion before granting summary judgment, the omission is reviewed de novo. Margolis, 140 F.3d at 853; Byrd, 137 F.3d at 1135; Kennedy v. Applause, Inc., 90 F.3d 1477, 1482 (9th Cir. 1996); Qualls, 22 F.3d at 844.

This court reviews the grant of a protective order for an abuse of discretion. See Portland General Electric v. U.S. Bank Trust Nat'l Ass'n, 218 F.3d 1085, 1089 (9th

Cir. 2000); Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999); Zimmerman v. Bishop, 25 F.3d 784, 789 (9th Cir. 1994); Travers v. Shalala, 20 F.3d 993, 999 (9th Cir. 1994); see also Wharton v. Calderon, 127 F.3d 1201, 1205 (9th Cir. 1997) (protective order entered pursuant to trial court's inherent authority). A court's decision to grant or deny a request to modify a protective order is also reviewed for an abuse of discretion. See Phillips v. General Motors Corp., 289 F.3d 1117, 1121 (9th Cir. 2002); Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc., 62 F.3d 1217, 1219 (9th Cir. 1995). When the legal basis for a protective order is challenged, review may be de novo. See Phillips, 289 F.3d at 1121; see also McDowell v. Calderon, 197 F.3d 1253, 1255 & n.4 (9th Cir. 1999) (en banc) (habeas). When the order itself is not directly appealed, but is challenged only by the denial of a motion for reconsideration, review is for an abuse of discretion. See McDowell, 197 F.3d at 1255-56.

Issues regarding limitations imposed on discovery by application of the attorney-client privilege are governed by federal common law. Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992). The district court's rulings on the scope of the attorney-client privilege are reviewed de novo. Id. at 130.

A court's decision to deny discovery is reviewed for an abuse of discretion. See Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001). The court's ruling limiting the scope of discovery is reviewed for an abuse of discretion. See Blackburn v. United States, 100 F.3d 1426, 1436 (9th Cir. 1996). The court's decision to stay discovery is also reviewed for an abuse of discretion. Alaska Cargo Transp., Inc. v. Alaska R.R., 5 F.3d 378, 383 (9th Cir. 1993). The court's decision to cut off discovery is reviewed for an abuse of discretion. Villegas-Valenzuela v. INS, 103 F.3d 805, 813 (9th Cir. 1996). The court's decision to permit a party to withdraw a prior admission is reviewed for an abuse of discretion. See Sonoda v. Cabrera, 255 F.3d 1035, 1039 (9th Cir. 2001) (citing Fed. R. Civ. Pro. 36(b)).

A district court interpretation of 28 U.S.C. § 1782, permitting domestic discovery of use in foreign proceedings, is reviewed de novo but its application of that statute to the facts of the case is reviewed for an abuse of discretion. See Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 666 (9th Cir. 2002); United States v. Sealed 1, Letter of Request, 235 F.3d 1200, 1203 & 1206 (9th Cir. 2000).

21. **Disqualifying Counsel**

The trial court's decision ordering counsel to withdraw from a case is reviewed for an abuse of discretion. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995). The denial of a motion to withdraw is also reviewed for an abuse of discretion.

LaGrand v. Stewart, 133 F.3d 1253, 1269 (9th Cir. 1998) (habeas). An order disqualifying an attorney will not be disturbed if the record reveals "any sound" basis for the court's action. Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 438 (9th Cir. 1983). Therefore, a district court's decision concerning the disqualification of counsel will generally not be reversed unless the court either misperceives the relevant rule of law or abuses its discretion. Id. Other actions a court may take regarding the supervision of attorneys are also reviewed for an abuse of discretion. See, e.g., Erickson v. Newmar Corp., 87 F.3d 298, 300 (9th Cir. 1996).

22. **Disqualifying the Judge (Recusal)**

The denial of a recusal motion is reviewed for an abuse of discretion. See Kulas v. Flores, 255 F.3d 780, 783 (9th Cir. 2001) (noting that recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned), cert. denied, 122 S. Ct. 1557 (2002); F.J. Hanshaw Enter., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 (9th Cir. 2001); Leslie v. Grupo ICA, 198 F.3d 1152, 1157 (9th Cir. 1999); United States ex rel. Hochman v. Nackman, 145 F.3d 1069, 1076 (9th Cir. 1998).

A district court's refusal to disqualify the sitting judge under 28 U.S.C. § 144 may be reversed only for an abuse of discretion. See Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995); Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987); see also Stanley v. University of Southern California, 178 F.3d 1069, 1079 (9th Cir. 1999) (applying abuse of discretion standard to judge's refusal to recuse another judge).

Note that "[f]ederal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion. A judge's participation during trial warrants reversal only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." Price v. Kramer, 200 F.3d 1237, 1252 (9th Cir. 2000) (internal citation and quotation omitted).

23. **Dismissals**

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. See Transmission Agency of California v. Sierra Pacific Power Co., 295 F.3d 918, 927 (9th Cir. 2002); Lipton v. Pathogenesis

Corp., 284 F.3d 1027, 1035 (9th Cir. 2002); Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001); Vestar Dev. II v. General Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001); Arrington v. Wong, 237 F.3d 1066, 1069 (9th Cir. 2001); Monterey Plaza Hotel, Ltd. v. Local 483, 215 F.3d 923, 926 (9th Cir. 2000); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000); TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998); Tyler v. Cisneros, 136 F.3d 603, 607 (9th Cir. 1998); Geweke Ford v. St. Joseph's Omni Preferred Care Inc., 130 F.3d 1355, 1357 (9th Cir. 1997); Cohen v. Stratosphere Corp., 115 F.3d 695, 700 (9th Cir. 1997); Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997); Lewis v. Telephone Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996); see also In re Hemmeter, 242 F.3d 1186, 1189 (9th Cir. 2001) (bankruptcy court); In re Rogstad, 126 F.3d 1224, 1228 (9th Cir. 1997) (same). If support exists in the record, a dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning. See Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001); Vestar Dev. II, 249 F.3d at 960; Williamson, 208 F.3d at 1149; Burgert, 200 F.3d at 663; Steckman, 143 F.3d at 1295.

Dismissal based on judicial immunity is reviewed de novo. See Harvey v. Waldron, 210 F.3d 1008, 1011 (9th Cir. 2000); Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996); see also In re Castillo, 297 F.3d 940, 946 (9th Cir. 2002) (trustee immunity).

A dismissal based on Noerr-Pennington immunity is reviewed de novo. See Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1092 n.3 (9th Cir. 2000); Oregon Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991).

The district court's decision to dismiss a complaint for lack of ripeness is reviewed de novo. See Ross v. Alaska, 189 F.3d 1107, 1114 (9th Cir. 1999); see also City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171 (9th Cir. 2001) (counterclaim), cert. denied, 122 S. Ct. 809 (2002).

A dismissal pursuant to the Feres doctrine is also reviewed de novo. See Costo v. United States, 248 F.3d 863, 865-66 (9th Cir. 2001), cert. denied, 122 S. Ct. 808 (2002); Bowen v. Oistead, 125 F.3d 800, 803 (9th Cir. 1997); see also Wilkins v. United States, 279 F.3d 782, 785 (9th Cir. 2002) (noting that whether Feres doctrine applies is reviewed de novo).

Dismissal for lack of subject matter jurisdiction is reviewed de novo. See McGraw v. United States, 281 F.3d 997, 1001 (9th Cir.), amended by 298 F.3d 754 (9th

Cir. 2002); Sommatino v. United States, 255 F.3d 704, 707 (9th Cir. 2001); La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001); Arrington v. Wong, 237 F.3d 1066, 1069 (9th Cir. 2001); Crum v. Circus Circus Enter., 231 F.3d 1129, 1130 (9th Cir. 2000); Brady v. United States 211 F.3d 499, 502 (9th Cir. 2000) Murphey v. Lanier, 204 F.3d 911, 912 (9th Cir. 2000); Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1142 (9th Cir. 2000); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998); Jerron West, Inc. v. California State Bd. of Equalization, 129 F.3d 1334, 1337 (9th Cir. 1997); Evans v. Chater, 110 F.3d 1480, 1481 (9th Cir. 1997). The court's refusal to dismiss for lack of subject matter jurisdiction is also reviewed de novo. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002). The court's factual findings relevant to its determination of subject matter jurisdiction are reviewed for clear error. See Peninsula Communications, 287 F.3d at 836; La Reunion Francaise SA, 247 F.3d at 1024; Crum, 231 F.3d at 1130. All uncontroverted factual assertions regarding jurisdiction are taken as true. See McGraw, 281 F.3d at 1001.

The trial court's decision to dismiss for lack of personal jurisdiction is reviewed de novo. See Ochoa v. J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1187 (9th Cir. 2002); Lee v. City of Los Angeles, 250 F.3d 668, 680 (9th Cir. 2001); Meyers v. Bennett Law Offices, 238 F.3d 1068, 1071 (9th Cir. 2001).

Dismissals based on res judicata are reviewed de novo. See Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002); Cabrera v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998); In re Schimmels, 127 F.3d 875, 880 (9th Cir. 1997); Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997).

Rule 12(c) dismissals are reviewed de novo. See Weeks v. Bayer, 246 F.3d 1231, 1234 (9th Cir. 2001); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001); Arrington v. Wong, 237 F.3d 1066, 1069 (9th Cir. 2001); Fajardo v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999); Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998); Smith v. National Steel & Shipbuilding Co., 125 F.3d 751, 753 (9th Cir. 1997); McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996); Marx v. Loral Corp., 87 F.3d 1049, 1053 (9th Cir. 1996); Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1488 (9th Cir. 1995). A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. See Owens, 244 F.3d at 713; Fajardo, 179 F.3d at 699; Nelson, 143 F.3d at 1200; Smith, 125 F.3d at 753; McGann, 102 F.3d at 392; Merchants Home Delivery, 50 F.3d at 1488.

Dismissals based on statutes of limitations are reviewed de novo. See Underwood Cotton Co. v. Hyundai Merchant Marine, Inc., 288 F.3d 405, 407 (9th Cir. 2002); Papa v. United States, 281 F.3d 1004, 1009 (9th Cir. 2002); Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1135 (9th Cir. 2001) (en banc); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Johnson v. California, 207 F.3d 650, 653 (9th Cir. 2000); Ellis v. City of San Diego, 176 F.3d 1183, 1188 (9th Cir. 1999); Silva v. Crain, 169 F.3d 608, 610 (9th Cir. 1999); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998); United States ex rel. Saaf v. Lehman Bros., 123 F.3d 1307, 1307 (9th Cir. 1997); Papenthien v. Papenthien, 120 F.3d 1025, 1027 (9th Cir. 1997); Torres v. City of Santa Ana, 108 F.3d 224, 226 (9th Cir. 1997); see also Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (habeas).

Dismissal of a complaint for failure to serve a timely summons and complaint is reviewed for abuse of discretion. See In re Sheehan, 253 F.3d 507, 511 (9th Cir. 2001) (bankruptcy court); Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994); West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1528 (9th Cir. 1990).

Dismissals made pursuant to former 28 U.S.C. § 1915(d) are reviewed for an abuse of discretion. Denton v. Hernandez, 504 U.S. 25, 33 (1992); Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995); Trimble v. City of Santa Rosa, 49 F.3d 583, 584 (9th Cir. 1995). Note that § 1915(d) was recodified as 28 U.S.C. § 1915(e) by the Prison Litigation Reform Act of 1996 (PLRA). See Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc). Dismissals pursuant to that section are reviewed de novo. See Wyatt v. Terhune, 280 F.3d 1238, 1244-45 (9th Cir. 2002) (reviewing dismissal of § 1983 action based on failure to exhaust remedies as required by the PLRA); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); but see Bishop v. Lewis, 155 F.3d 1094, 1096-97 (9th Cir. 1998) (applying abuse of discretion standard to district court's decision to dismiss civil rights complaint on ground that plaintiff failed to exhaust administrative remedies pursuant to the PLRA); James v. Madison St. Jail, 122 F.3d 27, 27 n.1 (9th Cir. 1997) (noting that dismissals pursuant to § 1915, whether construed as dismissals for lack of prosecution, for failure to obey an order of the court, or for filing a frivolous complaint, are reviewed for an abuse of discretion). The court's decision not to permit an amendment to the complaint is reviewed, however, for an abuse of discretion. See Lopez, 203 F.3d at 1130.

A dismissal of a prisoner's complaint pursuant to 28 U.S.C. § 1915A is reviewed de novo. See Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000); Cooper v. Pickett, 137 F.3d 616, 623 (9th Cir. 1997). In determining whether a complaint states a claim,

the court must accept as true all allegations of material fact and construe those facts in the light most favorable to the prisoner. See Resnick, 213 F.3d at 447.

A dismissal pursuant to Rule 41(b) is reviewed for abuse of discretion. See Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000) (deficient pleadings); Bishop v. Lewis, 155 F.3d 1094, 1096-97 (9th Cir. 1998) (failure to comply with court order); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) (failure to comply with court order); Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996) (deficient pleadings); McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (deficient pleadings); Al-Torki v. Kaempen, 78 F.3d 1381, 1384 (9th Cir. 1996) (failure to prosecute); In re Dominguez, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings); but see Tonry v. Security Experts, Inc., 20 F.3d 967, 971 (9th Cir. 1994) (stating that findings of fact are reviewed for clear error and questions of law are reviewed de novo). Abuse of discretion is also applied when reviewing the district court's dismissal as a sanction. See Valley Eng'rs, Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1052 (9th Cir. 1998) (discovery); Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996).

The trial court's decision to grant voluntary dismissal is reviewed for abuse of discretion. See Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001); Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir. 1994); Bell v. Kellogg, 922 F.2d 1418, 1421 (9th Cir. 1991). In making the decision, the court must consider whether the defendant will suffer legal prejudice as a result of the dismissal. Smith, 263 F.3d at 975; Hyde & Drath, 24 F.3d at 1169. The court's determination of the terms and conditions of dismissal under Rule 41(a)(2) is reviewed for an abuse of discretion. Hargis v. Foster, 282 F.3d 1154, 1159 (9th Cir. 2002); Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993). The court's denial of a motion for voluntary dismissal is also reviewed for an abuse of discretion. In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996); Westlands Water Dist. v. United States, 100 F.3d 94, 96 (9th Cir. 1996). Whether a court possesses the authority to deny or vacate a voluntary dismissal is a question of law reviewed de novo. See American Soccer Co. v. Score First Enter., 187 F.3d 1108 (9th Cir. 1999).

A district court's order dismissing an action for lack of prosecution is reviewed for an abuse of discretion. See Southwest Marine, Inc. v. Danzig, 217 F.3d 1128, 1137 n.10 (9th Cir. 2000); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998); Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996). The court's sua sponte dismissal for failure to prosecute is reviewed for an abuse of discretion. Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992). "A district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." Id. (internal quotation omitted). A district

court's dismissal of a complaint with prejudice for failure to comply with a court's order to amend the complaint is also reviewed for an abuse of discretion. McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996). A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. Pagtalunan v. Gulaza, 291 F.3d 639, 640 (9th Cir. 2002) (habeas).

A dismissal for "judge-shopping" made pursuant to the inherent powers of the district court is reviewed for an abuse of discretion. See Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998). A dismissal for failure to comply with a vexatious litigant order is also reviewed for an abuse of discretion. See In re Fillbach, 223 F.3d 1089, 1190 (9th Cir. 2000).

The trial court's decision to dismiss an action based on improper venue is reviewed for an abuse of discretion. Bruns v. National Credit Union Admin., 122 F.3d 1251, 1253 (9th Cir. 1997).

A dismissal without leave to amend is reviewed de novo. See Kennedy v. Southern California Edison Co., 268 F.3d 763, 767 (9th Cir. 2001), cert. denied, 122 S. Ct. 1964 (2002); Adam v. Hawaii, 235 F.3d 1160, 1164 (9th Cir. 2000); Desaigoudar v. Meyercord, 223 F.3d 1020, 1021 (9th Cir. 2000); Franklin v. Terr, 201 F.3d 1098, 1100 (9th Cir. 2000); San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998); Dumas v. Kipp, 90 F.3d 386, 389 (9th Cir. 1996); Eaglesmith v. Ward, 73 F.3d 857, 860 (9th Cir. 1995); see also Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038 (9th Cir. 2002) (reviewing denial of leave to amend for an abuse of discretion); Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (reviewing refusal to permit amendment for an abuse of discretion). Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. See Lee v. City of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001); Adam, 235 F.3d at 1164; Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1196 (9th Cir. 1998); Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996). Dismissal of a pro se complaint without leave to amend is proper only if it is clear that the deficiencies of the complaint could not be cured by amendment. Lucas v. Department of Corrections, 66 F.3d 245, 248 (9th Cir. 1995); Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995); Rhoden v. United States, 55 F.3d 428, 432 n.9 (9th Cir. 1995).

A dismissal with leave to amend is also reviewed de novo. See Kennedy, 268 F.3d at 767; Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1151 (9th Cir. 1998). Note there may be a question whether a dismissal with leave to amend is a final, appealable order. See Does I Thur XXIII v. Advances Textile Corp., 214 F.3d

1058, 1066-67 (9th Cir. 2000); National Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433-434 (9th Cir. 1997); Montes v. United States, 37 F.3d 1347, 1350 (9th Cir. 1994).

24. **Diversity Jurisdiction**

A district court's determination that diversity jurisdiction exists is reviewed de novo. See Bretiman v. May Co. California, 37 F.3d 562, 563 (9th Cir. 1994); Co-Efficient Energy Sys. v. CSL Indus., Inc., 812 F.2d 556, 557 (9th Cir. 1987). Any factual determinations necessary to establish the existence of diversity jurisdiction are reviewed for clear error. See Prudential Real Estate Affiliates v. PPR Realty, 204 F.3d 867, 872-73 (9th Cir. 2000); Co-Efficient Energy Sys., 812 F.2d at 557. The court's decision whether state of federal law should be applied in a diversity action is reviewed de novo. See Torre v. Brickey, 278 F.3d 917, 919 (9th Cir. 2002) (diversity).

25. **Evidentiary Hearings**

A district court's decision to hold an evidentiary hearing is reviewed for an abuse of discretion. See Jaros v. E.I. Dupont, 292 F.3d 1124, 1138 (9th Cir. 2002) (Daubert motion); United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002) (preliminary injunction); McLachlan v. Bell, 261 F.3d 908, 910 (9th Cir. 2001) (motion to dismiss); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026 n.7 (9th Cir. 2001); Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987) (motion to enforce a settlement).

26. **Exhaustion**

Whether exhaustion is required is a question of law reviewed de novo. See Sodhu v. Flecto Co., 279 F.3d 896, 898 (9th Cir. 2002) (collective bargaining agreement); Witte v. Clark County School Dist., 197 F.3d 1271, 1274 (9th Cir. 1999) (IDEA); Collins v. Lobdell, 188 F.3d 1124, 1127 (9th Cir. 2000). Whether a district court lacks jurisdiction because plaintiff failed to exhaust claims is reviewed de novo. See B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1099 (9th Cir. 2002) (Title VII; Rodriguez v. Airborne Express, 265 F.3d 890, 896 (9th Cir. 2001) (FEHA). Whether administrative remedies must be exhausted is also a matter of law is reviewed de novo. See Rumbles v. Hill, 182 F.3d 1064, 1067 (9th Cir. 1999) (PLRA); Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50 F.3d 1478, 1483 (9th Cir. 1995) (ERISA); Cooney v. Edwards, 971 F.2d 345, 346 (9th Cir. 1992) (Bivens). If exhaustion is not statutorily prescribed, the court has the discretion to require exhaustion. See Pension Benefit Guar. Corp. v. Carter & Tillery Enters., 133 F.3d 1183, 1187 (9th Cir. 1998);

Western Radio Servs. Co. v. Espy, 79 F.3d 896, 899 (9th Cir. 1996). The decision of the district court to require exhaustion of administrative remedies is reviewed for an abuse of discretion. See Pension Benefit, 133 F.3d at 1187; Leorna v. United States Dep't of State, 105 F.3d 548, 550 (9th Cir. 1997); Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1452 n.8 (9th Cir. 1995). The court's decision to require a party to exhaust intra-union remedies prior to filing an action under the LMRDA is reviewed for an abuse of discretion. See Kofoed v. International Bro. of Elec., Local 48, 237 F.3d 1001, 1004 (9th Cir. 2001). Whether a prisoner asserted a habeas claim has exhausted state remedies is a question of law reviewed de novo. See Greene v. Lampert, 288 F.3d 1081, 1086 (9th Cir. 2002).

27. **Failure to State a Claim**

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. See Transmission Agency of California v. Sierra Pacific Power Co., 295 F.3d 918, 927 (9th Cir. 2002); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1035 (9th Cir. 2002); American Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002); Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001); Vestar Dev. II v. General Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001); Arrington v. Wong, 237 F.3d 1066, 1069 (9th Cir. 2001); Monterey Plaza Hotel, Ltd. v. Local 483, 215 F.3d 923, 926 (9th Cir. 2000); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000); TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998); Tyler v. Cisneros, 136 F.3d 603, 607 (9th Cir. 1998); Geweke Ford v. St. Joseph's Omni Preferred Care Inc., 130 F.3d 1355, 1357 (9th Cir. 1997); Cohen v. Stratosphere Corp., 115 F.3d 695, 700 (9th Cir. 1997); Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997); Lewis v. Telephone Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996); see also In re Hemmeter, 242 F.3d 1186, 1189 (9th Cir. 2001) (bankruptcy court); In re Rogstad, 126 F.3d 1224, 1228 (9th Cir. 1997) (same). If support exists in the record, a dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning. See Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001); Vestar Dev. II, 249 F.3d at 960; Williamson, 208 F.3d at 1149; Burgert, 200 F.3d at 663; Steckman, 143 F.3d at 1295.

Review is limited to the contents of the complaint. See Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002) (noting "incorporation by reference" exception); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)

(noting exceptions); Enesco Corp. v. Price/Costco, Inc., 146 F.3d 1083, 1085 (9th Cir. 1998); Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998); Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996); Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). If matters outside the pleadings are considered, the motion to dismiss under Rule 12(b)(6) is treated as one for summary judgment. See San Pedro Hotel, Co. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998); Keams v. Tempe Tech. Inst., Inc., 110 F.3d 44, 46 (9th Cir. 1997); Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996).

All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. See American Family, 277 F.3d at 1120; Burgert, 200 F.3d at 663; Enesco, 146 F.3d at 1085; Pareto, 139 F.3d at 699; Federation of African Am. Contractors v. Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996); Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996). Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a motion to dismiss. Associated Gen. Contractors v. Metropolitan Water Dist. of S. California, 159 F.3d 1178, 1181 (9th Cir. 1998); Pareto, 139 F.3d at 699; In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. See Van Buskirk, 284 F.3d at 980; American Family, 277 F.3d at 1120; Williamson, 208 F.3d at 1149; Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999); Tyler, 136 F.3d at 607; Wyler Summit Partnership v. Turner Broad. Sys., 135 F.3d 658, 661 (9th Cir. 1998); Johnson, 113 F.3d at 1117. The court may affirm the district court's dismissal for failure to state a claim on any basis fairly supported by the record. See Williamson, 208 F.3d at 1149; Burgert, 200 F.3d at 663; Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Steckman, 143 F.3d at 1295; Tyler, 136 F.3d at 607; Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996).

Dismissal of a complaint for failure to serve a timely summons and complaint pursuant to Federal Rule of Civil Procedure 4(j) is reviewed for abuse of discretion. Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994); West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1528 (9th Cir. 1990).

28. **Forum Non Conveniens**

A forum non conveniens determination is committed to the sound discretion of the district court. See Leetsch v. Freedman, 260 F.3d 1100, 1102-03 (9th Cir. 2001) (noting standard of review and factors for district court to consider); Ravelo Monegro v. Rosa, 211 F.3d 509, 511 (9th Cir. 2000); Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1090 (9th Cir. 1999); Gemini Capital Group, Inc. v. Yap

Fishing Corp., 150 F.3d 1088, 1091 (9th Cir. 1998); Creative Tech., Ltd. v. Aztech Sys. Pte, Ltd., 61 F.3d 696, 699 (9th Cir. 1995). The district court's decision "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." Creative Tech, 61 F.3d at 699; see also Ceramic Corp. v. Inka Maritime Corp., 1 F.3d 947, 948-49 (9th Cir. 1993); Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1448 (9th Cir. 1990).

A district court's decision to transfer pursuant to 28 U.S.C. § 1404(a) on the ground of forum non conveniens is also reviewed for an abuse of discretion. Lou v. Belzberg, 834 F.2d 730, 734 (9th Cir. 1987). A district court has discretion to decline jurisdiction when litigation in a foreign forum would be more convenient for the parties. See Lueck v. Sundstrand Corp., 216 F.3d 1133, 1143 (9th Cir. 2000).

29. **Forum Selection Clauses**

A district court's decision whether to enforce a forum selection clause is reviewed for an abuse of discretion. See Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty, 294 F.3d 1171, 1174 (9th Cir. 2002); Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc); Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 323 (9th Cir. 1996). The trial court's refusal to enforce such a clause is also reviewed for an abuse of discretion. Fireman's Fund Ins. v. M.V. DSR Atl., 131 F.3d 1336, 1338 (9th Cir. 1997). Fireman's Fund notes, however, that many other circuits have adopted de novo review of the enforceability of forum selection or arbitration clauses. Id. at 1338 n.1. This circuit has stated that trial courts' interpretations of such clauses are reviewed de novo. See Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1036 n.3 (9th Cir. 1995); Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987). Whether federal securities laws void a choice-of-laws clause is a question of law reviewed de novo. Richards, 135 F.3d at 1292.

30. **Frivolousness**

Dismissals made pursuant to former 28 U.S.C. § 1915(d) are reviewed for an abuse of discretion. Denton v. Hernandez, 504 U.S. 25, 33 (1992); Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995); Trimble v. City of Santa Rosa, 49 F.3d 583, 584 (9th Cir. 1995). Note that § 1915(d) was recodified as 28 U.S.C. § 1915(e) by the Prison Litigation Reform Act of 1996 (PLRA). See Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

Dismissals pursuant to that section are reviewed de novo. See Wyatt v. Terhune, 280 F.3d 1238, 1244-45 (9th Cir. 2002) (reviewing dismissal of § 1983 action based on failure to exhaust remedies as required by the PLRA); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); but see Bishop v. Lewis, 155 F.3d 1094, 1096-97 (9th Cir. 1998) (applying abuse of discretion standard to district court's decision to dismiss civil rights complaint on ground that plaintiff failed to exhaust administrative remedies pursuant to the PLRA); James v. Madison St. Jail, 122 F.3d 27, 27 n.1 (9th Cir. 1997) (noting that dismissals pursuant to § 1915, whether construed as dismissals for lack of prosecution, for failure to obey an order of the court, or for filing a frivolous complaint, are reviewed for an abuse of discretion). The court's decision refusal to permit an amendment is reviewed, however, for an abuse of discretion. See Lopez, 203 F.3d at 1130.

A dismissal of a prisoner's complaint pursuant to 28 U.S.C. § 1915A is reviewed de novo. See Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000); Cooper v. Pickett, 137 F.3d 616, 623 (9th Cir. 1997). In determining whether a complaint states a claim, the court must accept as true all allegations of material fact and construe those facts in the light most favorable to the prisoner. See Resnick, 213 F.3d at 447; see also Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) (construing prisoner's pro se pleadings liberally on defendant's motion to dismiss).

31. **Impleader**

The district court's decision to allow a third-party defendant to be impleaded under Federal Rule of Civil Procedure 14 is reviewed for an abuse of discretion. Brockman v. Merabank, 40 F.3d 1013, 1016 (9th Cir. 1994); Stewart v. American Int'l Oil & Gas Co., 845 F.2d 196, 199 (9th Cir. 1988).

32. **Immunities**

Immunity under the Eleventh Amendment presents questions of law reviewed de novo. See Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 (9th Cir. 2002) (summary judgment); Demshki v. Monteith, 255 F.3d 986, 988 (9th Cir. 2001); In re Lazar, 237 F.3d 967, 974 (9th Cir.), cert. denied, 122 S. Ct. 458 (2001); Bethel Native Corp. v. Department of the Interior, 208 F.3d 1171, 1173 (9th Cir. 2000); Yakama Indian Nation v. Washington Dep't of Revenue, 176 F.3d 1241, 1245 (9th Cir. 1999); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Oregon Short Line R.R. v. Department of Revenue Or., 139 F.3d 1259, 1263 (9th Cir. 1998); Quillin v. Oregon, 127 F.3d 1136, 1138 (9th Cir. 1997). Whether a party is immune under the Eleventh Amendment is also reviewed de novo. See California v. Campbell, 138 F.3d 784, 786

(9th Cir. 1998); Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 838 (9th Cir. 1997); Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1183 n.2 (9th Cir. 1997).

Whether a judge is protected from suit by judicial immunity is a question of law reviewed de novo. See Harvey v. Waldron, 210 F.3d 1008, 1011 (9th Cir. 2000); Crooks v. Maynard, 913 F.2d 699, 700 (9th Cir. 1990). The district court's conclusion that an individual is entitled to judicially conferred immunity is also reviewed de novo. See Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989). A dismissal based on judicial immunity is reviewed de novo. See Harvey, 210 F.3d at 1011; Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996); see also In re Castillo, 297 F.3d 940, 946 (9th Cir. 2002) (trustee immunity).

Whether an individual is entitled to legislative immunity is a question of law reviewed de novo. San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 476 (9th Cir. 1998); Trevino v. Gates, 23 F.3d 1480, 1481 (9th Cir. 1994); see also Chappell v. Robbins, 73 F.3d 918, 920 (9th Cir. 1996) (dismissal based on absolute legislative immunity is reviewed de novo).

A district court's decision on qualified immunity is reviewed de novo. See Elder v. Holloway, 510 U.S. 510, 516 (1994); Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002); Nelson v. Heiss, 271 F.3d 891, 893 (9th Cir. 2001); Robinson v. Prunty, 249 F.3d 862, 865-66 (9th Cir. 2001); DiRuzza v. County of Tehama, 206 F.3d 1304, 1313 (9th Cir. 2000); Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999); Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1998); Newell v. Sauser, 79 F.3d 115, 116 (9th Cir. 1996). The type of immunity to which a public official is entitled is a question of law reviewed de novo. See Mabe v. San Bernardino County, Dep't of Soc. Serv., 237 F.3d 1101, 1106 (9th Cir. 2001); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 n.7 (9th Cir. 1987). The court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. See Sorrels, 290 F.3d at 969; Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 (9th Cir. 2002); Case v. Kitsap County Sheriff's Dep't, 249 F.3d 921, 925 (9th Cir. 2001); LSO, Ltd, v. Stroh, 205 F.3d 1146, 1157 (9th Cir. 2000); Herb Hallman Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 641 (9th Cir. 1999); Knox v. Southwest Airlines, 124 F.3d 1103, 1105 (9th Cir. 1997). The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. See Billington v. Smith, 292 F.3d 1177, 1183 (9th Cir. 2002); White v. Lee, 227 F.3d 1214, 1227 (9th Cir. 2000); Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir. 2000); Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000); Nunez, 169 F.3d at 1222; Moran v. State of Washington, 147 F.3d 839, 844 (9th Cir. 1998); Thompson v. Souza, 111 F.3d 694, 698 (9th Cir. 1997). Whether federal rights asserted by a plaintiff were clearly established

at the time of the alleged violation is a question of law reviewed de novo. See Mabe, 237 F.3d at 1107; Oona, R.-S.- by Kate S. v. McCaffrey, 143 F.3d 473, 475 (9th Cir. 1998).

The existence of sovereign immunity is a question of law reviewed de novo. See In re Bliemeister, 296 F.3d 858, 861 (9th Cir. 2002) (bankruptcy proceedings); Corzo v. Banco Cent. de Reserva Del Peru, 243 F.3d 519, 522 (9th Cir. 2001); Clinton v. Babbitt, 180 F.3d 1081, 1086 (9th Cir. 1999); Montes v. United States, 37 F.3d 1347, 1351 (9th Cir. 1994); Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd., 99 F.3d 299, 305 (9th Cir. 1996); Fidelity & Deposit Co. v. City of Adelanto, 87 F.3d 334, 336 (9th Cir. 1996); United States v. $277,000 in U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995); see also Sierra Club v. Whitman, 268 F.3d 898, 901 (9th Cir. 2001) (whether immunity has been waived is a question of law reviewed de novo); Anderson v. United States, 127 F.3d 1190, 1191 (9th Cir. 1997) (whether sovereign immunity bars recovery of attorneys fees in FTCA action is a question of law reviewed de novo).

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. See Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 556 (9th Cir. 2002); Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.), cert. denied, 122 S. Ct. 2620 (2002); DeMontiney v. United States, 255 F.3d 801, 805 (9th Cir. 2001); United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992); Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991). Whether Congress has statutorily waived an Indian tribe's sovereign immunity is a question of statutory interpretation also reviewed de novo. See DeMontiney, 255 F.3d at 805; Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir. 1995).

A dismissal based on Noerr-Pennington immunity is reviewed de novo. See Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1092 n.3 (9th Cir. 2000); Oregon Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991).

33. **In Forma Pauperis Status**

The district court's denial of leave to proceed in forma pauperis is reviewed for an abuse of discretion. See Calhoun v. Stahl, 254 F.3d 845, 845 (9th Cir. 2001); Minetti v. Port of Seattle, 152 F.3d 1113, 1115 (9th Cir. 1998); O'Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir. 1990). A court's decision to impose a partial fee is also reviewed for an abuse of discretion. See Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002); Olivares v. Marshall, 59 F.3d 109, 111 (9th Cir. 1995); Alexander v. Carson Adult High Sch., 9 F.3d 1448, 1449 (9th Cir. 1993) (noting that discretion is not

"unbridled"). The denial of a motion for appointment of counsel to an in forma pauperis party is reviewed for an abuse of discretion. See Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), vacated on other grounds, 154 F.3d 952 (9th Cir. 1998) (en banc).

Dismissals made pursuant to former 28 U.S.C. § 1915(d) are reviewed for an abuse of discretion. Denton v. Hernandez, 504 U.S. 25, 33 (1992); Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995); Trimble v. City of Santa Rosa, 49 F.3d 583, 584 (9th Cir. 1995). Note that § 1915(d) was recodified as 28 U.S.C. § 1915(e) by the Prison Litigation Reform Act of 1996 (PLRA). See Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc). Dismissals pursuant to that section are reviewed de novo. See Wyatt v. Terhune, 280 F.3d 1238, 1244-45 (9th Cir. 2002) (reviewing dismissal of § 1983 action based on failure to exhaust remedies as required by the PLRA); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); but see Taylor, 281 F.3d at 847 noting that dismissals pursuant to § 1915 are reviewed for an abuse of discretion); Bishop v. Lewis, 155 F.3d 1094, 1096-97 (9th Cir. 1998) (applying abuse of discretion standard to district court's decision to dismiss civil rights complaint on ground that plaintiff failed to exhaust administrative remedies pursuant to the PLRA); James v. Madison St. Jail, 122 F.3d 27, 27 n.1 (9th Cir. 1997) (noting that dismissals pursuant to § 1915, whether construed as dismissals for lack of prosecution, for failure to obey an order of the court, or for filing a frivolous complaint, are reviewed for an abuse of discretion). The court's decision to dismiss without leave to amend is reviewed, however, for an abuse of discretion. See Lopez, 203 F.3d at 1130.

34. **Inherent Powers**

District courts have inherent power to control their dockets as long as exercise of that discretion does not nullify the procedural choices reserved to parties under the federal rules. See Atchison, Topeka & Santa Fe Ry. Co. v. Hercules, Inc., 146 F.3d 1071, 1074 (9th Cir. 1998); see also Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) (district courts "have inherent power to control their dockets"); Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995) (district courts "must have ample discretion to control their dockets"). A trial court's decision regarding time limits on a trial is reviewed for an abuse of discretion. Amarel v. Connell, 102 F.3d 1494, 1513 (9th Cir. 1996).

Protective orders entered pursuant to the trial court's inherent powers are reviewed for an abuse of discretion. Wharton v. Calderon, 127 F.3d 1201, 1205 (9th Cir. 1997); see also Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For

Us, Inc., 62 F.3d 1217, 1219 (9th Cir. 1995) (court's decision to grant or deny a request to modify a protective order is reviewed for an abuse of discretion).

A dismissal for "judge-shopping" made pursuant to the inherent powers of the district court is reviewed for an abuse of discretion. Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998).

A court's decision to impose sanctions pursuant to its inherent power is reviewed for an abuse of discretion. See Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991); Doi v. Halekulani Corp., 276 F.3d 1131, 1140 (9th Cir. 2002); Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); F.J. Hanshaw Enter. v. Emerald River Dev., 244 F.3d 1128, 1135 (9th Cir. 2001); Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1117 (9th Cir. 2000); Toumajian v. Frailey, 135 F.3d 648, 652 (9th Cir. 1998); Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997); Trulis v. Barton, 107 F.3d 685, 695 (9th Cir. 1995); Air Separation, Inc. v. Lloyd's of London, 45 F.3d 288, 291 (9th Cir. 1995). The district court's findings as to whether an attorney acted recklessly or in bad faith are reviewed for clear error. See Pacific Harbor Capital, 210 F.3d at 1117.

"District courts have inherent discretionary authority in setting supersedeas bonds; review is for an abuse of discretion." Rachel v. Banana Rep. Inc., 831 F.2d 1503, 1505 n.1 (9th Cir. 1987).

35. **Injunctions**

A district court's order regarding preliminary injunctive relief is subject to limited review. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002); Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000); FTC v. Affordable Media, LLC, 179 F.3d 1228, 1233 (9th Cir. 1999); Roe v. Anderson, 134 F.3d 1400, 1402 n.1 (9th Cir. 1998), aff'd, 526 U.S. 489 (1999); FDIC v. Garner, 125 F.3d 1272, 1276 (9th Cir. 1997). The grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See Peninsula Communications, 287 F.3d at 839 (granting); In re Dunbar, 245 F.3d 1058, 1061 (9th Cir. 2001) (bankruptcy); Textile Unlimited, Inc. v. A..BMH Co., 240 F.3d 781, 786 (9th Cir. 2001) (granting); Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1176 (9th Cir. 2000) (denying); Prudential Real Estate, 204 F.3d at 874; Affordable Media, 179 F.3d at 1233; Roe, 134 F.3d at 1402 n.1; Garner, 125 F.3d at 1276; San Antonio Community Hosp. v. Southern Cal. Dist.

Council of Carpenters, 125 F.3d 1230, 1233 (9th Cir. 1997); Does 1-5 v. Chandler, 83 F.3d 1150, 1152 (9th Cir. 1996); Contract Servs. Network, Inc. v. Aubry, 62 F.3d 294, 297 (9th Cir. 1995); Miller v. California Pac. Med. Ctr., 19 F.3d 449, 455 (9th Cir. 1994) (en banc). A preliminary injunction must be supported by findings of fact, which are reviewed for clear error. See Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1239 (9th Cir. 2001).

Review may be de novo, however, when the district court's ruling rests solely on a premise of law and the facts are either established or undisputed. See Gentala v. City of Tucson, 244 F.3d 1065, 1071 (9th Cir.) (en banc), vacated on other grounds, 122 S. Ct. 340 (2001); see also A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1096 (9th Cir. 2002) (noting that legal premises underlying decision are reviewed de novo); California v. Randtron, 284 F.3d 969, 974 (9th Cir. 2002) (reviewing de novo whether Anti-Injunction Act prohibits injunction); Gorbach v. Reno, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc); Prudential Real Estate, 204 F.3d at 879 (same); Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046 (same); Foti v. City of Menlo Park, 146 F.3d 629, 634-35 (9th Cir. 1998) (legal issues underlying district court's decision on preliminary injunction are reviewed de novo); Garner, 125 F.3d at 1276 ("[W]here the district court is alleged to have relied on erroneous legal premises, review is plenary."); San Antonio Community Hosp., 115 F.3d at 689 (same); Does 1-5, 83 F.3d at 1152 (issues of law underlying the decision on a preliminary injunction are reviewed de novo); Contract Servs., 62 F.3d at 297 (same); A-1 Ambulance Serv., Inc. v. County of Monterey, 90 F.3d 333, 335 (9th Cir. 1996) (review is de novo when trial court's decision to grant injunctive relief rests on an interpretation of a state statute); Roe, 134 F.3d at 1402 n.1 (advocating unitary standard); see also Bay Area Addiction Research and Treatment, Inc., 179 F.3d 725, 732 (9th Cir. 1999) (applying unitary abuse of discretion standard).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir. 2000); Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000); Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 708 (9th Cir. 1999); Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998); SEC v. Interlink Data Network, Inc., 77 F.3d 1201, 1204 (9th Cir. 1996); Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 488 (9th Cir. 1996). The district court's refusal to modify or dissolve a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See ACF Indus. Inc. v. California State Bd. of Equalization, 42 F.3d 1286, 1289 (9th Cir. 1994) (modify); Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve); see also Natural Res. Defense

Council, 242 F.3d 1163, 1168 (9th Cir. 2001) (noting that court may within its "sound discretion" modify its injunction); In re Complaint of Ross Island Sand & Gravel, 226 F.3d 1015, 1017 (9th Cir. 2000) (noting that district court has "broad discretion" to decide whether to dissolve an injunction). Whether a district court has jurisdiction to vacate a preliminary injunction during the pendency of an appeal is a question of law reviewed de novo. See Prudential Real Estate, 204 F.3d at 880. The court's decision not to enforce an injunction is reviewed for an abuse of discretion. See Paulson v. City of San Diego, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

A district court's decision to hold a hearing or to proceed by affidavit is reviewed for an abuse of discretion. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002). The court's discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is "very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence." Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988) (internal quotation omitted). The district court's decision to require a bond pursuant to Federal Rule Civil Procedure 65(c) is reviewed for an abuse of discretion. See Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999). The amount of the bond is also reviewed for an abuse of discretion. See id.

The court's grant of permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1053 (9th Cir. 2002) (noting that underlying legal rulings are reviewed de novo); Lavine v. Blaine School Dist., 257 F.3d 981, 987 (9th Cir. 2001); Gomez v. Vernon, 255 F.3d 1118, 1128 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 826 (9th Cir. 2001); Dare v. California, 191 F.3d 1167, 1170 (9th Cir. 1999); Planned Parenthood of S. Arizona v. Lawall, 180 F.3d 1022, 1027 (9th Cir.), amended by 193 F.3d 1042 (9th Cir. 1999); Rolex Watch, 179 F.3d at 708-09; Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999); Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1493 (9th Cir. 1996). Whether a district court possesses the authority or power to issue an injunction is a question of law reviewed de novo. See Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 874 (9th Cir. 1999); Erickson v. United States ex rel. Dep't of Health & Human Servs., 67 F.3d 858, 861 (9th Cir. 1995); Continental Airlines, Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1102 (9th Cir. 1994); see also Burlington Northern Santa Fe Ry. Co. v. International Bhd. of Teamsters, Local 174, 203 F.3d 703,707 (9th Cir. 2000) (en banc) (noting that existence of "labor dispute" for purposes of applying anti-injunction provisions of the Norris-LaGuardia Act is a question of law reviewed de novo).

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. California v. Randtron, 284 F.3d 969, 974 (9th Cir. 2002) (reviewing de novo whether Anti-Injunction Act prohibits injunction); Prudential Real Estate, 204 F.3d at 879; United States v. Alpine Land & Reservoir, Co., 174 F.3d 1007, 1011 (9th Cir. 1999); Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1377 (9th Cir. 1997). The decision whether to issue an injunction that does not violate the Act, however, is reviewed for an abuse of discretion. Randtron, 284 F.3d at 974; Alpine Land & Reservoir Co., 174 F.3d at 1011; Quakenbush, 121 F.3d at 1377.

36. **Interlocutory Appeals**

The district court's decision to certify an interlocutory appeal under Federal Rule of Civil Procedure 54(b) is reviewed for an abuse of discretion. See In re First T.D. & Investment, Inc., 253 F.3d 520, 531 (9th Cir. 2001); Schudel v. General Elec. Co., 120 F.3d 991, 994 n.8 (9th Cir. 1997); Blair v. Shanahan, 38 F.3d 1514, 1522 (9th Cir. 1994); see also Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1484 (9th Cir. 1993). But see Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 564 n.1 (9th Cir. 1994) (refusing to apply abuse of discretion standard and noting that "[t]he present trend is toward greater deference to a district court's decision to certify under Rule 54(b)"). A district judge's decision to reconsider an interlocutory order by another judge of the same court is reviewed for an abuse of discretion. See Delta Savings Bank v. United States, 265 F.3d 1017, 1027 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996); see also Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 530 (9th Cir. 2000) (noting that court has discretion to overrule interlocutory holding of another court).

37. **Intervention**

Whether the legal requirements of Federal Rule of Civil Procedure 24(a) have been met is reviewed de novo. See Employee Staffing Servs., Inc. v. Aubry, 20 F.3d 1038, 1042 (9th Cir. 1994); Waller v. Financial Corp., 828 F.2d 579, 582 (9th Cir. 1987). The district court's decision regarding intervention as a matter of right is reviewed de novo. See Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001); Wetlands Action Network v. United States Army Corps of Eng'r, 222 F.3d 1105, 1113 (9th Cir. 2000); Tocher v. City of Santa Ana, 219 F.3d 1040, 1044 (9th Cir. 2000); Smith v. Marsh, 194 F.3d 1045, 1049 (9th Cir. 1999); Cunningham v. David Special Commitment Ctr., 158 F.3d 1035, 1037 (9th Cir. 1998); Californians for Safe and Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189 (9th Cir. 1998); League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997); Cedars-Sinai Med. Ctr. v. Shalala, 125 F.3d 765, 768 (9th Cir. 1997); United

States v. Washington, 86 F.3d 1499, 1503 (9th Cir. 1996); Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995).

The district court's determination that an application to intervene is timely is reviewed for an abuse of discretion. See Southwest Ctr., 268 F.3d at 817; Cunningham, 158 F.3d at 1037; Key Bank of Washington v. Southern Comfort, 106 F.3d 1441, 1442 (9th Cir. 1997). The trial court's determination that the application to intervene is untimely is also reviewed for an abuse of discretion. Smith, 194 F.3d at 1049; Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1061 (9th Cir. 1997); Alaska v. Suburban Propane Gas Corp., 123 F.3d 1317, 1319 (9th Cir. 1997); Washington, 86 F.3d at 1503; but see League of United Latin Am. Citizens, 131 F.3d at 1302 (reviewing timeliness issue de novo when trial court made no findings of fact). The court's ruling is subject to harmless error analysis. Alaska, 123 F.3d at 1321 & n.1.

A district court's decision concerning permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(2) is reviewed for an abuse of discretion. See United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002); San Jose Mercury News v. United States District Court, 187 F.3d 1096, 1100 (9th Cir. 1999) (noting that review is de novo when decision turns on an underlying legal determination); Washington, 86 F.3d at 1507; Northwest Forest, 82 F.3d at 836; but see Beckman Indus., Inc. v. International Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992) (whether Rule 24(b) permits intervention for the purpose of seeking a modification of a protective order is reviewed de novo).

38. **Involuntary Dismissal**

A dismissal pursuant to Rule 41(b) is reviewed for abuse of discretion. See Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000) (deficient pleadings); Bishop v. Lewis, 155 F.3d 1094, 1096-97 (9th Cir. 1998) (failure to comply with court order); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) (failure to comply with court order); Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996) (deficient pleadings); McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (deficient pleadings); Al-Torki v. Kaempen, 78 F.3d 1381, 1384 (9th Cir. 1996) (failure to prosecute); In re Dominguez, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings); but see Tonry v. Security Experts, Inc., 20 F.3d 967, 971 (9th Cir. 1994) (stating that findings of fact are reviewed for clear error and questions of law are reviewed de novo). Abuse of discretion is also applied when reviewing the district court's dismissal as a sanction. See Valley Eng'rs, Inc. v. Electric Eng'g Co.,

158 F.3d 1051, 1052 (9th Cir. 1998) (discovery); Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996).

39. **Issue Preclusion**

Decisions regarding issue preclusion (collateral estoppel) are reviewed de novo. See In re Harmon, 250 F.3d 1240, 1245 (9th Cir. 2001) (bankruptcy court); Far Out Prod., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001); In re Dunbar, 245 F.3d 1058, 1061 (9th Cir. 2001) (BA); Frank v. United Airlines, Inc., 216 F.3d 845, 849-50 (9th Cir. 2000); In re Palmer, 207 F.3d 566, 567-68 (9th Cir. 2000) (bankruptcy court); Hydranautics v. Filmtec Corp., 204 F.3d 880, 885 (9th Cir. 2000); Zamarripa v. City of Mesa, 125 F.3d 792, 793 (9th Cir. 1997); Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997); Trevino v. Gates, 99 F.3d 911, 923 (9th Cir. 1996); In re Russell, 76 F.3d 242, 244 (9th Cir. 1996); Pardo v. Olson & Sons, Inc., 40 F.3d 1063, 1066 (9th Cir. 1994); Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994); Haupt v. Dillard, 17 F.3d 285, 288 (9th Cir. 1994); Town of N. Bonneville v. Callaway, 10 F.3d 1505, 1508 (9th Cir. 1993). The preclusive effect of a prior judgment is a question of law reviewed de novo. See Jacobs v. CBS Broadcasting, Inc., 291 F.3d 1173, 1176 (9th Cir. 2002); Far Out Prod., 247 F.3d at 993; Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525, 528 (9th Cir. 1998); Santamaria v. Horsley, 133 F.3d 1242, 1244 (9th Cir. 1998) (en banc) (state jury verdict) (citing Schiro v. Farley, 510 U.S. 222, 232 (1994)), amended by 138 F.3d 1280 (9th Cir. 1998).

40. **Joinder/Indispensable Party**

A district court's decision concerning joinder is generally reviewed for an abuse of discretion. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296-97 (9th Cir. 2000) (noting that district court has broad discretion to sever or join parties), cert. denied, 533 U.S. 950 (2001); Bowles v. Reade, 198 F.3d 752, 760 (9th Cir. 1999); United States v. Bowen, 172 F.3d 682, 688 (9th Cir. 1999); Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir. 1998); Kescoli v. Babbitt, 101 F.3d 1304, 1309 (9th Cir. 1996); United States ex rel. Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 907 (9th Cir. 1994). Legal conclusions underlying the court's decision are reviewed de novo. Bowen, 172 F.3d at 688.

The trial court's decision to dismiss an action for failure to join an indispensable party is reviewed for an abuse of discretion. See Dawavendewa v. Salt River Project, 276 F.3d 1150, 1154 (9th Cir. 2002); Clinton v. Babbitt, 180 F.3d 1081, 1086 (9th Cir. 1999); Washington v. Daley, 173 F.3d 1158, 1165 (9th Cir. 1999); Virginia Sur. Corp. v. Northrop Grumman Corp., 144 F.3d 1243, 1248 (9th Cir. 1998). The court's

decision that a party is not indispensable is also reviewed for an abuse of discretion. See Abkco Music, Inc. v. Lavere, 217 F.3d 684, 687 (9th Cir. 2000); see also In re County of Orange, 262 F.3d 1014, 1022 (9th Cir. 2001) (bankruptcy court). To the extent that the determination whether the movant's interest is impaired by failure to join an allegedly indispensable party involves an interpretation of law, review is de novo. See Dawavendewa, 276 F.3d at 1154; Kescoli, 101 F.3d at 1309; Morongo Band, 34 F.3d at 907. Note that the appellate court may need to consider a joinder issue even when neither raised nor decided by the district court. See UOP v. United States, 99 F.3d 344, 347 (9th Cir. 1996). Whether joinder is mandated as a matter of law is reviewed de novo. Id.

41. **Judicial Estoppel**

The district court's decision to invoke judicial estoppel is reviewed for an abuse of discretion. See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001); United States ex rel. Sequoia Orange Co. v. Strathmore Packing House Co., 151 F.3d 1139, 1146 (9th Cir. 1998); Johnson v. Oregon Dep't of Human Resources, 141 F.3d 1361, 1364 (9th Cir. 1998). Whether the district court properly applied the judicial estoppel doctrine to the facts presented in the case is also reviewed for an abuse of discretion. See Broussard v. University of California, 192 F.3d 1252, 1255 (9th Cir. 1999).

42. **Judicial Notice**

The district court's decision to take judicial notice is reviewed for an abuse of discretion. See Lee v. City of Los Angeles, 250 F.3d 688, 689 (9th Cir. 2001); Ritter v. Hughes Aircraft Co., 58 F.3d 454, 458 (9th Cir. 1995).

43. **Judgment on the Pleadings**

Rule 12(c) dismissals are reviewed de novo. See Weeks v. Bayer, 246 F.3d 1231, 1234 (9th Cir. 2001); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001); Arrington v. Wong, 237 F.3d 1066, 1069 (9th Cir. 2001); Fajardo v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999); Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998); Smith v. National Steel & Shipbuilding Co., 125 F.3d 751, 753 (9th Cir. 1997); McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996); Marx v. Loral Corp., 87 F.3d 1049, 1053 (9th Cir. 1996); Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1488 (9th Cir. 1995). A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. See

Owens, 244 F.3d at 713; Fajardo, 179 F.3d at 699; Nelson, 143 F.3d at 1200; Smith, 125 F.3d at 753; McGann, 102 F.3d at 392; Merchants Home Delivery, 50 F.3d at 1488.

44. **Jurisdiction**

Personal jurisdiction determinations are reviewed de novo. See Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002); Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 (9th Cir. 2000); Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316, 1319-20 (9th Cir. 1998); Fireman's Fund Ins. Co. v. National Bank of Coops., 103 F.3d 888, 893 (9th Cir. 1996); Gordy v. The Daily News, L.P., 95 F.3d 829, 831 (9th Cir. 1996); Vaccaro v. Dobre, 81 F.3d 854, 856 (9th Cir. 1996); Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir. 1995). The trial court's decision to dismiss for lack of personal jurisdiction is also reviewed de novo. See Ochoa v. J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1187 (9th Cir. 2002); Lee v. City of Los Angeles, 250 F.3d 668, 680 (9th Cir. 2001); Meyers v. Bennett Law Offices, 238 F.3d 1068, 1071 (9th Cir. 2001). Whether a district court exceeded its authority in exercising personal jurisdiction is reviewed de novo. Peterson v. Highland Music, Inc., 140 F.3d 1313, 1317 (9th Cir. 1998). Whether plaintiffs in a bankruptcy proceeding have established a prima facie case for personal jurisdiction is a question of law reviewed de novo. In re Pintlar Corp., 133 F.3d 1141, 1144 (9th Cir. 1997).

The existence of subject matter jurisdiction is a question of law reviewed de novo. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002); Delta Savings Bank v. United States, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001); City of San Diego v. Whitman, 242 F.3d 1097, 1101 (9th Cir. 2001); Burlington Northern Santa Fe Ry. Co. v. International Bhd. of Teamsters, Local 174, 203 F.3d 703,707 (9th Cir. 2000) (en banc); Garvey v. Roberts, 203 F.3d 580, 587 (9th Cir. 2000); Hexom v. Oregon Dep't of Transp., 177 F.3d 1134, 1135 (9th Cir. 1999); United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011 (9th Cir. 1999); Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1153 (9th Cir. 1998); Hoefler v. Babbitt, 139 F.3d 726, 727 (9th Cir. 1998); Ma v. Reno, 114 F.3d 128, 130 (9th Cir. 1997); Sahni v. American Diversified Partners, 83 F.3d 1054, 1057 (9th Cir. 1996); United States ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 742 (9th Cir. 1995) (en banc). The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. See Corza v. Banco Cent. de Reserva Del Peru, 243 F.3d 519, 522 (9th Cir. 2001); Alder v. Federal Republic of Nigeria, 219 F.3d 869, 874 (9th Cir. 2000); In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539, 543 (9th Cir. 1996). Dismissal for lack of subject matter jurisdiction is reviewed de novo. See McGraw v. United States, 281 F.3d 997, 1001

(9th Cir.), amended by 298 F.3d 754 (9th Cir. 2002); La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001); Brady v. United States 211 F.3d 499, 502 (9th Cir. 2000); Murphey v. Lanier, 204 F.3d 911, 912 (9th Cir. 2000); Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1142 (9th Cir. 2000); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998); Jerron West, Inc. v. California State Bd. of Equalization, 129 F.3d 1334, 1337 (9th Cir. 1997); Evans v. Chater, 110 F.3d 1480, 1481 (9th Cir. 1997). The district court's conclusion that it lacks subject matter jurisdiction is also reviewed de novo. See Peninsula Communications, 287 F.3d at 836; Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 (9th Cir. 2001); Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000); Ip v. United States, 205 F.3d 1168, 1170 (9th Cir. 2000); Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998); H20 Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 916 (9th Cir. 1996); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396 (9th Cir. 1996). This court reviews the district court's findings of fact relevant to its determination of subject matter jurisdiction for clear error. See Peninsula Communications, 287 F.3d at 836; La Reunion Francaise SA, 247 F.3d at 1024; Lockheed Missiles, 190 F.3d at 968; United States v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1998); Tucson Airport Auth., 136 F.3d at 644; H2O Houseboat Vacations, 103 F.3d at 916; Wilson, 87 F.3d at 396.

A district court's determination that diversity jurisdiction exists is reviewed de novo. See Bretiman v. May Co. California, 37 F.3d 562, 563 (9th Cir. 1994); Co-Efficient Energy Sys. v. CSL Indus., Inc., 812 F.2d 556, 557 (9th Cir. 1987). Any factual determinations necessary to establish the existence of diversity jurisdiction are reviewed for clear error. See Prudential Real Estate Affiliates v. PPR Realty, 204 F.3d 867, 872-73 (9th Cir. 2000); Co-Efficient Energy Sys., 812 F.2d at 557. The court's decision whether state of federal law should be applied in a diversity action is reviewed de novo. See Torre v. Brickey, 278 F.3d 917, 919 (9th Cir. 2002) (diversity).

Standing is a jurisdictional question of law reviewed de novo. See S.D. Meyers, Inc. v. City and County of San Francisco, 253 F.3d 461, 474 (9th Cir. 2001); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1149 (9th Cir. 2000); San Pedro Hotel, Inc. v. City of Los Angeles, 159 F.3d 470, 474-75 (9th Cir. 1998); Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir. 1998); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997). The district court's decision to grant standing to a party is reviewed de novo. See Young v. City of Simi Valley, 216 F.3d 807, 814 (9th Cir. 2000); Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000) (listing requirements).

A district court's decision whether to retain jurisdiction over supplemental (pendent) claims when the original federal claims are dismissed is reviewed for an abuse of discretion. See Bryant v. Adventist Health Sys./West, 289 F.3d 1162, 1165 (9th Cir. 2002); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1187 (9th Cir. 2001); Binder v. Gillespie, 184 F.3d 1059, 1066 (9th Cir. 1999); Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (district court should weigh factors such as economy, convenience, fairness, and comity). Note, however, limitations on the trial court's jurisdiction over supplemental claims when it dismissed the federal claims for lack of subject matter jurisdiction. See Herman Family Revocable Trust v. TEDDY BEAR, 254 F.3d 802, 806 (9th Cir. 2001).

The district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. See United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); United States ex rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 521 (9th Cir. 1999); Hughes Aircraft, 162 F.3d at 1030; Adler v. Federal Rep. of Nig., 107 F.3d 720, 729 (9th Cir. 1997); Wang v. Reno, 81 F.3d 808, 813 (9th Cir. 1996); Nike, Inc. v. Comercial Iberica de Exlusivas Deportivas, S.A., 20 F.3d 987, 990 (9th Cir. 1994).

This court reviews de novo the district court's assertion of jurisdiction for a Rule 60(b) motion. See Carriger v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992) (en banc); see also Thompson v. Calderon, 151 F.3d 918, 920 (9th Cir. 1998) (reviewing district court's authority to decide Rule 60(b) motion de novo). The district court's decision not to exercise its equitable jurisdiction is reviewed for an abuse of discretion. Mort v. United States, 86 F.3d 890, 892 (9th Cir. 1996).

Whether a magistrate judge has jurisdiction is reviewed de novo. United States v. Real Property, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

Whether a tribal court properly exercised its jurisdiction is a question of law reviewed de novo. See AT&T v. Coeur D'Alene Tribe, 283 F.3d 1156, 1162 (9th Cir.) (clarifying circuit law), amended by 295 F.3d 899 (9th Cir. 2002). A tribal court's exercise of jurisdiction over a non-Indian is a question of federal law reviewed de novo. See Big Horn County Elect. Coop. v. Adams, 219 F.3d 944, 949 (9th Cir. 2000); Montana v. Gilham, 133 F.3d 1133, 1135 (9th Cir. 1998).

45. **Jury Demand**

Entitlement to a jury trial in federal court is a question of law reviewed de novo. See Kulas v. Flores, 255 F.3d 780, 783 (9th Cir. 2001), cert. denied, 122 S. Ct. 1557 (2002); Thomas v. Oregon Fruit Prod. Co, 228 F.3d 991, 995 (9th Cir. 2000); Frost v. Huffman, 152 F.3d 1124, 1128 (9th Cir. 1998); United States v. California Mobile Home Park Management Co., 107 F.3d 1374, 1377 (9th Cir. 1997); KLK, Inc. v. United States Dep't of Interior, 35 F.3d 454, 455 (9th Cir. 1994); Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1395 (9th Cir. 1993); SEC v. Rind, 991 F.2d 1486, 1492 (9th Cir. 1993). The district court has discretion, however, whether to grant or deny an untimely demand for a jury trial. See Kulas, 255 F.3d at 783; Pacific Fisheries Corp. v. HIH Cas. and Gen. Ins., Ltd., 239 F.3d 1000, 1002 (9th Cir.), cert. denied, 122 S. Ct. 324 (2001); Kletzelman v. Capistrano Unified Sch. Dist., 91 F.3d 68, 71 (9th Cir. 1996); Craig v. Atlantic Richfield Co., 19 F.3d 472, 477 (9th Cir. 1994). Whether a juvenile defendant has a statutory or constitutional right to a jury trial is reviewed de novo. United States v. Male Juvenile (Pierre Y.), 280 F.3d 1008, 1014 (9th Cir. 2002).

46. **Laches**

The standard of review of the district court's decision to apply laches remains unsettled. See Jarrow Formulas, Inc. v. Nutrition Now, Inc., ___ F.3d ___, No. 01-55154 (9th Cir. June 4, 2002) (noting but not resolving conflict); Danjaq LLC v. Sony Corp., 263 F.3d 942, 952 (9th Cir. 2001) (same); Jackson v. Axton, 25 F.3d 884, 886 (9th Cir. 1994) (same). Pure issues of law, however, are reviewed de novo. See Jarrow Formulas, ___ F.3d at ___ (summary judgment standards); Wyler Summit P'ship v. Turner Broadcasting Sys., 235 F.3d 1184, 1193 (9th Cir. 2000) (whether laches is a valid defense). In Telink, Inc. v. United States, 24 F.3d 42, 47 (9th Cir. 1994), this court suggested that the district court's application of laches be reviewed for an abuse of discretion. The court noted that prior panels had invoked the "clearly erroneous" standard, but that "[f]or purposes of this appeal, any distinction that may exist between the two standards is immaterial." Telink, 24 F.3d at 47 n.11. Following Telink, however, this court stated that "[w]e review a district court's application of laches for abuse of discretion or clear error." See Apache Survival Coalition v. United States, 118 F.3d 663, 665 (9th Cir. 1997); see also United States v. Marolf, 173 F.3d 1213, 1218 (9th Cir. 1999) (reviewing district court's denial of laches defense for abuse of discretion).

47. **Lack of Prosecution**

A district court's order dismissing an action for lack of prosecution is reviewed for an abuse of discretion. See Southwest Marine, Inc. v. Danzig, 217 F.3d 1128, 1137, n.10 (9th Cir. 2000); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998);

Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996); In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994) (listing factors). The court's sua sponte dismissal for failure to prosecute is reviewed for an abuse of discretion. Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992). "A district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." Id. (internal quotation omitted). A district court's dismissal of a complaint with prejudice for failure to comply with a court's order to amend the complaint is also reviewed for an abuse of discretion. McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996).

48. **Law of the Case**

A district court's decision whether to apply law of the case doctrine is reviewed for an abuse of discretion. See Delta Savings Bank v. United States, 265 F.3d 1017, 1027 (9th Cir. 2001) (noting that discretion is limited and listing factors for district court to consider), cert. denied, 122 S. Ct. 816 (2002); United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000); Cunningham v. Gates, 229 F.3d 1271, 1285 n.21 (9th Cir. 2000) (stating test); Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088, 1093 (9th Cir. 1998); Thomas v. Bible, 983 F.2d 152, 155 (9th Cir. 1993) (listing factors); Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 715 (9th Cir. 1990) (listing factors; see also Mendenhall v. NTSB, 213 F.3d 464, 469 (9th Cir. 2000) (listing factors relevant to appellant court's decision to depart from law of case); United States v. Schrivner, 189 F.3d 825, 827 (9th Cir. 1999) (same) (habeas).

49. **Leave to Amend**

Leave to amend is generally within the discretion of the district court. See United States v. Smithkline Beecham, Inc., 245 F.3d 1048, 1051 (9th Cir. 2001) (noting that discretion is not absolute and listing factors for district court to consider); In re Daisy Sys. Corp., 97 F.3d 1171, 1175 (9th Cir. 1996); Nelson v. Pima Community College, 83 F.3d 1075, 1079 (9th Cir. 1996); Rhoden v. United States, 55 F.3d 428, 432 (9th Cir. 1995). Thus, the district court's denial of a motion to amend is reviewed for an abuse of discretion. See Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (en banc); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038 (9th Cir. 2002); In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1097 (9th Cir. 2002); Wilkins v. United States, 279 F.3d 782, 785 (9th Cir. 2002); Smithkline Beecham, 245 F.3d at 1051; Bly-Magee v. California, 236 F.3d 1014, 1017 (9th Cir. 2001); Chappel v. Laboratory Corp. of America, 232 F.3d 719, 725-16 (9th Cir. 2000); Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000), amended by 234 F.3d 428 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001); Griggs v. Pace Amer. Group, Inc., 170 F.3d 877, 879

(9th Cir. 1999); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1189 (9th Cir. 1998). The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint. See In re Vantive Corp. Sec. Litig., 283 F.3d at 1097-98; Simon, 208 F.3d at 1084; Griggs, 170 F.3d at 879; Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 355 (9th Cir. 1996).

A party is entitled to amend pleadings once "as a matter of course" at any time before a responsive pleading is served. See Fed. R. Civ. P. 15(a); see also Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002); Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1530 (9th Cir. 1995) (noting that motion to dismiss is not a responsive pleading); Doe v. United States, 58 F.3d 494, 496-97 (9th Cir. 1995) (same). The denial of leave to amend after a responsive pleading has been filed is reviewed for an abuse of discretion. Yakama Indian Nation v. Washington Dep't of Revenue, 176 F.3d 1241, 1246 (9th Cir. 1999); Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1103 (9th Cir. 1998); Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996); Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994). Such a denial, however, is "strictly" reviewed in light of the strong policy permitting amendment. Plumeau v. School Dist. No. 40, 130 F.3d 432, 439 (9th Cir. 1997); Sisseton-Wahpeton Sioux Tribe, 90 F.3d at 355; Pierce, 76 F.3d at 1043. Denial of leave to amend is not an abuse of discretion, however, where further amendment would be futile. See In re Vantive Corp. Sec. Litig., 283 F.3d at 1097; Pink, 157 F.3d at 1189; Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996); Allwaste, 65 F.3d at 1530.

A dismissal without leave to amend is reviewed de novo. See Kennedy v. Southern California Edison Co., 268 F.3d 763, 767 (9th Cir. 2001), cert. denied, 122 S. Ct. 1964 (2002); Adam v. Hawaii, 235 F.3d 1160, 1164 (9th Cir. 2000); Desaigoudar v. Meyercord, 223 F.3d 1020, 1021 (9th Cir. 2000); Franklin v. Terr, 201 F.3d 1098, 1100 (9th Cir. 2000); San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998); Dumas v. Kipp, 90 F.3d 386, 389 (9th Cir. 1996); Eaglesmith v. Ward, 73 F.3d 857, 860 (9th Cir. 1995); Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir. 1991); see also Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038 (9th Cir. 2002) (reviewing denial of leave to amend for abuse of discretion); Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (reviewing refusal to permit amendment for an abuse of discretion). Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. See Lee v. City of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001); Adam, 235 F.3d at 1164; Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1196 (9th Cir. 1998); Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996). Dismissal of a pro se complaint without leave to amend is proper only if it is clear that the deficiencies of the complaint could not be cured by amendment. Lucas v. Department of Corrections,

66 F.3d 245, 248 (9th Cir. 1995); Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995); Rhoden v. United States, 55 F.3d 428, 432 n.9 (9th Cir. 1995).

A dismissal with leave to amend is also reviewed de novo. See Kennedy, 268 F.3d at 767; Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1151 (9th Cir. 1998). Note there may be a question whether a dismissal with leave to amend is a final, appealable order. See Does I Thur XXIII v. Advances Textile Corp., 214 F.3d 1058, 1066-67 (9th Cir. 2000) National Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433-434 (9th Cir. 1997); Montes v. United States, 37 F.3d 1347, 1350 (9th Cir. 1994).

A denial of a Rule 15(c) relation back amendment is reviewed for an abuse of discretion. See Eaglesmith v. Ward, 73 F.3d 857, 860 (9th Cir. 1995); Louisiana-Pac. Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993). But see Rodriguez v. Airborne Express, 265 F.3d 890, 898 n.6 (9th Cir. 2001) ("We review de novo the district court's decision that the amendment did not relate back to the original administrative complaint."); In re Dominguez, 51 F.3d 1502, 1509 (9th Cir. 1995) ("We review de novo a Rule 15(c)(2) relation-back decision that permits or denies amendment to add a new claim against a defendant named in the original pleading.").

50. **Local Rules**

Broad deference is owed to the district court's interpretation of its local rules. See DeLange v. Dutra Const. Co., 183 F.3d 916, 919 n.2 (9th Cir. 1999) (noting that district courts have "broad discretion in interpreting and applying their local rules"); Jacobson v. Hughes Aircraft Co., 105 F.3d 1288, 1302 (9th Cir.), amended by 128 F.3d 1305 (9th Cir. 1997), rev'd on other grounds, 525 U.S. 432 (1999). The district court's compliance with local rules is reviewed for an abuse of discretion. Hinton v. NMI Pac. Enters., 5 F.3d 391, 394 (9th Cir. 1993). The district court's decision whether to permit oral arguments pursuant to a local rule is reviewed for an abuse of discretion. Mahon v. Credit Bureau of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999) (noting that an abuse of discretion may occur when a party may suffer prejudice from the denial of argument).

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. See Mabe v. San Bernardino County, 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); Big Bear Lodging Assoc. v. Snow Summit, Inc., 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of

discretion standard to district court's decision to impose sanctions pursuant to local rule); DeLange, 183 F.3d at 919 n.2 (9th Cir. 1999) (noting that district courts have "broad discretion in interpreting and applying their local rules"); but see United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

51. **Magistrate Judges**

Whether a magistrate judge has jurisdiction is reviewed de novo. United States v. Real Property, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture). Factual findings made by a magistrate judge are reviewed for clear error. See Marinero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999) (extradition proceedings). A magistrate judge's findings adopted by the district court are also reviewed for clear error. See Wildman v. Johnson, 261 F.3d 832, 836 (9th Cir. 2001) (habeas); Seidel v. Merkle, 146 F.3d 750, 753 (9th Cir. 1998) (same). A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed by this court for an abuse of discretion. See Brown v. Roe, 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "clearly erroneous or contrary to law." See Osband v. Woodford, 290 F.3d 1036, 1041 (9th Cir. 2002).

52. **Mandamus**

Mandamus is an extraordinary remedy that is granted "only in the exercise of sound discretion." See Miller v. French, 539 U.S. 327, 339 (2000) (internal quotation omitted); see also Ellis v. United States Dist. Court, 294 F.3d 1094, 1099 (9th Cir. 2002) (noting factors and limitations); DeGeorge v. United States Dist. Court for the Cent. Dist. of California, 219 F.3d 930, 935 (9th Cir. 2000) (same); Calderon v. United States Dist. Court for the Cent. Dist. of Cal., 163 F.3d 530, 534 (9th Cir. 1998) (en banc) (characterizing mandamus as an "extraordinary or drastic" remedy and discussing factors court must consider before issuing writ). Review is for an abuse of discretion. See R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065 (9th Cir. 1997); Independence Mining Co. v. Babbitt, 105 F.3d 502, 505 (9th Cir. 1997); Oregon Natural Resources Council v. Harrell, 52 F.3d 1499, 1508 (9th Cir. 1995) (listing factors); Garcia v. Taylor, 40 F.3d 299, 301 (9th Cir. 1994). A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard. Independence Mining, 105 F.3d at 505; Garcia, 40 F.3d at 301.

Dismissal for lack of mandamus jurisdiction is reviewed de novo. See Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 648 (9th Cir. 1998); Stang v. IRS, 788 F.2d 564, 565 (9th Cir. 1986); Pescosolido v. Block, 765 F.2d 827, 829 (9th

Cir. 1985). Whether the elements of the mandamus test are satisfied is a question of law reviewed de novo. Phoenix Newspapers, Inc. v. United States Dist. Court for Dist. of Ariz.; 156 F.3d 940, 945 (9th Cir. 1998); R.T. Vanderbilt, 113 F.3d at 1065; Oregon Natural Resources Council, 52 F.3d at 1508; Garcia, 40 F.3d at 301. Whether mandamus is a proper remedy is also reviewed de novo. Gill v. Villagomez, 140 F.3d 833, 834 (9th Cir. 1998).

Note that in applying mandamus appellate jurisdiction, this court reviews the district court's underlying action for clear error. See Z-Seven Fund, Inc. v. Motorcar Parts & Accessories, 231 F.3d 1215, 1219 (9th Cir. 2000); In re Grand Jury Investigation, 182 F.3d 668, 670 (9th Cir. 1999); Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1551 (9th Cir. 1994); Washington Pub. Utils. Group v. United States Dist. Court, 843 F.2d 319, 325 (9th Cir. 1987); but see Taiwan v. United States Dist. Court, 128 F.3d 712, 717 (9th Cir. 1997) (stating that district court's underlying "order" is reviewed for clear error).

53. **Mootness**

Mootness is a question of law reviewed de novo. See Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1053 (9th Cir. 2002); Carlson v. United Academics-AAUP/AFT/APEA, 265 F.3d 778, 785 (9th Cir. 2001), cert. denied, 122 S. Ct. 1437 (2002); Smith v. University of Washington Law School, 233 F.3d 1188, 1193 (9th Cir. 2000), cert. denied, 532 U.S. 1051 (2001); Tinoqui-Chalola Council of Kitanemuk and Wowlumne Tejon Indians v. United States Dep't of Energy, 232 F.3d 1300, 1303 (9th Cir. 2000); Alaska Center for the Environment, 189 F.3d 851, 854 (9th Cir. 1999); In re Filtercorp, Inc. (Paulman v. Gateway Venture Partners), 163 F.3d 570, 576 (9th Cir. 1998) (bankruptcy); Ruiz v. City of Santa Maria, 160 F.3d 543, 548 (9th Cir. 1998) (dismissal on mootness ground); In re Di Giorgio, 134 F.3d 971, 973 (9th Cir. 1998); Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 811 (9th Cir. 1997); In re Arnold & Baker Farms, 85 F.3d 1415, 1419 (9th Cir. 1996); Native Village v. Blatchford, 38 F.3d 1505, 1509 (9th Cir. 1994).

54. **Oral Argument**

A trial court's decision whether to permit oral argument is reviewed for an abuse of discretion. See Willis v. Pacific Maritime Ass'n, 244 F.3d 675, 684 n.2 (9th cir. 2001); Mahon v. Credit Bureau of Placer County, Inc., 171 F.3d 1197, 1201 (9th Cir. 1999) (noting that abuse of discretion may occur if party would suffer unfair prejudice from the denial of oral argument); In re Jess, 169 F.3d 1204, 1209 (9th Cir. 1999)

(bankruptcy court did not abuse its discretion by deciding motion for new trial without oral argument); Spradlin v. Lear Siegler Management Servs., Inc., 926 F.2d 865, 867 (9th Cir. 1991) (no abuse of discretion when court decided motion to dismiss without oral argument); see also Stanley v. University of S. Cal., 13 F.3d 1313, 1316 (9th Cir. 1994) (oral testimony); Kenneally v. Lundgen, 967 F.3d 329, 335 (9th Cir. 1992) (same).

55. **Pendent Jurisdiction**

Whether a district court has pendent (supplemental) jurisdiction is reviewed de novo. See Hoeck v. City of Portland, 57 F.3d 781, 784-85 (9th Cir. 1995). A district court's decision whether to retain jurisdiction over pendent claims when the original federal claims are dismissed is reviewed for an abuse of discretion. See Bryant v. Adventist Health Sys./West, 289 F.3d 1162, 1165 (9th Cir. 2002); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1187 (9th Cir. 2001); Binder v. Gillespie, 184 F.3d 1059, 1066 (9th Cir. 1999); Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (district court should weigh factors such as economy, convenience, fairness, and comity). Note, however, limitations on the trial court's jurisdiction over supplemental claims when it dismissed the federal claims for lack of subject matter jurisdiction. See Herman Family Revocable Trust v. TEDDY BEAR, 254 F.3d 802, 806 (9th Cir. 2001).

56. **Personal Jurisdiction**

Personal jurisdiction determinations are reviewed de novo. See Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002); Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 (9th Cir. 2000); Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316, 1319-20 (9th Cir. 1998); Fireman's Fund Ins. Co. v. National Bank of Coops., 103 F.3d 888, 893 (9th Cir. 1996); Gordy v. The Daily News, L.P., 95 F.3d 829, 831 (9th Cir. 1996); Vaccaro v. Dobre, 81 F.3d 854, 856 (9th Cir. 1996); Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir. 1995). The trial court's decision to dismiss for lack of personal jurisdiction is also reviewed de novo. See Ochoa v. J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1187 (9th Cir. 2002); Lee v. City of Los Angeles, 250 F.3d 668, 680 (9th Cir. 2001); Meyers v. Bennett Law Offices, 238 F.3d 1068, 1071 (9th Cir. 2001). Whether a district court exceeded its authority in exercising personal jurisdiction is reviewed de novo. Peterson v. Highland Music, Inc., 140 F.3d 1313,

1317 (9th Cir. 1998). Whether plaintiffs in a bankruptcy proceeding have established a prima facie case for personal jurisdiction is a question of law reviewed de novo. In re Pintlar Corp., 133 F.3d 1141, 1144 (9th Cir. 1997).

57. **Preemption**

The district court's decision regarding preemption is reviewed de novo. See Transmission Agency of California v. Sierra Pacific Power Co., 295 F.3d 918, 927 (9th Cir. 2002) (FPA); AGG Enter. v. Washington County, 281 F.3d 1324, 1327 (9th Cir. 2002) (FAAAA); Nathan Kimmel, Inc. v. Dowelanco, 275 F.3d 1199, 1203 (9th Cir. 2002) (FIFRA); Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 689 (9th Cir. 2001) (en banc) (LMRA), cert. denied, 122 S. Ct. 806 (2002); Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1014 (9th Cir. 2000) (LMRA); Radici v. Associated Ins. Co., 217 F.3d 737, 740 (9th Cir. 2000) (COBRA); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000) (FLSA); Audette v. ILWU, 195 F.3d 1107, 1111 (9th Cir. 1999) (LMRA); Niehaus v. Greyhound Lines, Inc., 173 F.3d 1207, 1211 (9th Cir. 1999) (LMRA); Californians for Safe and Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1186 (9th Cir. 1998) (FAAA); Ward v. Management Analysis Co., 135 F.3d 1276, 1279 (9th Cir. 1998) (ERISA), aff'd in part, rev'd in part, 526 U.S. 358 (1999); Industrial Truck Ass'n, Inc. v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997) (OSHA); Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 748 (9th Cir. 1996) (Newspaper Preservation Act); Espinal v. Northwest Airlines, 90 F.3d 1452, 1455 (9th Cir. 1996) (Railway Labor Act); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996) (Davis-Bacon Act).

58. **Preliminary Injunctions**

A district court's order regarding preliminary injunctive relief is subject to limited review. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002); Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000); FTC v. Affordable Media, LLC, 179 F.3d 1228, 1233 (9th Cir. 1999); Roe v. Anderson, 134 F.3d 1400, 1402 n.1 (9th Cir. 1998), aff'd, 526 U.S. 489 (1999); FDIC v. Garner, 125 F.3d 1272, 1276 (9th Cir. 1997). The grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See Peninsula Communications, 287 F.3d at 839; In re Dunbar, 245 F.3d 1058, 1061 (9th Cir. 2001) (bankruptcy); Textile Unlimited, Inc. v. A..BMH Co.,

240 F.3d 781, 786 (9th Cir. 2001) (granting); Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1176 (9th Cir. 2000) (denying); Prudential Real Estate, 204 F.3d at 874; Affordable Media, 179 F.3d at 1233; Roe, 134 F.3d at 1402 n.1; Garner, 125 F.3d at 1276; San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1233 (9th Cir. 1997); Does 1-5 v. Chandler, 83 F.3d 1150, 1152 (9th Cir. 1996); Contract Servs. Network, Inc. v. Aubry, 62 F.3d 294, 297 (9th Cir. 1995); Miller v. California Pac. Med. Ctr., 19 F.3d 449, 455 (9th Cir. 1994) (en banc). A preliminary injunction must be supported by findings of fact, which are reviewed for clear error. See Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1239 (9th Cir. 2001).

Review may be de novo, however, when the district court's ruling rests solely on a premise of law and the facts are either established or undisputed. See Gentala v. City of Tucson, 244 F.3d 1065, 1071 (9th Cir.) (en banc), vacated on other grounds, 122 S. Ct. 340 (2001); see also A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1096 (9th Cir. 2002) (noting that legal premises underlying decision are reviewed de novo); Gorbach v. Reno, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc); Prudential Real Estate, 204 F.3d at 879 (reviewing de novo whether Anti-Injunctive Act prohibits injunction); Brookfield Communications, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1046 (same); Foti v. City of Menlo Park, 146 F.3d 629, 634-35 (9th Cir. 1998) (legal issues underlying district court's decision on preliminary injunction are reviewed de novo); Garner, 125 F.3d at 1276 ("[W]here the district court is alleged to have relied on erroneous legal premises, review is plenary."); San Antonio Community Hosp., 115 F.3d at 689 (same); Does 1-5, 83 F.3d at 1152 (issues of law underlying the decision on a preliminary injunction are reviewed de novo); Contract Servs., 62 F.3d at 297 (same); A-1 Ambulance Serv., Inc. v. County of Monterey, 90 F.3d 333, 335 (9th Cir. 1996) (review is de novo when trial court's decision to grant injunctive relief rests on an interpretation of a state statute); Roe, 134 F.3d at 1402 n.1 (advocating unitary standard); see also Bay Area Addiction Research and Treatment, Inc., 179 F.3d 725, 732 (9th Cir. 1999) (applying unitary abuse of discretion standard).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir. 2000); Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000); Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 708 (9th Cir. 1999); Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998); SEC v. Interlink Data Network, Inc., 77 F.3d 1201, 1204 (9th Cir. 1996); Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 488 (9th Cir. 1996). The district court's refusal to modify or dissolve a preliminary injunction will be reversed only where the district court abused its

discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See ACF Indus. Inc. v. California State Bd. of Equalization, 42 F.3d 1286, 1289 (9th Cir. 1994) (modify); Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve); see also Natural Res. Defense Council, 242 F.3d 1163, 1168 (9th Cir. 2001) (noting that court may within its "sound discretion" modify its injunction); In re Complaint of Ross Island Sand & Gravel, 226 F.3d 1015, 1017 (9th Cir. 2000) (noting that district court has "broad discretion" to decide whether to dissolve an injunction). Whether a district court has jurisdiction to vacate a preliminary injunction during the pendency of an appeal is a question of law reviewed de novo. See Prudential Real Estate, 204 F.3d at 880.

A district court's decision to hold a hearing or to proceed by affidavit is reviewed for an abuse of discretion. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002). The court's discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is "very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence." Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988) (internal quotation omitted). The district court's decision to require a bond pursuant to Fed. R. Civ. P. 65(c) is reviewed for an abuse of discretion. See Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999). The amount of the bond is also reviewed for an abuse of discretion. See id.

59. **Pretrial Conferences**

A district court is given "considerable deference" in handling a pretrial conference pursuant to Fed. R. Civ. P. 16. See Sanders v. Union Pacific R.R. Co., 193 F.3d 1080, 1082 (9th Cir. 1999) (en banc). Sanctions imposed for counsel's failure to appear at a pretrial conference or to be prepared for the conference are reviewed for an abuse of discretion. See Transamerica Corp. v. Transamerica Bancgrowth Corp., 627 F.2d 963, 965-66 (9th Cir. 1980); cf. Tobert v. Leighton, 623 F.2d 585, 586 (9th Cir. 1980) (reversing sua sponte dismissal for failure to attend pretrial conference)

60. **Pretrial Orders**

A court's refusal to enter a pretrial order is reviewed for an abuse of discretion. See In re Roosevelt, 220 F.3d 1032, 1035 (9th Cir. 2000) (noting that bankruptcy judge has discretion to refuse). A district court's denial of a motion to modify a pretrial order is reviewed for an abuse of discretion. Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir. 1998). The court's decision regarding the preclusive effect of a pretrial order on issues

of law and fact at trial will not be disturbed unless there is evidence of a clear abuse of discretion. See Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895, 900 (9th Cir. 2000); Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998). A district court's refusal to sanction a party for violation of a pretrial order is also reviewed for an abuse of discretion. See Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 537 (9th Cir. 2001).

61. **Protective Orders**

This court reviews the grant or denial of a protective order for an abuse of discretion. See Phillips v. General Motors Corp., 289 F.3d 1117, 1121 (9th Cir. 2002); Anderson v. Calderon, 232 F.3d 1053, 1099 (9th Cir. 2000), cert. denied, 122 S. Ct. 580 (2001); Portland General Electric Co. v. U.S. Bank Trust Nat. Ass'n., 218 F.3d 1085, 1089 (9th Cir. 2000); Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999); Zimmerman v. Bishop, 25 F.3d 784, 789 (9th Cir. 1994); Travers v. Shalala, 20 F.3d 993, 999 (9th Cir. 1994); see also Wharton v. Calderon, 127 F.3d 1201, 1205 (9th Cir. 1997) (protective order entered pursuant to trial court's inherent authority). A court's decision to grant or deny a request to modify a protective order is also reviewed for an abuse of discretion. Phillips, 289 F.3d at 1121; Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc., 62 F.3d 1217, 1219 (9th Cir. 1995). When the legal basis for a protective order is challenged, review may be de novo. See Phillips, 289 F.3d at 1121; see also McDowell v. Calderon, 197 F.3d 1253, 1255 & n.4 (9th Cir. 1999) (en banc) (habeas). When the order itself is not directly appealed, but is challenged only by the denial of a motion for reconsideration, review is for an abuse of discretion. See McDowell, 197 F.3d at 1255-56.

62. **Qualified Immunity**

A district court's decision on qualified immunity is reviewed de novo. See Elder v. Holloway, 510 U.S. 510, 516 (1994); Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002); Nelson v. Heiss, 271 F.3d 891, 893 (9th Cir. 2001); Robinson v. Prunty, 249 F.3d 862, 865-66 (9th Cir. 2001); DiRuzza v. County of Tehama, 206 F.3d 1304, 1313 (9th Cir. 2000); Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999); Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1998); Newell v. Sauser, 79 F.3d 115, 116 (9th Cir. 1996). The type of immunity to which a public official is entitled is a question of law reviewed de novo. See Mabe v. San Bernardino County, Dep't of Soc. Serv., 237 F.3d 1101, 1106 (9th Cir. 2001); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 n.7 (9th Cir. 1987). The court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. See

Sorrels, 290 F.3d at 969; Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 (9th Cir. 2002); Case v. Kitsap County Sheriff's Dep't., 249 F.3d 921, 925 (9th Cir. 2001); LSO, Ltd, v. Stroh, 205 F.3d 1146, 1157 (9th Cir. 2000); Herb Hallman Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 641 (9th Cir. 1999); Knox v. Southwest Airlines, 124 F.3d 1103, 1105 (9th Cir. 1997). The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. See Billington v. Smith, 292 F.3d 1177, 1183 (9th Cir. 2002); White v. Lee, 227 F.3d 1214, 1227 (9th Cir. 2000); Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir. 2000); Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000); Nunez, 169 F.3d at 1222; Moran v. State of Washington, 147 F.3d 839, 844 (9th Cir. 1998); Thompson v. Souza, 111 F.3d 694, 698 (9th Cir. 1997). Whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation is a question of law reviewed de novo. See Mabe, 237 F.3d at 1107; Oona, R.-S.- by Kate S. v. McCaffrey, 143 F.3d 473, 475 (9th Cir. 1998).

63. **Recusal**

The denial of a recusal motion is reviewed for an abuse of discretion. See Kulas v. Flores, 255 F.3d 780, 783 (9th Cir. 2001) (noting that recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned), cert. denied, 122 S. Ct. 1557 (2002); F.J. Hanshaw Enter., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 (9th Cir. 2001); Leslie v. Grupo ICA, 198 F.3d 1152, 1157 (9th Cir. 1999); United States ex rel. Hochman v. Nackman, 145 F.3d 1069, 1076 (9th Cir. 1998); Hirsh v. Justices of Superior Court, 67 F.3d 708, 715 (9th Cir. 1995); Moideen v. Gillespie, 55 F.3d 1478, 1482 (9th Cir. 1995).

A district court's refusal to disqualify the sitting judge under 28 U.S.C. § 144 may be reversed only for an abuse of discretion. See Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995); Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987); see also Stanley v. University of Southern California, 178 F.3d 1069, 1079 (9th Cir. 1999) (applying abuse of discretion standard to judge's refusal to recuse another judge).

Note that "[f]ederal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion. A judge's participation during trial warrants reversal only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or

partiality." Price v. Kramer, 200 F.3d 1237, 1252 (9th Cir. 2000) (internal citation and quotation omitted).

64. **Removal**

Removal is a question of federal subject matter jurisdiction reviewed de novo. See Vasquez v. North County Transit Dist., 292 F.3d 1049, 1054 (9th Cir. 2002); Prize Frize, Inc., v. Matrix (U.S.), Inc., 167 F.3d 1261, 1265 (9th Cir. 1999); Newcombe v. Adolf Coors Co., 157 F.3d 686, 690 (9th Cir. 1998); Toumajian v. Frailey, 135 F.3d 648, 652 (9th Cir. 1998); Kruse v. Hawaii, 68 F.3d 331, 333 (9th Cir. 1995); Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994). Thus, the denial of a motion to remand a removed case is reviewed de novo. See Oregon Bureau of Labor v. U.S. West Communications, Inc., 288 F.3d 414, 417 (9th Cir. 2002); Abraham v. Norcal Waste Sys., Inc. 265 F.3d 811, 819 (9th Cir. 2001); ARCO Envtl. Remediation v. Department of Health and Envtl. Quality, 213 F.3d 1108, 1111 (9th Cir. 2000); Audette v. ILWU, 195 F.3d 1107, 1111 (9th Cir. 1999); Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1211 (9th Cir. 1998); Brennan v. Southwest Airlines Co., 134 F.3d 1405, 1409 (9th Cir.), amended by 140 F.3d 849 (9th Cir. 1998); Patterson v. International Bhd. of Teamsters, Local 959, 121 F.3d 1345, 1348 (9th Cir. 1997). Similarly, the trial court's decision to remand a removed case is reviewed de novo. See United Nat. Ins. Co. v. R&D Laex Corp., 242 F.3d 1102, 1111-12 (9th Cir. 2001); Nebraska ex rel. Dep't of Soc. Servs. v. Bentson, 146 F.3d 676, 678 (9th Cir. 1998); Crawford Country Homeowners Ass'n v. Delta Sav. & Loan, 77 F.3d 1163, 1165 (9th Cir. 1996). Even when a party fails to object to removal, this court reviews de novo whether the district court has subject matter jurisdiction. Campbell v. Aerospace Corp., 123 F.3d 1308, 1311 (9th Cir. 1997).

An award of fees and costs for improper removal is reviewed for an abuse of discretion. See Hofler v. Aetna U.S. HealthCare, Inc., 296 F.3d 764, 767 (9th Cir. 2002); Kanter v. Warner-Lambert Co., 265 F.3d 853, 861 (9th Cir. 2001); Stuart v. UNUM Life Ins. Co., 217 F.3d 1145, 1148 (9th Cir. 2000); Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1105 (9th Cir. 2000); K.V. Mart Co. v. United Food and Comm. Workers, Local 324, 173 F.3d 1221, 1223 (9th Cir. 1999). Note, however, that review of a fee award under § 1447(c) must include a de novo examination of whether the remand order was legally correct. Hofler, 296 F.3d at 767; Gibson v. Chrysler Corp., 261 F.3d 927, 932 (9th Cir. 2001), cert. denied, 122 S. Ct. 903 (2002).

65. **Res Judicata**

The trial court's determination that res judicata (claim preclusion) applies is reviewed de novo. See Albano v. Norwest Financial Hawaii, Inc., 244 F.3d 1061, 1063 (9th Cir.), cert. denied, 122 S. Ct. 505 (2001); Frank v. United Airlines, 216 F.3d 845, 849-50 (9th Cir. 2000); Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998); In re Russell, 76 F.3d 242, 244 (9th Cir. 1996); Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994). The district court's dismissal on that ground is subject to de novo review. See Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002); Cabrera v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998); In re Schimmels, 127 F.3d 875, 880 (9th Cir. 1997); Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1193 (9th Cir. 1997); United Parcel Serv., Inc. v. California Pub. Utils. Comm'n, 77 F.3d 1178, 1182 (9th Cir. 1996). A trial court's grant of summary judgment on res judicata grounds is also reviewed de novo. See Akootchook v. United States, 271 F.3d 1160, 1164 (9th Cir. 2001); Albano, 244 F.3d at 1063; Ross v. Alaska, 189 F.3d 1107, 1110 (9th Cir. 1999); Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 283 (9th Cir. 1997); Hiser v. Franklin, 94 F.3d 1287, 1290 (9th Cir. 1996). Whether a party has waived its right to invoke the defense of res judicata is also reviewed de novo. See Kern Oil & Refining Co. v. Tenneco Oil Co., 840 F.2d 730, 735 (9th Cir. 1988).

66. **Ripeness**

Ripeness is a question of law reviewed de novo. See Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002); Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1070 (9th Cir. 2002); Stuhlbarg Intern. Sales Co. v. John D. Brush & Co., 240 F.3d 832, 939 (9th Cir. 2001); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998); Richardson v. City and County of Honolulu, 124 F.3d 1150, 1160 (9th Cir. 1997); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1124 (9th Cir. 1996); Fireman's Fund Ins. Co. v. Quackenbush, 87 F.3d 290, 294 (9th Cir. 1996); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1434 (9th Cir. 1996); Dodd v. Hood River County, 59 F.3d 852, 857 (9th Cir. 1995). The district court's decision to dismiss a complaint for lack of ripeness is reviewed de novo. See Ross v. Alaska, 189 F.3d 1107, 1114 (9th Cir. 1999); see also City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171 (9th Cir. 2001) (dismissing counterclaim), cert. denied, 122 S. Ct. 809 (2002). Note that questions of ripeness may be raised and considered for the first time on appeal. See Washington Legal Found. v. Legal Found. of

Washington, 271 F.3d 835, 850 (9th Cir. 2001) (en banc), cert. granted, 122 S. Ct. 2355 (2002); In re Cool Fuel, Inc., 210 F.3d 999, 1006 (9th Cir. 2000).

67. **Sanctions**

Orders imposing Rule 11 sanctions are reviewed for an abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); Christian v. Mattel, Inc., 286 F.3d 1118, 1126 (9th Cir. 2002); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 788 n.16 (9th Cir.), cert. denied, 122 S. Ct. 545 (2001); Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998); Olson Farms, Inc. v. Barbosa, 134 F.3d 933, 936 (9th Cir. 1998); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1016 (9th Cir. 1997); Montrose Chem. Corp. v. American Motorists Ins. Co., 117 F.3d 1128, 1133 (9th Cir. 1997); Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997). A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. See Patelco Credit Union v. Sahni, 262 F.3d 897, 913 (9th Cir. 2001); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1198 (9th Cir. 1999); Security Farms, 124 F.3d at 1016; Terran, 109 F.3d at 1434. A court's refusal to impose sanctions is also reviewed for an abuse of discretion. See Ingram v. United States, 167 F.3d 1240, 1246 (9th Cir. 1999).

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. See Big Bear Lodging Assoc. v. Snow Summit, Inc., 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); DeLange v. Dutra Const. Co., 183 F.3d 916, 919 n.2 (9th Cir. 1999) (noting that district courts have "broad discretion in interpreting and applying their local rules"); but see United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict). Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. See Erickson v. Newmar Corp., 87 F.3d 298, 300 (9th Cir. 1996).

A court's imposition of sanctions pursuant to its inherent power is reviewed for an abuse of discretion. See Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991); Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); F.J. Hanshaw Enter. v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 (9th Cir. 2001); Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1117 (9th Cir. 2000); Toumajian v. Frailey, 135 F.3d 648, 652 (9th Cir. 1998); Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997); Trulis v. Barton, 107 F.3d 685, 695 (9th Cir. 1995); see also Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) (dismissing for "judge-shopping"). The district court's findings as

to whether an attorney acted recklessly or in bad faith are reviewed for clear error. Pacific Harbor Capital, 210 F.3d at 1117.

A district court's civil contempt order that includes imposition of sanctions is reviewed for an abuse of discretion. See Cacique, Inc. v. Robert Reiser & Co., 169 F.3d 619, 622 (9th Cir. 1999); Hook v. Arizona Dep't of Corrections, 107 F.3d 1397, 1403 (9th Cir. 1997); Reebok Int'l v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir. 1995).

Sanctions imposed pursuant to 28 U.S.C. § 1927 are reviewed for an abuse of discretion. See Gomez v. Vernon, 255 F.3d 1118, 1135 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); Salstrom v. Citicorp Credit Servs., Inc., 74 F.3d 183, 184 (9th Cir. 1996); GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 (9th Cir. 1994). But see Goehring v. Brophy, 94 F.3d 1294, 1305 (9th Cir. 1996) (stating that appropriateness of sanction imposed under § 1927 is reviewed for an abuse of discretion, but findings underlying decision are reviewed for clear error and legal determinations are reviewed de novo). The denial of sanctions sought under § 1927 is reviewed for an abuse of discretion. Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998).

The imposition of discovery sanctions is reviewed for an abuse of discretion. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002) (striking answer and entering default); Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1022 (9th Cir. 2002) (entering default); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001); Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997); Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 762, 764 (9th Cir. 1996); Dahl v. City of Huntington Beach, 84 F.3d 363, 367 (9th Cir. 1996). Findings of fact underlying the motion for discovery sanctions are reviewed for clear error. Payne, 121 F.3d at 507; Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1408 (9th Cir. 1990); Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988). If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo. Adriana, 913 F.2d at 1408. The court's refusal to impose discovery sanctions is reviewed for an abuse of discretion. See Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1200 (9th Cir. 1999). Whether discovery sanctions against the government are barred by sovereign immunity is a question of law reviewed de novo. United States v. Woodley, 9 F.3d 774, 781 (9th Cir. 1993).

The district court's choice of sanctions is reviewed for an abuse of discretion. See United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996). For example, the

district court's dismissal of a complaint with prejudice for failure to comply with the court's order to amend the complaint to comply with Federal Rule of Civil Procedure 8 is reviewed for an abuse of discretion. McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996).

The district court's refusal to impose sanctions is reviewed for an abuse of discretion. See Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001) (reversing); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000) (affirming), cert. denied, 533 U.S. 950 (2001); Read-Rite Corp., 186 F.3d at 1200; Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998); Murdock v. Stout, 54 F.3d 1437, 1444 (9th Cir. 1995); Larez v. Holcomb, 16 F.3d 1513, 1521 (9th Cir. 1994); see also In re Marino, 37 F.3d 1354, 1358 (9th Cir. 1994) (bankruptcy court's denial of Rule 9011 sanctions is reviewed for an abuse of discretion).

68. **Service of Process**

The district court's decision regarding the sufficiency of service of process is reviewed for an abuse of discretion. See Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002); Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994).

69. **Severance**

The district court's decision on a motion to sever is reviewed for an abuse of discretion. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001); Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997); Davis v. Mason County, 927 F.2d 1473, 1479 (9th Cir. 1991). The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. See Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996); Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 575 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996). Trial courts have broad discretion to order separate trials. Davis, 927 F.2d at 1479.

70. **Sovereign Immunity**

The existence of sovereign immunity is a question of law reviewed de novo. See In re Bliemeister, 296 F.3d 858, 861 (9th Cir. 2002) (bankruptcy proceedings); Corzo v. Banco Cent. de Reserva Del Peru, 243 F.3d 519, 522 (9th Cir. 2001); Clinton v. Babbitt, 180 F.3d 1081, 1086 (9th Cir. 1999); Montes v. United States, 37 F.3d 1347,

1351 (9th Cir. 1994); Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd., 99 F.3d 299, 305 (9th Cir. 1996); Fidelity & Deposit Co. v. City of Adelanto, 87 F.3d 334, 336 (9th Cir. 1996); United States v. $277,000 in U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995); see also Sierra Club v. Whitman, 268 F.3d 898, 901 (9th Cir. 2001) (whether immunity has been waived is a question of law reviewed de novo); Anderson v. United States, 127 F.3d 1190, 1191 (9th Cir. 1997) (whether sovereign immunity bars recovery of attorneys fees in FTCA action is reviewed de novo); United States v. Woodley, 9 F.3d 774, 781 (9th Cir. 1993) (whether discovery sanctions against the government are barred by sovereign immunity is reviewed de novo).

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. See Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 556 (9th Cir. 2002); Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.), cert. denied, 122 S. Ct. 2620 (2002); DeMontiney v. United States, 255 F.3d 801, 805 (9th Cir. 2001); United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992); Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991). Whether Congress has statutorily waived an Indian tribe's sovereign immunity is a question of statutory interpretation also reviewed de novo. See DeMontiney, 255 F.3d at 805; Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir. 1995). Whether a state is immune from action in a tribal court is a question of federal law reviewed de novo. See Montana v. Gilham, 133 F.3d 1133, 1135 (9th Cir. 1998).

Whether a state has immunity under the Eleventh Amendment presents questions of law reviewed de novo. See Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 (9th Cir. 2002) (summary judgment); Demshki v. Monteith, 255 F.3d 986, 988 (9th Cir. 2001); In re Lazar, 237 F.3d 967, 974 (9th Cir.), cert. denied, 122 S. Ct. 458 (2001); Bethel Native Corp. v. Department of the Interior, 208 F.3d 1171, 1173 (9th Cir. 2000); Yakama Indian Nation v. Washington Dep't of Revenue, 176 F.3d 1241, 1245 (9th Cir. 1999); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Oregon Short Line R.R. v. Department of Revenue Or., 139 F.3d 1259, 1263 (9th Cir. 1998); Quillin v. Oregon, 127 F.3d 1136, 1138 (9th Cir. 1997). Whether a party is immune under the Eleventh Amendment is also reviewed de novo. See California v. Campbell, 138 F.3d 784, 786 (9th Cir. 1998); Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 838 (9th Cir. 1997); Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1183 n.2 (9th Cir. 1997).

71. **Special Masters**

The district court has discretion to appoint a special master and to decide the extent of duties. See Jaros v. E.I. Dupont, 292 F.3d 1124, 1138 (9th Cir. 2002). The district court's order of reference to a special master is reviewed for an abuse of discretion. See United States v. Washington, 157 F.3d 630, 660 (9th Cir. 1998) (concurring opinion); Burlington N. R.R. v. Washington Dep't of Revenue, 934 F.2d 1064, 1071 (9th Cir. 1991); United States v. Suquamish Indian Tribe, 901 F.2d 772, 774 (9th Cir. 1990). The court's refusal to enlist the services of a special master is also reviewed for an abuse of discretion. See Lobatz v. U.S. West Cellular, Inc., 222 F.3d 1142, 1149 (9th Cir. 2000). A special master's factual findings are entitled to deference and reviewed for clear error. See Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth., 263 F.3d 1041, 1049 (9th Cir. 2001), cert. denied, 122 S. Ct. 1349 (2002).

72. **Standing**

Standing is a question of law reviewed de novo. See Bernhardt v. County of Los Angeles, 279 F.3d 862, 867 (9th Cir. 2002); Columbia Basin Apartment Ass'n v. City of Pasco, 268 F.3d 791, 797 (9th Cir. 2001); S.D. Meyers, Inc. v. City and County of San Francisco, 253 F.3d 461, 474 (9th Cir. 2001); Tyler v. Cuomo, 236 F.3d 1124, 1131 (9th Cir. 2000); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1149 (9th Cir. 2000); San Pedro Hotel, Inc. v. City of Los Angeles, 159 F.3d 470, 474-75 (9th Cir. 1998); Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir. 1998); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997).

Whether a particular party has standing is also reviewed de novo. See Fair Housing of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002); Natural Resources Defense Council v. Southwest Marine, 236 F.3d 985, 994 (9th Cir. 2000), cert. denied, 533 U.S. 902 (2001); Young v. City of Simi Valley, 216 F.3d 807, 814 (9th Cir. 2000); Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000) (listing requirements); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000); Abboud v. INS, 140 F.3d 843, 846 (9th Cir. 1998); but see In re P.R.T.C., Inc. (Duckor Spradling & Metzger v. Baum Trust), 177 F.3d 774, 777 (9th Cir. 1999) (noting that whether an individual has standing to appeal is a question of fact reviewed for clear error).

73. **Stare Decisis**

Whether stare decisis applies is a question of law reviewed de novo. Baker v. Delta Air Lines, Inc., 6 F.3d 632, 637 (9th Cir. 1993).

74. **Statutes of Limitation**

The district court's dismissal on statute of limitations grounds presents a question of law reviewed de novo. See Underwood Cotton Co. v. Hyundai Merchant Marine, Inc., 288 F.3d 405, 407 (9th Cir. 2002); Papa v. United States, 281 F.3d 1004, 1009 (9th Cir. 2002); Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1135 (9th Cir. 2001) (en banc); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Johnson v. California, 207 F.3d 650, 653 (9th Cir. 2000); Ellis v. City of San Diego, 176 F.3d 1183, 1188 (9th Cir. 1999); Silva v. Crain, 169 F.3d 608, 610 (9th Cir. 1999); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998); United States ex rel. Saaf v. Lehman Bros., 123 F.3d 1307, 1307 (9th Cir. 1997); Papenthien v. Papenthien, 120 F.3d 1025, 1027 (9th Cir. 1997); Torres v. City of Santa Ana, 108 F.3d 224, 226 (9th Cir. 1997). Thus, whether a claim is barred by a statute of limitations is reviewed de novo. See Orr v. Bank of America, 285 F.3d 764, 779 (9th Cir. 2002); EEOC v. Dinuba Medical Clinic, 222 F.3d 580, 584 (9th Cir. 2000); Harvey v. Waldron, 210 F.3d 1008, 1013 (9th Cir. 2000); Santa Maria v. Pacific Bell, 202 F.3d 1170, 1175 (9th Cir. 2000).

A ruling on the appropriate statute of limitations is a question of law reviewed de novo. See S.V. v. Sherwood Sch. Dist., 254 F.3d 877, 879 (9th Cir. 2001); United States ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027, 1034 (9th Cir. 1998); Burrey v. Pacific Gas and Elec. Co., 159 F.3d 388, 396 (9th Cir. 1998); Naas v. Stolman, 130 F.3d 892, 893 (9th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996); Bartleson v. United States, 96 F.3d 1270, 1274 (9th Cir. 1996); Livingston Sch. Dist. v. Keenan, 82 F.3d 912, 915 (9th Cir. 1996); see also Bresson v. Commissioner, 213 F.3d 1173, 1174 (9th Cir. 2000) (tax court). When the statute of limitations begins to run is a question of law reviewed de novo. See Orr, 285 F.3d at 780; In re DeLaurentiis Entertainment Group, Inc., 87 F.3d 1061, 1062 (9th Cir. 1996); In re Hanna, 72 F.3d 114, 115 (9th Cir. 1995). When the question turns on what a reasonable person should know, a mixed question of law and fact is presented that is reviewed for clear error. See Bartleson, 96 F.3d at 1274; Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990). Whether an action is governed by an analogous limitations period is a legal conclusion reviewed de novo. See Telink, Inc. v. United States, 24 F.3d 42, 46 (9th Cir. 1994).

Whether a statute of limitations has been equitably tolled is generally reviewed for an abuse of discretion, unless facts are undisputed, in which case review remains de novo. See Santa Maria, 202 F.3d at 1175; Truitt v. County of Wayne, 148 F.3d 644, 648 (9th Cir. 1998); see also Malcom v. Payne, 281 F.3d 951, 955-56 (9th Cir. 2002)

(AEDPA); Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (same); Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999) (same). The district court's decision to apply equitable estoppel is reviewed for an abuse of discretion. Santa Maria, 202 F.3d at 1176.

75. **Stay Orders**

A district court's stay order is reviewed for an abuse of discretion. See Yong v. INS, 208 F.3d 1116, 1119 (9th Cir. 2000) (noting "somewhat less deferential" standard and reversing stay); United States v. Pend Oreille County Pub. Util. Dist. No. 1, 135 F.3d 602, 614 (9th Cir. 1998); MacKillop v. Lowe's Mkt., Inc., 58 F.3d 1441, 1446 (9th Cir. 1995); Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 912 (9th Cir. 1993) (noting that abuse of discretion standard here is stricter that the flexible abuse of discretion standard used in other contexts). The appellate court reviews the denial of a motion to stay for an abuse of discretion. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 838 (9th Cir. 2002); MacKillop, 58 F.3d at 1446.

Whether the automatic stay provisions of the Bankruptcy Act have been violated is a question of law reviewed de novo. See In re Pettit, 217 F.3d 1072, 1077 (9th Cir. 2000); In re Del Mission Ltd., 98 F.3d 1147, 1150 (9th Cir. 1996). The bankruptcy court's decision to grant or deny relief from an automatic stay is reviewed, however, for an abuse of discretion. See In re Cybernetic Servs., Inc., 252 F.3d 1039, 1045 (9th Cir. 2001), cert. denied, 122 S. Ct. 1069 (2002); In re Gruntz, 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc); In re Lowenschuss (Lowenschuss v. Selnick), 170 F.3d 923, 928 (9th Cir. 1999); In re National Envtl. Waste Corp., 129 F.3d 1052, 1055 (9th Cir. 1997); In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996).

A district court's decision to stay a civil trial is reviewed for an abuse of discretion. Clinton v. Jones, 520 U.S. 681, 706-07 (1997).

76. **Subject Matter Jurisdiction**

The existence of subject matter jurisdiction is a question of law reviewed de novo. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002); Delta Savings Bank v. United States, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001); City of San Diego v. Whitman, 242 F.3d 1097, 1101 (9th Cir. 2001); Burlington Northern Santa Fe Ry. Co. v. International Bhd. of Teamsters, Local 174, 203 F.3d 703,707 (9th Cir. 2000) (en banc); Garvey v. Roberts, 203 F.3d

580, 587 (9th Cir. 2000); Hexom v. Oregon Dep't of Transp., 177 F.3d 1134, 1135 (9th Cir. 1999); United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011 (9th Cir. 1999); Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1153 (9th Cir. 1998); Hoefler v. Babbitt, 139 F.3d 726, 727 (9th Cir. 1998); Ma v. Reno, 114 F.3d 128, 130 (9th Cir. 1997); Sahni v. American Diversified Partners, 83 F.3d 1054, 1057 (9th Cir. 1996); United States ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 742 (9th Cir. 1995) (en banc). The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. See Corza v. Banco Cent. de Reserva Del Peru, 243 F.3d 519, 522 (9th Cir. 2001); Alder v. Federal Republic of Nigeria, 219 F.3d 869, 874 (9th Cir. 2000); In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539, 543 (9th Cir. 1996).

Dismissal for lack of subject matter jurisdiction is reviewed de novo. See McGraw v. United States, 281 F.3d 997, 1001 (9th Cir.), amended by 298 F.3d 754 (9th Cir. 2002); La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001); Brady v. United States 211 F.3d 499, 502 (9th Cir. 2000); Murphey v. Lanier, 204 F.3d 911, 912 (9th Cir. 2000); Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1142 (9th Cir. 2000); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998); Jerron West, Inc. v. California State Bd. of Equalization, 129 F.3d 1334, 1337 (9th Cir. 1997); Evans v. Chater, 110 F.3d 1480, 1481 (9th Cir. 1997).

The district court's conclusion that it lacks subject matter jurisdiction is also reviewed de novo. See Transmission Agency of California v. Sierra Pacific Power Co., 295 F.3d 918, 925 (9th Cir. 2002); Peninsula Communications, 287 F.3d at 836; Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 (9th Cir. 2001); Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000); Ip v. United States, 205 F.3d 1168, 1170 (9th Cir. 2000); Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998); H20 Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 916 (9th Cir. 1996); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396 (9th Cir. 1996).

This court reviews the district court's findings of fact relevant to its determination of subject matter jurisdiction for clear error. See Peninsula Communications, 287 F.3d at 836; La Reunion Francaise SA, 247 F.3d at 1024; Lockheed Missiles, 190 F.3d at 968; United States v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1998); Tucson Airport Auth., 136 F.3d at 644; H2O Houseboat Vacations, 103 F.3d at 916; Wilson, 87 F.3d at 396. All uncontroverted factual assertions regarding jurisdiction are taken as true. See McGraw, 281 F.3d at 1001.

77. **Subpoenas**

The trial court's denial of a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. In re Grand Jury Proceedings, 45 F.3d 343, 346 (9th Cir. 1995); In re Subpoena to Testify Before Grand Jury, 39 F.3d 973, 976 (9th Cir. 1994); see also Kaur v. INS, 237 F.3d 1098, 1099 (9th Cir.) (reviewing IJ's decision not to issue a subpoena for the production of documents for an abuse of discretion), amended by, 249 F.3d 830 (9th Cir. 2001).

A district court's decision whether to enforce an administrative subpoena is reviewed de novo. See NLRB v. The Bakersfield Californian, 128 F.3d 1339, 1341 (9th Cir. 1997); FDIC v. Garner, 126 F.3d 1138, 1142 (9th Cir. 1997); Reich v. Montana Sulphur & Chem. Co., 32 F.3d 440, 443 (9th Cir. 1994);

A court's decision to enforce a summons is reviewed for clear error. United States v. Blackman, 72 F.3d 1418, 1422 (9th Cir. 1995); Fortney v. United States, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion). The district court's conclusion that it lacks subject matter jurisdiction over a petition to quash IRS summons is reviewed de novo. See Ip v. United States, 205 F.3d 1168, 1170 (9th Cir. 2000). Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. United States v. Jose, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc). A district court's decision to quash an IRS summons is reviewed, however, for clear error. David H. Tedder & Assocs. v. United States, 77 F.3d 1166, 1169 (9th Cir. 1996); but see Crystal v. United States, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (rejecting clear error standard and applying de novo review when appeal was from grant if summary judgment).

78. **Substitution of Parties**

A court's decision regarding substitution of parties is reviewed for an abuse of discretion. See In re Bernal, 207 F.3d 595, 598 (9th Cir. 2000) (noting that Fed. R. Civ. P. 25(c) leaves the substitution decision to the "court's sound discretion"); United States v. F. D. Rich Co., 437 F.2d 549, 552 (9th Cir. 1970) (noting that district court has "ample discretionary power to substitute parties"). Mandatory substitution of the United States as a defendant party is reviewed, however, de novo. See Pelletier v. Federal Home Loan Bank; 968 F.2d 865, 875 (9th Cir. 1992) (FELRTCA); Meridian Int'l Logistics, Inc. v. United States, 939 F.3d 740, 745 (9th Cir. 1991) (same).

79. **Summary Judgment**

A grant of summary judgment is reviewed de novo. See Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002); Delta Savings Bank v. United States, 265 F.3d 1017, 1021 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Lite-On Peripherals, Inc. v. Burlington Aire Express, Inc., 255 F.3d 1189, 1192 (9th Cir. 2001), cert. denied, 122 S. Ct. 1067 (2002); Clicks Billiards Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir. 2001); Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000); Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir. 2000); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); Balint v. Carson City, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc); Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999); Burrell v. Star Nursery, Inc., 170 F.3d 951, 954 (9th Cir. 1999); Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996); Warren v. Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995); Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987); see also In re Stanton, 285 F.3d 888, 891 (9th Cir. 2002) (bankruptcy court); In re Betacom of Phoenix, Inc., 240 F.3d 823, 828 (9th Cir. 2001) (same); In re Feiler, 218 F.3d 948, 951 (9th Cir. 2000) (same); In re Filtercorp, Inc., 163 F.3d 570, 578 (9th Cir. 1998) (same); In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243, 1245 (9th Cir. 1997) (same); Whitmire v. Commissioner, 178 F.3d 1050, 1051 (9th Cir. 1999) (tax court); Talley Indus. Inc. v. Commissioner, 116 F.3d 382, 385 (9th Cir. 1997) (same).

The court's decision to deny summary judgment is also reviewed de novo. See Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1124 (9th Cir. 2002) (noting limitations on reviewing denial of summary judgment); Brewster v. Shasta County, 275 F.3d 803, 806 (9th Cir. 2001) (§ 1983 liability); Regula v. Delta Family-Care Survivorship Plan, 266 F.3d 1130, 1138 (9th Cir. 2001) (termination of ERISA benefits); Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir. 2000) (qualified immunity); Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000) (same); see also Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 n.1 (9th Cir. 2002) (declining to review denial of summary judgment).

The appellate court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). See Delta Savings Bank, 265 F.3d at 1021; Far Out Prods., Inc. v. Oscar, 247 F.3d 986, 992 (9th Cir. 2001); Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999); Meade v. Cedarapids, Inc., 164 F.3d 1218, 1221 (9th Cir. 1999); Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997); Parker v. United States, 110 F.3d 678, 681 (9th Cir. 1997). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether

the district court correctly applied the relevant substantive law. See Oliver, 289 F.3d at 626; Delta Savings Bank, 265 F.3d at 1021; Far Out Prods., 247 F.3d at 992 (defining "genuine" and "material"); Clicks Billiards, 251 F.3d at 1257; Lopez, 203 F.3d at 1131; Balint, 180 F.3d at 1050; Berry v. Valence Tech., Inc., 175 F.3d 699, 703 (9th Cir. 1999); Robi, 173 F.3d at 739; Burrell, 170 F.3d at 954; Margolis, 140 F.3d at 852; Bagdadi, 84 F.3d at 1197; Warren, 58 F.3d at 441; Jesinger, 24 F.3d at 1130. The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. See Balint, 180 F.3d at 1054; Meade, 164 F.3d at 1221; Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996); Jesinger, 24 F.3d at 1130. When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. See Colacurcio v. City of Kent, 163 F.3d 545, 549 (9th Cir. 1998); Citicorp Real Estate, Inc., 155 F.3d 1097, 1103 (9th Cir. 1998); Han v. Mobil Oil Corp., 73 F.3d 872, 874 (9th Cir. 1995); Union Sch. Dist. v. Smith, 15 F.3d 1519, 1523 (9th Cir. 1994). Summary judgment is not proper, however, if material factual issues exist for trial. Meade, 164 F.3d at 1221; Citicorp Real Estate, Inc., 155 F.3d at 1103; Warren, 58 F.3d at 441. Note that summary judgment maybe affirmed on any ground supported by the record. See Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750 (9th Cir. 2001); Venetian Casino Resort v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 941 (9th Cir. 2001), cert. denied, 122 S. Ct. 1204 (2002); Guidroz-Brault v. Missouri Pac. R.R. Co., 254 F.3d 825, 829 (9th Cir. 2001); Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000).

A district court's decision to grant a "summary adjudication" motion is reviewed de novo. Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1046 (9th Cir. 1998); California v. Campbell, 138 F.3d 772, 776 (9th Cir. 1998). The grant of "partial" summary judgment is also reviewed de novo. See Delta Savings Bank v. United States, 265 F.3d 1017, 1021 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001); Adair v. City of Kirkland, 185 F.3d 1055, 1059 (9th Cir. 1999); Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 991 (9th Cir. 1998); Amdahl Corp. v. Profit Freight Sys., Inc., 65 F.3d 144, 146 (9th Cir. 1995).

This circuit employs a special standard to review factual issues arising in an appeal from the grant of summary judgment in a FOIA case. See Lissner v. United States Custom Serv., 241 F.3d 1220, 1222 (9th Cir. 2001); Klamath Water Users Protective Ass'n v. United States Dept. of Interior, 189 F.3d 1034, 1036 (9th Cir. 1999); Frazee v. United States Forest Serv., 97 F.3d 367, 370 (9th Cir. 1996); Minier v. Central Intelligence Agency, 88 F.3d 796, 800 (9th Cir. 1996); Schiffer v. Federal Bureau of

Investigation, 78 F.3d 1405, 1408 (9th Cir. 1996); Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995). Instead of determining whether a genuine issue of material fact exists, the court employs a two-step standard. First, the court inquires whether an adequate factual basis supports the district court's ruling. Second, if such a basis exists, the court overturns the ruling only if it is clearly erroneous. See Frazee, 97 F.3d at 370; but see Lissner, 241 F.3d at 1222 (noting that when parties do not dispute whether the court had an adequate basis for its decision, the court's conclusion that documents are exempt from disclosure is reviewed de novo); Klamath Water Users, 189 F.3d at 1037 (noting that "where the adequacy of the factual basis is not disputed, the district court's legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo").

The district court's decision not to permit additional discovery pursuant to Federal Rule of Civil Procedure 56(f) is reviewed for an abuse of discretion. See Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th Cir. 2002) (denying motion to reopen discovery); U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 933 (9th Cir. 2002); Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001); DeGrassi v. City of Glendora, 207 F.3d 636, 641 (9th Cir. 2000); Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999); Citicorp Real Estate, 155 F.3d at 1097; Nidds v. Schindler Elevator Corp., 113 F.3d 912, 920 (9th Cir. 1996); Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 887 (9th Cir. 1996); Qualls v. Blue Cross, Inc., 22 F.3d 839, 844 (9th Cir. 1994). "We will only find that the district court abused its discretion if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir. 1998) (quoting Qualls, 22 F.3d at 844); see also Panatronic USA, 287 F.3d at 846 (reciting standard); Chance, 242 F.3d at 1161 n.6 (same). Thus, there can be no abuse of discretion where the movant has failed to show how allowing additional discovery would have precluded summary judgment. Maljack, 81 F.3d at 888; United States v. A.E. Lopez Enter., Ltd., 74 F.3d 972, 975 (9th Cir. 1996). The district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past. See Chance, 242 F.3d at 1161 n.6; Nidds, 113 F.3d at 921. If a trial judge fails to address a Rule 56(f) motion before granting summary judgment, the omission is reviewed de novo. Margolis, 140 F.3d at 853; Byrd, 137 F.3d at 1135; Kennedy v. Applause, Inc., 90 F.3d 1477, 1482 (9th Cir. 1996); Qualls, 22 F.3d at 844.

Evidentiary rulings made in the context of summary judgment are reviewed for an abuse of discretion. See Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002)

(noting limited review "even when the rulings determine the outcome of a motion for summary judgment); Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002) (exclusion of evidence); Sea-Land Serv., Inc. v. Lozen Intern., 285 F.3d 808, 813 (9th Cir. 2002) (inclusion of evidence); Block v. City of Los Angeles, 253 F.3d 410, 416 (9th Cir. 2001); Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir. 1998); Sementilli v. Trinidad Corp., 155 F.3d 1130, 1133 (9th Cir. 1998); Quevedo v. Trans-Pac. Shipping, Inc., 143 F.3d 1255, 1258 (9th Cir. 1998); National Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997); Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 886 (9th Cir. 1996); Maffei v. Northern Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993); Carpenter v. Universal Star Shipping, S.A., 924 F.2d 1539, 1547 (9th Cir. 1991) (court's refusal to consider untimely evidence in opposition to motion for summary judgment is reviewed for abuse of discretion).

The district court's decision whether to permit oral arguments before ruling on a motion for summary judgment is reviewed for an abuse of discretion. See Willis v. Pacific Maritime Ass'n, 244 F.3d 675, 684 n.2 (9th Cir. 2001); Mahon v. Credit Bureau of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999) (noting that an abuse of discretion may occur when a party may suffer prejudice from the denial of argument).

The district court's refusal to reconsider or to vacate summary judgment is reviewed for an abuse of discretion. See Minnesota Life Ins. Co. v. Ensley, 174 F.3d 977, 987 (9th Cir. 1999); School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

80. **Summons**

A district court's decision to quash an IRS summons is reviewed for clear error. David H. Tedder & Assocs. v. United States, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce the summons is also reviewed for clear error. United States v. Blackman, 72 F.3d 1418, 1422 (9th Cir. 1995); Fortney v. United States, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion to quash). Whether a district court may conditionally enforce an IRS summons, however, raises questions of statutory interpretation reviewed de novo. United States v. Jose, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc); see also Crystal v. United States, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (reviewing de novo when appeal is from grant of summary judgment).

81. **Supplemental Complaints**

A district court's decision to grant or deny a party's request to supplement a complaint pursuant to Federal Rule of Civil Procedure 15(d) is reviewed for an abuse of discretion. Planned Parenthood of S. Ariz. v. Neely, 130 F.3d 400, 402 (9th Cir. 1997); Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988).

82. **Supplemental Jurisdiction**

Whether a district court has supplement (pendent) jurisdiction is reviewed de novo. See Hoeck v. City of Portland, 57 F.3d 781, 784-85 (9th Cir. 1995). A district court's decision whether to retain jurisdiction over supplement claims when the original federal claims are dismissed is reviewed for an abuse of discretion. See Bryant v. Adventist Health Sys./West, 289 F.3d 1162, 1165 (9th Cir. 2002); Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1187 (9th Cir. 2001); Binder v. Gillespie, 184 F.3d 1059, 1066 (9th Cir. 1999); Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (district court should weigh factors such as economy, convenience, fairness, and comity). Note, however, limitations on the trial court's jurisdiction over supplemental claims when it dismissed the federal claims for lack of subject matter jurisdiction. See Herman Family Revocable Trust v. TEDDY BEAR, 254 F.3d 802, 806 (9th Cir. 2001).

83. **Venue**

A district court's venue ruling is reviewed de novo. See Myers v. Bennett Law Offices, 238 F.3d 1068, 1071 (9th Cir. 2001); Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 504 (9th Cir. 2000); Columbia Pictures Television v. Krypton Broad., Inc., 106 F.3d 284, 288 (9th Cir. 1997) ("So long as the underlying facts are not in dispute, we review the district court's venue determination de novo."), rev'd on other grounds, 523 U.S. 340 (1998). The trial court's factual findings are reviewed for clear error. Columbia Pictures Televison, 106 F.3d at 288. The district court's decision, however, to transfer or dismiss an action on the ground of improper venue pursuant to 28 U.S.C. § 1404(a) is reviewed for an abuse of discretion. See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000); Bruns v. National Credit Union Admin., 122 F.3d 1251, 1253 (9th Cir. 1997); King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992). The district court's dismissal for improper venue based on a contractual forum selection provision is reviewed for abuse of discretion. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 323 (9th Cir. 1996).

84. **Vexatious Litigants**

A district court's vexatious litigant order is reviewed for an abuse of discretion. See De Long v. Hennessey, 912 F.2d. 1144, 1146 (9th Cir. 1990). A dismissal for failure to comply with a vexatious litigant order is reviewed for an abuse of discretion. See In re Fillbach, 223 F.3d 1089, 1190 (9th Cir. 2000).

85. **Voir Dire**

A trial court's conduct during civil voir dire is reviewed for abuse of discretion. See Scott v. Lawrence, 36 F.3d 871, 874 (9th Cir. 1994) (abuse of discretion); Medrano v. City of Los Angeles, 973 F.2d 1499, 1507-08 (9th Cir. 1992) (no abuse of discretion). The trial court's decision not to use a party's proposed voir dire questions was held not to be an abuse of discretion. See Monore v. City of Phoenix, 248 F.3d 851, 856 (9th Cir. 2001). A court's order to parties to make their opening statements to the entire prospective jury panel before voir dire was also not an abuse of discretion. See In re Yagman, 796 F.2d 1165, 1171 (9th Cir.), amended by 803 F.2d 1085 (9th Cir. 1986).

86. **Voluntary Dismissals**

The trial court's decision to grant voluntary dismissal is reviewed for abuse of discretion. See Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001); Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir. 1994); Bell v. Kellogg, 922 F.2d 1418, 1421 (9th Cir. 1991). In making the decision, the court must consider whether the defendant will suffer legal prejudice as a result of the dismissal. Smith, 263 F.3d at 975; Hyde & Drath, 24 F.3d at 1169. The court's determination of the terms and conditions of dismissal under Rule 41(a)(2) is reviewed for an abuse of discretion. Hargis v. Foster, 282 F.3d 1154, 1159 (9th Cir. 2002); Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993). The court's denial of a motion for voluntary dismissal is also reviewed for an abuse of discretion. In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996); Westlands Water Dist. v. United States, 100 F.3d 94, 96 (9th Cir. 1996). Whether a court possesses the authority to deny or vacate a voluntary dismissal is a question of law reviewed de novo. See American Soccer Co. v. Score First Enter., 187 F.3d 1108 (9th Cir. 1999).

C. Trial Decisions in Civil Cases

1. **Alter Ego**

A district court's application of the alter ego doctrine is reviewed for clear error. See F.J. Hanshaw Enter. v. Emerald River Dev., 244 F.3d 1128, 1135 (9th Cir. 2001); Commodity Futures Trading Comm. v. Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 2000); McClaran v. Plastic Indus., Inc., 97 F.3d 347, 358 (9th Cir. 1996); Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1391 (9th Cir. 1993).

2. **Authentication**

The district court's ruling on the authenticity of proffered evidence is reviewed for an abuse of discretion. Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1011 (9th Cir. 1997) (summary judgment); see also Pahl v. Commissioner, 150 F.3d 1124, 1132 (9th Cir. 1998) (tax court). The trial court's determination that there is a sufficient evidentiary basis to establish authenticity is also reviewed for an abuse of discretion. See E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392, 1398 (9th Cir. 1989); but see M/V Am. Queen v. San Diego Marine Constr. Corp., 708 F.2d 1483, 1491 (9th Cir. 1983) ("Whether evidence is properly authenticated is a question of law subject to de novo review.").

3. **Bench Trials**

The district court's decision to conduct a bench trial is reviewed for an abuse of discretion. See Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 419 (9th Cir. 1998). Following a bench trial, the judge's findings of fact, are reviewed for clear error. See Allen v. Iranon, 283 F.3d 1070, 1076 (9th Cir. 2002); Dubner v. City and County of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001); Troutt v. Colorado Western Ins. Co., 246 F.3d 1150, 1156 (9th Cir. 2001); Howard v. United States, 181 F.3d 1064, 1066 (9th Cir. 1999); Dolman v. Agee, 157 F.3d 708, 711 (9th Cir. 1998); FDIC v. Craft, 157 F.3d 697, 701 (9th Cir. 1998); Jones v. United States, 127 F.3d 1154, 1156 (9th Cir. 1997); Magnuson v. Video Yesteryear, 85 F.3d 1424, 1427 (9th Cir. 1996); Spokane Arcade, Inc. v. Spokane, 75 F.3d 663, 665 (9th Cir. 1996). The district court's findings of fact must be accepted unless the reviewing court is left with a definite and firm conviction that a mistake has been made. See Allen, 283 F.3d at 1076; Jones, 127 F.3d at 1156; see also Craft, 157 F.3d at 701 ("The district court's findings are binding unless clearly erroneous.").

The district court's computation of damages following a bench trial is reviewed for clear error. Ambassador Hotel Co. v. Wei-Chuan Investment, 189 F.3d 1017, 1024 (9th Cir. 1999); United States v. Pend Oreille County Pub. Util. Dist., 135 F.3d 602, 609 (9th Cir. 1998); Bartleson v. United States, 96 F.3d 1270, 1274 (9th Cir. 1996); Howard

v. Crystal Cruises, Inc., 41 F.3d 527, 530 (9th Cir. 1994). Whether the court applied the correct legal standard, however, is reviewed de novo. Ambassador Hotel, 189 F.3d at 1024.

The district court's conclusions of law are reviewed de novo. See Dubner, 266 F.3d at 964; Troutt, 246 at 1156; Dolman, 157 F.3d at 708; Craft, 157 F.3d at 701; Terran v. Kaplan, 109 F.3d 1428, 1432 (9th Cir. 1997); Magnuson, 85 F.3d at 1427; Spokane Arcade, 75 F.3d at 665.

4. **Bifurcation**

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. See Danjaq LLC v. Sony Corp., 263 F.3d 942, 961 (9th Cir. 2001); Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996) (trifurcation); Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 (9th Cir. 1995); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 575 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996). The court has broad discretion to order separate trials under Federal Rule of Civil Procedure 42(b). Davis v. Mason County, 927 F.2d 1473, 1479 (9th Cir. 1991). The court will set aside a severance order only for an abuse of discretion. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001); Davis, 927 F.2d at 1479; Davis & Cox v. Summa Corp., 751 F.2d 1507, 1517 (9th Cir. 1985).

5. **Choice of Laws**

A district court's decision concerning the appropriate choice of law is reviewed de novo. See Torre v. Brickey, 278 F.3d 917, 919 (9th Cir. 2002); Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1210 (9th Cir. 2001); Zinser v. Accufix Research Inst., 253 F.3d 1180, 1187 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001); Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000); Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1091 (9th Cir. 1999); Aqua-Marine Constructors, Inc. v. Banks, 110 F.3d 663, 667 (9th Cir. 1997); Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167 (9th Cir. 1995); Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501, 1505 (9th Cir. 1993); see also In re Megafoods Stores, Inc., 163 F.3d 1063, 1067 (9th Cir. 1998) (bankruptcy court). Underlying factual determinations are reviewed for clear error. See Zinser, 253 F.3d at 1187; Alpha Therapeutic, 199 F.3d at 1091; but see Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 644-45 (9th Cir. 1988) (noting that even when district court's determination of choice of law is not in dispute, the court's application of facts in determining the choice of law is reviewed de novo).

Whether a choice-of-law clause is void by operation of other law is reviewed de novo. Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997).

Whether a forum selection clause is mandatory or permissive is a question of law reviewed de novo if the district court's interpretation did not turn on the credibility of extrinsic evidence. Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1036 (9th Cir. 1995). The trial court's decision to enforce a contractual forum selection provision and dismiss is reviewed, however, for an abuse of discretion. International Business Machines Corp. v. Bajorek, 191 F.3d 1033, 1036 (9th Cir. 1999); Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc); Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 323 (9th Cir. 1996). The court's refusal to enforce a forum selection clause is reviewed for an abuse of discretion. Fireman's Fund Ins. Co. v. M.V. DSR Atl., 131 F.3d 1336, 1338 (9th Cir. 1997) (noting that other circuits review de novo). Interpretations of state law are reviewed de novo. State Farm Mut. Automotive Ins. Co. v. Davis, 937 F.2d 1415, 1418 (9th Cir. 1991).

The trial court's interpretation of Federal Rule of Civil Procedure 44.1 requiring notice of the intent to raise an issue of foreign law is reviewed de novo. See DP Aviation v. Smiths Indus. Aerospace and Defense Sys., Ltd., 268 F.3d 829, 846 (9th Cir. 2001). The court's determination whether the notice is "reasonable" is reviewed for an abuse of discretion. Id.

6. **Closing Arguments**

The district court's control of counsel's closing arguments is reviewed for abuse of discretion. See Larez v. Holcomb, 16 F.3d 1513, 1520-21 (9th Cir. 1994); United States v. Spillone, 879 F.2d 514, 518 (9th Cir. 1989). The court's decision to exclude evidence offered during closing argument is also reviewed for an abuse of discretion. See Beech Aircraft Corp. v. United States, 51 F.3d 834, 842 (9th Cir. 1995). The court's decision to inform the parties of the substance of special interrogatories after closing argument is an abuse of discretion. See Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 521-22 (9th Cir. 1999). When there is no objection to conduct during closing argument, review is limited to plain error. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1193 (9th Cir. 2002); Bird v. Glacier Elec. Coop. Inc., 255 F.3d 1136, 1144-48 (9th Cir. 2001).

7. **Credibility Findings**

Special deference is paid to a trial court's credibility findings. See Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); Allen v. Iranon, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002); Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1119 (9th Cir. 2000) (deferring to judge's credibility findings); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1110 (9th Cir. 1998); Anheuser-Busch, Inc. v. National Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996); United States v. Zermeno, 66 F.3d 1058, 1063 (9th Cir. 1995); see also Duckett v. Godinez, 109 F.3d 533, 535 (9th Cir. 1997) (habeas). Note that trial judges have broad discretion to commit upon the evidence, including the credibility of witnesses. Navellier v. Sletten, 262 F.3d 923, 942 (9th Cir. 2001), cert. denied, 122 S. Ct. 2623 (2002).

8. **Cross-Examination**

The district court's decision to limit the scope and extent of cross-examination is reviewed for an abuse of discretion. Robertson v. Burlington N. R.R., 32 F.3d 408, 411 (9th Cir. 1994); Insurance Co. v. Gibralco, Inc., 847 F.2d 530, 534 (9th Cir. 1988).

9. **Directed Verdict**

A grant of a motion for directed verdict (now called judgment as a matter of law) is reviewed de novo. See Howard v. Everex Sys., Inc., 228 F.3d 1057, 1060 (9th Cir. 2000); LaLonde v. County of Riverside, 204 F.3d 947, 959 (9th Cir. 2000); Saman v. Robbins, 173 F.3d 1150, 1155 (9th Cir. 1999); Johnson v. Paradise Valley Unified Sch. Dist., 151 F.3d 1222, 1226 (9th Cir. 2001); Amarel v. Connell, 102 F.3d 1494, 1517 (9th Cir. 1996). In reviewing a judgment as a matter of law, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 149-50 (2000); Howard, 228 F.3d at 1060. If conflicting inferences may be drawn from the facts, the case must go to the jury. See Howard, 228 F.3d at 1060.

A denial of a motion for a judgment as a matter of law is also reviewed de novo. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886 (9th Cir. 2002); Swenson v. Potter, 271 F.3d 1184, 1190 (9th Cir. 2001); Monroe v. City of Phoenix, 248 F.3d 851, 861 (9th Cir. 2001); Cochran v. City of Los Angeles, 222 F.3d 1195, 1199 (9th Cir. 2000); Passantino v. Johnson & Johnson Consumer Prod., 212 F.3d 493, 506 (9th Cir. 2000); Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999); Desrosiers v.

Flight Int'l of Florida, Inc., 156 F.3d 952, 957 (9th Cir. 1998); Scott v. Ross, 140 F.3d 1275, 1281 (9th Cir. 1998).

10. **Evidentiary Rulings**

Evidentiary rulings are reviewed for an abuse of discretion. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886 (9th Cir. 2002); Freeman v. Allstate Ins. Co., 253 F.3d 533, 536 (9th Cir. 2001); Tennison v. Circus Circus Enter., Inc., 244 F.3d 684, 689 (9th Cir. 2001); Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001); Defenders of Wildlife v. Bernal, 204 F.3d 920, 927 (9th Cir. 2000); Norris v. Sysco Corp., 191 F.3d 1043, 1047 (9th Cir. 1999) (Rule 403); Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir. 1999); Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113 (9th Cir. 1998); Russian River Watershed Protection Comm. v. Santa Rosa, 142 F.3d 1136, 1144 n.6 (9th Cir. 1998); EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997); see also General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) (exclusion of expert testimony); Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1183 (9th Cir. 2002) (admission of expert testimony); Amantea Cabrera v. Potter, 279 F.3d 746, 749 (9th Cir. 2002) (exclusion of evidence); Lambert v. Ackerley, 180 F.3d 997, 1009 n.12 (9th Cir. 1999) (en banc) (admission of testimony); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1011 (9th Cir. 1997) (Rule 901(a)). To reverse on the basis of an erroneous evidentiary ruling, the court must conclude not only that the district court abused its discretion, but also that the error was prejudicial. See Janes, 279 F.3d at 886; Freeman, 253 F.3d at 536; Tennison, 244 F.3d at 689; Defenders of Wildlife, 204 F.3d at 927-28; Gilbrook, 177 F.3d at 858; Evanow, 163 F.3d at 1113. Prejudice means that, more probable than not, the lower court's error tainted the verdict. See Tennison, 244 F.3d at 689.

In reviewing the district court's exclusion of evidence as a sanction, this court first engages in de novo review of whether the district court had the power to exclude the evidence. If such a power exists, this court reviews the district court's imposition of the sanction for abuse of discretion. See S.M. v. J.K., 262 F.3d 914, 917 (9th Cir. 2001); Lewis v. Telephone Employees Credit Union, 87 F.3d 1537, 1556-57 (9th Cir. 1996); see also Quevedo v. Trans-Pac. Shipping, Inc., 143 F.3d 1255, 1258 (9th Cir. 1998) (trial court's refusal to consider expert testimony for purposes of deciding motion for summary judgment is reviewed for an abuse of discretion).

The admissibility of scientific evidence under Federal Rule of Evidence 702 is reviewed for an abuse of discretion. See Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 939 (9th Cir. 2001); Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir.

1998); Cabrera v. Cordis Corp., 134 F.3d 1418, 1420 (9th Cir. 1998); Lust v. Merrell Dow Pharms., Inc., 89 F.3d 594, 596 (9th Cir. 1996).

The court's interpretation of the hearsay rule is reviewed de novo. See Orr v. Bank of America, 285 F.3d 764, 778 (9th Cir. 2002); Bemis v. Edwards, 45 F.3d 1369, 1372 (9th Cir. 1995). The court's decision to allow or to exclude evidence based on the hearsay rule is reviewed for an abuse of discretion. See Orr, 285 F.3d at 778; Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1479 n.24 (9th Cir. 1996); Larez v. City of Los Angeles, 946 F.2d 630, 641 (9th Cir. 1991).

Whether a party's attorney should be permitted to testify is a decision reviewed for an abuse of discretion. Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1391 (9th Cir. 1993).

The district court's decision to exclude extra-record evidence is reviewed for an abuse of discretion. See San Francisco Baykeeper v. Whitman, 297 F.3d 877, 886 (9th Cir. 2002) (noting exception that permits district court to review evidence outside the administrative record); Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996).

11. **Experts**

The trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999); General Elec. Co. v. Joiner, 522 U.S. 136, 141-42 (1997); Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1183 (9th Cir. 2002); Guidroz-Brault v. Missouri Pac. R.R. Co., 254 F.3d 825, 830 (9th Cir. 2001); Deppe v. United Airlines, 217 F.3d 1262, 1266 (9th Cir. 2000); De Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 879 (9th Cir. 2000); United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999); Desrosiers v. Flight Int'l of Florida, Inc., 156 F.3d 952, 960 (9th Cir. 1998); Cabrera v. Cordis Corp., 134 F.3d 1418, 1420 (9th Cir. 1998); Masayesva ex rel. Hopi Indian Tribe v. Hale, 118 F.3d 1371, 1378 (9th Cir. 1997). The applicability of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), presents a question of law reviewed de novo. McKendall v. Crown Control Corp., 122 F.3d 803, 805 (9th Cir. 1997).

A trial court's decision not to consider expert testimony for purposes of deciding a motion for summary judgment is reviewed for an abuse of discretion. See Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir. 1998; Quevedo v. Trans-Pac. Shipping, Inc., 143 F.3d 1255, 1258 (9th Cir. 1998).

The court's decision to appoint an expert sua sponte under Federal Rule of Evidence 706(a) is reviewed for an abuse of discretion. See Walker v. American Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999).

12. **Foreign Law**

A district court's determination and interpretation of foreign law are questions of law reviewed under the de novo standard. See Shalit v. Coppe, 182 F.3d 1124, 1127 (9th Cir. 1999); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992). The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. See Lyon v. Agusta S.P.A., 252 F.3d 1078, 1082 (9th Cir. 2001), cert. denied, 122 S. Ct. 809 (2002); Corzo v. Banco Cent. De Reserva Del Peru, 243 F.3d 519, 522 (9th Cir. 2001); Alder v. Federal Republic of Nigeria, 219 F.3d 869, 874 (9th Cir. 2000); Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1083 (9th Cir. 1999). Note that a district court has discretion to decline jurisdiction when litigation in a foreign forum would be more convenient for the parties. See Lueck v. Sundstrand Corp., 216 F.3d 1137, 1143 (9th Cir. 2001).

The trial court's interpretation of Federal Rule of Civil Procedure 44.1 requiring notice of the intent to raise an issue of foreign law is reviewed de novo. See DP Aviation v. Smiths Indus. Aerospace and Defense Sys., Ltd., 268 F.3d 829, 846 (9th Cir. 2001). The court's determination whether the notice is "reasonable" is reviewed for an abuse of discretion. Id.

A district court interpretation of 28 U.S.C. § 1782, permitting domestic discovery of use in foreign proceedings, is reviewed de novo but its application of that statute to the facts of the case is reviewed for an abuse of discretion. See Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 666 (9th Cir. 2002); United States v. Sealed 1, Letter of Request, 235 F.3d 1200, 1203 & 1206 (9th Cir. 2000).

13. **Judgment as a Matter of Law**

A grant of a motion for judgment as a matter of law (formerly directed verdict) is reviewed de novo. See Howard v. Everex Sys., Inc., 228 F.3d 1057, 1060 (9th Cir. 2000); LaLonde v. County of Riverside, 204 F.3d 947, 959 (9th Cir. 2000); Saman v. Robbins, 173 F.3d 1150, 1155 (9th Cir. 1999); Johnson v. Paradise Valley Unified Sch.

Dist., 151 F.3d 1222, 1226 (9th Cir. 2001); Amarel v. Connell, 102 F.3d 1494, 1517 (9th Cir. 1996). In reviewing a judgment as a matter of law, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 149-50 (2000); Howard, 228 F.3d at 1060. If conflicting inferences may be drawn from the facts, the case must go to the jury. See Howard, 228 F.3d at 1060.

A denial of a motion for a judgment as a matter of law is also reviewed de novo. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886 (9th Cir. 2002); Swenson v. Potter, 271 F.3d 1184, 1190 (9th Cir. 2001); Monroe v. City of Phoenix, 248 F.3d 851, 861 (9th Cir. 2001); Cochran v. City of Los Angeles, 222 F.3d 1195, 1199 (9th Cir. 2000); Passantino v. Johnson & Johnson Consumer Prod., 212 F.3d 493, 506 (9th Cir. 2000); Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999); Desrosiers v. Flight Int'l of Florida, Inc., 156 F.3d 952, 957 (9th Cir. 1998); Scott v. Ross, 140 F.3d 1275, 1281 (9th Cir. 1998).

14. **Juror Misconduct, Partiality or Bias**

The district court's denial of a new trial based on alleged juror misconduct is reviewed for an abuse of discretion. See Sea Hawk Seafoods v. Alyeska Pipeline Service Co., 206 F.3d 900, 911 n.19 (9th Cir. 2000); Couglin v. Tailhook Ass'n, 112 F.3d 1052, 1055 (9th Cir. 1997). The court's credibility determinations and findings of historical fact are reviewed for clear error. Sea Hawk Seafoods, 206 F.3d at 911 n.19.

The trial court has broad discretion in dealing with matters of juror bias. See Price v. Kramer, 200 F.3d 1237, 1254-55 (9th Cir. 2000) (concluding that court did not abuse its discretion by rejecting charges of juror bias); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1220-21 (9th Cir. 1997) (noting that "trial judge, who observes the demeanor and credibility of a juror, is best suited to determine a juror's impartiality").

The district court also has broad discretion in how to conduct voir dire. See Monroe v. City of Phoenix, 248 F.3d 851, 856 (9th Cir. 2001); Paine v. City of Lompoc, 160 F.3d 562, 564-65 (9th Cir. 1998) (permitting district court to reject questions if voir dire is otherwise sufficient to test the jury for bias or partiality).

15. **Jury Instructions**

A district court's formulation of civil jury instructions is reviewed for an abuse of discretion. See Costa v. Desert Palace, Inc., 299 F.3d 838, ___ (9th Cir. 2002) (en banc); Monroe v. City of Phoenix, 248 F.3d 851, 857 (9th Cir. 2001); Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713 (9th Cir. 2001) (explaining that standard of review depends on nature of the claimed error); Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001); Duran v. City of Maywood, 221 F.3d 1127, 1130 (9th Cir. 2000); Beachy v. Boise Cascade Corp., 191 F.3d 1010, 1013 (9th Cir. 1999); Gilbrook v. City of Westminster, 177 F.3d 839, 860 (9th Cir. 1999); Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1046 (9th Cir. 1998); Scott v. Ross, 140 F.3d 1275, 1280 (9th Cir. 1998); Abromson v. American Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997). Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. See Duran, 221 F.3d at 1130; Gilbrook, 177 F.3d at 860; Mockler v. Multnomah County, 140 F.3d 808, 812 (9th Cir. 1998); Abromson, 114 F.3d at 898. When the alleged error is in the formulation of the instructions, the instructions are to be considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate. See Guebara, 237 F.3d at 992; Masson v. New Yorker Magazine, Inc., 85 F.3d 1394, 1397 (9th Cir. 1996); Gizoni v. Southwest Marine Inc., 56 F.3d 1138, 1142 n.5 (9th Cir. 1995).

When the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. See Costa, 299 F.3d at ___; Jazzabi v. Allstate Ins. Co., 278 F.3d 979, 982 (9th Cir. 2002); Voohries-Larson, 241 F.3d at 713; Beachy, 191 F.3d at 1022; Gilbrook, 177 F.3d at 860; Mockler, 140 F.3d at 812; Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997); Fireman's Fund Ins. Cos. v. Alaskan Pride Partnership, 106 F.3d 1465, 1469 (9th Cir. 1997).

An error in instructing the jury in a civil case does not require reversal if it is harmless. See Swinton v. Potomac Corp., 270 F.3d 794, 805 (9th Cir. 2001), cert. denied, 122 S. Ct. 1609 (2002); Kennedy v. Southern California Edison Co., 268 F.3d 763, 770 (9th Cir. 2001), cert. denied, 122 S. Ct. 1964 (2002); Shaw v. City of Sacramento, 250 F.3d 1289, 1293 (9th Cir. 2001); Monroe, 248 F.3d at 860; Lambert v. Ackerley, 180 F.3d 997, 1008 (9th Cir. 1999) (en banc); Saman v. Robbins, 173 F.3d 1150, 1155 (9th Cir. 1999); Westinghouse Elec. Corp. v. General Circuit Breaker & Elec. Supply Inc., 106 F.3d 894, 902 (9th Cir. 1997); Phillips v. IRS, 73 F.3d 939, 941 (9th Cir. 1996); Larez v. Holcomb, 16 F.3d 1513, 1516-17 (9th Cir. 1994). Note that the harmless error standard applied in civil cases is far "less stringent' than that applied in

criminal cases. Swinton, 270 F.3d at 805; Kennedy, 268 F.3d at 770; Monroe, 248 F.3d at 860; Lambert, 180 F.3d at 1008 n.11. Finally, the failure to object to an instruction waives the right of appellate review. See Voohries-Larson, 241 F.3d at 713-14 (applying Rule 51).

A trial court's decision to give a supplemental jury instruction is reviewed for an abuse of discretion. See Jazzabi v. Allstate Ins. Co., 278 F.3d 979, 982 (9th Cir. 2002). The formulation of such an instruction is also reviewed for an abuse of discretion. Id.

16. **Jury Selection**

The district court has broad discretion in how to conduct voir dire. See Monroe v. City of Phoenix, 248 F.3d 851, 856 (9th Cir. 2001); Paine v. City of Lompoc, 160 F.3d 562, 564-65 (9th Cir. 1998) (permitting district court to reject questions if voir dire is otherwise sufficient to test the jury for bias or partiality); see also Scott v. Lawrence, 36 F.3d 871, 874 (9th Cir. 1994) (district court abused its discretion); Medrano v. City of Los Angeles, 973 F.2d 1499, 1507-08 (9th Cir. 1992) (district court did not abuse its discretion).

The trial court has broad discretion in ruling on challenges for cause and can be reversed only for an abuse of discretion. Hard v. Burlington N. R.R., 870 F.2d 1454, 1460 (9th Cir. 1989). The court has broad discretion in dealing with a matter of juror bias. See Price v. Kramer, 200 F.3d 1237, 1254-55 (9th Cir. 2000) (concluding that court did not abuse its discretion by rejecting charges of juror bias); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1220-21 (9th Cir. 1997) (noting that "trial judge, who observes the demeanor and credibility of a juror, is best suited to determine a juror's impartiality"

A district court's rulings concerning purposeful discrimination in the jury selection process are findings of fact which will be set aside only if clearly erroneous. Johnson v. Campbell, 92 F.3d 951, 953 (9th Cir. 1996); Montiel v. City of Los Angeles, 2 F.3d 335, 339 (9th Cir. 1993).

17. **Jury Verdicts**

A jury's verdict must be upheld if supported by "substantial evidence." See Swenson v. Potter, 271 F.3d 1184, 1190 (9th Cir. 2001); Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir.), cert. denied, 122 S. Ct. 645 (2001);

Shaw v. City of Sacramento, 250 F.3d 1289, 1293 n.1 (9th Cir. 2001); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000); Lambert v. Ackerly, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc); Poppell v. City of San Diego, 149 F.3d 951, 962 (9th Cir. 1998); Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1128 (9th Cir. 1997); Murray v. Laborors Union Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995). Substantial evidence is evidence adequate to support the jury's conclusion, even if it is possible to draw a contrary conclusion from the same evidence. See Johnson, 251 F.3d at 1227. Note that the credibility of the witnesses and the weight of the evidence are issues for the jury and are generally not subject to appellate review. See Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir. 1999); Murray, 55 F.3d at 1452; Oviatt v. Pearce, 954 F.2d 1470, 1473 (9th Cir. 1992); see also Three Boys Music, 212 F.3d at 482 ("The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.").

When a party fails to move for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), a challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 888 (9th Cir. 2002); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997). Reversal under the plain error standard is proper only for a "manifest miscarriage of justice," Janes, 279 F.3d at 888, or if "there is an absolute absence of evidence to support the jury's verdict," Image Tech. 125 F.3d at 1212 (internal quotation omitted). The failure to make a timely Rule 50(b) motion waives any sufficiency of the evidence argument on appeal. See Saman v. Robbins, 173 F.3d 1150, 1154 (9th Cir. 1999).

The district court's determination in a diversity action that a jury verdict does not violate state law for excessiveness and therefore does not warrant remittitur or a new trial is reviewed under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 417 (1996).

The district court has broad discretion in deciding whether to send the case to the jury for a special or general verdict. Acosta v. City & County of San Francisco, 83 F.3d 1143, 1149 (9th Cir. 1996); United States v. Real Property Located at 20832 Big Rock Drive, 51 F.3d 1402, 1408 (9th Cir. 1995). "This discretion extends to determining the content and layout of the verdict form, and any interrogatories submitted to the jury, provided the questions asked are reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment." Real Property, 51 F.3d at 1408. A special verdict form is reviewed for an abuse of discretion. See Saman, 173 F.3d at 1155 ("As long as the questions are

adequate to obtain a jury determination of all the factual issues essential to judgment, the trial court has complete discretion as to the form of the special verdict."); Smith v. Jackson, 84 F.3d 1213, 1220 (9th Cir. 1996) (appellate court must determine whether the questions in the form were adequate to obtain a jury determination of the factual issues essential to judgment).

The district court's decision to resubmit a verdict to the jury for clarification is reviewed for an abuse of discretion. Larson v. Neimi, 9 F.3d 1397, 1398 (9th Cir. 1993).

A trial court's determination that the jury returned a general verdict inconsistent with its answers to special interrogatories is reviewed de novo on appeal. Norris v. Sysco Corp., 191 F.3d 1043, 1047 (9th Cir. 1999); Wilks v. Reyes, 5 F.3d 412, 415 (9th Cir. 1993). The court must uphold allegedly inconsistent jury verdicts "unless it is impossible under a fair reading to harmonize the answers." Magnussen v. YAK, Inc., 73 F.3d 245, 246 (9th Cir. 1996) (internal quotation omitted). As a general rule, a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury. Poppell, 149 F.3d at 970; Knapp v. Ernst & Whinney, 90 F.3d 1431, 1439 (9th Cir. 1996). A reviewing court, however, has discretion to construe a general verdict as attributable to any theory if it is supported by substantial evidence and was submitted to the jury free of error. Knapp, 90 F.3d at 1439. A district court's application of this exception to the general rule is reviewed for an abuse of discretion. Id.

The preclusive effect of a jury verdict is a question of federal law to be reviewed de novo. Schiro v. Farley, 510 U.S. 222, 232 (1994); see also Santamaria v. Horsley, 133 F.3d 1242, 1245 (9th Cir. 1998) (habeas), amended by 138 F.3d 1280 (9th Cir. 1998).

18. **Opening Statements**

A district court's order to parties to make their opening statements to the entire prospective jury panel before voir dire has been held not to be an abuse of discretion. In re Yagman, 796 F.2d 1165, 1171 (9th Cir.), amended by 803 F.2d 1085 (9th Cir. 1986).

19. **Parol Evidence**

A district court's application of the parol evidence rule is reviewed de novo. See Jinro America Inc. v. Secure Inv., Inc., 266 F.3d 993, 998-99 (9th Cir.), amended by 272 F.3d 1289 (9th Cir. 2001); Brinderson-Newberg v. Pacific Erectors, Inc., 971 F.2d 272, 277 (9th Cir. 1992); Miller v. Fairchild Indus., Inc., 885 F.2d 498, 503 (9th Cir. 1989). The court's refusal to consider parol evidence is reviewed, however, for an abuse of discretion. See U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 938 (9th Cir. 2002).

20. **Proximate Cause Determinations**

A district court's finding of proximate cause presents a mixed question of law and fact that is reviewed for clear error. See Tahoe-Sierra Preservation Council, Inc., 216 F.3d 764, 783 (9th Cir. 2000), aff'd, 122 S. Ct. 1465 (2002); Farr v. NC Machinery Co., 186 F.3d 1165, 1168 n.7 (9th Cir. 1999); Exxon Co v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995).

21. **Regulations**

A district court's interpretation of a federal regulation is reviewed de novo. Webster v. Public Sch. Employees of Washington, 247 F.3d 910, 916 (9th Cir. 2001); Parravano v. Babbitt, 70 F.3d 539, 543 (9th Cir. 1995); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 918 (9th Cir. 1995); see also Dykstra v. Commissioner, 260 F.3d 1181, 1182 (9th Cir. 2001) (tax court). The constitutionality of a regulation is reviewed de novo. See Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999). Deference is owed to an agency's interpretation of its own regulations. See CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001); Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001); see also United States v. Mead Corp., 121 S. Ct. 2164, 2171-73 (2001) (explaining when deference is owed); Pronsolino v. Nastri, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference).

22. **State Law**

A district court's interpretation of state law is reviewed de novo. See Salve Regina College v. Russell, 499 U.S. 225, 231 (1991); Paulson v. City of San Diego, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc); Vasquez v. North County Transit Dist., 292 F.3d 1049, 1054 (9th Cir. 2002); Bailey v. Southwest Gas Co., 275 F.3d 1181, 1186-87 (9th Cir. 2002), Pacific Fisheries Corp v. HIH Cas. & Gen. Ins, Ltd., 239 F.3d 1000, 1003 (9th Cir.), cert. denied, 122 S. Ct. 324 (2001); Downey v. Crowley Marine Serv., Inc., 236 F.3d 1019, 1022 (9th Cir. 2001); Ellis v. City of San Diego, 176 F.3d 1183,

1188 (9th Cir. 1999); Cacique, Inc. v. Robert Reiser & Co., 169 F.3d 619, 622 (9th Cir. 1999); Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999); Gibson v. County of Riverside, 132 F.3d 1311, 1312 (9th Cir. 1997); National Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 499 (9th Cir. 1997); Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1055 (9th Cir. 1997); Huey v. Honeywell, Inc., 82 F.3d 327, 329 (9th Cir. 1996). Thus, state statutes are reviewed de novo. See Wetzel v. Lou Ehlers Cadillac, 222 F.3d 643, 646 (9th Cir. 2000) (en banc) (state statute of limitations); Planned Parenthood of S. Arizona v. Lawall, 180 F.3d 1022, 1027 (9th Cir.) (parental consent law), amended by 193 F.3d 1042 (9th Cir. 1999); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998).

A district court's ruling on the constitutionality of a state statute is reviewed de novo. See Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1054 (9th Cir. 2000) (initiative), cert. denied, 122 S. Ct. 46 (2001); Tri-State Dev., Ltd. v. Johnston, 160 F.3d 528, 529 (9th Cir. 1998); California First Amendment Coalition v. Calderon, 150 F.3d 976, 980 (9th Cir. 1998); Bland v. Fessler, 88 F.3d 729, 732 (9th Cir. 1996); NCAA v. Miller, 10 F.3d 633, 637 (9th Cir. 1993).

Whether state law is preempted by federal law is also reviewed de novo. See Radici v. Associated Ins. Cos., 217 F.3d 737, 740 (9th Cir. 2000); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000).

An award of attorneys fees made pursuant to state law is reviewed, for an abuse of discretion. See Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000); MRO Communications, Inc. v. American Tel. & Tel. Co., 197 F.3d 1276, 1279 (9th Cir. 1999); 389 Orange St. Partners v. Arnold, 179 F.3d 656, 661 (9th Cir. 1999); Apollo Group, Inc. v. Avnet, Inc., 58 F.3d 477, 482 (9th Cir. 1995). Whether the denial of attorneys fees under state law was proper is a question of law reviewed de novo. See Kona Enter., 229 F.3d at 883; O'Hara v. Teamsters Union Local No. 856, 151 F.3d 1152, 1157 (9th Cir. 1998); Resolution Trust Corp. v. Midwest Fed. Sav. Bank of Minot, 36 F.3d 785, 799 (9th Cir. 1993).

23. **Statutes**

The district court's interpretation and construction of statutes are questions of law reviewed de novo. See Sea-Land Serv., Inc. v. Lozen Intern., 285 F.3d 808, 813 (9th Cir. 2002) (COGSA); Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 870 (9th Cir. 2001) (en banc) (CERCLA), cert. denied, 122 S. Ct. 1437 (2002); Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 819 (9th Cir. 2001)

(Fair Housing Act); Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115, 1117 (9th Cir. 2001) (FLSA); Wetzel v. Lou Ehlers Cadillac, 222 F.3d 643, 646 (9th Cir. 2000) (en banc) (ERISA); Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1182 (9th Cir. 2000) (CERCLA); Firebaugh Canal Co. v. United States, 203 F.3d 568, 573 (9th Cir. 2000) (San Luis Act); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999) (Americans with Disabilities Act); Gilbrook v. City of Westminster, 177 F.3d 839, 872 (9th Cir. 1999) (Civil Rights Act); Burrey v. Pacific Gas & Elec. Co., 159 F.3d 388, 392 (9th Cir. 1998) (ERISA); Alexander v. Glickman, 139 F.3d 733, 735 (9th Cir. 1998) (Food Stamp Act); Waste Action Project v. Dawn Mining Corp., 137 F.3d 1426, 1428 (9th Cir. 1998) (Clean Water Act); Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997) (Prison Litigation Reform Act); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997) (Comprehensive Environmental Response, Compensation, and Liability Act); Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Village, 101 F.3d 610, 612 (9th Cir. 1996) (Alaska Native Claims Settlement Act); Parravano v. Babbitt, 70 F.3d 539, 543 (9th Cir. 1995) (Magnuson Act); Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995) (Endangered Species Act); Allen v. Shalala, 48 F.3d 456, 457 (9th Cir. 1995) (Social Security Act); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir. 1995) (Navajo-Hopi Settlement Act).

The constitutionality of a federal statute is also reviewed de novo. See Eunique v. Powell, 281 F.3d 940, 943 (9th Cir. 2002) (42 U.S.C. § 652(k); Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002) (PLRA); Free Speech Coalition v. Reno, 198 F.3d 1083, 1090 (9th Cir. 1999); United States v. $129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997); Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 693 (9th Cir. 1997); Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1437 (9th Cir. 1996); Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995); Association of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994).

A district court's determination of state law is reviewed de novo. See Salve Regina College v. Russell, 499 U.S. 225, 231 (1991); Bailey v. Southwest Gas Co., 275 F.3d 1181, 1186-87 (9th Cir. 2002); Pacific Fisheries Corp v. HIH Cas. & Gen. Ins, Ltd., 239 F.3d 1000, 1003 (9th Cir.), cert. denied, 122 S. Ct. 324 (2001); Downey v. Crowley Marine Serv., Inc., 236 F.3d 1019, 1022 (9th Cir. 2001). Thus, state statutes are reviewed de novo. See Wetzel v. Lou Ehlers Cadillac, 222 F.3d 643, 646 (9th Cir. 2000) (en banc) (state statute of limitations); Planned Parenthood of S. Arizona v. Lawall, 180 F.3d 1022, 1027 (9th Cir.) (parental consent law), amended by 193 F.3d

1042 (9th Cir. 1999); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998) (Civil Service Act). The constitutionality of a state statute is reviewed de novo. See Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1054 (9th Cir. 2000) (initiative), cert. denied, 122 S. Ct. 46 (2001); Tri-State Dev., Ltd. v. Johnston, 160 F.3d 528, 529 (9th Cir. 1998); California First Amendment Coalition v. Calderon, 150 F.3d 976, 980 (9th Cir. 1998); Bland v. Fessler, 88 F.3d 729, 732 (9th Cir. 1996); NCAA v. Miller, 10 F.3d 633, 637 (9th Cir. 1993).

A district court's decision on whether a statute may be applied retrospectively is a question of law reviewed de novo. See Lyon v. Agusta S.P.A., 252 F.3d 1078, 1081 (9th Cir. 2001), cert. denied, 122 S. Ct. 809 (2002); Scott v. Boos, 215 F.3d 940, 942 (9th Cir. 2000); Means v. Northern Cheyenne Tribal Ct., 154 F.3d 941, 943 (9th Cir. 1998); Hyatt v. Northrop Corp., 80 F.3d 1425, 1428 (9th Cir. 1996), vacated on other grounds, 521 U.S. 1101 (1997). Note that there is a traditional presumption against retroactive application of statutes. United States v. Bacon, 82 F.3d 822, 824 (9th Cir. 1996).

An federal agency's interpretation or application of a statute is a question of law reviewed de novo. See Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001); Friend v. Reno, 172 F.3d 638, 641 (9th Cir. 1999); Lafarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999). Courts must reject constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (establishing two-part standard for reviewing an agency's interpretation of a statute); Brower, 257 F.3d at 1065; Foothill Presbyterian Hosp. v. Shalala, 152 F.3d 1132, 1134 (9th Cir. 1998); Anaheim Mem'l Hosp. v. Shalala, 130 F.3d 845, 859 (9th Cir. 1997). Nonetheless, a federal agency's interpretation of a statutory provision it is charged with administering may be entitled to deference. See Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1053 (9th Cir. 2002) (noting that deference is owed unless agency's interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); Royal Foods Co. v. RJR Holdings Inc., 252 F.3d 1102, 1106 (9th Cir. 2000) (noting that under the two-part Chevron analysis, deference is due the agency's interpretation of a statute unless the plain language is unambiguous "with regard to the precise matter at issue"); CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001) (describing Chevron standard).

24. **Substantive Areas of Law**

a. **Admiralty**

The judgment of a admiralty court is reviewed for clear error. See Simeonoff v. Hiner, 249 F.3d 883, 888 (9th Cir. 2001). An admiralty court's findings of fact are reviewed under the clearly erroneous standard of review. See Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113-14 (9th Cir. 1998) (marine peril); Fireman's Fund Ins. Cos. v. Big Blue Fisheries, Inc., 143 F.3d 1172, 1177 (9th Cir. 1998) (damage computation); Chan v. Society Expeditions, Inc., 123 F.3d 1287, 1290 (9th Cir. 1997); Resner v. Arctic Orion Fisheries, 83 F.3d 271, 273 (9th Cir. 1996); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996); Mateo v. M/S Kiso, 41 F.3d 1283, 1289 (9th Cir. 1994); Havens v. F/T Polar Mist, 996 F.2d 215, 217 (9th Cir. 1993); Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 822 (9th Cir. 1988). "We reverse only if we are left with a definite and firm conviction that a mistake has been committed." Resner, 83 F.3d at 273 (internal quotation omitted). "This standard also extends, under comparative negligence principles, to an admiralty court's apportionment of fault." Trinidad, 845 F.2d at 822; see also Newby v. F/V Kristen Gail, 937 F.2d 1439, 1441, 1444 (9th Cir. 1991). "Special deference is paid to a trial court's credibility findings." Exxon, 54 F.3d at 576.

An admiralty court's conclusions of law are reviewed de novo. See Harper v. U.S. Seafoods. 278 F.3d 971, 973 (9th Cir. 2002) (interpreting admiralty statute); Nautilus Marine, Inc. v. Neimela, 170 F.3d 1195, 1196 (9th Cir. 1999); Fireman's Fund, 143 F.3d at 1175; Howard v. Crystal Cruises, Inc., 41 F.3d 527, 529 (9th Cir. 1994); Mateo, 41 F.3d at 1289; Havens, 995 F.2d at 217; Trinidad, 845 F.2d at 822. Whether a court may exercise its admiralty jurisdiction is a question of law reviewed de novo. See La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001) (reviewing dismissal for lack of admiralty jurisdiction); H20 Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 916 (9th Cir. 1996); Logistics Management, Inc. v. One Pyramid Tent Arena, 86 F.3d 908, 911 (9th Cir. 1996). Whether a party is liable in admiralty is a question of law reviewed de novo. Chan, 123 F.3d at 1290. The court's interpretation of the terms of a bill of lading is reviewed de novo. Sea-Land Serv., Inc. v. Lozen Intern., 285 F.3d 808, 813 (9th Cir. 2002). Whether a party's claims give rise to a maritime lien so that the party may pursue an action in rem against a vessel is a question of law reviewed de novo. See Myers v. American Triumph F/V, 260 F.3d 1067, 1069 (9th Cir. 2001).

Whether the doctrine of maintenance and cure applies to a given set of facts is a question of law reviewed de novo. See Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1044 (9th Cir. 1999). The question of the existence of a duty is a matter of law subject to de novo review in maritime law. Sutton v. Earles, 26 F.3d 903, 912 n.8 (9th Cir. 1994). The district court's award of damages for pain, suffering, and permanent

partial disability made under the Jones Act will not be disturbed on appeal unless the award "shocks the conscience or was motivated by the trial judge's passion or prejudice." Havens v. F/T Polar Mist, 996 F.2d 215, 219 (9th Cir. 1993).

Evidentiary rules by the admiralty court are reviewed for an abuse of discretion. See Sea-Land Serv., 285 F.3d at 813 (summary judgment); Evanow, 163 F.3d at 113. This court will not reverse absent some prejudice. Evanow, 163 F.3d at 113. The district court's order regarding the apportionment of costs incurred while the vessel was in custodia legis is reviewed for abuse of discretion. Certain Underwriters at Lloyds v. Kenco Marine Terminal, Inc., 81 F.3d 871, 872 (9th Cir. 1996). A district court's order confirming a United States Marshal's sale of a vessel is reviewed for an abuse of discretion. Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir.1999). An award of costs made by an admiralty court is reviewed for an abuse of discretion, but whether the court had authority to award costs is reviewed de novo. Evanow, 163 F.3d at 1113. The court's decision whether to award prejudgment interest is reviewed for an abuse of discretion. See Simeonoff, 249 F.3d at 894.

b. **Americans with Disabilities Act (ADA)**

An interpretation of the ADA is reviewed de novo. See Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1047 (9th Cir. 2000); Martin v. PGA Tour, Inc., 204 F.3d 994, 997 (9th Cir. 2000), aff'd 121 S. Ct. 1879 (2001); Bay Area Addiction Research and Treatment, Inc., 179 F.3d 725, 730 (9th Cir. 1999). The court's decision to grant summary judgment in an ADA action is reviewed de novo. See Humphrey v. Memorial Hospitals Ass'n., 239 F.3d 1128, 1133 (9th Cir.), cert. denied, 122 S. Ct. 1592 (2001). Whether a party is immune from an ADA action is a question of law reviewed de novo. See Demshki v. Monteith, 255 F.3d 986, 988 (9th Cir. 2001). Dismissal of an ADA action without leave to amend is also reviewed de novo. See Lee v. City of Los Angeles, 250 F.3d 668, 691-92 (9th Cir. 2001).

Regulations promulgated under the ADA must be given "legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute." Does 1-5 v. Chandler, 83 F.3d 1150, 1153 (9th Cir. 1996) (internal quotation omitted). The preemptive effect of the ADA is a question of law reviewed de novo. See Saridakis v. United Airlines, 166 F.3d 1272, 1276 (9th Cir. 1999). Whether a per se rule exists barring ADA claims after a claimant has applied for and received disability benefits is a question of law reviewed de novo. Johnson v. Oregon Dep't of Human Resources, 141 F.3d 1361, 1364 (9th Cir. 1998) (rejecting application of judicial estoppel). Whether a plaintiff has waived the right to sue under the ADA by agreeing

to arbitrate any employment-related disputes is a question of law reviewed de novo. See Kummetz v. Tech Mold, 152 F.3d 1153, 1154 (9th Cir. 1998). The reasonable accommodation of a disability is a question of fact reviewed for clear error. See Fuller v. Frank, 916 F.2d 558, 562 n.6 (9th Cir. 1990); but see Morton v. United Parcel Service, 272 F.3d 1249, 1253 (9th Cir. 2001) (applying de novo review when summary judgment is based on court's reasonable accommodation determination), cert. denied, 122 S. Ct. 1910 (2002). An award of attorneys fees in an ADA action is reviewed for an abuse of discretion. See Barrios v. California Interscholastic Fed., 277 F.3d 1128, 1133-35 (9th Cir. 2002); Fisher v. SJB-P.D. Inc., 214 F.3d 1115, 1119 (9th Cir. 2000).

c. **Antitrust**

Whether specific conduct is anticompetitive is a question of law reviewed de novo. SmileCare Dental Group v. Delta Dental Plan, 88 F.3d 780, 783 (9th Cir. 1996). Whether alleged acts, if proved, might be found anticompetitive and predatory within the meaning of the antitrust laws is a question of law reviewed de novo. Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992). Antitrust standing is a question of law reviewed de novo. American Ad Management v. General Tel. Co., 190 F.3d 1051, 1054 (9th Cir. 1999); Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1996); Hillis Motors, Inc. v. Hawaii Automotive Dealers' Ass'n, 997 F.2d 581, 584 (9th Cir. 1993). Whether a party possesses monopoly power is a question of fact, but whether specific conduct is anticompetitive in violation of the Sherman Act is one of law reviewed de novo. Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1425 (9th Cir. 1993).

The grant of summary judgment is reviewed de novo. See County of Tuolumne v. Sonora Comm. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001) (noting standards for antitrust actions). The denial of judgment as a matter of law is also reviewed de novo. Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997) (noting factors for antitrust cases). A jury's award of damages is reviewed for substantial evidence. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1221 (9th Cir. 1997) (noting relaxed standard for antitrust cases).

Dismissal of a complaint alleging antitrust violations is reviewed de novo. See Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 984 (9th Cir. 2000) (noting requirements for antitrust complaint); Big Bear Lodging Assoc. v. Snow Summit, Inc.,

182 F.3d 1096, 1101 (9th Cir. 1999) (noting that dismissal was without leave to amend).

An award of attorneys fees in an antitrust action is reviewed for an abuse of discretion. See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 109 F.3d 602, 607 (9th Cir. 1997); Hasbrouck v. Texaco, Inc., 879 F.2d 632, 635 (9th Cir. 1989).

d. **Bankruptcy**

This court reviews de novo the district court's decision on an appeal from a bankruptcy court. See In re Cardelucci, 285 F.3d 1231, 1233 (9th Cir. 2002); In re Smith's Home Furnishings, Inc., 265 F.3d 959, 962-63 (9th Cir. 2001); In re First T.D. & Investment, Inc., 253 F.3d 520, 526 (9th Cir. 2001); In re Dudley, 249 F.3d 1170, 1173 (9th Cir. 2001); In re Gruntz, 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc); Preblich v. Battley, 181 F.3d 1048, 1051 (9th Cir. 1999); In re Turley, 172 F.3d 671, 673 (9th Cir. 1999); Richmond v. United States, 172 F.3d 1099, 1101 (9th Cir. 1999); In re Wilbur, 126 F.3d 1218, 1219 (9th Cir. 1997); In re Claremont Acquisition Corp., 113 F.3d 1029, 1031 (9th Cir. 1997); In re Daily, 47 F.3d 365, 367 (9th Cir. 1995); In re Siragusa, 27 F.3d 406, 407 (9th Cir. 1994). Thus, this court applies the same standard of review applied by the district court. See Cardelucci, 285 F.3d at 1233 (statutory interpretation); In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998); In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243, 1245 (9th Cir. 1997) (summary judgment); In re Lazar, 83 F.3d 306, 308 (9th Cir. 1996). No deference is given to the district court's decision. See In re Harmon, 250 F.3d 1240, 1245 (9th Cir. 2001); In re Larry's Apartment, 249 F.3d 832, 836 (9th Cir. 2001); Preblich, 181 F.3d at 1051; In re Maya Constr. Co., 78 F.3d 1395, 1398 (9th Cir. 1996); In re Weisman, 5 F.3d 417, 419 (9th Cir. 1993). The district court's acceptance of jurisdiction over core proceedings in bankruptcy is reviewed de novo. In re Harris Pine Mills, 44 F.3d 1431, 1434 (9th Cir. 1995)

This court reviews the bankruptcy court's conclusions of law de novo and its factual findings for clear error. See In re Su, 290 F.3d 1140, 1142 (9th Cir. 2002); In re Reaves, 285 F.3d 1152, 1155 (9th Cir. 2002); In re Los Gatos Lodge, Inc., 278 F.3d 890, 893 (9th Cir. 2002); In re Jastrem, 253 F.3d 438, 441 (9th Cir. 2001); In re Dudley, 249 F.3d 1170, 1173 (9th Cir. 2001); In re P.R.T.C., Inc., 177 F.3d 774, 782 (9th Cir. 1999); Preblich, 181 F.3d at 1051; Richmond, 172 F.3d at 1101; In re Filtercorp, Inc., 163 F.3d 570, 576 (9th Cir. 1998); In re Pena, 155 F.3d 1108, 1110 (9th Cir. 1998); Claremont Acquisition, 113 F.3d at 1031; Lazar, 83 F.3d at 308; Weisman, 5 F.3d at

419. Note, however, that "[f]indings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge." In re Alcock, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995).

The bankruptcy court's decision to grant summary judgment is reviewed de novo. See In re Stanton, 285 F.3d 888, 891 (9th Cir. 2002); In re Betacom, 240 F.3d 823, 828 (9th Cir. 2001); In re Home America T.V. Appliance Audio, Inc., 232 F.3d 1046, 1050 (9th Cir. 2000), cert. denied, 122 S. Ct. 39 (2001); Filtercorp, 163 F.3d at 578; In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243, 1245 (9th Cir. 1997). The court's denial of summary judgment is also reviewed de novo. In re Prestige Ltd. P'ship-Concord, 234 F.3d 1108, 1112-14 (9th Cir. 2000) (explaining when denial of summary judgment may be reviewed).

A bankruptcy court's decision to dismiss an action for failure to state a claim is reviewed de novo. See In re Hemmeter, 242 F.3d 1186, 1189 (9th Cir. 2001); In re Rogstad, 126 F.3d 1224, 1228 (9th Cir. 1997). The court's decision to vacate a confirmation order is reviewed de novo. See In re Lowenschuss, 170 F.3d 923, 932 (9th Cir. 1999). The bankruptcy court's legal conclusion that trustees can transfer their avoidance powers is also reviewed de novo. See P.R.T.C., 177 F.3d at 780. The district court's ruling that a bankruptcy court's decision is an appealable, final order is reviewed de novo. See In re Bonham, 229 F.3d 750, 761 (9th Cir. 2000); P.R.T.C., 177 F.3d at 779.

The bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion. In re Renovizor's, Inc., 282 F.3d 1233, 1237 n.1 (9th Cir. 2002); In re Smith's Home Furnishings, Inc., 265 F.3d 959, 963 (9th Cir. 2001); In re Kim, 130 F.3d 863, 865 (9th Cir. 1997); In re Gergely, 110 F.3d 1448, 1452 (9th Cir. 1997). The court's decision to approve a compromise as part of a plan is reviewed for an abuse of discretion. See In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1065 (9th Cir. 2001) (noting that court abuses its discretion by erroneously interpreting the applicable law); In re Arden, 176 F.3d 1226, 1228 (9th Cir. 1999). The court's decision to appoint a trustee is reviewed for an abuse of discretion. In re Lowenschuss, 171 F.3d 673, 685 (9th Cir. 1999). The denial of a motion for a new trial is reviewed for an abuse of discretion. In re Jess, 169 F.3d 1204, 1209 (9th Cir. 1999). This court reviews for abuse of discretion the bankruptcy court's exercise of discretion over a creditor's voluntary withdrawal of claims. In re Lowenschuss, 67 F.3d 1394, 1399 (9th Cir. 1995). A dismissal for failure to serve a summons and complaint is reviewed for an abuse of discretion. See In re Sheehan, 253 F.3d 507, 511 (9th Cir. 2001). The

court's refusal to reopen a bankruptcy case is reviewed for an abuse of discretion. See In re McGhan, 288 F.3d 1172, 1178 (9th Cir. 2002).

Decisions of the Bankruptcy Appellate Panel are reviewed de novo. See In re Su, 290 F.3d 1140, 1142 (9th Cir. 2002); In re McGhan, 288 F.3d 1172, 1178 (9th Cir. 2002); In re Reaves, 285 F.3d 1152, 1155 (9th Cir. 2002); In re Scovis, 249 F.3d 975, 980 (9th Cir. 2001); In re Dunbar, 245 F.3d 1058, 1061 (9th Cir. 2001); In re Cool Fuel, Inc., 210 F.3d 999, 1001 (9th Cir. 2000); In re Harry Mitchell, 209 F.3d 1111, 1115 (9th Cir. 2000); In re Bernal, 207 F.3d 595, 597 (9th Cir. 2000); In re Arden, 176 F.3d 1226, 1227 (9th Cir. 1999); In re CFLC, Inc., 166 F.3d 1012, 1015 (9th Cir. 1999); In re Megafoods Stores, Inc., 163 F.3d 1063, 1067 (9th Cir. 1998); In re Parker, 139 F.3d 668, 670 (9th Cir. 1998); Kim, 130 F.3d at 865; In re Fischer, 116 F.3d 388, 390 (9th Cir.), amended by 127 F.3d 819 (9th Cir. 1997); In re Johnston, 21 F.3d 323, 326 (9th Cir. 1994). This court independently reviews bankruptcy courts' rulings on appeal from the BAP. See In re Su, 290 F.3d at 1142; In re Reaves, 285 F.3d at 1155; In re Sheehan, 253 F.3d 507, 511 (9th Cir. 2001); In re Taggart, 249 F.3d 987, 990 (9th Cir. 2001); Dunbar, 245 F.3d at 1061; Mitchell, 209 F.3d at 1115; Bernal, 207 F.3d at 597; Cool Fuel, 210 F.3d at 1001-02; In re Tuli, 172 F.3d 707, 709 (9th Cir. 1999); CFCL, 166 F.3d at 1015; Megafoods, 163 F.3d at 1067; In re Weisberg, 136 F.3d 655, 657 (9th Cir. 1998); Kim, 130 F.3d at 865; In re Saylor, 108 F.3d 219, 220 (9th Cir. 1997); In re Pace, 67 F.3d 187, 191 (9th Cir. 1995).

The bankruptcy court's interpretation of the Bankruptcy Code is reviewed de novo. See In re Su, 290 F.3d 1140, 1142 (9th Cir. 2002); In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1065 (9th Cir. 2001); In re Taggart, 249 F.3d 987, 990 (9th Cir. 2001); In re Celebrity Home Entertainment, Inc., 210 F.3d 995, 997 (9th Cir. 2000); In Re G.I. Indus., Inc., 204 F.3d 1276, 1279 (9th Cir. 2000); In re Been, 153 F.3d 1034, 1036 (9th Cir. 1998); In re Parker, 139 F.3d 668, 672 (9th Cir. 1998); In re Federated Group, Inc., 107 F.3d 730, 732 (9th Cir. 1997); In re Harrell, 73 F.3d 218, 219 (9th Cir. 1996) (per curiam). BAP's interpretation of the code is also reviewed de novo. See In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1065 (9th Cir. 2001); In re Berg, 230 F.3d 1165, 1167 (9th Cir. 2000). BAP's interpretation of a bankruptcy rule is reviewed de novo. See In re Los Angeles Int'l Airport Hotel Assocs., 106 F.3d 1479, 1480 (9th Cir. 1997).

Jurisdictional issues in bankruptcy are reviewed de novo. See In re McGhan, 288 F.3d 1172, 1178 (9th Cir. 2002); In re Bonham, 229 F.3d 750, 761 (9th Cir. 2000) (final order); In re Harry Mitchell, 209 F.3d 1111, 1115 (9th Cir. 2000) (sovereign immunity); In Re G.I. Indus., Inc., 204 F.3d 1276, 1279 (9th Cir. 2000) (subject matter

jurisdiction); In re Filtercorp, Inc., 163 F.3d 570, 576 (9th Cir. 1998) (mootness); In re Vylene Enters., Inc., 90 F.3d 1472, 1475 (9th Cir. 1996); In re Arnold & Baker Farms, 85 F.3d 1415, 1419 (9th Cir. 1996); In re United Ins. Management, Inc., 14 F.3d 1380, 1383 (9th Cir. 1994); In re Castlerock Properties, 781 F.2d 159, 161 (9th Cir. 1986). Whether plaintiffs in a bankruptcy proceeding have established a prima facie case for personal jurisdiction is a question of law reviewed de novo. In re Pintlar Corp., 133 F.3d 1141, 1144 (9th Cir. 1997). Domicile is a question of fact reviewed for clear error. In re Lowenschuss, 171 F.3d 673, 684 (9th Cir. 1999).

A bankruptcy court's finding that a claim is or is not substantially similar to other claims within the meaning of 11 U.S.C. § 1122(a) constitutes a finding of fact reviewable under the clearly erroneous standard. In re Johnston, 21 F.3d 323, 327 (9th Cir. 1994). Whether a creditor relied upon false statements is a question fact reviewed for clear error. In re Candland, 90 F.3d 1466, 1469 (9th Cir. 1996). Whether a debtor acted with intent to hinder, delay, or defraud creditors is a finding reviewed for clear error. In re Lawson, 122 F.3d 1237, 1240 (9th Cir. 1997). The court's finding of bad faith is reviewed for clear error. In re Leavitt, 171 F.3d 1219, 1222-23 (9th Cir. 1999). Reconstruction of income through statistical methods is a factual question reviewed for clear error. In re Renovizor's, Inc., 282 F.3d 1233, 1237 n.1 (9th Cir. 2002).

The bankruptcy court has no discretion to allow a late-filed proof of claim. In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996). The timeliness of a notice of appeal from the bankruptcy court to the district court is a question of law reviewed de novo. In re Delaney, 29 F.3d 516, 517-18 (9th Cir. 1994) (per curiam). The district court's decision to withdraw reference to the bankruptcy court is reviewed for an abuse of discretion. Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1008 (9th Cir. 1997). The bankruptcy court's decision on a motion to reopen or to supplement the record is reviewed for an abuse of discretion. In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998). The bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. In Re Kaypro, 218 F.3d 1070, 1073 (9th Cir. 2000). The court's decision to vacate its prior order of dismissal is reviewed for an abuse of discretion. See In re Sylman, 234 F.3d 1081, 1086 (9th Cir. 2000).

Whether the automatic stay provisions of 11 U.S.C. § 362(a) have been violated is a question of law reviewed de novo. See In re Del Mission Ltd., 98 F.3d 1147, 1150 (9th Cir. 1996); In re Chugach Forest Prods., Inc., 23 F.3d 241, 244 (9th Cir. 1994). The decision to grant relief from the automatic stay is reviewed for an abuse of discretion. See In re Cybernetic Servs., Inc., 252 F.3d 1039, 1045 (9th Cir. 2001), cert. denied, 122 S. Ct. 1069 (2002); In re Gruntz, 202 F.3d 1074, 1084 n.9 (9th Cir. 2000)

(en banc); In re Lowenschuss, 170 F.3d 923, 928 (9th Cir. 1999); In re National Envtl. Waste Corp., 129 F.3d 1052, 1054 (9th Cir. 1997); In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996); In re Kissinger, 72 F.3d 107, 108 (9th Cir. 1995).

The bankruptcy court's award of attorneys fees must be upheld unless the court abused its discretion or erroneously applied the law. See In re Jastrem, 253 F.3d 438, 442 (9th Cir. 2001); In re Larry's Apartment, 249 F.3d 832, 836 (9th Cir. 2001); In re Kord Enter., 139 F.3d 684, 686 (9th Cir. 1998); In re Lazar, 83 F.3d 306, 308 (9th Cir. 1996); In re Vasseli, 5 F.3d 351, 352 (9th Cir. 1993); see also In re Hunt, 238 F.3d 1098, 1101 (9th Cir. 2001) (awarding fees pursuant to 11 U.S.C. § 523(d)). The amount of the fee award is also reviewed for an abuse of discretion. See Hunt, 238 F.3d at 1101; In re B.U.M. Int'l, 229 F.3d 824, 828 (9th Cir. 2000); In re Lewis, 113 F.3d 1040, 1043 (9th Cir. 1997).

When a transfer occurs within the meaning of the Bankruptcy Code is a question of law reviewed de novo. In re Roosevelt, 87 F.3d 311, 315 (9th Cir.), amended by 98 F.3d 1169 (9th Cir. 1996).

Whether a Chapter 11 plan provides a secured creditor with the indubitable equivalent of its claim is a question of law reviewed de novo. In re Arnold & Baker Farms, 85 F.3d 1415, 1420 (9th Cir. 1996).

The bankruptcy court's entry of a nunc pro tunc approval is reviewed for abuse of discretion or erroneous application of law. See In re Bonham, 229 F.3d 750, 763 (9th Cir. 2000); In re Atkins, 69 F.3d 970, 973 (9th Cir. 1995).

Whether a claim is nondischargeable presents mixed issues of law and fact reviewed de novo. See In re Diamond, 285 F.3d 822, 826 (9th Cir. 2002); In re Peklar, 260 F.3d 1035, 1037 (9th Cir. 2001); In re Rifino, 245 F.3d 1083, 1087 (9th Cir. 2001); In re Bammer, 131 F.3d 788, 790 (9th Cir. 1997) (en banc) (overruling prior cases). Whether a pre-petition installment contract for legal services rendered in contemplation of bankruptcy is discharged presents a question of law reviewed de novo. In re Biggar, 110 F.3d 685, 687 (9th Cir. 1997).

The bankruptcy court has broad discretion to determine whether to grant an administrative expense claim. See In re Kadjevich, 220 F.3d 1016, 1019 (9th Cir. 2000); In re DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995). When its decision to deny an administrative claim is based on its interpretation of law, however, review is de novo. In re Allen Care Ctrs., Inc., 96 F.3d 1328, 1330 n.1 (9th Cir. 1996).

e. **Civil Rights**

A district court's grant of summary judgment in a 42 U.S.C. § 1983 action is reviewed de novo. See Bauer v. Sampson, 261 F.3d 775, 781 (9th Cir. 2001); Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir. 2000); Stone v. City of Prescott, 173 F.3d 1172, 1174 (9th Cir. 1999); Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999); Picray v. Sealock, 138 F.3d 767, 770 (9th Cir. 1998). The court's denial of summary judgment is also reviewed de novo. See Brewster v. Shasta County, 275 F.3d 803, 806 (9th Cir. 2001) (§ 1983 liability).

A court's decision to dismiss a § 1983 action pursuant to Rule 12(b)(6) is reviewed de novo. See Wyatt v. Terhune, 280 F.3d 1238, 1244-45 (9th Cir. 2002) (reviewing dismissal of § 1983 action based on failure to exhaust remedies as required by the PLRA); Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir. 2001); Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001); Morales v. City of Los Angeles, 214 F.3d 1151, 1153 (9th Cir. 2000); Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999); Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir. 1998). The court's denial of leave to amend the complaint to add additional civil rights claims is reviewed for an abuse of discretion. See Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (en banc).

A district court's decision on qualified immunity in a § 1983 action is reviewed de novo. See Elder v. Holloway, 510 U.S. 510, 516 (1994); Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002); Nelson v. Heiss, 271 F.3d 891, 893 (9th Cir. 2001); Robinson v. Prunty, 249 F.3d 862, 865-66 (9th Cir. 2001); DiRuzza v. County of Tehama, 206 F.3d 1304, 1313 (9th Cir. 2000); Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999); Ferguson v. City of Phoenix, 157 F.3d 668, 676 (9th Cir. 1998); Jensen v. Oxnard, 145 F.3d 1078, 1082 (9th Cir. 1998); Hyland v. Wonder, 117 F.3d 405, 409 (9th Cir.), amended by 127 F.3d 1135 (9th Cir. 1997); Newell v. Sauser, 79 F.3d 115, 116 (9th Cir. 1996); Neely v. Feinstein, 50 F.3d 1502, 1507 (9th Cir. 1995). The court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. See Sorrels, 290 F.3d at 969; Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 (9th Cir. 2002); Case v. Kitsap County Sheriff's Dep't., 249 F.3d 921, 925 (9th Cir. 2001); Mabe v. San Bernardino County, 237 F.3d 1101, 1106 (9th Cir. 2001); LSO, Ltd, v. Stroh, 205 F.3d 1146, 1157 (9th Cir. 2000); Herb Hallman Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 641 (9th Cir. 1999); Knox v. Southwest Airlines, 124 F.3d 1103, 1105 (9th Cir. 1997). The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. See Billington v. Smith, 292 F.3d 1177, 1183 (9th Cir. 2002); Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir. 2000);

Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000); Nunez, 169 F.3d at 1222; Moran v. State of Washington, 147 F.3d 839, 844 (9th Cir. 1998); Thompson v. Souza, 111 F.3d 694, 698 (9th Cir. 1997). Whether governing law was clearly established at the time of the alleged violation is a question of law reviewed de novo. See Mabe, 237 F.3d at 1106; Kelly v. City of Oakland, 198 F.3d 779, 784 (9th Cir. 1999); Oona, R.-S.-by Kate S. v. McCaffrey, 143 F.3d 473, 475 (9th Cir. 1998). Whether specific facts constitute a violation of established law is a legal determination reviewed de novo. See Mabe, 237 F.3d at 1106.

The court's refusal to dismiss a defendant based on sovereign immunity is reviewed de novo. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2002).

Whether a plaintiff is a "policymaker" or "confidential employee" not entitled to bring a § 1983 based on First Amendment retaliation is a mixed question of law and fact reviewed de novo. See Walker v. City of Lakewood, 272 F.3d 1114, 1132 (9th Cir. 2001) (noting intercircuit conflict), cert. denied, 122 S. Ct. 1607 (2002).

A probable cause determination in a false arrest claim is reviewed de novo. Picray v. Sealock, 138 F.3d 767, 770 (9th Cir. 1998).

Standing to assert a claim under § 1983 presents a question of law reviewed de novo. See LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000); Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 369 (9th Cir. 1998); Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir. 1998).

A district court's decision whether to exercise supplemental jurisdiction in a § 1983 action is reviewed de novo. San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 478 (9th Cir. 1998); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996).

Attorneys fees awarded in § 1983 actions are reviewed for an abuse of discretion. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Webb v. Ada County, 285 F.3d 829, 837 (9th Cir. 2002); Bauer v. Sampson, 261 F.3d 775, 781 (9th Cir. 2001); LSO, 205 F.3d at 1160; Herb Hallman Chevrolet, 169 F.3d at 642; Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997); Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996); Trevino v. Gates, 99 F.3d 911, 924 (9th Cir. 1996); McGrath v. County of Nev., 67 F.3d 248, 252 (9th Cir. 1995); see also Webb v. Ada County, 285 F.3d 829, 834 (9th Cir. 2002) (noting that PLRA limits the amount of fees that can be awarded in actions brought on behalf of prisoners); Gilbrook v. City of Westminster, 177 F.3d 839, 876

(9th Cir. 1999) (noting that district court's fee award in civil rights cases is entitled to deference). A trial court abuses its discretion if its fee award is based on an inaccurate view of the law or a clearly erroneous finding of fact. Barjon, 132 F.3d at 500. Any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed de novo. Corder, 104 F.3d at 249; Associated Gen. Contractors v. Smith, 74 F.3d 926, 930 (9th Cir. 1996); Kilgour v. Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1995). Factual findings underlying the district court's award are reviewed for clear error. Corder, 104 F.3d at 249; Stivers v. Pierce, 71 F.3d 732, 751 (9th Cir. 1995); Kilgour, 53 F.3d at 1010 ("prevailing party" determination).

A district court's decision to deny fees in a civil rights action is also reviewed for an abuse of discretion. Webb v. Ada County, Idaho, 195 F.3d 524, 526 (9th Cir. 1999); Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999); Corder, 104 F.3d at 249. Any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewed de novo. Native Village of Venetie IRA Council v. State of Alaska, 155 F.3d 1150, 1151-52 (9th Cir. 1998). Factual findings are reviewed for clear error. Id. at 1152.

f. **Discrimination Claims**

Legal questions in discrimination actions brought under Title VII and similar statutes are reviewed de novo, while a district court's underlying findings of fact are subject to clearly erroneous review. See Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 871 (9th Cir. 2001) (noting that findings based on credibility determinations are given "greater deference"); Star v. West, 237 F.3d 1036, 1038 (9th Cir. 2001) (Title VII); Gilligan v. Department of Labor, 81 F.3d 835, 838 (9th Cir. 1996); Fuller v. Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Atonio v. Wards Cove Packing Co., 827 F.2d 439, 443 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 642 (1989). Whether a party has complied the administrative claim requirements of Title VII is reviewed de novo. See Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001). Whether a Title VII action is barred by the applicable statute of limitations is a question of law reviewed de novo. See EEOC v. Dinuba Medical Clinic, 222 F.3d 580, 584 (9th Cir. 2000). Whether an employer "took immediate and appropriate remedial action" is a mixed question of law and fact reviewed de novo. See Star, 237 F.3d at 1038. Venue in a Title VII action is reviewed de novo. Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 504 (9th Cir. 2000).

A district court's conclusion whether a plaintiff has satisfied the elements of a prima facie case is reviewed de novo, although the underlying findings of fact are

reviewed for clear error. See Paige v. California, 291 F.3d 1141, 1145 n.3 (9th Cir. 2002) (disparate impact); Dinuba Medical Clinic, 222 F.3d at 596; Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998); Atonio, 827 F.2d at 443. Findings as to actual discriminatory intent in a civil rights action are findings of pure fact subject to review for clear error. Pullman-Standard v. Swint, 456 U.S. 273, 288-90 (1982); Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1317 n.7 (9th Cir. 1992) (equal protection); Edwards v. Occidental Chem. Corp., 892 F.2d 1442, 1447 (9th Cir. 1990) (Title VII). Whether an employment test was properly validated for purposes of Title VII presents primarily a factual question reviewed for clear error. See Association of Mexican-American Educators v. California, 231 F.3d 572, 584-85 (9th Cir. 2000) (en banc). Whether an employer's proffered justification for differential treatment is pretextual (the third prong of a disparate treatment case) is reviewed under the clearly erroneous standard. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993); Trent v. Valley Elec. Ass'n, Inc., 195 F.3d 534, 537 (9th Cir. 1999); Gilligan, 81 F.3d at 838; Edwards, 892 F.2d at 1449 (resolving prior conflict identified in Atonio, 827 F.2d at 443).

The district court's choice of remedies in a Title VII action is reviewed for an abuse of discretion. See Caudle v. Bristow Optical Co., 224 F.3d 1014, 1023 (9th Cir. 2000); Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 94 F.3d 1366, 1369 (9th Cir. 1996); Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1495 (9th Cir. 1995). An award of attorneys fees in a civil rights case is reviewed for an abuse of discretion. See Shaw v. City of Sacramento, 250 F.3d 1289, 1293-94 (9th Cir. 2001); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997); Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996); McGrath v. County of Nev., 67 F.3d 248, 252 (9th Cir. 1995). Whether punitive damages are available in a Title VII action is a question of law reviewed de novo. EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 992 (9th Cir. 1998). The trial court's allocation of the damages is normally reviewed for an abuse of discretion, but to the extent that allocation rests on an interpretation of Title VII, review is de novo. See Caudle, 224 F.3d at 1023; Passantino, 212 F.3d at 509; see also Pavon v. Swift Transp. Co., 192 F.3d 902, 910 (9th Cir. 1999) (noting that court's application of Title VII's damages cap is subject to de novo review); Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1153 (9th Cir. 1999) (same).

In Equal Pay Act cases, the trial court's factual findings are reviewed for clear error. See Stanley v. University of S. Cal., 13 F.3d 1313, 1324 (9th Cir. 1994) (retaliation); EEOC v. First Citizens Bank, 758 F.2d 397, 400 (9th Cir. 1985) (validity of employer's justifications). Whether an employer has sustained its burden of proving one of the exceptions to the Equal Pay Act is also reviewed for clear error. Maxwell

v. Tucson, 803 F.2d 444, 447 (9th Cir. 1986). Cost awards are reviewed for an abuse of discretion. See Stanley v. University of S. California, 178 F.3d 1069, 1079 (9th Cir. 1999).

g. **Constitutional Law**

Constitutional issues are reviewed de novo. See S.D. Meyers, Inc. v. City and County of San Francisco, 253 F.3d 461, 466 (9th Cir. 2000); Gumataotao v. Director of Dep't of Rev. and Taxation, 236 F.3d 1077, 1079 (9th Cir. 2001); Taylor v. United States, 181 F.3d 1017, 1034 (9th Cir. 1999) (en banc); Martinez v. City of Los Angeles, 141 F.3d 1373, 1382 (9th Cir. 1998); Neal v. Shimoda, 131 F.3d 818, 823 (9th Cir. 1997); Perry v. Los Angeles Police Dep't, 121 F.3d 1365, 1367 (9th Cir. 1997); Cohen v. San Bernardino Valley College, 92 F.3d 968, 971 (9th Cir. 1996); United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996); Gilbert v. National Transp. Safety Bd., 80 F.3d 364, 367 (9th Cir. 1996).

The constitutionality of a statute is reviewed de novo. See Eunique v. Powell, 281 F.3d 940, 943 (9th Cir. 2002) (federal statute); Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1054 (9th Cir. 2000) (state statute), cert. denied, 122 S. Ct. 46 (2001); Free Speech Coalition v. Reno, 198 F.3d 1083, 1090 (9th Cir. 1999) (federal statute); Dittman v. California, 191 F.3d 1020, 1024-25 (9th Cir. 1999) (state statute); Glauner v. Miller, 184 F.3d 1053, 1054 (9th Cir. 1999) (state statute); Tri-State Dev., Ltd. v. Johnston, 160 F.3d 528, 529 (9th Cir. 1998) (state statute); Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 693 (9th Cir. 1997) (federal statute); Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996) (state statute). A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are reviewed de novo. Neal, 131 F.3d at 823; Perry, 121 F.3d at 1368; National Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 587 (9th Cir. 1992); Jacobsen v. United States Postal Serv., 993 F.2d 649, 653 (9th Cir. 1992) (First Amendment); American Fed'n of Gov't Employees, Local 2391 v. Martin, 969 F.2d 788, 790 (9th Cir. 1992) (drug testing).

When the district court upholds a restriction on speech, this court conducts an independent, de novo examination of the facts. See Gentala v. City of Tucson, 244 F.3d 1065, 1071 (9th Cir.) (en banc), vacated on other grounds, 122 S. Ct. 340 (2001); Tucker v. California Dep't of Educ., 97 F.3d 1204, 1209 n.9 (9th Cir. 1996); Jacobsen, 993 F.2d at 653; see also Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1069-70 (9th Cir. 2002) (en banc) (noting that First Amendment questions of "constitutional fact" compel de novo review); Nunez v. Davis, 169 F.3d

1222, 1226 (9th Cir. 1999) ("The determination whether speech involves a matter of public concern is a question of law.").

The constitutionality of a regulation is a question of law reviewed de novo. See Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999); International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1298 (9th Cir. 1991).

h. **Contracts**

The interpretation and meaning of contract provisions are questions of law reviewed de novo. See Yu v. Albany Ins. Co., 281 F.3d 803, 807 n.2 (9th Cir. 2002); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 937 (9th Cir. 2001), cert. denied, 122 S. Ct. 1075 (2002); Kassbaum v. Steppenwolf Prods., Inc., 236 F.3d 487, 490 (9th Cir. 2000), cert. denied, 122 S. Ct. 41 (2001); Mendler v. Winterland Production, Ltd., 207 F.3d 1119, 1121 (9th Cir. 2000); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999); Stanford Univ. Hosp. v. Federal Ins. Co., 174 F.3d 1077, 1083 (9th Cir. 1999); Cariaga v. Laborers Int'l Union, Local No. 1184, 154 F.3d 1072, 1074 (9th Cir. 1998); Confederated Tribes of Siletz Indians v. Oregon, 143 F.3d 481, 484 (9th Cir. 1998); Blue Ridge Ins. Co. v. Stanewich, 142 F.3d 1145, 1147 (9th Cir. 1998); HS Servs., Inc. v. Nationwide Mut. Ins. Co., 109 F.3d 642, 644 (9th Cir. 1997); Crow Tribe of Indians v. Racicot, 87 F.3d 1039, 1045 (9th Cir. 1996); O'Neill v. United States, 50 F.3d 677, 682 (9th Cir. 1995); Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1511 (9th Cir. 1991). Whether reformation of a contract is permissible is a question of law reviewed de novo. Resolution Trust Corp. v. Midwest Fed. Sav. Bank, 36 F.3d 785, 793 (9th Cir. 1993).

The court's decision to grant summary judgment on a contract claim is reviewed de novo. See U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 933 (9th Cir. 2002); Kassbaum, 236 F.3d at 491 (noting that "[s]ummary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning"); In re K F Dairies, Inc., 224 F.3d 922, 924 (9th Cir. 2000); Stanley v. University of S. California, 178 F.3d 1069, 1078 (9th Cir. 1999).

The determination of whether contract language is ambiguous is also a question of law reviewed de novo. See U.S. Cellular Inv., 281 F.3d at 934; Tyler v. Cuomo, 236 F.3d 1124, 1134 (9th Cir. 2000); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999); Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co., 172 F.3d 702, 704 (9th Cir. 1999); Cisneros v. UNUM Life Ins. Co., 134 F.3d

939, 942 (9th Cir. 1998); O'Neill, 50 F.3d at 682; Carpenters Pension Trust Fund v. Underground Constr. Co., 31 F.3d 776, 778 (9th Cir. 1994); Aetna, 948 F.2d at 1511; see also Northwest Envtl. Advocates v. Portland, 56 F.3d 979, 982 (9th Cir. 1995) (treating NPDES permit as contract and applying appropriate standards of review).

When a district court uses extrinsic evidence to interpret a contract, the findings of fact themselves are reviewed under the clearly erroneous standard, while the principles of contract law applied to those facts are reviewed de novo. See DP Aviation v. Smiths Indus. Aerospace and Defense Sys., Ltd., 268 F.3d 829, 836 (9th Cir. 2001); United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1411 (9th Cir. 1995); In re Tamen, 22 F.3d 199, 203 (9th Cir. 1994); Stephens v. Vista, 994 F.2d 650, 655 (9th Cir. 1993). When extrinsic evidence is not considered and the court limits its review to the four corners of the contract, review is de novo. See Shaw v. City of Sacramento, 250 F.3d 1289, 1293 (9th Cir. 2001).

The trial court's factual findings are reviewed for clear error. Cariaga, 154 F.3d at 1074; McDonnell Douglas Corp. v. Thiokol Corp., 124 F.3d 1173, 1176 (9th Cir. 1997). Findings relating to offer, revocation, and rejection are also reviewed under the clearly erroneous standard. Erdman v. Cochise County, 926 F.2d 877, 879 (9th Cir. 1991) (offer); Ah Moo v. A.G. Becker Paribas, Inc., 857 F.2d 615, 621 (9th Cir. 1988) (offer, revocation, rejection); Collins v. Thompson, 679 F.2d 168, 170 (9th Cir. 1982) (offer, revocation, rejection). The existence of a waiver of a contract right is a question of fact. L.K. Comstock & Co. v. United Eng'rs & Constructors, Inc., 880 F.2d 219, 221 (9th Cir. 1989); CBS, Inc. v. Merrick, 716 F.2d 1292, 1295 (9th Cir. 1983).

i. **Copyright/Trademark**

Interpretations of the Copyright Act are reviewed de novo. See Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000). Whether a district court has subject matter jurisdiction over a trademark dispute is a question of law reviewed de novo. See Stuhbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 836 (9th Cir. 2001). Summary judgments are reviewed de novo. See Karl Storz Endoscopy-America, Inc., 285 F.3d 848, 853 (9th Cir. 2002) (reversing summary judgment in Lanham Act action); Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 & 1267 (9th Cir. 2001) (noting that summary judgment is not favored in trademark cases); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) (noting that summary judgment is not favored on questions of substantial similarity); Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) (noting that summary judgment is

appropriate only if "no reasonable juror could find substantial similarity of ideas and expression, viewing the evidence in the light most favorable to the nonmoving party"). Whether something is "sufficiently original" to merit copyright protection is a question of law reviewed de novo. See CDN, Inc. v. Kapes, 197 F.3d 1256, 1259 n.1 (9th Cir. 1999). Whether a given work is protected by copyright laws is a mixed question of law and fact reviewed de novo. See Cavalier v. Random House, 297 F.3d 815, 822 (9th Cir. 2002); Ets-Hokin, 225 F.3d at 1073. Whether laches may be a defense to an action seeking a declaration of co-authorship of a copyrightable work and co-ownership of the copyright is a question of law reviewed de novo. Jackson v. Axton, 25 F.3d 884, 886 (9th Cir. 1994).

The court of appeals reviews a legal and factual determination of likelihood of confusion for clear error. See Walter v. Mattel, Inc., 210 F.3d 1108, 1111 (9th Cir. 2000); Goto.Com, Inc v. Walt Disney Co., 202 F.3d 1199, 1204 (9th Cir. 2000); Brookfield Comm., Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1061 (9th Cir. 1999); E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1291 (9th Cir. 1992); Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1357-58 (9th Cir. 1985) (en banc); see also Clicks Billiards, 251 F.3d at 1264 (noting that likelihood of confusion is a question of fact); Dreamwerks Prod., Inc. v. SKG Studio, 142 F.3d 1127, 1129 & n.1 (9th Cir. 1998) (noting that likelihood of confusion findings made after trial are reviewed for clear error but a trial court's ruling that a plaintiff has not stated a claim for trademark infringement is a ruling of law reviewed de novo). Issues of access and substantial similarity are also findings of fact reviewable under the clearly erroneous standard. Data E. USA, Inc. v. Epyx, Inc., 862 F.2d 204, 206 (9th Cir. 1988). The district court's finding on willful infringement is reviewed for clear error. See Dolman v. Agee, 157 F.3d 708, 714 (9th Cir. 1998). Copying and improper appropriation are issues of fact. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000). Fair use is a mixed question of law and fact reviewed de novo. See Kelly v. Arriba Soft Corp., 280 F.3d 934, 939 (9th Cir. 2002); Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998). The proper copyright classification of a given work is a question of fact. See Leicester v. Warner Bros., 232 F.3d 1212, 1216 (9th Cir. 2000). Findings on the elements of nonfunctionality and secondary meaning are also reviewed for clear error. See Committee for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 822 (9th Cir. 1996); Qualitex Co. v. Jacobson Prods. Co., 13 F.3d 1297, 1304 (9th Cir. 1994), rev'd on other grounds, 514 U.S. 159 (1995).

District courts have wide discretion in setting the amount of statutory damages under the Copyright Act. See Columbia Pictures Television v. Krypton Broad., Inc.,

106 F.3d 284, 296 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 340 (1998); Nintendo of Am., Inc. v. Dragon Pac. Int'l, 40 F.3d 1007, 1010 (9th Cir. 1994); but see Mackie v. Rieser, 296 F.3d 909, 916 (9th Cir. 2002) (reviewing de novo legal standard used to determine damages). The trial court's decision to deny a new trial due to an allegedly excessive jury verdict is reviewed for an abuse of discretion. See Columbia Pictures Indus., Inc. v. Krypton Broadcastings of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001), cert. denied, 122 S. Ct. 1063 (2002).

The district court's decision whether to award attorneys fees under the Copyright Act is reviewed for an abuse of discretion. See Columbia Pictures, 259 F.3d at 1197; Dolman, 157 F.3d at 715; Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1216 (9th Cir. 1997); Yount v. Acuff Rose-Opryland, 103 F.3d 830, 836 (9th Cir. 1996); Fantasy, Inc. v. Fogerty, 94 F.3d 553, 555 (9th Cir. 1996); Magnuson v. Video Yesteryear, 85 F.3d 1424, 1427 (9th Cir. 1996). The court's findings of fact underlying the fee determination are reviewed for clear error. Smith v. Jackson, 84 F.3d 1213, 1221 (9th Cir. 1996). Any legal analysis and statutory interpretations are reviewed de novo. See Entertainment Research, 122 F.3d at 1216. An award of fees under the Lanham Act is reviewed for an abuse of discretion. See Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 711 (9th Cir. 1999); Stephen W. Boney, Inc. v. Boney Servs., Inc., 127 F.3d 821, 825 (9th Cir. 1997); Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1314 (9th Cir. 1997); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1111 (9th Cir. 1992). An award of costs is also reviewed for an abuse of discretion. See Disc Golf Ass'n, Inc. v. Champion Disc, Inc., 158 F.3d 1002, 1009 (9th Cir. 1998).

The legal premises underlying a preliminary injunction are review de novo while the terms are reviewed for an abuse of discretion. See A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1096 (9th Cir. 2002) (copyright infringement). The scope of injunctive relief granted by the district court is reviewed for an abuse of discretion. See Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000); Rolex Watch, 179 F.3d at 708.

j. **Declaratory Judgment Act**

The trial court's decision whether to exercise jurisdiction over a declaratory judgment action is reviewed for an abuse of discretion. See Wilton v. Seven Falls Co., 515 U.S. 277, 289-90 (1995); Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1192 & n.51 (9th Cir. 2000); American Casualty Cov v. Krieger, 181 F.3d 1113, 1117-18 (9th Cir.

1999); Snodgrass v. Provident Life and Accident Ins. Co., 147 F.3d 1163, 1164 (9th Cir. 1998); Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc); see also United Nat'l Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 918-19 (9th Cir. 1998) (explaining discretionary jurisdiction). A trial court may abuse its discretion by failing to provide a party an adequate opportunity to be heard when the court contemplates granting an unrequested declaratory judgment ruling. See Fordyce v. City of Seattle, 55 F.3d 436, 442 (9th Cir. 1995).

Review of the court's decision to grant or deny declaratory relief is de novo. See DP Aviation v. Smiths Indus. Aerospace and Defense Sys., Ltd., 268 F.3d 829, 840 (9th Cir. 2001); Kassbaum v. Steppenwolf Prods., Inc., 236 F.3d 487, 490 (9th Cir. 2000), cert. denied, 122 S. Ct. 41 (2001); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1212 (9th Cir. 1999); Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996); Ablang v. Reno, 52 F.3d 801, 803 (9th Cir. 1995); Tashima v. Administrative Office, 967 F.2d 1264, 1273 (9th Cir. 1992); Fireman's Fund Ins. Co. v. Ignacio, 860 F.2d 353, 354 (9th Cir. 1988).

k. **Defamation**

Appellate courts conduct "independent review" of a jury's finding of actual malice in a defamation action. See Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001); Newton v. National Broad. Co., 930 F.2d 662, 669-72 (9th Cir. 1990); see also Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984); Kaelin v. Globe Communications Corp., 162 F.3d 1036, 1039 (9th Cir. 1998) ("The question of whether evidence in the record is sufficient to support a finding of actual malice is one of law."); Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1252 (9th Cir. 1997) (describing standard as "deferential-yet-de-novo"). Under the rule of independent review, the reviewing court may accept all the purely factual findings of the district court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence. Newton, 930 F.2d at 670. Whether a publication is libelous on its face is a question of law, measured by the effect the publication would have on the mind of the average reader. See Newcombe v. Adolf Coors Co., 157 F.3d 686, 695 (9th Cir. 1998).

l. **Environmental Law**

An agency's action taken under the National Environmental Policy Act (NEPA) is reviewed under two standards: factual disputes implicating substantial agency expertise are reviewed under the arbitrary and capricious standard; legal issues are

reviewed under the reasonableness standard. See Ka Makani ‘O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002); Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 666-67 (9th Cir. 1998); Price Rd. Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505, 1508 (9th Cir. 1997). Thus, an agency’s threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1070 (9th Cir. 2002).

In reviewing the adequacy of an agency's environmental impact statement (EIS), this circuit applies a "rule of reason" standard. See Kern, 284 F.3d at 1071; Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002); Hells Canyon Alliance v. United States Forest Service, 227 F.3d 1170, 1177 (9th Cir. 2000); Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997); see also American Rivers v. FERC, 201 F.3d 1186, 1195 (9th Cir. 2000) (reciting and applying standard); Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 809 (9th Cir. 1999) (reciting test and applying abuse of discretion standard); Presidio Golf Club v. National Park Serv., 155 F.3d 1153, 1160 (9th Cir. 1998) (applying standard); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998) (applying standard); Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998) (noting that "rule of reason analysis and the review for an abuse of discretion are essentially the same"). Whether an EIS satisfies the requirements of NEPA is a question of law reviewed de novo. See Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 471 (9th Cir. 2000) (reviewing de novo and applying APA arbitrary and capricious standard); Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1150 (9th Cir. 1997).

Although review of agency action is generally limited to the administrative record, see Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 573 (9th Cir. 1998), the court in NEPA cases may extend its review beyond the record and permit the introduction of new evidence to determine whether the agency neglected to consider serious environmental consequences or failed adequately to discuss some reasonable alternative. Lowe, 109 F.3d at 526. The court's decision not to allow extra-record evidence is reviewed for an abuse of discretion. See Northcoast, 136 F.3d at 665; see also San Francisco Baykeeper v. Whitman, 297 F.3d 877, 886 (9th Cir. 2002) (noting when district court may consider extra-record evidence).

An agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard. See Ka Makani, 295 F.3d at 959 n.3 (clarifying when standard

applies); Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002); National Parks & Conservation Ass'n. v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001), cert. denied, 122 S. Ct. 903 (2002); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998); Northwest Envtl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997); see also Kern, 284 F.3d at 1070 (noting decision is reviewed for abuse of discretion but will be set aside only if arbitrary and capricious); Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (reviewing for abuse of discretion); Wetlands Action Network v. United States Army Corps of Eng., 222 F.3d 1105, 1114 (9th Cir. 2000) (reviewing agency's decision to prepare and EA rather an EIS); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 556 (9th Cir. 2000) (reviewing agency's decision not to prepare an SEIS). Using this standard, this court considers only whether the agency's decision is based on a "reasoned evaluation of the relevant factors." Northwest Envtl. Defense Ctr., 117 F.3d at 1536 (internal quotation omitted). The court must ensure that the agency has taken a "hard look" at the environmental consequences of its proposed action. See National Parks, 241 F.3d at 730; Wetlands Action Network, 222 F.3d at 1114; Blue Mountains Biodiversity Project, 161 F.3d at 1211.

Many environmental statutes permit an award of attorneys fees "where appropriate." See Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1094 (9th Cir. 1999) (listing statutes, including Endangered Species Act, 16 U.S.C. § 15409(g)(4)). Review of an award of fees under that standard is for an abuse of discretion. See id. at 1096. Whether a particular environmental statute authorizes attorneys fees is a question of law reviewed de novo. See United States v. Stone Container Corp., 196 F.3d 1066, 1068 (9th Cir. 1999) (Clean Air Act).

m. **ERISA**

The interpretation of ERISA, a federal statute, is a question of law reviewed de novo. See Everhart v. Allmerica Fin. Life Ins. Co., 275 F.3d 751, 753 (9th Cir. 2001), cert. denied, 122 S. Ct. 2662 (2002); Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643, 646 (9th Cir. 2000) (en banc); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1149 (9th Cir. 2000); Burrey v. Pacific Gas and Elec. Co., 159 F.3d 388, 392 (9th Cir. 1998); Emard v. Hughes Aircraft Co., 153 F.3d 949, 952 (9th Cir. 1998); Spink v. Lockheed Corp., 125 F.3d 1257, 1260 (9th Cir. 1997); Williams v. UNUM Life Ins. Co., 113 F.3d 1108, 1111 (9th Cir. 1997); Babikian v. Paul Revere Life Ins. Co., 63 F.3d 837, 839 (9th Cir. 1995); Corder v. Howard Johnson & Co., 53 F.3d 225, 229 (9th Cir. 1994). The applicability of other statutes to ERISA presents a question of law reviewed de novo. Kayes v. Pacific

Lumber Co., 51 F.3d 1449, 1455 (9th Cir. 1995). The potential applicability of exhaustion principles to ERISA is also reviewed de novo. Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50 F.3d 1478, 1483 (9th Cir. 1995). The trial court's decision to apply an exception to the exhaustion requirements of ERISA is reviewed, however, for an abuse of discretion. See Dishman v. UNUM Life Ins. Co., 269 F.3d 974, 984 (9th Cir. 2001). The denial of a motion to remand a removal case that allegedly implicates ERISA is reviewed de novo. See Abraham v. Norcal Waste Sys., Inc. 265 F.3d 811, 819 (9th Cir. 2001).

In an action to recover benefits under a plan, de novo review is required "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); see also Schikore v. Bankamerica Supplemental Retirement Plan, 269 F.3d 956, 960-61 (9th Cir. 2001) (explaining when abuse of discretion standard applies); Ingram v. Martin Marieta Long Term Disability Income Plan, 244 F.3d 1109, 1112 (9th Cir. 2001) (explaining when review is de novo or abuse of discretion); Thomas v. Oregon Fruit Products Co., 228 F.3d 991, 993-94 (9th Cir. 2000) (applying Firestone standard); McDaniel v. Chevron Corp., 203 F.3d 1099, 1107 (9th Cir. 2000) (explaining Firestone); Walker v. American Home Shield Long Term Disability Plan, 180 F.3d 1065, 1069 (9th Cir. 1999) (explaining that de novo standard applies to both law and factual determinations); Kearney v. Standard Ins. Co., 175 F.3d 1084, 1087-90 (9th Cir. 1999) (en banc) (explaining when de novo review should be applied); Estate of Shockley v. Alyeska Pipeline Serv. Co., 130 F.3d 403, 405 (9th Cir. 1997); Snow v. Standard Ins. Co., 87 F.3d 327, 330 (9th Cir. 1996); Parker v. Bank Am. Corp., 50 F.3d 757, 763 (9th Cir. 1995); Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1524 (9th Cir. 1993); Dytrt v. Mountain State Tel. & Tel. Co., 921 F.2d 889, 894 (9th Cir. 1990); see also Newcomb v. Standard Ins. Co., 187 F.3d 1004, 1006 (9th Cir. 1999) (explaining that Kearney overruled Snow).

When such discretion exists, the district court reviews the administrator's determinations for an abuse of discretion. See Schikore, 269 F.3d at 960; McDaniel, 203 F.3d at 1107; Bendixen v. Standard Ins. Co., 185 F.3d 939, 942 (9th Cir. 1999); Friedrich v. Intel Corp., 181 F.3d 1105, 1109 (9th Cir. 1999); Shockley, 130 F.3d at 405; Snow, 87 F.3d at 330; Winters v. Costco Wholesale Corp., 49 F.3d 550, 552 (9th Cir. 1995); see also Tremain v. Bell Indus., Inc. 196 F.3d 970, 975 n.5 (9th Cir. 1999) (noting that arbitrary and capricious standard is synonymous with abuse of discretion standard); Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1009 (9th Cir. 1997) (en banc) (noting that review is under arbitrary or capricious standard or for abuse of discretion,

"which comes to the same thing"); Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1471 n.2 (9th Cir. 1993) (explaining that other recent decisions have also used the standard "arbitrary and capricious" but that it is a "distinction without a difference"); see also Watkins, 12 F.3d at 1524 (arbitrary and capricious). The trial court's choice and application of the appropriate standard is reviewed by this court de novo. See Regula v. Delta Family-Care Survivorship Plan, 266 F.3d 1130, 1138 (9th Cir. 2001); Hensley v. Northwest Permanente P.C., 258 F.3d 986, 994 (9th Cir. 2001), cert. denied, 122 S. Ct. 815 (2002); Thomas, 228 F.3d at 993; McDaniel, 203 F.3d at 1107; Tremain, 196 F.3d at 975; Friedrich, 181 F.3d at 1109; Lang v. Long-Term Disability Plan, 125 F.3d 794, 797 (9th Cir. 1997). Note, however, that the abuse of discretion standard can be "heightened" by the presence of a serious conflict of interest by the administrator of the plan. See Bergt v. Retirement Plan for Pilots Employed by Markair, Inc., 293 F.3d 1139, 1142 (9th Cir. 2002); Bendixen, 185 F.3d at 943; Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322 (9th Cir. 1995); Barnett v. Kaiser Found. Health Plan, Inc., 32 F.3d 413, 415-16 (9th Cir. 1994); see also Schikore, 269 F.3d at 961 (declining to decide whether "heightened" standard applies). An ERISA plan administrator abuses its discretion if it construes provisions of the plan in a way that conflicts with the plain language of the plan. See Schikore, 269 F.3d at 960; Saffle v. Sierra Pac. Power Co., 85 F.3d 455, 456 (9th Cir. 1996).

Under 29 U.S.C. § 1401(a)(3)(A), any determination made by a plan sponsor is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. "[A] reasonableness standard is . . . deferential . . . , requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever the required degree of proof." Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993).

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. See Friedrich, 181 F.3d at 1110-11. The court's decision to permit evidence that was not before the plan administrator is also reviewed for an abuse of discretion. See Dishman, 269 F.3d at 985.

Whether ERISA preempts state law is a question of law reviewed de novo. See Southern California IBEW-NECA Trust Funds v. Standard Indus. Elect. Co., 247 F.3d 920, 924 (9th Cir. 2001); Associated Gen. Contractors v. Metropolitan Water Dist., 159 F.3d 1178, 1180 (9th Cir. 1998); Cisneros v. UNUM Life Ins. Co., 134 F.3d 939, 942 (9th Cir. 1998); Arizona State Carpenters Pension Trust v. Citibank, 125 F.3d 715, 721 (9th Cir. 1997); Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1316

(9th Cir. 1997); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996). Whether a party has standing to assert preemption is a question of law reviewed de novo. See S.D. Meyers, Inc. v. City and County of San Francisco, 253 F.3d 461, 474 (9th Cir. 2001).

An award of attorneys fees reviewed for an abuse of discretion. See Plumber, Steamfitter and Shipfitter Indus. Pension Plan & Trust v. Siemens Building Technologies Inc., 228 F.3d 964, 971 (9th Cir. 2000); Trustees of Directors Guild of America-Producer Pension Benefits Plans, 234 F.3d 415, 426 (9th Cir. 2000) (interpleader), amended by, 255 F.3d 661 (9th Cir. 2001); Van Gerwen v. Guarantee Mutual Life Co. 214 F.3d 1041, 1045 (9th Cir. 2000); Friedrich, 181 F.3d at 1113; McElwaine v. U.S. West, 176 F.3d 1167, 1171 (9th Cir. 1999); see also McBride v. PLM Int'l, 179 F.3d 737, 746 (9th Cir. 1999) (listing factors that appellate court considers in deciding whether to grant attorneys fees). Whether to award prejudgment interest to an ERISA plaintiff is also a reviewed for an abuse of discretion. See Landwehr v. DuPree, 72 F.3d 726, 739 (9th Cir. 1995). The court's calculation of prejudgment interest is also reviewed for an abuse of discretion. See Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1163-64 (9th Cir. 2001).

n. **Fair Debt Collection Practices Act**

A district court's interpretation of the Act is reviewed de novo. See Romine v. Diversified Collection Serv., Inc., 155 F.3d 1142, 1145 (9th Cir. 1998). The district court's determination that a collection letter violates the Act is a question of law reviewed de novo. Terran v. Kaplan, 109 F.3d 1428, 1422-23 (9th Cir. 1997). A grant of summary judgment under the FDCPA is reviewed de novo. See Slenk v. Transworld Sys., Inc., 236 F.3d 1072, 1074 (9th Cir. 2001). An award of attorneys fees is reviewed for an abuse of discretion. See Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1148 (9th Cir. 2001).

o. **Fair Labor Standards Act**

A district court's interpretation of the FLSA is reviewed de novo. See Do v. Ocean Peace, Inc., 279 F.3d 688, 690-91 (9th Cir. 2002) Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115, 1117 (9th Cir. 2001); Collins v. Lobdell, 188 F.3d 1124, 1128 (9th Cir. 1999); Berry v. County of Sonoma, 30 F.3d 1174, 1180 (9th Cir. 1994) ("We review the district court's findings of fact for clear error and its interpretation of the FLSA de novo."). Questions of law regarding application of the Act are reviewed de novo. See Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000)

(preemption); Collins, 188 F.3d at 1127 (exhaustion); Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997) (joint employer status). A district court's decision regarding exemptions to the FLSA is also reviewed de novo. See Do, 279 F.3d at 690-91; Magana v. Commonwealth of N. Mariana Islands, 107 F.3d 1436, 1438 (9th Cir. 1997); but see Adair v. City of Kirkland, 185 F.3d 1055, 1060 (9th Cir. 1999) (noting that whether an employer meets its burden of establishing that it qualifies for an exemption is generally a question of fact). The district court's interpretation of FLSA regulations is also reviewed de novo. See Webster v. Public Sch. Employees of Washington, 247 F.3d 910, 914-15 (9th Cir. 2001). Nonetheless, deference is owed to the DOL's regulations interpreting the Act. See id. at 914; Klem v. County of Santa Clara, 208 F.3d 1085, 1089 (9th Cir. 2000).

Findings of fact underlying a legal determination are reviewed under the clearly erroneous standard. See Icicle Seafoods Inc. v. Worthington, 475 U.S. 709, 714 (1986); see also Knickerbocker v. Stockton, 81 F.3d 907, 910-11 (9th Cir. 1996) (whether police officer would have been transferred but for protected activities under the FLSA); Berry, 30 F.3d at 1180 (whether employees are able to use on-call time for personal activities); Barner v. Novato, 17 F.3d 1256, 1258 (9th Cir. 1994) (whether employees are classified as wage or salaried).

p. **False Claims Act**

Whether the FCA qui tam provisions are constitutional is a question of law reviewed de novo. United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 747 (9th Cir. 1993); United States ex rel. Madden v. General Dynamics Corp., 4 F.3d 827, 830 (9th Cir. 1993). Whether a qui tam defendant can bring counterclaims is also reviewed de novo. Madden, 4 F.3d at 830. A trial court's interpretation of the Act is reviewed de novo. United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1143 (9th Cir. 1998); United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1213-14 (9th Cir. 1996); United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995); United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 812 (9th Cir. 1995). A court's decision to modify the parties' settlement to conform with the requirements of the FCA is reviewed de novo. United States ex rel. Sharma v. University of Southern California, 217 F.3d 1141, 1143 (9th Cir. 2000).

Jurisdictional issues are reviewed de novo. See A-1 Ambulance Service, Inc. v. California, 202 F.3d 1238, 1242-43 (9th Cir. 2000); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); United States ex

rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 520 (9th Cir. 1998) ("The district court's jurisdictional determination is reviewed de novo."); Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1472 (9th Cir. 1996) ("We review de novo the lower court's jurisdictional determination."). Any finding pertaining to the district court's jurisdictional ruling is reviewed for clear error. See A-1 Ambulance, 202 F.3d at 1243; Lockheed Missiles, 190 F.3d at 968; United States ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1998). A decision regarding whether a particular disclosure triggers the jurisdictional bar of the Act is a mixed question of law and fact also reviewed de novo. See United States v. Horizon West Inc., 265 F.3d 1011, 1013 (9th Cir.), amended by 275 F.3d 1189 (9th Cir. 2001), cert. denied, 122 S. Ct. 2292 (2002); A-1 Ambulance, 202 F.3d at 1243; United States v. Alcan Elec. and Engineering, Inc., 197 F.3d 1014, 1017 (9th Cir. 1999); United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1409 n.9 (9th Cir. 1995). The district court's determination of the applicable statute of limitations is reviewed de novo. Lujan, 162 F.3d at 1034. Whether a complaint states a cause of action under the FCA is reviewed de novo. See United States v. Smithkline Beecham, Inc., 245 F.3d 1048, 1051 (9th Cir. 2001); Byl-Magee v. California, 236 F.3d 1014, 1017 (9th Cir. 2001).

The denial of costs is reviewed for an abuse of discretion. See Lockheed Missiles, 190 F.3d at 968. Whether the district court has the authority to award costs under the Act is reviewed de novo. Id.; Lindenthal, 61 F.3d at 1412 n.13.

q. **Federal Employers' Liability Act (FELA)**

Questions relating to the district court's subject matter jurisdiction under FELA are reviewed de novo. Wharf v. Burlington N. R.R., 60 F.3d 631, 636 n.2 (9th Cir. 1995); Lewy v. Southern Pac. Transp. Co., 799 F.2d 1281, 1286-87 (9th Cir. 1986).

r. **Federal Tort Claims Act**

Interpretation of the Act is reviewed de novo. See Lehman v. United States, 154 F.3d 1010, 1013 (9th Cir. 1998). Whether the United States is liable under the FTCA is reviewed de novo. Anderson v. United States, 55 F.3d 1379, 1380 (9th Cir. 1995). Whether the United States is immune from liability under the FTCA is also a question of law reviewed de novo. See Alfrey v. United States, 276 F.3d 557, 561 (9th Cir. 2002); Kelly v. United States, 241 F.3d 755, 759 (9th Cir. 2001); Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998); Montes v. United States, 37 F.3d 1347, 1351 (9th Cir. 1994); see also Anderson v. United States, 127 F.3d 1190, 1191 (9th Cir. 1997)

(whether sovereign immunity bars recovery of attorneys fees in FTCA action is a question of law reviewed de novo).

The district court's determination of subject matter jurisdiction under the Act is reviewed de novo. See O'Toole v. United States, 295 F.3d 1029, 1032 (9th Cir. 2002); McGraw v. United States, 281 F.3d 997, 1001 (9th Cir.), amended by 298 F.3d 754 (9th Cir. 2002); Delta Savings Bank v. United States, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 (9th Cir. 2001); Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000); Gager v. United States, 149 F.3d 918, 920 (9th Cir. 1998); National Union Fire Ins. v. United States, 115 F.3d 1415, 1417-18 (9th Cir. 1997); Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir. 1995). The district court's application of the discretionary function exception is also reviewed de novo. See O'Toole, 295 F.3d at 1032; Marlys Bear Medicine, 241 F.3d at 1213; GATX/Airlog Co v. United States, 286 F.3d 1168, 1173 (9th Cir. 2002) (reviewing dismissal for lack of jurisdiction based on the discretionary function exception); Sutton v. Earles, 26 F.3d 903, 907 (9th Cir. 1994). This court reviews de novo whether a government employee was acting within the scope of employment. See Clamor v. United States, 240 F.3d 1215, 1216-17 (9th Cir. 2001); Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996). Whether the district court erred in substituting the United States for individual defendants is reviewed de novo. See McLachlan v. Bell, 261 F.3d 908, 910 (9th Cir. 2001) (reviewing de novo certification of government employment). The question of the existence of a duty is a matter of law subject to de novo review. Sutton, 26 F.3d at 912 n.8; USAir Inc. v. United States Dep't of Navy, 14 F.3d 1410, 1412 (9th Cir. 1994).

Findings of breach and proximate cause are reviewed for clear error. USAir, 14 F.3d at 1412. The district court's determination of negligence is reviewed under the clearly erroneous standard. Sutton, 26 F.3d at 913. Finally, whether an activity is "inherently dangerous" is a question of fact reviewed under the clearly erroneous standard. See McMillan v. United States, 112 F.3d 1040, 1043-44 (9th Cir. 1997) (applying federal standard of review), but see Marlys Bear Medicine, 241 F.3d at 1213 (reviewing de novo summary judgment determination whether activity is inherently dangerous).

s. **Feres Doctrine**

Whether the Feres doctrine is applicable to the facts of a given case is a question of law reviewed de novo. See Wilkins v. United States, 279 F.3d 782, 785 (9th Cir. 2002); Costo v. United States, 248 F.3d 863, 965-66 (9th Cir. 2001), cert. denied, 122

S. Ct. 808 (2002); Gregory v. Windall, 153 F.3d 1071, 1074 (9th Cir. 1998); Bowen v. Oistead, 125 F.3d 800, 803 (9th Cir. 1997); Jackson v. United States, 110 F.3d 1484, 1486 (9th Cir. 1997); Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996); Jackson v. Brigle, 17 F.3d 280, 282 (9th Cir. 1994); Green v. Hall, 8 F.3d 695, 700 (9th Cir. 1993). A court's decision to dismiss an action pursuant to the Feres doctrine is also reviewed de novo. Bowen, 125 F.3d at 803.

t. **Freedom of Information Act (FOIA)**

Whether an exemption applies is a question of law reviewed de novo. See Favish v. Officer of Indep. Counsel, 217 F.3d 1168, 1174 (9th Cir. 2000); Fiduccia v. United States Dep't of Justice, 185 F.3d 1035, 1040 (9th Cir. 1999); Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405, 1409 (9th Cir. 1996) ("[W]hile we review the underlying facts supporting the district court's decision for clear error, we review de novo its conclusion that [the documents are not exempt]."); see also Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997) (whether agency has met burden of establishing that information is exempt is a question of law reviewed de novo). But see Kamman v. IRS, 56 F.3d 46, 47 (9th Cir. 1995) (a district court's finding that documents are exempt from mandatory disclosure is reviewed for clear error); Painting Indus. of Haw. Mkt. Recovery Fund v. United States Air Force, 26 F.3d 1479, 1482 (9th Cir. 1994) ("We determine whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt."). Fee waiver decisions are reviewed de novo, with review limited to the record before the agency. See Friends of the Coast Fork v. United States Dep't of Interior, 110 F.3d 53, 55 (9th Cir. 1997).

This circuit employs a special standard to review factual issues arising in an appeal from the grant of summary judgment in a FOIA case. See Lissner v. United States Custom Serv., 241 F.3d 1220, 1222 (9th Cir. 2001); Klamath Water Users Protective Ass'n v. United States Dept. of Interior, 189 F.3d 1034, 1036 (9th Cir. 1999); Frazee v. United States Forest Serv., 97 F.3d 367, 370 (9th Cir. 1996); Minier v. Central Intelligence Agency, 88 F.3d 796, 800 (9th Cir. 1996); Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405, 1408 (9th Cir. 1996); Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995). Instead of determining whether a genuine

issue of material fact exists, the court employs a two-step standard. First, the court inquires whether an adequate factual basis supports the district court's ruling. Second, if such a basis exists, the court overturns the ruling only if it is clearly erroneous. See Frazee, 97 F.3d at 370; but see Lissner, 241 F.3d at 1222 (noting that when parties do not dispute whether the court had an adequate basis for its decision, the court's conclusion that documents are exempt from disclosure is reviewed de novo); Klamath Water Users, 189 F.3d at 1037 (noting that "where the adequacy of the factual basis is not disputed, the district court's legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo").

A district court's decision whether to award attorneys fees under FOIA is reviewed for an abuse of discretion. See Lissner, 241 F.3d at 1224 (9th Cir. 2001); GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1116 (9th Cir. 1994); Long v. IRS, 932 F.2d 1309, 1313 (9th Cir. 1991) (noting factors that district court should consider before exercising its discretion). Whether an interim fee award is permissible under FOIA is a question of law reviewed de novo. Rosenfeld v. United States, 859 F.2d 717, 723 (9th Cir. 1988).

u. **Immigration**

i. **Board of Immigration Appeals (BIA)**

The BIA's determination of purely legal questions regarding the Immigration and Nationality Act is reviewed de novo. See Molina-Estrada v. INS, 293 F.3d 1089, 1093 (9th Cir. 2002); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc); Andreiu v. Ashcroft, 253 F.3d 477, 482 (9th Cir. 2001) (en banc); Chowdhury v. INS, 249 F.3d 970, 972 (9th Cir. 2001); Pondoc Hernaez v. INS, 244 F.3d 752, 756 (9th Cir. 2001); Cervantes-Gonzales v. INS, 244 F.3d 1001, 1004 (9th Cir. 2001); Ram, 243 F.3d at 513-14; Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Larita-Martinez, 220 F.3d at 1095; Pichardo v. INS, 216 F.3d 1198, 1200 (9th Cir. 2000); Ye, 214 F.3d at 1131; Ladha v. INS, 215 F.3d 889, 896 (9th Cir. 2000); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000).

Claims of due process violations in INS proceedings are reviewed de novo. See Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222 (9th Cir. 2002); Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001); Chowdhury v. INS, 249 F.3d 970, 972 (9th Cir. 2001); Abovian v. INS, 219 F.3d 972, 978 (9th Cir.), amended by, 228 F.3d 1127 (9th Cir. 2000); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000); Perez-Lastor v. INS,

208 F.3d 773, 777 (9th Cir. 2000); Andriasian, 180 F.3d at 1040. The availability of a writ of audita querela for purposes of immigration is also reviewed de novo. Beltran-Leon v. INS, 134 F.3d 1379, 1380 (9th Cir. 1998). Whether the BIA had jurisdiction to consider an untimely appeal is a question of law reviewed de novo. Da Cruz v. INS, 4 F.3d 721, 722 (9th Cir. 1993).

The BIA's interpretation and application of the immigration laws are nevertheless entitled to deference. See Socop-Gonzalez, 272 F.3d at 1187 (noting limits of deference); Otarola v. INS, 270 F.3d 1272, 1275 (9th Cir. 2001); Chowdhury, 249 F.3d at 972; Pondoc Hernaez, 244 F.3d at 756; Ladha, 215 F.3d at 896. This court is not obligated, however, to accept an interpretation that is demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute. See Chowdhury, 249 F.3d at 972; Bui v. INS, 76 F.3d 268, 269-70 (9th Cir. 1996); Navarro-Aispura v. INS, 53 F.3d 233, 235 (9th Cir. 1995); see also Beltran-Tirado v. INS, 213 F.3d 1179, 1185 (9th Cir. 2000) (noting that no deference is owed when the intent of Congress is clear).

When the BIA does not perform an independent review of the IJ's decision and instead defers to the IJ's exercise of discretion, the court of appeals reviews the IJ's decision. See Gui v. INS, 280 F.3d 1217, 1225 (9th Cir. 2002); Ochave v. INS, 254 F.3d 859, 862 (9th Cir. 2001); Campos-Granillo v. INS, 12 F.3d 849, 852 (9th Cir. 1993); Yepes-Prado v. INS, 10 F.3d 1363, 1366-67 (9th Cir. 1993); see also Lopez-Reyes v. INS, 79 F.3d 908, 911 (9th Cir. 1996) (We review the IJ's decision if the BIA clearly incorporated it and fails to perform an independent review of the record.). Conversely, when the BIA conducts an independent review of the IJ's findings, this court reviews the BIA's decision and not that of the IJ. See Salazar-Paucar v. INS, 281 F.3d 1069, 1073 (9th Cir.), amended by 290 F.3d 964 (9th Cir. 2002); Dillingham v. INS, 267 F.3d 996, 1004 (9th Cir. 2001); Lal v. INS, 255 F.3d 998, 1001 (9th Cir.), amended by 268 F.3d 1148 (9th Cir. 2001); Molina-Morales v. INS, 237 F.3d 1048, 1050 (9th Cir. 2001); Kaur v. INS, 237 F.3d 1098, 1099 (9th Cir.), amended by, 249 F.3d 830 (9th Cir. 2001); Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Sidhu v. INS, 220 F.3d 1085, 1088 (9th Cir. 2000); Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000); Vongsakdy v. INS, 171 F.3d 1203, 1206 (9th Cir. 1999); Garrovillas v. INS, 156 F.3d 1010, 1013 (9th Cir. 1998). To the extent that the BIA incorporates the IJ's decision as its own, the court should treat the IJ's statements of reasons as the BIA's, and review the IJ's decision. See Gonzalez v. INS, 82 F.3d 903, 907 (9th Cir. 1996). When neither the BIA or the IJ makes an explicit finding that a petitioner's testimony is not credible, the court is required to accept the petitioner's testimony as true. See Leiva-Montalvo v. INS, 173 F.3d 749, 750 (9th Cir. 1999).

Review is limited to the administrative record. See Chouchkov v. INS, 220 F.3d 1077, 1080 (9th Cir. 2000); Ratnam v. INS 154 F.3d 990, 994 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998). Findings made by the BIA are reviewed under the deferential "substantial evidence" standard and will be upheld "unless the evidence compels a contrary conclusion." See Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Andriasian v. INS, 180 F.3d 1033, 1040 (9th Cir. 1999); Meza-Manay v. INS, 139 F.3d 759, 762 (9th Cir. 1998).

Note that judicial review of deportation and exclusion orders was substantially altered by passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). See Pazcoguin v. Radcliffe, 292 F.3d 1209, 1211-12 (9th Cir. 2002) (reviewing jurisdictional limitations of IIRIRA); Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1140-44 (9th Cir. 2002) (same); Torres-Aguilar v. INS, 246 F.3d 1267, 1269 (9th Cir. 2001) (same); Palma-Rojas v. INS, 244 F.3d 1191, 1192 (9th Cir. 2001) (same); Castro-Cortez v. INS, 239 F.3d 1037, 1043 (9th Cir. 2001) (noting that "IIRIRA significantly revised the . . . procedures for judicial review"); Alfaro-Reyes v. INS, 224 F.3d 916, 920 (9th Cir. 2000) (noting that "IIRIRA changed the judicial review structure through its permanent and transitional rules); Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000) (noting that IIRIRA stripped court of jurisdiction to review agency's discretionary decisions); Ye v. INS, 214 F.3d 1128, 1131 (9th Cir. 2000) (noting that IIRIRA limits review); Beltran-Tirado v. INS, 213 F.3d 1179, 1182 (9th Cir. 2000) (noting that transitional rules deprives court of jurisdiction to review the discretionary denial of suspension of deportation and voluntary departure); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000) (noting that IIRIRA substantially restricts the scope of judicial review); Lafarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999) (noting that IIRIRA may prohibit review of discretionary decisions, but that direct review remains "as to those elements of statutory eligibility . . . which do not involve the exercise of discretion"); Antonio-Cruz v. INS, 147 F.3d 1129, 1130 (9th Cir. 1998) (IIRIRA's transitional rules preclude review of denial of voluntary departure); Kalaw v. INS, 133 F.3d 1147, 1149-50 (9th Cir. 1997) (discussing nature and scope of judicial review under IIRIRA transitional rules). The jurisdictional limitations of IIRIRA present questions of law reviewed de novo. See Pondoc Hernaez v. INS, 244 F.3d 752, 756 (9th Cir. 2001); Luu-Le v. INS, 224 F.3d 911, 914 (9th Cir. 2000).

Whether IIRIRA applies depends on when immigration proceedings were commenced and when the final agency order was issued. See Socop-Gonzalez v. INS, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc) (applying transitional rules); Ram v. INS, 243 F.3d 510, 512-13 (9th Cir. 2001) (explaining when different rules apply);

Alfaro-Reyes, 224 F.3d at 920 (same); see also Ochave v. INS, 254 F.3d 859, 868 (9th Cir. 2001) (applying transitional rules); Park v. INS, 252 F.3d 1018, 1021 n.3 (9th Cir. 2001) (same); Scales v. INS, 232 F.3d 1159, 1161 n.2 (9th Cir.) (same) Abovian v. INS, 219 F.3d 972, 975, n.1 (9th Cir. 2000) (same), amended by, 228 F.3d 1127 (9th Cir. 2000); Rivera-Moreno v. INS, 213 F.3d 481, 485 n.3 (9th Cir. 2000) (applying pre-amendment law); Belayneh v. INS, 213 F.3d 488, 490 n.1 (9th Cir. 2000) (same); Yazitchian v. INS, 207 F.3d 1164, 1167 n.2 (9th Cir. 2000) (same); Duarte de Guinac v. INS, 179 F.3d 1156, 1158 n.2 (9th Cir. 1999) (same); Romani v. INS, 146 F.3d 737, 738 n.1 (9th Cir. 1998) (same). Whether application of the permanent rules is impermissibly retroactive presents a question of law reviewed de novo. See Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 599-600 (9th Cir. 2000). Note that IIRIRA did not repeal the statutory habeas corpus remedy provided by 28 U.S.C. § 2241. See INS v. St. Cyr, 121 S. Ct. 2271 (2001); Cruz-Aguilera v. INS, 245 F.3d 1070, 1073 (9th Cir. 2001); Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000); Sulit v. Schiltgen, 213 F.3d 449, 453 (9th Cir. 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1136 (9th Cir. 2000).

IIRIRA replaced deportation and exclusion proceedings with "removal." See Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 597 (9th Cir. 2002); Angulo-Dominguez v. Ashcroft, 290 F.3d 1147, 1149 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1183 n.5 (9th Cir. 2001). Legal determinations regarding an alien's eligibility for cancellation of removal are reviewed de novo. See Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1145 (9th Cir. 2002) (reviewing whether petitioner's daughter was a qualifying "child"). The BIA's decision whether to withhold removal is reviewed for substantial evidence. See Molina-Estrada v. INS, 293 F.3d 1089, 1093 (9th Cir. 2002). Whether a particular offense constitutes an aggravated felony for which an alien is subject to removal is reviewed de novo. See Ye v. INS, 214 F.3d 1128, 1131 (9th Cir. 2000).

A deportation order is reviewed to determine if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." See Lopez-Chavez v. INS, 259 F.3d 1176, 1180 (9th Cir. 2001); Singh v. Ilchert, 63 F.3d 1501, 1506 n.1 (9th Cir. 1995); Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994). Factual findings underlying the BIA's decision are reviewed for substantial evidence. See Espinoza-Casro v. INS, 242 F.3d 1181, 1185 (9th Cir. 2001). The BIA's decision whether to withhold deportation is also reviewed for substantial evidence. See Del Carmen Molina v. INS, 170 F.3d 1247, 1249 (9th Cir. 1999); Vang v. INS, 146 F.3d 1114, 1116 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Mejia-Paiz v. INS, 111 F.3d 720, 722 (9th Cir. 1997); Aruta v. INS, 80 F.3d 1389, 1393

(9th Cir. 1996). Legal issues such as whether a statute defines a crime involving moral turpitude are reviewed de novo. Goldeshtein v. INS, 8 F.3d 645, 647 (9th Cir. 1993). Whether a particular conviction is a deportable offense is a question of law reviewed de novo. See Park v. INS, 252 F.3d 1018, 1021 (9th Cir. 2001); Luu-Le v. INS, 224 F.3d 911, 914 (9th Cir. 2000); Albillo-Figueroa v. INS, 221 F.3d 1070, 1071 (9th Cir. 2000); Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997). The Board's interpretation of the statutory requirements for establishing eligibility for withholding of deportation is reviewed de novo. See Aguirre-Aguirre v. INS, 121 F.3d 521, 523 (9th Cir. 1997), rev'd on other grounds, 526 U.S. 415 (1999).

Note that IIRIRA eliminated judicial review of the BIA's discretionary denials of suspension of deportation and voluntary departure. See Ochave v. INS, 254 F.3d 859, 868 (9th Cir. 2001) (suspension of deportation); Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000) (suspension of deportation); Beltran-Tirado v. INS, 213 F.3d 1179, 1182 (9th Cir. 2000) (both). Formerly, these decisions were reviewed for an abuse of discretion. See Cheo v. INS, 162 F.3d 1227, 1230 (9th Cir. 1998) (voluntary departure); Ordonez v. INS, 137 F.3d 1120, 1123 (9th Cir. 1998) (suspension of deportation); Astrero v. INS, 104 F.3d 264, 266 (9th Cir. 1996) (suspension of deportation; Perez v. INS, 96 F.3d 390, 391 (9th Cir. 1996) (suspension of deportation); Rashtabadi v. INS, 23 F.3d 1562, 1566 (9th Cir. 1994) (voluntary departure); Casem v. INS, 8 F.3d 700, 702 (9th Cir. 1993) (waiver of deportation).

IIRIRA did not eliminate judicial review of the denial of registry. See Beltran-Tirado, 213 F.3d at 1182-83. Where the agency's denial of the alien's application for registry is based on the agency's conclusion that the alien is statutorily ineligible, this court reviews to ensure that the decision is supported by reasonable, substantial, and probative evidence on the record considered as a whole. See Manzo-Fontes v. INS, 53 F.3d 280, 282 (9th Cir. 1995). When a decision is discretionary, "we review the Board's exercise of discretion to determine whether that discretion has been abused." Beltran-Tirado, 213 F.3d at 1185.

The BIA's decision that an alien has not established eligibility for asylum is reviewed under the substantial evidence standard. See Cardenas v. INS, 294 F.3d 1062, 1065 (9th Cir. 2002); Al-Saher v. INS, 268 F.3d 1143, 1145 (9th Cir. 2001); Ochave v. INS, 254 F.3d 859, 861-62 (9th Cir. 2001); Kataria v. INS, 232 F.3d 1107, 1112 (9th Cir. 2000); Rivera-Moreno v. INS, 213 F.3d 481, 485 (9th Cir. 2000); Andriasian, 180 F.3d at 1040; Ortiz v. INS, 179 F.3d 1148, 1154 (9th Cir. 1999); Singh v. INS, 134 F.3d 962, 966 (9th Cir. 1998) (defining standard). The BIA's determination must be upheld if supported by reasonable, substantial, and probative evidence in the

record. See INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); Cardenas, 294 F.3d at 1065; Gui v. INS, 280 F.3d 1217, 1228 (9th Cir. 2002); Maini v. INS, 212 F.3d 1167, 1173 (9th Cir. 2000); Leiva-Montalvo v. INS, 173 F.3d 749, 750 (9th Cir. 1999); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Astrero v. INS, 104 F.3d 264, 265 (9th Cir. 1996); Lopez-Galarza v. INS, 99 F.3d 954, 958 (9th Cir. 1996). Thus, factual findings underlying the denial of asylum are reviewed for substantial evidence. See Gui v. INS, 280 F.3d 1217, 1228 (9th Cir. 2002); Popova v. INS, 273 F.3d 1251, 1257 (9th Cir. 2001); Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Navas v. INS, 217 F.3d 646, 657 (9th Cir. 2000); Prasad v. INS, 101 F.3d 614, 616-17 (9th Cir. 1996); Aruta v. INS, 80 F.3d 1389, 1393 (9th Cir. 1996); Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995); Prasad v. INS, 47 F.3d 336, 338-39 (9th Cir. 1995) (citing Elias-Zacarias, 502 U.S. at 483-84, and explaining standard). Adverse credibility determinations are also reviewed under this same substantial evidence standard. See Gui, 280 F.3d at 1225 (noting that IJ must provide "specific and cogent" reasons); Valderrama v. INS, 260 F.3d 1083, 1085 (9th Cir. 2001) (same); Lata v. INS, 204 F.3d 1241, 1245 (9th Cir. 2000); Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000). Nonetheless, "[w]e give 'special deference' to a credibility determination that is based on demeanor." Singh-Kaur v. INS, 183 F.3d 1147, 1151 (9th Cir. 1999). This "special deference" accorded to an IJ's credibility finding does not apply, however, to the BIA's independent, adverse credibility determination. See Abovian v. INS, 219 F.3d 972, 978 (9th Cir.), amended by, 228 F.3d 1127 (9th Cir. 2000).

The BIA's discretionary decision to deny asylum to an eligible petitioner is reviewed for an abuse of discretion. See Andriasian v. INS, 180 F.3d 1033, 1041 (9th Cir. 1999) (noting that "BIA must exercise its discretion 'within the constraints of law'"); Stoyanov v. INS, 149 F.3d 1226, 1227 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1310 (9th Cir. 1998) (noting that BIA abuses its discretion if its decision is "arbitrary, irrational, or contrary to law"); Mejia-Paiz v. INS, 111 F.3d 720, 722 (9th Cir. 1997); see also Belayneh v. INS, 213 F.3d 488, 491 (9th Cir. 2000) (humanitarian asylum). Note that IIRIRA may alter this standard of review. See 8 U.S.C. § 1254(b)(4)(D) (providing that "the Attorney General's discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion") (emphasis added).

The BIA's decision denying reconsideration is reviewed for an abuse of discretion. Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994), overruled on other grounds by Stone v. INS, 514 U.S. 386 (1995). Under the abuse of discretion standard, the decision of the BIA "will be upheld unless it is arbitrary, irrational, or contrary to law." Id. (internal quotation omitted).

The BIA's decision on an applicant's motion to reopen is reviewed for an abuse of discretion. See INS v. Doherty, 502 U.S. 314, 324 (1992) (agency's denial of a motion to reopen is reviewed for an abuse of discretion regardless of the underlying basis of the alien's request for relief); INS v. Rios-Pineda, 471 U.S. 444, 449-50 (1985); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222 (9th Cir. 2002); Gui v. INS, 280 F.3d 1217, 1230 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc); Garcia v. INS, 222 F.3d 1208, 1209 (9th Cir. 2000); Singh v. INS, 213 F.3d 1050, 1052 (9th Cir. 2000); Varela v. INS, 204 F.3d 1237, 1239 (9th Cir. 2000) (noting that any underlying issues of law are reviewed de novo); Konstantinova v. INS, 195 F.3d 528, 529 (9th Cir. 1999); Arrozal v. INS, 159 F.3d 429, 432 (9th Cir. 1998); Urbina-Osejo v. INS, 124 F.3d 1314, 1317 (9th Cir. 1997); Arrieta v. INS, 117 F.3d 429, 430 (9th Cir. 1997); Gutierrez-Centeno v. INS, 99 F.3d 1529, 1531 (9th Cir. 1996). The BIA abuses its discretion when it fails to offer a reasoned explanation for its decision, or distorts or disregards important aspects of the alien's claim. See Konstantinova, 195 F.3d at 529; Gutierrez-Centeno, 99 F.3d at 1531; see also Singh, 213 F.3d at 1052 (noting that BIA's ruling should not be disturbed unless it acted "arbitrarily, irrationally, or contrary to law"); Ontiveros-Lopez v. INS, 213 F.3d 1121, 1124 (9th Cir. 2000) (concluding that BIA abused its discretion); Arrozal, 159 F.3d at 432-33 (discussing abuse of discretion standard).

The Board's denial of a motion to remand is reviewed for an abuse of discretion. See Popova v. INS, 273 F.3d 1251, 1257 (9th Cir. 2001); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000); Konstantinova v. INS, 195 F.3d 528, 529 (9th Cir. 1999)

The IJ's decision not to issue a subpoena for the production of documents is reviewed for an abuse of discretion. See Kaur v. INS, 237 F.3d 1098, 1099 (9th Cir.), amended by, 249 F.3d 830 (9th Cir. 2001). The IJ's decision whether to take administrative notice, whether to allow rebuttal evidence of the noticed facts, and whether the parties must be notified that notice will be taken is also reviewed for an abuse of discretion. See Castillo-Villagra v. INS, 972 F.2d 1017, 1028 (9th Cir. 1992); see also Getachew v. INS, 25 F.3d 841, 845 (9th Cir. 1994) (administrative notice).

This circuit has not clearly articulated the proper standard for reviewing the BIA's summary dismissals. See Vargas-Garcia v. INS, 287 F.3d 882, 884 (9th Cir. 2002) (noting that review is whether summary dismissal is "appropriate"). Castillo-Manzanarez v. INS, 65 F.3d 793, 794 (9th Cir. 1995); Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994) (noting that circuit has previously reviewed such

dismissal for "appropriateness" but other circuits apply abuse of discretion standard), overruled on other grounds by Stone v. INS, 514 U.S. 386 (1995).

ii. **District Court Appeals**

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, a petition for a writ of habeas corpus could be brought in federal district court pursuant to the Immigration and Naturalization Act, 8 U.S.C. § 1105a(b). The grant or denial of habeas relief under § 1105a(b) was reviewed de novo. See Singh v. Reno, 113 F.3d 1512, 1514 (9th Cir. 1997); Mosa v. Rogers, 89 F.3d 601, 603 (9th Cir. 1996); Singh v. Ilchert, 69 F.3d 375, 378 (9th Cir. 1995). Section 1105a was repealed by the IIRIRA. See Hose v. INS, 180 F.3d 992, 994 & n.1 (9th Cir. 1999) (en banc) (noting that IIRIRA merged deportation and exclusion proceedings into a broader category called "removal proceedings). IIRIRA did not repeal, however, the statutory habeas corpus remedy provided by 28 U.S.C. § 2241. See INS v. St. Cyr, 121 S. Ct. 2271 (2001); Angula-Dominguez v. Ashcroft, 290 F.3d 1147, 1149 (9th Cir. 2002) (noting that review of grant or denial of habeas corpus is reviewed de novo); Cruz-Aguilera v. INS, 245 F.3d 1070, 1073 (9th Cir. 2001); Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000); Barapind v. Reno, 225 F.3d 1100, 1110 (9th Cir. 2000); Sulit v. Schiltgen, 213 F.3d 449, 453 (9th Cir. 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1136 (9th Cir. 2000); Magana-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 1999). Similarly, "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." Zadvydas v. Davis, 121 S. Ct. 2491, 2498 (2001); see also Gutierrez-Chavez v. INS, 298 F.3d 824, 827-28 (9th Cir. 2002) (noting limitations on scope of habeas jurisdiction).

The district court's determinations regarding jurisdiction are reviewed de novo. See Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000); Barapind, 225 F.3d at 1109-10; Ortiz v. Meissner, 179 F.3d 718, 721-23 (9th Cir. 1999). A dismissal based on procedural default is also reviewed de novo. See Reese v. Baldwin, 282 F.3d 1184, 1190 (9th Cir. 2002); Nakaranurack v. United States, 231 F.3d 568, 570 (9th Cir. 2000). The district court's decision to dismiss an alien's habeas petition under the federal comity doctrine is reviewed, however, for an abuse of discretion. See Barapind, 225 at 1109.

The decision whether to grant a continuance is left to the sound discretion of the trial judge and will not be overturned except upon a showing of clear abuse. See Gonzalez v. INS, 82 F.3d 903, 908 (9th Cir. 1996). The district court's decision to stay

habeas proceedings is also reviewed for an abuse of discretion. See Yong v. INS, 208 F.3d 1116, 1119 (9th Cir. 2000); see also Andreiu v. Ashcroft, 253 F.3d 477, 483 (9th Cir. 2001) (en banc) (defining standard when this court grants stay).

v. **Individuals with Disabilities Education Act (IDEA)**

Judicial review in IDEA cases differs from judicial review of other agency actions because the standard is established by the Act itself. See generally Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 887-88 (9th Cir. 2001); Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471-72 (9th Cir. 1993). The district court reviews de novo administrative decisions under the IDEA. Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1499 (9th Cir. 1996); Livingston Sch. Dist. Nos. 4 & 1 v. Keenan, 82 F.3d 912, 915 (9th Cir. 1996). Deference is owed, however, to the hearings officer's administrative findings and to the policy decisions of school administrators. Seattle Sch., 82 F.3d at 1499, Livingston Sch., 82 F.3d at 915; Union Sch. Dist. v. Smith, 15 F.3d 1519, 1525 (9th Cir. 1994). The district court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. Seattle Sch., 82 F.3d at 1499. The district court's factual findings as to each part of the four-part test for determining whether placement of a student with a disability represents a "least restrictive environment" under IDEA are reviewed for clear error. Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1401 (9th Cir. 1994). Whether a school district's proposed individual education plan provides a "free appropriate public education" is a question of law reviewed de novo. See Amanda J., 267 F.3d at 887. The ultimate appropriateness of an educational program is reviewed de novo. See Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir. 1999); County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1466 (9th Cir. 1996); Seattle Sch., 82 F.3d at 1499; Clyde K., 35 F.3d at 1401; Union Sch., 15 F.3d at 1525; Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1402 (9th Cir. 1994). Whether exhaustion of administrative remedies is required under IDEA in a particular case is a question of law reviewed de novo. Witte v. Clark County School Dist., 197 F.3d 1271, 1274 (9th Cir. 1999); Doe v. Arizona Dep't of Educ., 111 F.3d 678, 681 (9th Cir. 1997). Whether an IDEA action is barred by a statute of limitations is reviewed de novo. See S.V. v. Sherwood Sch. Dist., 254 F.3d 877, 879 (9th Cir. 2001). The district court's discretion to award attorneys fees is narrow. See Kletzelman v. Capistrano Unified Sch. Dist., 91 F.3d 68, 70 (9th Cir. 1996) (defining standard); see also Lucht v. Molalla River School Dist., 225 F.3d 1023, 1026-27 (9th Cir. 2000) (discussing when fees are available); Z.A. v. San Bruno Park Sch. Dist., 165 F.3d 1273, 1275 (9th Cir. 1999) (noting that IDEA permits an award of attorneys fees to the prevailing party "in the discretion of the court").

w. **Labor Law**

A labor arbitrator's award is entitled to "nearly unparalleled degree of deference." See Teamsters Local Union 58 v. BOC Gases, 249 F.3d 1089, 1093 (9th Cir. 2001) (internal quotation omitted). Courts must defer "as long as the arbitrator even arguably construed or applied the contract." See id. (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)); see also Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177, 1180-81 (9th Cir. 2001) (noting that review is "extremely deferential"); Association of Western Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc., 221 F.3d 1085, 1093 (9th Cir. 2000) (noting "broad deference"); Garvey v. Roberts, 203 F.3d 580, 588 (9th Cir. 2000) (noting "extremely limited" review); FIC Properties, Inc. v. International Ass'n of Machinists, Local 311, 103 F.3d 923, 924 (9th Cir. 1996) ("extremely narrow").

A district court's decision to compel arbitration is reviewed de novo. See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 n.2 (9th Cir.), cert. denied, 122 S. Ct. 2329 (2002); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001). The denial of a motion to compel arbitration is also reviewed de novo. See United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co., 13 F.3d 1365, 1368 (9th Cir. 1994). The validity and scope of an arbitration clause is reviewed de novo. See Moore v. Local 569 of Int'l Bhd. of Elec. Workers, 53 F.3d 1054, 1055 (9th Cir. 1995); Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. General Bldg. Contractor, Inc., 952 F.2d 1073, 1076 (9th Cir. 1991).

Confirmation or vacation of an arbitration award is also reviewed de novo. See Grammar v. Artists Agency, 287 F.3d 886, 890 (9th Cir. 2002) (affirming award and noting "nearly unparalleled" deference afforded to labor arbitration awards); Teamsters Local Union 58, 249 F.3d at 1093 (vacating); Hawaii Teamsters, Local 996, 241 F.3d at 1180 (confirming); Line Drivers, Pickup and Delivery, Local No. 81 v. Roadway Express, Inc., 152 F.3d 1098, 1099 (9th Cir. 1998) (confirming); Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997) (confirming); International Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1411 (9th Cir. 1997) (confirming); Sheet Metal Workers' Int'l Ass'n v. Madison Indus., Inc., 84 F.3d 1186, 1190 (9th Cir. 1996) (confirming).

"The construction and interpretation of a collective bargaining agreement is reviewed de novo. See Carpenters Health & Welfare Trust Fund v. Bla-Delco Constr., Inc., 8 F.3d 1365, 1367 (9th Cir. 1993). Whether a plaintiff is required to exhaust

remedies provided by the collective bargaining agreement prior to filing an action in federal court is a question of law reviewed de novo. See Sidhu v. Flecto Co., 279 F.3d 896, 898 (9th Cir. 2002).

Whether a district court has jurisdiction under § 301 is reviewed de novo. See Garvey v. Roberts, 203 F.3d 580, 587 (9th Cir. 2000). Whether claims fall within § 301(a) jurisdiction or the primary jurisdiction of the NLRB is a question of law reviewed de novo. See Pace v. Honolulu Disposal Serv., Inc., 227 F.3d 1150, 1155 (9th Cir. 2000); International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co., 50 F.3d 770, 773 (9th Cir. 1995). Whether state claims are preempted by § 301 is reviewed de novo. See Cramer v. Consolidated Freightways Inc., 255 F.3d 683, 689 (9th Cir. 2001) (en banc), cert. denied, 122 S. Ct. 806 (2002); Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1014 (9th Cir. 2000); Niehaus v. Greyhound Lines, Inc., 173 F.3d 1207, 1211 (9th Cir. 1999); Associated Builders & Contractors, Inc. v. Local 302 Int'l Bhd. of Elec. Workers, 109 F.3d 1353, 1355 (9th Cir. 1997).

The court's decision to require a party to exhaust intra-union remedies prior to filing an action under the LMRDA is reviewed for an abuse of discretion. See Kofoed v. International Bro. of Elec., Local 48, 237 F.3d 1001, 1004 (9th Cir. 2001).

Decisions issued by the Federal Labor Relations Authority may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See Eisinger v. FLRA, 218 F.3d 1097, 1100 n.3 (9th Cir. 2000); Department of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994). Note that no deference is owed to the FLRA's interpretation of a statute that is not charged with administering. See Association of Civilian Technicians v. FLRA, 200 F.3d 590, 592 (9th Cir. 2000) (reviewing de novo).

Decisions of the Department of Labor Benefits Review Board in LHWCA cases are reviewed for errors of law and adherence to the substantial evidence standard. See Johnson v. Director, OWCP, 280 F.3d 1272, 1275 (9th Cir. 2002); Matson Terminals, Inc. v. Berg, 279 F.3d 694, 696 (9th Cir. 2002); Marine Power & Equipment v. Department of Labor, 203 F.3d 664, 667 (9th Cir. 2000); Taylor v. Director, OWCP, 201 F.3d 1234, 1238 (9th Cir. 2000); Healy Tibbitts Builders, Inc. v. Cabral, 201 F.3d 1090, 1092 (9th Cir. 2000); A-Z Int'l v. Phillips, 179 F.3d 1187, 1190 (9th Cir. 1999); Duhagon v. Metropolitan Stevedore Co., 169 F.3d 615, 618 (9th Cir. 1999) (per curiam); Alcala v. Director, OWCP, 141 F.3d 942, 944 (9th Cir. 1998); Sproull v. Director, OWCP, 86 F.3d 895, 898 (9th Cir. 1996); Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 889 (9th Cir. 1993). The Board must accept the ALJ's findings

of fact unless they are contrary to law, irrational, or unsupported by substantial evidence in the record considered as a whole. See Sestich v. Long Beach Container Terminal, 289 F.3d 1157, 1159 (9th Cir. 2002); Matson Terminals, 279 F.3d at 696; Marine Power & Equipment, 203 F.3d at 667; Duhagon, 169 F.3d at 618; Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1275 (9th Cir. 1998); Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683, 687 (9th Cir. 1997); Sproull, 86 F.3d at 898. The Board's interpretation of the LHWCA is a question of law reviewed de novo. See Gilliland v. E.J. Bartells Co., 270 F.3d 1259, 1261 (9th Cir. 2001). No special deference is owed to the Board's interpretation of the Act. See Johnson, 280 F.3d at 1275; Matson Terminals, 279 F.3d at 696; Gilliland, 270 F.3d at 1261; Taylor, 201 F.3d at 1238 Healy Tibbitts Builders, 201 F.3d at 1093; A-Z Int'l, 179 F.3d at 1190; Port of Portland v. Director, OWCP, 932 F.2d 836, 838 (9th Cir. 1991). Rather, this court accords "considerable weight" to the construction of the statute urged by the Director, charged with its administration. See Matson Terminals, 279 F.3d at 696; Taylor, 201 F.3d at 1238; Healy Tibbitts Builders, 201 F.3d at 1093; Moyle v. Director, OWCP, 147 F.3d 1116, 1119 (9th Cir. 1998); Force v. Director, OWCP, 938 F.2d 981, 983 (9th Cir. 1991); Sproull, 86 F.3d at 898 ("We give no special deference to the Board's interpretations of the Longshore and Harbor Workers Act, but do defer to the Director's interpretations. Although we respect the Board's reasonable interpretations, the distinction in the deference owed the Director and the Board . . . is significant where their positions conflict with respect to the issues raised on appeal."). Note that when the Board's affirmance is mandated by Public Law No. 104-134 rather than by deliberate adjudication, this court will review the ALJ's decision directly under the substantial evidence standard. See Matulic v. Director, OWCP, 154 F.3d 1052, 1055 (9th Cir. 1998); Transbay, 141 F.3d at 910; Jones Stevedoring, 133 F.3d at 687. The ALJ's findings must be accepted unless they are contrary to law, irrational, or unsupported by substantial evidence. See Amos v. Director, OWCP, 153 F.3d 1051, 1054 (9th Cir. 1998).

Decisions of the NLRB will be upheld on appeal if its findings of fact are supported by substantial evidence and if the agency correctly applied the law. See NLRB v. Calkins, 187 F.3d 1080, 1085 (9th Cir. 1999); Northern Montana Health Care Ctr. v. NLRB, 178 F.3d 1089, 1093 (9th Cir. 1999); Retlaw Broad. Co. v. NLRB, 172 F.3d 660, 664 (9th Cir. 1999); California Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1098 (9th Cir. 1998); NLRB v. Iron Workers of Cal., 124 F.3d 1094, 1098 (9th Cir. 1997); Gardner Mechanical Servs., Inc. v. NLRB, 115 F.3d 636, 640 (9th Cir. 1997); Associated Ready Mixed Concrete, Inc. v. NLRB, 108 F.3d 1182, 1184 (9th Cir. 1997); Walnut Creek Honda Assocs. 2, Inc. v. NLRB, 89 F.3d 645, 648 (9th Cir. 1996); California Pac. Med. Ctr. v. NLRB, 87 F.3d 304, 307 (9th Cir. 1996); Tualatin Elec.,

Inc. v. NLRB, 84 F.3d 1202, 1205 (9th Cir. 1996); Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 (9th Cir. 1995); but see TCI West, Inc. v. NLRB, 145 F.3d 1113, 1115 (9th Cir. 1998) ("The Board's decision to certify a union is reviewed for an abuse of discretion.").

The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record. See Iron Workers, 125 F.3d at 1098; California Pac., 87 F.3d at 307; NLRB v. Unbelievable, Inc., 71 F.3d 1434, 1438 (9th Cir. 1995). "A reviewing court may not displace the NLRB's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Walnut Creek, 89 F.3d at 648 (internal quotation omitted); see also Retlaw Broad., 53 F.3d at 1005. The Supreme Court noted that under the substantial evidence standard, the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366 (1998).

Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect. Underwriter's Lab., Inc. v. NLRB., 147 F.3d 1048, 1051 (9th Cir. 1998); NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995); see also Nabors Alaska Drilling, Inc. v. NLRB, 190 F.3d 1008, 1013 (9th Cir. 1999) ("credibility findings are entitled to special deference"); California Acrylic Indus., 150 F.3d at 1099 ("We must accord substantial deference to the ALJ's evaluation of the testimonial evidence."); Walnut Creek, 89 F.3d at 648; Retlaw Broad., 53 F.3d at 1005 ("Credibility determinations by the ALJ are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.") (internal quotation omitted).

The court of appeals should defer to the NLRB's reasonable interpretation and application of the National Labor Relations Act. See Allentown Mack, 522 U.S. at 364 (noting that deference is owed if Board's "explication is not inadequate, irrational or arbitrary"); United Food & Commercial Workers Union v. NLRB, 284 F.3d 1099, 1105-06 (9th Cir. 2002) (en banc) (explaining when deference is owed); NLRB v. Advanced Stretchforming Int'l, Inc., 233 F.3d 1176, 1180 (9th Cir. 2000) (noting that deference is owed as long as the Board's interpretation is reasonable and not precluded by Supreme Court precedent), cert. denied, 122 S. Ct. 341 (2001); Nabors, 190 F.3d at 1013; Calkins, 187 F.3d at 1085 (noting that the Board's interpretation of the NLRA is accorded deference as long as it is "rational and consistent" with the statute); Northern Montana Health Care Ctrs., 178 F.3d at 1093; NLRB v. Kolkka, 170 F.3d 937, 939 (9th Cir. 1999); Iron Workers, 124 F.3d at 1098; Unbelievable, Inc., 71 F.3d at 1438;

Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1087 (9th Cir. 1995); Retlaw Broad., 53 F.3d at 1005; Wagon Wheel Bowl, Inc. v. NLRB, 47 F.3d 332, 334 (9th Cir. 1995). Thus, "[t]his Court will uphold a Board rule as long as it is rational and consistent with the Act, . . . even if we would have formulated a different rule had we sat on the Board." Gardner Mechanical Servs., 115 F.3d at 640 (internal quotation omitted). "Even if a Board rule represents a departure from the Board's previous policy, it is entitled to deference." Id. The Board's decision to apply a case ruling retroactively is also entitled to deference, "absent manifest injustice." Saipan Hotel Corp. v. NLRB, 114 F.3d 994, 998 (9th Cir. 1997) (internal quotation omitted).

A district court's decision denying enforcement of an NLRB subpoena is reviewed de novo. NLRB v. The Bakersfield Californian, 128 F.3d 1339, 1341 (9th Cir. 1997). The denial of § 10(j) injunction will be reversed only if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." See Scott ex. rel. NLRB v. Stephen Dunn & Assocs., 241 F.3d 652, 659 (9th Cir. 2001) (internal quotation omitted).

Whether a claim has been stated under the Jones Act is a question of law subject to de novo review. In re Hechinger, 890 F.2d 202, 208 (9th Cir. 1989). Who is a "seaman" under the Jones Act is a mixed question of law and fact. See DeLange v. Dutra Const. Co., 183 F.3d 916, 919 (9th Cir. 1999); Boy Scouts v. Graham, 86 F.3d 861, 864 (9th Cir. 1996). If reasonable persons, applying proper legal standards, could differ as to whether an employee was a seaman, it is a question for the jury. Heise v. Fishing Co., 79 F.3d 903, 905 (9th Cir. 1996). Whether the doctrine of maintenance and cure applies to a given set of facts is reviewed de novo. See Sana v. Hawaiian Cruises, Inc., 181 F.3d 1041, 1044 (9th Cir. 1999). The district court's computation of damages in a Jones Act action is reviewed for clear error. See Simeonoff v. Hiner, 249 F.3d 883, 893 (9th Cir. 2001). The grant of denial of prejudgment interest is reviewed for an abuse of discretion. See id. at 894.

Statutory questions regarding the Railway Labor Act are reviewed de novo. Wharf v. Burlington N. R.R., 60 F.3d 631, 636 n.2 (9th Cir. 1995). The scope of review of Adjustment Board awards under the RLA is "among the narrowest known to the law." English v. Burlington N. R.R., 18 F.3d 741, 742 (9th Cir. 1994) (internal quotation omitted). The RLA allows courts to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. Id. Similarly, review of decisions of the National Mediation Board, acting pursuant to its authority under the RLA, is "extraordinarily limited." See

Horizon Air Indus. v. National Mediation Bd., 232 F.3d 1126, 1131 (9th Cir. 2000), cert. denied, 533 U.S. 915 (2001). Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. Association of Flight Attendants v. Horizon Air Indus., Inc., 280 F.3d 901, 904 (9th Cir. 2002).

x. **Negligence**

A district court's finding of negligence is reviewed under the clearly erroneous standard. See Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1116 (9th Cir. 1998); In re Catalina Cruises, Inc., 137 F.3d 1422, 1425 (9th Cir. 1998); Miller v. United States, 66 F.3d 220, 224 (9th Cir. 1995); Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996); Sutton v. Earles, 26 F.3d 903, 913 (9th Cir. 1994); Vollendorff v. United States, 951 F.2d 215, 217 (9th Cir. 1991). This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed de novo. Exxon, 54 F.3d at 576; Vollendorff, 951 F.2d at 217. "The existence and extent of the standard of conduct are questions of law, reviewable de novo, but issues of breach and proximate cause are questions of fact, reviewable for clear error." Vollendorff, 951 F.2d at 217; see also Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 216 F.3d 764, 783 (9th Cir. 2000) (noting that findings of proximate cause and causation-in-fact are reviewed for clear error), aff'd, 122 S. Ct. 1465 (2002); Exxon, 54 F.3d at 576 (findings regarding proximate cause are reviewed for clear error); but see Catalina Cruises, 137 F.3d at 1425 (standard of care is a question of law reviewed de novo).

A tax court's finding that understatement of tax liability was due to negligence is reviewed for clear error. See O.S.C. & Assocs, Inc. v. Commissioner, 187 F.3d 1116, 1121 (9th Cir. 1999); Little v. Commissioner, 106 F.3d 1445, 1449 (9th Cir. 1997); Sacks v. Commissioner, 82 F.3d 918, 920 (9th Cir. 1996).

y. **Securities**

This court reviews a district court's Federal Rule of Civil Procedure 12(b)(6) dismissal of a federal securities claim de novo. See DSAM Global Value Fund v. Altris Software, Inc., 288 F.3d 385, 388 (9th Cir. 2002); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1035 (9th Cir. 2002); In re Silicon Graphics Inc. Securities Litigation, 183 F.3d 970, 983 (9th Cir. 1999); Partnership Exch. Sec. Co. v. National Ass'n of Sec. Dealers, Inc., 169 F.3d 606, 608 (9th Cir. 1999); In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996); Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). Issues of personal jurisdiction are reviewed de novo. See Howard v. Everex Sys., Inc.,

228 F.3d 1057, 1061 (9th Cir. 2000). Dismissals pursuant to Federal Rule of Civil Procedure 9(b) are also reviewed de novo. See Berry v. Valence Tech., Inc., 175 F.3d 699, 706 (9th Cir. 1999); In re GlenFed, Inc. Sec. Litig., 11 F.3d 843, 847 (9th Cir. 1993), vacated on other grounds, 42 F.3d 1541 (9th Cir. 1995) (en banc). The denial of a motion to dismiss is also reviewed de novo. See SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998). A grant of summary judgment is reviewed de novo. See SEC v. Dain Rauscher, Inc., 254 F.3d 852, 855 (9th Cir. 2001); Berry v. Valence Tech., Inc., 175 F.3d 699, 703 (9th Cir. 1999). A district court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. See Griggs v. Pace Amer. Group, Inc., 170 F.3d 877, 879 (9th Cir. 1999). The trial court's refusal to remand a securities action to state court is reviewed de novo. See Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1211 (9th Cir. 1998). Whether a securities statute may be applied retroactively is a question of law reviewed de novo. Scott v. Boos, 215 F.3d 940, 942 (9th Cir. 2000).

In a stockholder's derivative action, the trial court's determination that it would have been futile to have made a demand on the corporate directors is reviewed for an abuse of discretion. See In re Silicon Graphics, 183 F.3d at 983.

This court reviews de novo decisions regarding the validity and scope of arbitration clauses. Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1139 (9th Cir. 1991); Paulson v. Dean Witter Reynolds, Inc., 905 F.2d 1251, 1254 (9th Cir. 1990).

"Class definitions" in securities litigation present questions of law reviewed de novo. In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 49 F.3d 541, 543 (9th Cir. 1995). Dismissal of class action state securities fraud claims is reviewed for an abuse of discretion. See Binder v. Gillespie, 184 F.3d 1059, 1066 (9th Cir. 1999). The court's decision to certify a class is "very limited" and will be reversed "only upon a strong showing that the district court's decision was a clear abuse of discretion." In re Mego Financial Corp. Securities Litigation, 213 F.3d 454, 461 (9th Cir. 2000) (internal quotation omitted). The court's approval of an allocation plan for a settlement in a class action is also reviewed for an abuse of discretion. See id. at 460. The court's decision whether to award attorneys fees in a securities class action is reviewed for an abuse of discretion. See Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000).

The Securities Exchange Commission's factual findings are reviewed for substantial evidence. See Krull v. SEC, 248 F.3d 907, 911 (9th Cir. 2001); Alderman

v. SEC, 104 F.3d 285, 288 (9th Cir. 1997). Deference is owed to the agency's construction of its own regulations unless its interpretation is "unreasonable" or "plainly erroneous." Alderman 104 at 288. This court reviews the SEC's affirmance of sanctions for an abuse of discretion. See Krull, 248 F.3d at 912; Alderman, 104 F.3d at 288; Atlanta-One, Inc. v. SEC, 100 F.3d 105, 107 (9th Cir. 1996).

A disgorgement order is reviewed for an abuse of discretion. See SEC v. First Pac. Bancorp, 142 F.3d 1186, 1190 (9th Cir. 1998); SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998).

Whether federal securities law voids choice of law and forum selection clauses present questions of law reviewed de novo. See Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc).

z. **Social Security**

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. See Moore v. Commissioner of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002); Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001); Pagter v. Massanari, 250 F.3d 1255, 1258 (9th Cir. 2001); Holohan v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001); Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001); Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Gatliff v. Commissioner of the Soc. Sec. Admin., 172 F.3d 690, 692 (9th Cir. 1999); Morgan v. Commissioner of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Sousa v. Callahan, 143 F.3d 1240, 1243 (9th Cir. 1998); Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997); Sandgathe v. Chater, 108 F.3d 978, 979 (9th Cir. 1997); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

The decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. See Moore, 278 F.3d at 924; Pagter, 250 F.3d at 1258; Holohan, 246 F.3d at 1201; Lewis, 236 F.3d at 509; Tackett, 180 F.3d at 1097; Morgan, 169 F.3d at 999; Reddick, 157 F.3d at 720; Sousa, 143 F.3d at 1243; Smolen, 80 F.3d at 1279. When reviewing factual determinations by the Commissioner, acting through the administrative law judge, this court affirms if substantial evidence supports the determinations. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996).

Substantial evidence is more than a mere scintilla, but less than a preponderance. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); Edlund, 253 F.3d at 1156; Holohan, 246 F.3d at 1201; Lewis, 236 F.3d at 509; Tackett, 180 F.3d at 1098; Tidwell, 161 F.3d at 601; Reddick, 157 F.3d at 720; Sousa, 143 F.3d at 1243; Jamerson, 112 F.3d at 1066. Substantial evidence, considering the entire record, is relevant evidence which a reasonable person might accept as adequate to support a conclusion. Morgan, 169 F.3d at 999; Reddick, 157 F.3d at 720; Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279.

If the evidence can reasonably support either affirming or reversing the Secretary's conclusion, the court may not substitute its judgment for that of the Secretary. See Mayes, 276 F.3d at 459; Edlund, 253 F.3d at 1156; Holohan, 246 F.3d at 1201; Lewis, 236 F.3d at 509; Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at 720. The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. See Edlund, 253 F.3d at 1156; Lewis, 236 F.3d at 509; Reddick, 157 F.3d at 720. The ALJ, however, cannot discount a claim of excess pain without making specific findings justifying that decision. Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1996). These findings must be supported by clear and convincing reasons and substantial evidence in the record as a whole. Id. The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. See Edlund, 253 F.3d at 1156; McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000).

The Commissioner's interpretation of social security statutes or regulations is entitled to deference. See Campbell ex rel. Campbell v. Apfel, 177 F.3d 890, 893 (9th Cir. 1999) (regulation and statute); Jamerson, 112 F.3d at 1066 (statute); Esselstrom v. Chater, 67 F.3d 869, 872 (9th Cir. 1995) (regulations); Flaten, 44 F.3d at 1460; Peura v. Mala, 977 F.2d 484, 487 (9th Cir. 1992) (statute). A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulations or statute under which the regulations were promulgated. Esselstrom, 67 F.3d at 872.

Whether new evidence justifies a remand to the Commissioner is reviewed de novo. See Mayes, 276 F.3d at 461-62 (clarifying standard); Harman, 211 F.3d at 1174. Whether the claimant has shown good cause is reviewed, however, for an abuse of discretion. Mayes, 276 F.3d at 462. The district court's decision whether to remand for further proceedings or for immediate payment of benefits is reviewed for an abuse of discretion. See Harman, 211 F.3d at 1175-78.

An award of attorneys fees under the Social Security Act is reviewed for an abuse of discretion. See Gisbrecht v. Apfel, 238 F.3d 1196, 1197 (9th Cir. 2000), rev'd on other grounds, 122 S. Ct. 1817, 1829 (2002) (noting that 42 U.S.C. § 406(b) fee awards must also be reviewed for "reasonableness"); Widrig v. Apfel, 140 F.3d 1207, 1209 (9th Cir. 1998); Allen v. Shalala, 48 F.3d 456, 457 (9th Cir. 1995). "An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact." Allen, 48 F.3d at 457. The court's interpretation of the Social Security Act's attorneys fees provision, however, is reviewed de novo. Id.

aa. **Tariffs**

A tariff is considered a contract. "The construction of a tariff, including the threshold question of ambiguity, ordinarily presents a question of law for the court to resolve." Milne Truck Lines, Inc. v. Makita U.S.A., Inc., 970 F.2d 564, 567 (9th Cir. 1992).

bb. **Tax**

Decisions of the United States Tax Court are reviewed on the same basis as decisions in civil bench trials in the United States District Court. See DHL Corp. v. Commissioner, 285 F.3d 1210, 1216 (9th Cir. 2002); Estate of Ashman v. Commissioner, 231 F.3d 541, 542 (9th Cir. 2000); Custom Chrome, Inc. v. Commissioner, 217 F.3d 1117, 1121 (9th Cir. 2000); Baizer v. Commissioner, 204 F.3d 1231, 1233 (9th Cir. 2000); Hill v. Commissioner, 204 F.3d 1214, 1217 (9th Cir. 2000); Estate of Rapp v. Commissioner, 140 F.3d 1211, 1214 (9th Cir. 1998); Delk v. Commissioner, 113 F.3d 984, 986 (9th Cir. 1997); Condor Int'l, Inc. v. Commissioner, 78 F.3d 1355, 1358 (9th Cir. 1996); Kelley v. Commissioner, 45 F.3d 348, 350 (9th Cir. 1995).

Thus, the tax court's conclusions of law are reviewed de novo. See DHL Corp., 285 F.3d at 1216; Sklar v. Commissioner, 282 F.3d 610, 612 (9th Cir. 2002); Schachter v. Commissioner, 255 F.3d 1031, 1033 (9th Cir.) (credit offset), cert. denied, 122 S. Ct. 65 (2001); Estate of Mitchell v. Commissioner, 250 F.3d 696, 701 (9th Cir. 2001) (burden of proof); Custom Chrome, 217 F.3d at 1121; Baizer, 204 F.3d at 1233; Hill, 204 F.3d at 1217; Boyd Gaming Corp. v. Commissioner, 177 F.3d 1096, 1098 (9th Cir. 1999); Ferguson v. Commissioner, 174 F.3d 997, 1001 (9th Cir. 1999); Lucky Stores, Inc. v. Commissioner, 153 F.3d 964, 965 (9th Cir. 1998); Rapp, 140 F.3d at 1215; Rankin v. Commissioner, 138 F.3d 1286, 1288 (9th Cir. 1998); Harbor Bancorp v.

Commissioner, 115 F.3d 722, 727 (9th Cir. 1997); Ann Jackson Family Found. v. Commissioner, 15 F.3d 917, 920 (9th Cir. 1994).

Jurisdictional issues are reviewed de novo. See Crawford v. Commissioner, 266 F.3d 1120, 123 (9th Cir. 2001), cert. denied, 122 S. Ct. 1080 (2002); Estate of Branson v. Commissioner, 264 F.3d 904, 908 (9th Cir. 2001) (equitable recoupment), cert. denied, 122 S. Ct. 1296 (2002); I & O Pub. Co. v. Commissioner, 131 F.3d 1314, 1315 (9th Cir. 1997); Correia v. Commissioner, 58 F.3d 468, 469 (9th Cir. 1995).

The tax court's interpretation of treasury regulations is reviewed de novo. See DHL Corp., 285 F.3d at 1216; Dykstra v. Commissioner, 260 F.3d 1181, 1182 (9th Cir. 2001). The tax court's construction of the tax code is reviewed de novo. See Best Life Assur. Co. v. Commissioner, 281 F.3d 828, 830 (9th Cir. 2002); Strange v. Commissioner, 270 F.3d 786, 787 (9th Cir. 2001); Leslie v. Commissioner, 146 F.3d 643, 650 (9th Cir. 1998); Leila G. Newhall Unitrust v. Commissioner, 105 F.3d 482, 484 (9th Cir. 1997); Condor Int'l, 78 F.3d at 1358; Citrus Valley Estates, Inc. v. Commissioner, 49 F.3d 1410, 1413 (9th Cir. 1995). The constitutionality of additions to tax presents questions of law reviewed de novo. See Louis v. Commissioner, 170 F.3d 1232, 1234 (9th Cir. 1999); Little v. Commissioner, 106 F.3d 1445, 1449 (9th Cir. 1997). The tax court's grant of summary judgment is reviewed de novo. See Whitmire v. Commissioner, 178 F.3d 1050, 1051 (9th Cir. 1999); Gladden v. Commissioner, 262 F.3d 851, 853 (9th Cir. 2001); Talley Indus. Inc. v. Commissioner, 116 F.3d 382, 385 (9th Cir. 1997). The determination of time limitations applicable to a cause of action are reviewed de novo. Bresson v. Commissioner, 213 F.3d 1173, 1174 (9th Cir. 2000). Whether additional taxes imposed violates the Double Jeopardy Clause or the Fifth, Sixth, or Eighth Amendments are questions of law reviewed de novo. See Louis v. Commissioner, 170 F.3d 1232, 1234 (9th Cir. 1999).

A district court's interpretation of the tax code and corresponding treasury regulations are reviewed de novo. See Boeing Co. v. United States, 258 F.3d 958, 962-63 (9th Cir. 2001) (noting what deference may be owed to the Commissioner's interpretations), cert. granted 122 S. Ct. 2289 (2002). A district court's determination of the appropriate interest rate to be applied to unpaid taxes is a legal issue reviewed de novo. See Oregon Short Line R.R. v. Dep't of Revenue Or., 139 F.3d 1259, 1263 (9th Cir. 1998).

Although a presumption exists that the tax court correctly applied the law, no special deference is given to the tax court's decisions. See Best Life Assur., 281 F.3d at 830-31; Custom Chrome, 217 F.3d at 1121; Baizer, 204 F.3d at 1233; Hill, 204 F.3d at 1217; AMERCO, Inc. v. Commissioner, 979 F.2d 162, 165 (9th Cir. 1992); Pacific

First Fed. Sav. Bank v. Commissioner, 961 F.2d 800, 803 (9th Cir. 1992); see also Boyd Gaming, 177 F.3d at 1098 (noting that tax court's interpretation of tax laws "is entitled to respect."); Pahl v. Commissioner, 150 F.3d 1124, 1127 (9th Cir. 1998) (noting that no deference is owed to the tax court on issues of state law); Harbor Bancorp, 115 F.3d at 727 ("We owe no deference to the Commissioner or to the Tax Court on issues of state law."); Ann Jackson Family Found., 15 F.3d at 920 n.9 (reviewing argument whether deference is owed to the tax court's legal conclusions).

Questions of fact are reviewed for clear error. See DHL Corp. 285 F.3d at 1216 (valuation and common control); Estate of Trompeter v. Commissioner, 279 F.3d 767, 770 (9th Cir. 2002) (valuation of assets/fraudulent behavior); Suzy's Zoo v. Commissioner, 273 F.3d 875, 878 (9th Cir. 2001) ("producer"); Schachter, 255 F.3d at 1033 (business expenses); Emert v. Commissioner, 249 F.3d 1130, 1131-32 (9th Cir. 2001) (notice of deficiency); Baizer, 204 F.3d at 1233-34 (recission); Hill, 204 F.3d at 1217 (profit motive); Boyd Gaming, 177 F.3d at 1098 (deduction); Ferguson, 174 F.3d at 1001 (value of stock); Henry v. Commissioner, 170 F.3d 1217, 1219 (9th Cir. 1999) (negligence); Henderson v. Commissioner, 143 F.3d 497, 500 (9th Cir. 1998) (location of "tax home"); I & O Pub., 131 F.3d at 1315 (tax liability); Harbor Bancorp, 115 F.3d at 727 (sham transactions); Wiksell v. Commissioner, 90 F.3d 1459, 1461 (9th Cir. 1996) (innocent spouse); see also Commissioner v. Duberstein, 363 U.S. 278, 289-91 (1960) (question of whether there has been a gift for income tax purposes is one of fact). The tax court's finding of negligence is also reviewed for clear error. See Henry, 170 F.3d at 1219; Little, 106 F.3d at 1449; Sacks v. Commissioner, 82 F.3d 918, 920 (9th Cir. 1996). This court reviews for clear error the imposition of tax penalties for intentional disregard of rules and regulations. Cramer v. Commissioner, 64 F.3d 1406, 1414 (9th Cir. 1995).

Discretionary decisions are reviewed for abuse of discretion. See Jim Turin & Sons, Inc. v. Commissioner, 219 F.3d 1103, 1105 & n.3 (9th Cir. 2000) (clarifying standard); Boyd Gaming, 177 F.3d at 1098; Condor Int'l, 78 F.3d at 1358; Kelley v. Commissioner, 45 F.3d 348, 350 (9th Cir. 1995); but see Bob Wondries Motors, Inc. v. Commissioner, 268 F.3d 1156, 1160 (9th Cir. 2001) (declining to decide whether de novo or abuse of discretion standard applies to choice of accounting method). The tax court's exclusion of evidence is reviewed for an abuse of discretion. Little, 106 F.3d at 1449. A decision whether to award attorneys fees is reviewed for an abuse of discretion. See Liti v. Commissioner, 289 F.3d 1103, 1104 (9th Cir. 2002); Bertolino v. Commissioner, 930 F.2d 759, 761 (9th Cir. 1991). The denial of attorneys fees sought pursuant to 26 U.S.C. § 7430 is also reviewed for an abuse of discretion. See United States v. Ayres, 166 F.3d 991, 997 (9th Cir. 1999); Awmiller v. United States,

1 F.3d 930, 930 (9th Cir. 1993). The tax court's imposition of sanctions is reviewed for an abuser of discretion. Liti, 289 F.3d at 1105.

A district court's decision to quash an IRS summons is reviewed for clear error. David H. Tedder & Assocs. v. United States, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce the summons is also reviewed for clear error. United States v. Blackman, 72 F.3d 1418, 1422 (9th Cir. 1995); Fortney v. United States, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion to quash); but see Crystal v. United States, 172 F.3d 1141, 1145 (9th Cir. 1999) (applying de novo review when appeal was from grant of summary judgment). Whether a district court may conditionally enforce an IRS summons, however, raises questions of statutory interpretation reviewed de novo. United States v. Jose, 131 F.3d 1325, 1327 (Cir. 1997) (en banc).

cc. **Title VII**

Legal questions under Title VII are reviewed de novo, while a district court's underlying findings of fact are subject to clearly erroneous review. See Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 871 (9th Cir. 2001) (noting that findings based on credibility determinations are given "greater deference"); Star v. West, 237 F.3d 1036, 1038 (9th Cir. 2001); Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 94 F.3d 1366, 1369 (9th Cir. 1996); Gilligan v. Department of Labor, 81 F.3d 835, 838 (9th Cir. 1996); Fuller v. Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Bouman v. Block, 940 F.2d 1211, 1218 (9th Cir. 1991); see also Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999) (reviewing summary judgment de novo).

Whether a party has complied with the administrative claim requirements of Title VII is reviewed de novo. See Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001). Whether a district courts lacks jurisdiction because plaintiff failed to exhaust her claims is reviewed de novo. See B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1099 (9th Cir. 2002). Whether a Title VII action is barred by the applicable statute of limitations is a question of law reviewed de novo. See EEOC v. Dinuba Medical Clinic, 222 F.3d 580, 584 (9th Cir. 2000). Whether an employer "took immediate and appropriate remedial action" is a mixed question of law and fact reviewed de novo. See Star, 237 F.3d at 1038. The decision to grant a defendant's motion to strike which effectively dismissed all of a plaintiff's claims is reviewed de novo. See Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1482-83 (9th Cir. 1997). Venue in a Title VII action is reviewed de novo. Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 504 (9th Cir. 2000).

A district court's conclusion whether a plaintiff has satisfied the elements of a prima facie case is reviewed de novo, although the underlying findings are reviewed for clear error. See Paige v. California, 291 F.3d 1141, 1145 (9th Cir. 2002) (disparate impact); Dinuba Medical Clinic, 222 F.3d at 596; Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998); Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993). Whether an employment test was properly validated for purposes of Title VII presents primarily a factual question reviewed for clear error. See Association of Mexican-American Educators v. California, 231 F.3d 572, 584-85 (9th Cir. 2000) (en banc). Whether an employer's proffered justification for differential treatment is pretextual (the third prong of a disparate treatment case) is reviewed under the clearly erroneous standard. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993); Trent v. Valley Elec. Ass'n, Inc., 195 F.3d 534, 537 (9th Cir. 1999). Whether an employer has made reasonable efforts to accommodate an employee is a question of fact reviewed for clear error. See Heller, 8 F.3d at 1439-40.

The district court's choice of remedies in a Title VII action is reviewed for an abuse of discretion. See Caudle v. Bristow Optical Co., 224 F.3d 1014, 1023 (9th Cir. 2000); Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 94 F.3d 1366, 1369 (9th Cir. 1996); Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1495 (9th Cir. 1995). Whether punitive damages are available, however, is a question of law reviewed de novo. See EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 992 (9th Cir. 1998). The trial court's allocation of the damages is normally reviewed for an abuse of discretion, but to the extent that allocation rests on an interpretation of Title VII, review is de novo. See Caudle, 224 F.3d at 1023; Passantino, 212 F.3d at 509; see also Pavon v. Swift Transp. Co., 192 F.3d 902, 910 (9th Cir. 1999) (noting that court's application of Title VII's damages cap is subject to de novo review); Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1153 (9th Cir. 1999) (same).

An award of attorneys fees is reviewed for an abuse of discretion. See Shaw v. City of Sacramento, 250 F.3d 1289, 1293-94 (9th Cir. 2001); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997); Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996); McGrath v. County of Nev., 67 F.3d 248, 252 (9th Cir. 1995).

Whether the district court's jury instructions properly state the elements of a Title VII claim is reviewed de novo. Mockler v. Multnomah County, 140 F.3d 808, 812 (9th Cir. 1998); Heller, 8 F.3d at 1441. The court's formulation of Title VII jury instructions is reviewed for an abuse of discretion. See Mockler, 140 F.3d at 808; Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996).

dd. **Warsaw Convention**

Dismissal of an action pursuant to the venue provisions of the Warsaw Convention is reviewed de novo. See Sopcak v. Northern Mountain Helicopter Servs., 52 F.3d 817, 818 (9th Cir. 1995). The trial court's finding of "wilfull misconduct" is reviewed for clear error even if it presents a mixed question of law and fact. Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1210 (9th Cir. 1997). The court's findings of fact concerning an award of damages are also reviewed for clear error. Id. at 1213. Summary judgments are reviewed de novo. See Carey v. United Airlines, 255 F.3d 1044, 1047 (9th Cir. 2001); Insurance Co. of N. Am. v. Federal Express Corp., 189 F.3d 914, 917 (9th Cir. 1999). Dismissals for failure to state a claim are also reviewed de novo. Dazo v. Globe Airport Sec. Servs., 295 F.3d 934, 937 (9th Cir. 2002).

25. **Supervising Trials**

"Federal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion. A judge's participation during trial warrants reversal only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." Price v. Kramer, 200 F.3d 1237, 1252 (9th Cir. 2000) (internal citation and quotation omitted).

26. **Supplemental Jury Instructions**

A trial court's decision to give a supplemental jury instruction is reviewed for an abuse of discretion. See Jazzabi v. Allstate Ins. Co., 278 F.3d 979, 982 (9th Cir. 2002). The formulation of such an instruction is also reviewed for an abuse of discretion. Id.

27. **Territorial Laws**

This court reviews by direct appeal decisions of the district court of Guam and by writ of certiorari final decisions of the Guam Supreme Court. See 48 U.S.C. §§ 1414-2; 1424-3(c)(d). This court has adopted a deferential standard of review of Guam Supreme Court decisions that interpret laws enacted by the Guam legislature or develop Guam's common law. See Gutierrez v. Pangleinan, 276 F.3d 539, 546 (9th Cir. 2002); EIE Guam Corp. v. Supreme Court of Guam, 191 F.3d 1123, 1125, n.5 (9th Cir. 1999). This court will affirm when the Guam Supreme Court "reasonably and fairly" interprets the law. Gutierrez, 276 F.3d at 546. Review of the Guam Organic Act is, however, de novo after "we consider fully the Guam Supreme Court's explication of legal issues of unique concern to Guam." Id. at 546-47. Review of the Guam Supreme Court's

interpretation of a federal criminal statute is de novo. See Guam v. Guerrero, 290 F.3d 1210, 1213-14 (9th Cir. 2002).

This court also has jurisdiction over appeals from the district court for the Northern Mariana Islands and over appeals from the Supreme Court of the Commonwealth of the Northern Mariana Islands "involving the Constitution, treaties or laws of the United States or any other authority exercised thereunder." See 48 U.S.C. §§ 1823(c); 1824(a); see also Sonoda v. Cabrera, 189 F.3d 1047, 1049-51 (9th Cir. 1999) (discussing limited review of CNMI Supreme Court decisions). Whether the CNMI Supreme Court possessed jurisdiction to decide a case is a question of law reviewed de novo. See Aldan-Pierce v. Mafnas, 31 F.3d 756, 758 (9th Cir. 1994). Whether a particular federal law applies to the CNMI is a question of law reviewed de novo. See Saipan Stevedore Co. v. Director, OWCP, 133 F.3d 717, 719 (9th Cir. 1998); A & E Pac. Constr. Co. v. Saipan Stevedore Co., 888 F.2d 68, 70 (9th Cir. 1989).

28. **Treaties**

The interpretation or application of a treaty or related executive order requires de novo review. See United States v. Idaho, 210 F.3d 1067, 1072 (9th Cir. 2000), aff'd by 121 S. Ct. 2135 (2001); Cree v. Flores, 157 F.3d 762, 768 (9th Cir. 1998) (treaty); United States v. Washington, 157 F.3d 630, 642 (9th Cir. 1998) (treaty); Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 340 (9th Cir. 1996) (executive order and treaty); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996) (treaty); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995). "Where an executive order relates to a reservation set aside by treaty, the review is also de novo." United States v. Washington, 969 F.2d 752, 754-55 (9th Cir. 1992). Findings of historical facts regarding treaties are reviewed for clear error. See Idaho, 210 F.3d at 1072; Cree, 157 F.3d at 768; Washington, 157 F.3d at 642. A court's ruling that non-Indians may exercise treaty rights is reviewed for an abuse of discretion. Cree, 157 F.3d at 769.

Whether a constitutionally valid extradition treaty exists is a question of law reviewed de novo. Then v. Melendez, 92 F.3d 851, 853 (9th Cir. 1996). A trial court's interpretation of an extradition treaty is reviewed de novo. In re Requested Extradition of Kevin Artt, 158 F.3d 462, 465 (9th Cir. 1998); United States v. Lazarevich, 147 F.3d 1061, 1063 (9th Cir. 1998); Clarey v. Gregg, 138 F.3d 764, 765 (9th Cir. 1998). An extradition tribunal's factual determinations are reviewed for clear error. Artt, 158 F.3d at 465.

29. **Tribal Courts**

Whether a tribal court properly exercised its jurisdiction is a question of law reviewed de novo. See AT&T v. Coeur D'Alene Tribe, 295 F.3d 889, 904 (9th Cir. 2002) (clarifying circuit law). Thus, a tribal court's exercise of jurisdiction over non-Indians is a question of federal law reviewed de novo. See Big Horn County Electric Coop., Inc. v. Adams, 219 F.3d 944, 949 (9th Cir. 2000); Montana v. Gilham, 133 F.3d 1133, 1135 (9th Cir. 1998); see also Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1209 (9th Cir. 2001) (en banc) (noting that district court's decision regarding the scope of a tribe's authority to regulate matters affecting non-Indians is reviewed de novo), cert. denied, 122 S. Ct. 1296 (2002); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990) (reasoning that tribal court's exercise of jurisdiction is reviewed de novo while underlying findings of fact are reviewed for clear error). Decisions regarding the scope of tribal court jurisdiction are also reviewed de novo. See Big Horn, 219 F.3d at 949; State v. Hicks, 196 F.3d 1020, 1024 (9th Cir. 1999).

Whether a district court is required to abstain from granting or denying an injunction when a party has failed to exhaust tribal court remedies is an issue of law reviewed de novo. El Paso Nat'l Gas Co. v. Neztsosie, 136 F.3d 610, 613 (9th Cir. 1998), rev'd on other grounds, 526 U.S. 473 (1999). Whether a federal district court should abstain in favor of exhaustion of tribal court remedies is reviewed de novo. Burlington N. R.R. v. Red Wolf, 106 F.3d 868, 869-70 (9th Cir.) (en banc), vacated, 522 U.S. 801 (1997); see also United States v. Plainbull, 957 F.2d 724, 725-28 (9th Cir. 1992) (discussing deference owed to tribal courts).

Whether a tribal court's denial of compulsory process violated rights of an accused under the Indian Civil Rights Act is reviewed de novo. See Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 951 (9th Cir. 1998). Whether a denial of due process precludes a district court's grant of comity to the trial court's judgment presents questions of law reviewed de novo. See Bird v. Glacier Elect. Coop., Inc., 255 F.3d 1136, 1140-41 (9th Cir. 2001).

Facts found by a tribal court are given deference unless they are clearly erroneous. See Bugenig, 266 F.3d at 1206; FMC, 905 F.3d at 1313.

30. **Verdict Forms**

The district court has broad discretion in deciding whether to use a special or general verdict. Acosta v. City & County of San Francisco, 83 F.3d 1143, 1149 (9th Cir. 1996); United States v. Real Property Located at 20832 Big Rock Drive, 51 F.3d 1402, 1408 (9th Cir. 1995). "This discretion extends to determining the content and layout of the verdict form, and any interrogatories submitted to the jury, provided the questions asked are reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment." Real Property, 51 F.3d at 1408.

A special verdict form is reviewed for an abuse of discretion. See Saman v. Robbins, 173 F.3d 1150, 1155 (9th Cir. 1999); Smith v. Jackson, 84 F.3d 1213, 1220 (9th Cir. 1996) (appellate court must determine whether the questions in the form were adequate to obtain a jury determination of the factual issues essential to judgment). A trial court may abuse its discretion, however, by failing to disclose to the parties prior to closing arguments the substance of special verdict interrogatories. See Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 522 (9th Cir. 1999).

D. Post-Trial Decisions in Civil Cases

1. Appeals

A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. See Marx v. Loral Corp., 87 F.3d 1049, 1053 (9th Cir. 1996). The court's grant or denial of relief under FRAP 4(a) is also reviewed for an abuse of discretion. See Nguyen v. Southwest Leasing and Rental, Inc., 282 F.3d 1061, 1064 (9th Cir. 2002); In re Stein, 197 F.3d 421, 424 (9th Cir. 1999); Nunley v. City of Los Angeles, 52 F.3d 792, 795 (9th Cir. 1995).

2. Attorneys Fees

Attorneys fees awards are generally reviewed for an abuse of discretion. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1200 (9th Cir. 2002) (Title VII); Webb v. Ada County, 285 F.3d 829, 837 (9th Cir. 2002) (civil rights); Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1148 (9th Cir. 2001) (FDCPA); Roy Allen Slurry Seal v. Local Union 1184, 241 F.3d 1142, 1145 (9th Cir. 2001) (state law); Fischer v. SJB-P.D., Inc. 214 F.3d 1115, 1118 (9th Cir. 2000); Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1105 (9th Cir. 2000) (wrongful removal); Cline v. Industrial Maintenance Eng. and Contracting Co., 200 F.3d 1223, 1235 (9th Cir. 2000); Lambert v. Ackerley, 180 F.3d 997, 1012-13 (9th Cir. 1999) (en banc) (supplemental award); Gilbrook v. City of Westminster, 177 F.3d 839, 875 (9th Cir. 1999); Herb Hallman Chevrolet Inc. v. Nash-Holmes, 169 F.3d 636, 641 (9th Cir. 1999); San Pedro Hotel Co.

v. City of Los Angeles, 159 F.3d 470, 479 (9th Cir. 1998); Margolis v. Ryan, 140 F.3d 850, 854 (9th Cir. 1998); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997); Wing v. Asarco Inc., 114 F.3d 986, 988 (9th Cir. 1997); Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1132 (9th Cir. 1997); Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996).

Supporting findings of fact are reviewed for clear error. See Ferland, 244 F.3d at 1147-48; Roy Allen Slurry Seal, 241 F.3d at 1145; Fischer, 214 F.3d at 1118; San Pedro Hotel, 159 F.3d at 479; Corder, 104 F.3d at 249; Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 696 (9th Cir. 1996). Whether the district court applied the correct legal standard is reviewed de novo. See Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc., 260 F.3d 1054, 1058 (9th Cir. 2001); Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525, 528 (9th Cir. 1998); Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1318 (9th Cir. 1997); Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1498 (9th Cir. 1994). Any element of legal analysis and statutory interpretation that figures in the district court's decision is also reviewed de novo. See Fischer, 214 F.3d at 1118; Gilbrook, 177 F.3d at 875; San Pedro Hotel, 159 F.3d at 479; Corder, 104 F.3d at 249; Schwarz v. Secretary of Health & Human Servs., 73 F.3d 895, 900 (9th Cir. 1995).

The court's decision to deny attorneys fees is also reviewed for an abuse of discretion. See Barrios v. California Interscholastic Fed., 277 F.3d 1128, 1133 (9th Cir. 2002) (ADA); Shaw v. City of Sacramento, 250 F.3d 1289, 1293-94 (9th Cir. 2001) (Title VII); Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 711 (9th Cir. 1999); Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999); Native Village of Venetie IRA Council v. Alaska, 155 F.3d 1150, 1151 (9th Cir. 1998); United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996).

A district court's departure from the American rule limiting awards of attorneys fees is reviewed de novo. Home Sav. Bank, F.S.B. v. Gillam, 952 F.2d 1152, 1161 (9th Cir. 1991); Perry v. O'Donnell, 759 F.2d 702, 704 (9th Cir. 1985). Whether an award of attorneys fees from the United States is barred by sovereign immunity is a question of law reviewed de novo. Anderson v. United States, 127 F.3d 1190, 1191 (9th Cir. 1997) (FTCA action).

a. **Antitrust**

Although the award of attorneys fees as part of the cost of a successful antitrust suit is mandatory, a trial court has discretion to decide the amount of a reasonable fee and its decision will not be disturbed absent an abuse of discretion or clear error of law. Hasbrouck v. Texaco, Inc., 879 F.2d 632, 635 (9th Cir. 1989); see also In re

Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 109 F.3d 602, 607 (9th Cir. 1997) (applying abuse of discretion standard). An award of fees pursuant to the antitrust immunity provisions of the Health Care Quality Improvement Act is reviewed for an abuse of discretion. Smith v. Ricks, 31 F.3d 1478, 1487 (9th Cir. 1994).

b. **Bankruptcy**

A bankruptcy court's award of attorneys fees should not be reversed absent an abuse of discretion or an erroneous application of the law. See In re Jastrem, 253 F.3d 438, 442 (9th Cir. 2001); In re Larry's Apartment, LLC, 249 F.3d 832, 836 (9th Cir. 2001); Renfrow v. Draper, 232 F.3d 688, 693 (9th Cir. 2000); In re Kord Enters. II, 139 F.3d 684, 687 (9th Cir. 1998); In re Baroff, 105 F.3d 439, 441 (9th Cir. 1997); In re Del Mission Ltd., 98 F.3d 1147, 1152 (9th Cir. 1996); In re Lazar, 83 F.3d 306, 308 (9th Cir. 1996). The amount of the fee award is also reviewed for an abuse of discretion. In re Lewis, 113 F.3d 1040, 1043 (9th Cir. 1997). The bankruptcy court's decision whether to award fees under 11 U.S.C. § 523(d) is also reviewed for an abuse of discretion. See In re Hunt, 238 F.3d 1098, 1101 (9th Cir. 2001).

c. **Civil Rights**

In the civil rights context, awards made pursuant to 42 U.S.C. § 1988 are generally reviewed for an abuse of discretion. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Webb v. Ada County, 285 F.3d 829, 837 (9th Cir. 2002); Bauer v. Sampson, 261 F.3d 775, 781 (9th Cir. 2001); LSO, Ltd, v. Stroh, 205 F.3d 1146, 1160 (9th Cir. 2000); Gilbrook v. City of Westminster, 177 F.3d 839, 875 (9th Cir. 1999); San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 479 (9th Cir. 1998); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997); Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996); Trevino v. Gates, 99 F.3d 911, 924 (9th Cir. 1996); McGrath v. County of Nev., 67 F.3d 248, 252 (9th Cir. 1995). A trial court abuses its discretion if its fee award is based on an inaccurate view of the law or a clearly erroneous finding of fact. Webb, 285 F.3d at 837; Barjon, 132 F.3d at 500.

Any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed de novo. Webb, 285 F.3d at 837; Gilbrook, 177 F.3d at 875; San Pedro Hotel, 159 F.3d at 479; Corder, 104 F.3d at 249; Associated Gen. Contractors Inc. v. Smith, 74 F.3d 926, 930 (9th Cir. 1996); Kilgour v. Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1995). Factual findings underlying the district court's decision are reviewed for clear error. San Pedro Hotel, 159 F.3d at 479; Corder, 104

F.3d at 249; Stivers v. Pierce, 71 F.3d 732, 751 (9th Cir. 1995); Kilgour, 53 F.3d at 1010 ("prevailing party" determination).

The district court's decision to deny attorneys fees for work done in furtherance of a prevailing party's § 1988 motion is also reviewed for an abuse of discretion. Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999); Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994). The court's decision to award fees-on-fees is reviewed for an abuse of discretion. Schwarz v. Secretary of Health & Human Servs., 73 F.3d 895, 908 (9th Cir. 1995); Thompson v. Gomez, 45 F.3d 1365, 1367 (9th Cir. 1995).

d. **Class Actions**

An award of attorneys fees in a class action is reviewed for an abuse of discretion. See Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000); Lobatz v. U.S. West Cellular, Inc., 222 F.3d 1142, 1148 (9th Cir. 2000); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998); Williams v. MGM-Pathe Communications Co., 129 F.3d 1026, 1027 & n.1 (9th Cir. 1997); In re FPI/Agretech Sec. Litig., 105 F.3d 469, 472 (9th Cir. 1997) ("In class actions, the district court has broad authority over awards of attorneys' fees; therefore, our review is for an abuse of discretion."). The trial court's choice of method for determining fees is also reviewed for an abuse of discretion. See Powers, 229 F.3d at 1256; Lobatz, 222 F.3d at 1149; Hanlon, 150 F.3d at 1029; FPI/Agretech, 105 F.3d at 472.

e. **Contract Provision**

An award of fees made pursuant to the parties' contractual agreement is reviewed for an abuse of discretion. See Doherty v. Wireless Broad. Sys. of Sacramento, Inc., 151 F.3d 1129, 1131 (9th Cir. 1998); Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525, 528 (9th Cir. 1998); Nelson v. Pima Community College, 83 F.3d 1075, 1083 (9th Cir. 1996); see also Kord Enters. II v. California Commerce Bank (In re Kord Enters. II), 139 F.3d 684, 686 (9th Cir. 1998) (bankruptcy court). Any element of legal analysis, however, that figures in the district court's decision to award fees is reviewed de novo. Siegel, 143 F.3d at 528.

A trial court's decision not to award contractually-authorized attorneys fees is also reviewed for an abuse of discretion. See Anderson v. Melwani, 179 F.3d 763, 767 (9th Cir. 1999); Kim v. Kang, 154 F.3d 996, 1001 (9th Cir. 1998). A court can decline to award fees whenever such an award would be "inequitable and unreasonable." See Anderson, 179 F.3d at 767.

f. **Copyright/Trademark**

An award of attorneys fees made pursuant to the Copyright Act is reviewed for an abuse of discretion. See Columbia Pictures Indus., Inc. v. Krypton Broad., Inc., 259 F.3d 1186, 1197 (9th Cir. 2001), cert. denied, 122 S. Ct. 1063 (2002); Dolman v. Agee, 157 F.3d 708, 715 (9th Cir. 1998); Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1216 (9th Cir. 1997); Fantasy, Inc. v. Fogerty, 94 F.3d 553, 555 (9th Cir. 1996); Magnuson v. Video Yesteryear, 85 F.3d 1424, 1427 (9th Cir. 1996). The district court's findings of fact underlying the award are reviewed for clear error. Smith v. Jackson, 84 F.3d 1213, 1221 (9th Cir. 1996). Any legal analysis or statutory interpretations are reviewed de novo. See Entertainment Research, 122 F.3d at 1216. The court's refusal to award fees is reviewed for an abuse of discretion. See Yount v. Acuff Rose-Opryland, 103 F.3d 830, 836 (9th Cir. 1996).

An award of fees under the Lanham Act is also reviewed for an abuse of discretion. See Cairns v. Frankin Mint Co., 292 F.3d 1139, 1156 (9th Cir. 2002); Gracie v. Gracie, 217 F.3d 1060, 1071-72 (9th Cir. 2000); Stephen W. Boney, Inc. v. Boney Servs., Inc., 127 F.3d 821, 825 (9th Cir. 1997); Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1314 (9th Cir. 1997); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1111 (9th Cir. 1992). The denial of fees is also reviewed for an abuse of discretion. See Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 711 (9th Cir. 1999).

The district court has discretion to award attorneys fees for actions to enforce trademarks, but only in "exceptional cases," including with "bad faith or other opprobrious conduct." McClaran v. Plastic Indus., Inc., 97 F.3d 347, 364 (9th Cir. 1996). Such fee awards are reviewed for an abuse of discretion. Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1023 (9th Cir. 2002).

g. **Environmental Laws**

Many environmental statutes permit an award of attorneys fees "where appropriate." See Marbled Murrelet v. Babbitt, 182 F.3d 1096, 1094 (9th Cir. 1999) (listing statutes, including Endangered Species Act, 16 U.S.C. § 15409(g)(4)). Review of an award of fees under that standard is for an abuse of discretion. See id. at 1096. Whether a particular statute authorizes attorneys fees is a question of law reviewed de novo. See Unocal Corp. v. United States, 222 F.3d 528, 542 (9th Cir. 2000) (Oil Pollution Act); United States v. Stone Container Corp., 196 F.3d 1066, 1068 (9th Cir. 1999) (Clean Air Act).

h. **Equal Access to Justice Act (EAJA)**

The decision whether to award fees under the EAJA is reviewed for an abuse of discretion. See United States v. Real Property at 2659 Roundhill Dr., 283 F.3d 1146, 1151 n.6 (9th Cir. 2002); United States v. Marolf, 277 F.3d 1156, 1160 (9th Cir. 2002); United States v. 2.6 Acres of Land, 251 F.3d 809, 811 (9th Cir. 2001; Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir. 1998); Sampson v. Chater, 103 F.3d 918, 921 (9th Cir. 1996); United States v. 87 Skyline Terrace, 26 F.3d 923, 927 (9th Cir. 1994); see also Mendenhall v. NTSB, 213 F.3d 464, 470 (9th Cir. 2000) (agency's award of attorney's fees). In particular, this court reviews for an abuse of discretion the district court's conclusion that the government's position is substantially justified. See Marolf, 277 F.3d at 1160; Meinhold v. United States Dep't of Defense, 123 F.3d 1275, 1278 (9th Cir.), amended by 131 F.3d 842 (9th Cir. 1997); Flores v. Shalala, 49 F.3d 562, 567 (9th Cir. 1995). The amount of fees is also reviewed for an abuse of discretion. See Mendenhall v. NTSB, 213 F.3d 464, 470 (9th Cir. 2000); Atkins v. Apfel, 154 F.3d 986, 987 (9th Cir. 1998); Meinhold, 123 F.3d at 1280; Brown v. Sullivan, 916 F.2d 492, 495 (9th Cir. 1990).

"In this circuit, we apply a reasonableness standard in determining whether the government's position was substantially justified for purposes of the EAJA." Flores v. Shalala, 49 F.3d 562, 569 (9th Cir. 1995). The district court's determination that the government's position was reasonable is reviewed, however, for an abuse of discretion. See United States v. Trident Seafoods Corp., 92 F.3d 855, 860-61 (9th Cir. 1996).

Issues involving the interpretation of the EAJA are reviewed de novo. See Marolf, 277 F.3d at 1160; Zambrano v. INS, 282 F.3d 1145, 1149 (9th Cir. 2002) (jurisdiction); 2.6 Acres of Land, 251 F.3d at 811; Atkins, 154 F.3d at 987; United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996); 87 Skyline Terrace, 26 F.3d at 927; Yang v. Shalala, 22 F.3d 213, 215 (9th Cir. 1994). The decision whether a party is a prevailing party is a finding of fact "that will be set aside if clearly erroneous or if based on an incorrect legal standard." Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 496 (9th Cir. 1987); McQuiston v. Marsh, 790 F.2d 798, 800 (9th Cir. 1986); see also Rubin, 97 F.3d at 375 (noting that "prevailing party" is a finding by the district court).

i. **ERISA**

In an ERISA action, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party. See Van Gerwen v. Guarantee Mutual Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000); Plumber, Steamfitter and Shipfitter Indus. Pension Plan & Trust v. Siemens Building Tech. Inc., 228 F.3d 964, 971 (9th Cir. 2000); McBride v. PLM Int'l, 179 F.3d 737, 746 (9th Cir. 1999); Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1468 (9th Cir. 1995) (quoting 29 U.S.C. 1132(g)), see also Cline v.

Industrial Maintenance Eng. & Contracting Co., 200 F.3d 1223, 1235 (9th Cir. 2000) (noting factors for court to consider); Duggan v. Hobbs, 99 F.3d 307, 314 (9th Cir. 1996) (noting that ERISA allows award of attorneys fees on appeal "regardless of the outcome"); Barnes v. Independent Automotive Dealers Ass'n, 64 F.3d 1389, 1397 (9th Cir. 1995) (noting factors for court to consider). Accordingly, review of the district court's decision to award attorneys fees in an ERISA action is for an abuse of discretion. See California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1042 (9th Cir. 2001); Van Gerwen, 214 F.3d at 1045; Cline, 200 F.3d at 1235; Friedrich v. Intel Corp., 181 F.3d 1105, 1113 (9th Cir. 1999); Lee v. California Butchers' Pension Trust Fund, 154 F.3d 1075, 1081-82 (9th Cir. 1998); Estate of Shockley v. Alyeska Pipeline Serv. Co., 130 F.3d 403, 407 (9th Cir. 1997); Corder v. Howard Johnson & Co., 53 F.3d 225, 229 (9th Cir. 1994); Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 25 F.3d 743, 748 (9th Cir. 1994). Moreover, the amount of reasonable fees is reviewed for an abuse of discretion. See Van Gerwen, 214 F.3d at 1045; D'Emanuele v. Montgomery Ward & Co., 904 F.2d 1379, 1384 (9th Cir. 1990).

The district court's denial of fees is also reviewed under the abuse of discretion standard. See McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1171 (9th Cir. 1999); Graphic Communications Union, Dist. Council No. 2 v. GCIU-Employer Retirement Benefit Plan, 917 F.2d 1184, 1189 (9th Cir. 1990).

The court's interpretation of ERISA's attorneys fees provision is de novo. Associated Gen. Contractors v. Smith, 74 F.3d 926, 931 (9th Cir. 1996); Corder, 53 F.3d at 229. Whether interim attorneys fees awards are available under ERISA is a question of law reviewed de novo. Kayes, 51 F.3d at 1468.

j. **FOIA**

A district court has discretion to award attorneys fees to a claimant who substantially prevails under FOIA. See Lissner v. United States Customs Service, 241 F.3d 1220, 1224 (9th Cir. 2001); GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1116 (9th Cir. 1994); Long v. IRS, 932 F.2d 1309, 1313 (9th Cir. 1991) (noting factors that district court should consider before exercising its discretion). Whether an interim fee award is permissible under FOIA is a question of law reviewed de novo. Rosenfeld v. United States, 859 F.2d 717, 723 (9th Cir. 1988).

k. **Inherent Powers**

Courts have inherent power to award attorneys fees as sanctions. See Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1134 (9th Cir. 1995) (abusive litigation practices); In re Akros Installations, Inc., 834 F.2d 1526, 1531 (9th Cir. 1987) (attorney misconduct); Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 957 (9th Cir. 1983) (abuse of judicial process or other bad faith litigation conduct). A trial court's decision to award attorneys fees pursuant to its inherent powers is reviewed for an abuse of discretion. See Mark Indus., Ltd. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995).

l. **Removal**

An award of fees and costs associated with removal or remand under 28 U.S.C. § 1447(c) is reviewed for an abuse of discretion. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 861 (9th Cir. 2001); Stuart v. UNUM Life Ins. Co., 217 F.3d 1145, 1148 (9th Cir. 2000); Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1105 (9th Cir. 2000); K.V. Mart Co. v. United Food and Comm. Workers, Local 324, 173 F.3d 1221, 1223 (9th Cir. 1999). Note, however, that "review of a fee award under § 1447(c) must include a de novo examination of whether the remand order was legally correct." Gibson v. Chrysler Corp., 261 F.3d 927, 932 (9th Cir. 2001) (internal quotation omitted), cert. denied, 122 S. Ct. 903 (2002).

m. **Rule 68**

Federal Rule of Civil Procedure 68 is a cost-shifting provision designed to encourage settlement of legal disputes by forcing a plaintiff to weigh the risk of incurring post-settlement offer costs and fees. Herrington v. County of Sonoma, 12 F.3d 901, 907 (9th Cir. 1993). Whether Rule 68 authorizes an award of attorneys fees is a question of law reviewed de novo. See Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc., 260 F.3d 1054, 1058 (9th Cir. 2001) (affirming denial of fees); United States v. Trident Seafoods Corp., 92 F.3d 855, 859 (9th Cir. 1996); Holland v. Roeser, 37 F.3d 501, 503 (9th Cir. 1995); see also Haworth v. Nevada, 56 F.3d 1048, 1051 (9th Cir. 1995) (reviewing Rule 68's application to FLSA). Thus, issues involving construction of Rule 68 offers are reviewed de novo, while disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error. Herrington, 12 F.3d at 906.

n. **Social Security**

Fee awards made pursuant to the Social Security Act, 42 U.S.C. § 406(b)(1), are reviewed for an abuse of discretion. See Gisbrecht v. Apfel, 238 F.3d 1196, 1197 (9th

Cir. 2000) rev'd on other grounds, 122 S. Ct. 1817, 1829 (2002) (noting that § 406(b) fee awards must also be reviewed for "reasonableness"); Widrig v. Apfel, 140 F.3d 1207, 1209 (9th Cir. 1998); Allen v. Shalala, 48 F.3d 456, 457 (9th Cir. 1995). "An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact." Allen, 48 F.3d at 457.

A district court's interpretation of the Social Security Act's attorneys fees provision is reviewed de novo. Allen, 48 F.3d at 457.

o. **State Law**

An award of attorneys fees made pursuant to state law is reviewed for an abuse of discretion. See Cairns v. Frankin Mint Co., 292 F.3d 1139, 1156 (9th Cir. 2002); Roy Allen Slurry Seal v. Local Union 1184, 241 F.3d 1142, 1145 (9th Cir. 2001); Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000); MRO Communications, Inc. v. American Tel. & Tel. Co., 197 F.3d 1276, 1279 (9th Cir. 1999); 389 Orange St. Partners v. Arnold, 179 F.3d 656, 661 (9th Cir. 1999); Apollo Group, Inc. v. Avnet, Inc., 58 F.3d 477, 482 (9th Cir. 1995). The interpretation of a state statute regarding attorneys fees is reviewed de novo. See Kona Enter., 229 F.3d at 883; O'Hara v. Teamsters Union Local No. 856, 151 F.3d 1152, 1157 (9th Cir. 1998) (denying fees); Resolution Trust Corp. v. Midwest Fed. Sav. Bank of Minot, 36 F.3d 785, 799 (9th Cir. 1993) (same). The denial of fees requested under state law is also reviewed for an abuse of discretion. See Barrios v. California Interscholastic Fed., 277 F.3d 1128, 1133 (9th Cir. 2002).

p. **Tax**

The tax court's decision to grant or deny attorneys fees is reviewed for an abuse of discretion. See Liti v. Commissioner, 289 F.3d 1103, 1104 (9th Cir. 2002); Bertolino v. Commissioner, 930 F.2d 759, 761 (9th Cir. 1991). A district court's decision whether to award fees is also reviewed for abuse of discretion. Estate of Merchant v. Commissioner, 947 F.2d 1390, 1392 (9th Cir. 1991); Bertolino, 930 F.2d at 761. The denial of attorneys fees sought pursuant to 26 U.S.C. § 7430 is reviewed for an abuse of discretion. See United States v. Ayres, 166 F.3d 991, 997 (9th Cir. 1999); Awmiller v. United States, 1 F.3d 930, 930 (9th Cir. 1993).

q. **Title VII**

The decision whether to award attorneys fees under Title VII is reviewed for an abuse of discretion. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1200 (9th Cir.

2002) (granting fees); Shaw v. City of Sacramento, 250 F.3d 1289, 1293-94 (9th Cir. 2001) (denying fees); Passantino v. Johnson & Johnson Consumer Products, 212 F.3d 493, 517-18 (9th Cir. 2000); Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996); McGrath v. County of Nev., 67 F.3d 248, 252 (9th Cir. 1995); Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1498 (9th Cir. 1995); EEOC v. Bruno's Restaurant, 13 F.3d 285, 287 (9th Cir. 1993). Attorneys fees may be awarded pursuant to 42 U.S.C. § 2000e-5(k) when a plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Crowe, 103 F.3d at 900.

3. **Bonds**

The district court's decision to require a bond pursuant to Federal Rule Civil Procedure 65(c) is reviewed for an abuse of discretion. See Goto.Com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1211 (9th Cir. 2000); Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999); see also Catholic Social Servs., Inc. v. INS, 232 F.3d 1139, 1151 (9th Cir. 2000) (en banc) (finding no abuse of discretion in district court's continuation of a bond). The amount of the bond is also reviewed for an abuse of discretion. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028 (9th Cir. 2001); Walczak v. EPLK Prolong, Inc., 198 F.3d 725, 733 (9th Cir. 1999); Barahona-Gomez, 167 F.3d at 1237.

A district court's order setting a supersedeas bond is reviewed for an abuse of discretion. See American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1109 (9th Cir. 2000), cert. denied, 532 U.S. 1008 (2001); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1027 (9th Cir. 1991). "District courts have inherent discretionary authority in setting supersedeas bonds; review is for an abuse of discretion." See Rachel v. Banana Rep. Inc., 831 F.2d 1503, 1505 n.1 (9th Cir. 1987); see also Raby v. M/V Pine Forest, 918 F.2d 80, 81 (9th Cir. 1990) ("We review the decision of the district court setting the amount of the bond for abuse of discretion.").

The district court's decision to execute a bond is reviewed de novo. See Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency, 89 F.3d 629, 631 (9th Cir. 1996); Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994). A court's refusal to allow the execution of a surety bond is a decision of law to which an appellate court applies de novo review. Matek v. Murat, 862 F.2d 720, 733 (9th Cir. 1988). The legal validity of a surety bond is reviewed de novo. See United States v. Noriega-Sababia, 116 F.3d 417, 419 (9th Cir. 1997) (bail bond). An allegation that a district court ignored legal procedure in its decision is also reviewed de novo. Nintendo, 16 F.3d at 1036.

The court's decision to set aside or remit the forfeiture of an appearance bond is reviewed for an abuse of discretion. See United States v. Nguyen, 279 F.3d 1112, 1115 (9th Cir. 2002); United States v. Amwest Surety Ins. Co., 54 F.3d 601, 602 (9th Cir. 1995).

4. **Certified Appeals**

The district court's decision to certify an appeal under Federal Rule of Civil Procedure 54(b) is reviewed for an abuse of discretion. See In re First T.D. & Investment, Inc., 253 F.3d 520, 531-32 (9th Cir. 2001); Schudel v. General Elec. Co., 120 F.3d 991, 994 n.8 (9th Cir. 1997); Blair v. Shanahan, 38 F.3d 1514, 1522 (9th Cir. 1994); see also Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1484 (9th Cir. 1993). But see Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 564 n.1 (9th Cir. 1994) (refusing to apply abuse of discretion standard and noting that "[t]he present trend is toward greater deference to a district court's decision to certify under Rule 54(b)"). A district judge's decision to reconsider an interlocutory order by another judge of the same court is reviewed for an abuse of discretion. See Delta Savings Bank v. United States, 265 F.3d 1017, 1027 (9th Cir. 2001), cert. denied, 122 S. Ct. 816 (2002); Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996).

5. **Consent Decrees**

Interpretation of a consent decree is a question of law reviewed de novo. See California v. Randtron, 284 F.3d 969, 974 (9th Cir. 2002); Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth., 263 F.3d 1041, 1048 (9th Cir. 2001), cert. denied, 122 S. Ct. 1349 (2002); Gates v. Gomez, 60 F.3d 525, 530 (9th Cir. 1995); United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1432 (9th Cir. 1994); Collins v. Thompson, 8 F.3d 657, 658-59 (9th Cir. 1993); Thompson v. Enomoto, 915 F.2d 1383, 1388 (9th Cir. 1990). Although review of the district court's interpretation of a consent decree is de novo, the court of appeals will defer to the district court's factual findings unless they are clearly erroneous. See Labor/Community Strategy Ctr., 263 F.3d at 1048; Gates, 60 F.3d at 530; Gila Valley Irrigation Dist., 31 F.3d at 1432; see also Nehmer v. Veterans' Administration, 284 F.3d 1158, 1160 (9th Cir. 2002) (noting deference owed to district court's interpretation); Randtron, 284 F.3d at 974 (same).

The district court's decision to approve a consent decree is reviewed for an abuse of discretion. See United States v. Montrose Chem. Corp., 50 F.3d 741, 746 (9th Cir. 1995). Modification of a consent decree is also reviewed for abuse of discretion. See Labor/Community Strategy Ctr., 263 F.3d at 1048; Hook v. Arizona Dep't of Corrections, 107 F.3d 1397, 1402 (9th Cir. 1997); Thompson, 915 F.2d at 1388;

Shimkus v. Gersten Cos., 816 F.2d 1318, 1320 (9th Cir. 1987); see also Taylor v. United States, 181 F.3d 1017, 1024 (9th Cir. 1999) (en banc) (noting that a court may "decide in its discretion to reopen and set aside a consent decree").

A district court's refusal to enter a proposed consent judgment is reviewed for abuse of discretion. Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1356 (9th Cir. 1990).

The district court's decision to hold a party in contempt for violating a consent decree is reviewed for an abuse of discretion. See Wolfard Glassblowing Co. v. Vanbragt, 118 F.3d 1320, 1322 (9th Cir. 1997).

6. **Costs**

The district court's award of costs is reviewed for an abuse of discretion. See Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc., 260 F.3d 1054, 1058 (9th Cir. 2001); LSO, Ltd, v. Stroh, 205 F.3d 1146, 1160 (9th Cir. 2000); K.V. Mart Co. v. United Food and Commercial Workers Int'l Union, Local No. 324, 173 F.3d 1221, 1223 (9th Cir. 1999); Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113 (9th Cir. 1998); Disc Golf Ass'n, Inc. v Champion Disc, Inc., 158 F.3d 1002, 1010 (9th Cir. 1998); Russian River Watershed Protection Comm. v. Santa Rosa, 142 F.3d 1136, 1144 (9th Cir. 1998); EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997); Amarel v. Connell, 102 F.3d 1494, 1523 (9th Cir. 1996). The court's decision to award law clerk costs to a prevailing civil rights litigant is reviewed for an abuse of discretion. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997). Whether the district court has the authority to award costs, however, is a question of law reviewed de novo. United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); Evanow, 163 F.3d at 1113; Russian River, 142 F.3d at 1144.

Denial of costs is also reviewed for an abuse of discretion. See Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1187 (9th Cir. 2001); Association of Mexican-American Educators v. California, 231 F.3d 572, 591-92 (9th Cir. 2000) (en banc) (noting that court must "specify reasons" for denying costs); Stanley v. University of S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999); Lockheed Missiles, 190 F.3d at 968; Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996); see also Liti v. Commissioner, 289 F.3d 1103, 1104 (9th Cir. 2002) (denial of costs by tax court).

7. **Damages**

The district court's award of damages is reviewed for an abuse of discretion. See McLean v. Runyon, 222 F.3d 1150, 1155 (9th Cir. 2000) (Rehabilitation Act); Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 712 (9th Cir. 1999) (Lanham Act); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1015 (9th Cir. 1997); Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1495 (9th Cir. 1995); see also Columbia Pictures Indus., Inc. v. Krypton Broad., 259 F.3d 1186, 1194 (9th Cir. 2001) (noting that court has wide discretion in determining statutory damages under the Copyright Act), cert. denied, 122 S. Ct. 1063 (2002); Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1318 (9th Cir. 1997) (treble damage award made pursuant to state law is reviewed for an abuse of discretion). The district court's findings of fact in support of an award for damages are reviewed for clear error. See Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1213 (9th Cir. 1997) (Warsaw Convention); Saratoga Fishing Co. v. Marco Seattle, Inc., 69 F.3d 1432, 1437 (9th Cir. 1995), rev'd on other grounds, 520 U.S. 875 (1997).

The trial court's computation of damages is a finding of fact reviewed under the clearly erroneous standard. See Amantea Cabrera v. Potter, 279 F.3d 746, 750 (9th Cir. 2002); California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1042 (9th Cir. 2001); Simeonoff v. Hiner, 249 F.3d 883, 893 (9th Cir. 2001); Ambassador Hotel Co. v. Wei-Chuan Investment, 189 F.3d 1017, 1024 (9th Cir. 1999) (bench trial); Marsu v. Walt Disney Co., 185 F.3d 932, 938 (9th Cir. 1999) (noting that the district court has discretion to select the formula "most appropriate to compensate the injured party"); Fireman's Fund Ins. Co. v. Big Blue Fisheries, Inc., 143 F.3d 1172, 1177 (9th Cir. 1998) (admiralty); United States v. Pend Oreille County Pub. Util. Dist., 135 F.3d 602, 609 (9th Cir. 1998) (bench trial); Bartleson v. United States, 96 F.3d 1270, 1274 (9th Cir. 1996); Howard v. Crystal Cruises, Inc., 41 F.3d 527, 530 (9th Cir. 1994). The court's allocation of damages for purposes of Title VII's statutory cap is reviewed de novo when it involves an interpretation of the Act. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1195 (9th Cir. 2002); Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 509 (9th Cir. 2000); Pavon v. Swift Transp. Co., 192 F.3d 902, 909 (9th Cir. 1999); Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1153 (9th Cir. 1999). Otherwise, review of a district court's allocation of damages is reviewed for an abuse of discretion. See Caudle v. Bristow Optical Co., 224 F.3d 1014, 1023 (9th Cir. 2000) (Title VII).

This court reviews de novo the district court's legal conclusion that damages are available. See Hemmings, 285 F.3d at 1197 (punitive); United States v. Real Prop. Located at 22 Santa Barbara Dr., 264 F.3d 860, 868 (9th Cir. 2001); EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 992 (9th Cir. 1998); Saratoga Fishing, 69 F.3d at 1437. Whether the district court selected the correct legal standard in computing damages is

also reviewed de novo. See Mackie v. Rieser, 296 F.3d 909, 916 (9th Cir. 2002); Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Railway Co., 213 F.3d 1118, 1119 (9th Cir. 2000); Ambassador Hotel, 189 F.3d at 1024; Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113-14 (9th Cir. 1998); Pend Oreille County Pub. Util. Dist., 135 F.3d at 608; Howard, 41 F.3d at 530; see also In re Air Crash Disaster Near Cerritos, Cal., 982 F.2d 1271, 1275 (9th Cir. 1992) (de novo standard applies to district court's legal determination regarding the proper elements of a damage award).

A jury's verdict of compensatory damages is reviewed for substantial evidence. See In re Exxon Valdez, 270 F.3d 1215, 1247-48 (9th Cir. 2001); Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1108 (9th Cir. 2001). A reviewing court must uphold the jury's finding of the amount of damages unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. See Lambert v. Ackerley, 180 F.3d 997, 1017 (9th Cir. 1999) (en banc); Del Monte Dunes at Monterey, Ltd. v. Monterey, 95 F.3d 1422, 1435 (9th Cir. 1996), aff'd, 526 U.S. 687 (1999); see also Simeonoff, 249 F.3d at 893 (noting that damage award will not be disturbed "unless it is clearly unsupported by the evidence or it shocks the conscience") (internal quotations omitted). But in antitrust cases, the plaintiff need only provide sufficient evidence to permit a just and reasonable estimate of the damages. See Los Angeles Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1360 (9th Cir. 1986). Under the Lanham Act, the district court has discretion to fashion relief, including monetary relief, based on the totality of circumstances, even if the plaintiff cannot show actual damages. See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997); see also Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 996 (9th Cir. 1998) (court has "wide discretion"); Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1313 (9th Cir. 1997) (district court's decision to deny equitable relief in Lanham Act action is reviewed for an abuse of discretion).

a. **Liquidated**

The district court's decision to award liquidated damages is reviewed for an abuse of discretion. See Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 996 (9th Cir. 1998) (noting that court has wide discretion); Local 246 Util. Workers Union v. Southern Cal. Edison Co., 83 F.3d 292, 298 (9th Cir. 1996) (noting that FLSA gives district court discretion whether to award liquidated damages); Bratt v. County of Los Angeles, 912 F.2d 1066, 1071 (9th Cir. 1990); EEOC v. First Citizens Bank, 758 F.2d 397, 402 (9th Cir. 1985); see also Martinez v. Shinn, 992 F.2d 997, 999 (9th Cir. 1993) (court of appeals reviews award of statutory damages for abuse of discretion).

b. **Punitive**

"In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989); see also Fair Housing of Marin v. Combs, 285 F.3d 899, 906-07 (9th Cir. 2002) (noting that abuse of discretion standard applies to court's decision to award punitive damages while challenge to the sufficiency of the evidence to support the award is reviewed for substantial evidence); Yeti by Molly, Ltd. v. Deckers Outdoor Corp. 259 F.3d 1101, 1111 (9th Cir. 2001) (reciting standard) Pavon v. Swift Transp. Co., 192 F.3d 902, 909 (9th Cir. 1999) (same); Lambert v. Ackerley, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc) (noting that a challenge to the sufficiency of the evidence to support a punitive damage award must be rejected if the jury's verdict is supported by substantial evidence); Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1126 (9th Cir. 1994) (reciting standard); Bouman v. Block, 940 F.2d 1211, 1234 (9th Cir. 1991) (trial court has discretion to award punitive damages); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 707 n.3 (9th Cir. 1990) (jury had considerable discretion to award punitive damages, and its award, if supportable, will not be lightly disturbed). The court's allocation of punitive damages is reviewed for an abuse of discretion. See In re Exxon Valdez, 229 F.3d 790, 795 (9th Cir. 2000). A trial court's decision to strike a plaintiff's prayer for punitive damages is also reviewed for an abuse of discretion. See Nurse v. United States, 226 F.3d 996, 1003 (9th Cir. 2000).

Whether an award of punitive damages is constitutionally excessive, however, is reviewed de novo. See Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435-36 (2001) (rejecting abuse of discretion standard); see also Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1197 (9th Cir. 2002) ("We review de novo legal conclusions about the availability of punitive damages."); Swinton v. Potomac Corp., 270 F.3d 794, 802 (9th Cir. 2001) ("We review de novo a due process challenge to the punitive damages award."), cert. denied, 122 S. Ct. 1609 (2002); EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989 (9th Cir. 1998) ("We review de novo the district court's legal conclusion as to whether [punitive] damages are available."); Central Office Tel., Inc. v. American Tel. & Tel. Co., 108 F.3d 981, 993 (9th Cir. 1997) (When the decision to award punitive damages turns on application of state law, review is de novo.), rev'd on other grounds, 524 U.S. 214 (1998); Murray v. Laborers Union Local 324, 55 F.3d 1445, 1453 (9th Cir. 1995) (discussing standard to be applied for due process challenge to

punitive damages); Morgan v. Woessner, 997 F.2d 1244, 1255 n.8 (9th Cir. 1993) (same).

c. **Remittitur**

A trial court's decision not to allow remittitur should be reversed only upon a showing of "clear abuse of discretion." Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1477 (9th Cir. 1993). The court's decision to order remittitur is also reviewed for an abuse of discretion. See Snyder v. Freight, Const., Gen. Drivers, Warehousemen and Helpers, Local No. 287, 175 F.3d 680, 690 (9th Cir. 1999); Rinehart v. Wedge, 943 F.2d 1158, 1161 (9th Cir. 1991) (per curiam); see also Silver Sage Partners v. City of Desert Hot Springs, 251 F.3d 814, 818-19 (9th Cir. 2001) (holding that order forcing either remitittur or new trial is reviewed for an abuse of discretion). The court's calculation of remittitur is reviewed for an abuse of discretion. Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 778 (9th Cir. 1990). The district court's determination in a diversity action that a jury verdict does not violate state law for excessiveness and therefore does not warrant remittitur or a new trial is reviewed under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 417 (1996); see also Del Monte Dunes at Monterey, Ltd. v. Monterey, 95 F.3d 1422, 1434-35 (9th Cir. 1996) (reviewing denial of new trial based on claim of excessive damages under abuse of discretion standard), aff'd, 526 U.S. 687 (1999).

8. **Equitable Relief**

A federal court's choice of equitable relief is reviewed for an abuse of discretion. See Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth., 263 F.3d 1041, 1048 (9th Cir. 2001), cert. denied, 122 S. Ct. 1349 (2002). The court's decision to deny equitable relief is also reviewed for an abuse of discretion. Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1313 (9th Cir. 1997) (Lanham Act). A court's equitable order is reviewed also for an abuse of discretion. See Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1163 (9th Cir. 2001); United States v. Washington, 157 F.3d 630, 642 (9th Cir. 1998).

9. **Excusable Neglect**

A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. Marx v. Loral Corp., 87 F.3d 1049, 1053 (9th Cir. 1996). The court's grant or denial of relief under FRAP 4(a) is also reviewed for an abuse of discretion. See Nguyen v. Southwest Leasing and Rental, Inc., 282

F.3d 1061, 1064 (9th Cir. 2002); In re Stein, 197 F.3d 421, 424 (9th Cir. 1999). A bankruptcy court has discretion to extend any time period upon a showing of excusable neglect. See In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001).

10. **Default**

A motion to set aside an entry of default is reviewed for an abuse of discretion. See Brady v. United States 211 F.3d 499, 502 (9th Cir. 2000); O'Connor v. Nevada, 27 F.3d 357, 364 (9th Cir. 1994); see also Speiser, Kruase & Madole v. Ortiz, 271 F.3d 884, 886 (9th Cir. 2001) (reviewing district court's decision to enter a default judgment for an abuse of discretion). Note that the trial court's discretion is "especially broad where . . . it is entry of default that is being set aside, rather than a default judgment." O'Connor, 27 F.3d at 364. Thus, the appellate court will not find an abuse of discretion in the trial court's decision to set aside an entry of default unless the trial court was "'clearly wrong' in its determination of good cause." Id.

The court's decision to order default judgment is reviewed for an abuse of discretion. See Estrada v. Speno & Cohen, 244 F.3d 1050, 1056 (9th Cir. 2001). A decision to impose a default judgment as a sanction is reviewed for an abuse of discretion. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002); Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1021-22 (9th Cir. 2002); Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997). The entry of a default judgment inconsistent with prior rulings is also reviewed for an abuse of discretion. See In re First T.D. & Investment, Inc., 253 F.3d 520, 532-33 (9th Cir. 2001).

Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. Electrical Specialty Co. v. Road & Ranch Supply, Inc., 967 F.2d 309, 311 (9th Cir. 1992). A court's ruling on a Rule 60(b)(4) motion to set aside a default judgment as void is a question of law reviewed de novo. Virtual Vision, Inc. v. Praegitzer Indus., Inc., 124 F.3d 1140, 1143 (9th Cir. 1997) (bankruptcy court).

This court reviews a trial court's decision to grant or deny a Rule 60(b) motion to vacate a default judgment for an abuse of discretion. See Community Dental Servs. v. Tani, 282 F.3d 1164, 1167 n.7 (9th Cir. 2002) (reversing denial of motion to set aside default); Laurino v. Syringa General Hosp., 279 F.3d 750, 753 (9th Cir. 2002) (reversing denial of motion); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 695 (9th Cir. 2001) (reversing denial of motion to vacate); Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999) (reopening and reducing amount of default judgment); Cassidy, 856 F.2d at 1415 (evaluating motion under a three-factor test,

concerning which the moving party's factual allegations are accepted as true). Thus, the denial of a motion to set aside a default judgment is reviewed for a clear showing of abuse of discretion. See American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1109 (9th Cir. 2000), cert. denied, 532 U.S. 1008 (2001); United States v. Real Property, 135 F.3d 1312, 1314 (9th Cir. 1998).

11. **Interest**

The grant or denial of prejudgment interest is reviewed for an abuse of discretion. See Webb v. Ada County, 285 F.3d 829, 841 (9th Cir. 2002) (reviewing grant of interest); Simeonoff v. Hiner, 249 F.3d 883, 894 (9th Cir. 2001); Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1107 (9th Cir. 1998); United States v. Pend Oreille County Pub. Util. Dist. No. 1, 135 F.3d 602, 613 (9th Cir. 1998); Knapp v. Ernst & Whinney, 90 F.3d 1431, 1441 (9th Cir. 1996); In re Acequia, Inc., 34 F.3d 800, 818 (9th Cir. 1994); Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707, 714 (9th Cir. 1992); Vance v. American Haw. Cruises, Inc., 789 F.2d 790, 794 (9th Cir. 1986). "Awards of prejudgment interest are governed by considerations of fairness and are awarded when it is necessary to make the wronged party whole." In re Aceguia, 34 F.3d at 818 (internal quotation omitted). The court's decision to award prejudgment interest should be "upset only if it is so unfair or inequitable as to require it." Knapp, 90 F.3d at 1441 (internal quotation omitted). Whether to award prejudgment interest is "a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities." Knapp, 90 F.3d at 1441 (internal quotation omitted); Landwehr v. Dupree, 72 F.3d 726, 739 (9th Cir. 1995) (same).

Whether interest is permitted as a matter of law is reviewed de novo. See Battista v. FDIC, 195 F.3d 1113, 1116 (9th Cir. 1999) (sovereign immunity); Citicorp Real Estate, 155 F.3d at 1107 (statutory interpretation); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir. 1995) (sovereign immunity). The court's selection of an appropriate rate of interest, however, is reviewed for an abuse of discretion. See Dishman v. UNUM Life Ins. Co., 269 F.3d 974, 988 (9th Cir. 2001) (reversing rate that amounted to penalty rather than compensation); Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1163-64 (9th Cir. 2001); Saavedra v. Korean Air Lines Co., 93 F.3d 547, 555 (9th Cir. 1996).

Awards of post-judgment interest are also reviewed for an abuse of discretion. See Kyocera Corp. v. Prudential-Bache Trade Servs., 299 F.3d 769, ___ (9th Cir. 2002); Citicorp Real Estate, 155 F.3d at 1107; Home Sav. Bank, F.S.B. v. Gillam, 952 F.2d 1152, 1161 (9th Cir. 1991). Whether a statute allows post-judgment interest on all elements of a money judgment, including prejudgment interest, is a question of law

reviewed de novo. Air Separation, Inc. v. Underwriters at Lloyd's, 45 F.3d 288, 290 (9th Cir. 1994).

12. **Judgment Notwithstanding the Verdict (JNOV)**

A motion for JNOV has been renamed a renewed motion for judgment as a matter of law. See Fed. R. Civ. P. 50(b). This court reviews the district court's grant or denial of a renewed motion for judgment as a matter of law de novo. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886 (9th Cir. 2002); Johnson v. Paradise Valley Unified School Dist., 251 F.3d 1222, 1226 (9th Cir.), cert. denied, 122 S. Ct. 645 (2001); McLean v. Runyon, 222 F.3d 1150, 1153 (9th Cir. 2000); Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999); Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1046 (9th Cir. 1998); Huffman v. County of Los Angeles, 147 F.3d 1054, 1057 (9th Cir. 1998); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997); EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997); Forrett v. Richardson, 112 F.3d 416, 419 (9th Cir. 1997); Crowe v. Wiltel Communications Sys., 103 F.3d 897, 899 (9th Cir. 1996). The reviewing court's role is the same as that of the district court. See Forrett, 112 F.3d at 419. Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. See McLean, 222 at 1153; Gilbrook v. City of Westminster, 177 F.3d 839, 864 (9th Cir. 1999); Huffman, 147 F.3d at 1057; Omega Envtl., 127 F.3d at 1161; Image Tech. Servs., 125 F.3d at 1203; Forrett, 112 F.3d at 419; Crowe, 103 F.3d at 899.

When a party fails to move for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), a challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See Janes, 279 F.3d at 888; Image Tech. Servs., 125 F.3d at 1203. Reversal under the plain error standard is proper only for a "manifest miscarriage of justice," Janes, 279 F.3d at 888, or if "there is an absolute absence of evidence to support the jury's verdict," Image Tech. 125 F.3d at 1212 (internal quotation omitted). The failure to make a timely Rule 50(b) motion waives any sufficiency of the evidence argument on appeal. See Saman v. Robbins, 173 F.3d 1150, 1154 (9th Cir. 1999).

13. **Judgments (Amending, Vacating, Reopening)**

Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound discretion of the district court and will not be reversed absent an abuse of

discretion. See SEC v. Coldicutt, 258 F.3d 939, 942 (9th Cir. 2001); American Ironworks & Erectors Inc. v. North American Constr. Corp., 248 F.3d 892, 899 (9th Cir. 2001); Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223 (9th Cir. 2000); De Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 880 (9th Cir. 2000); Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999); Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1252 (9th Cir. 1999) (Rule 60(b)(5); Wilson v. San Jose, 111 F.3d 688, 691 (9th Cir. 1997); United States v. Washington, 98 F.3d 1159, 1163 (9th Cir. 1996); Historical Research v. Cabral, 80 F.3d 377, 379 n.2 (9th Cir. 1996); Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1469 (9th Cir. 1995); see also Agostini v. Felton, 521 U.S. 203, 238 (1997) ("[T]he trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained.").

This court reviews de novo the district court's assertion of jurisdiction for Rule 60(b) motions. See Carriger v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992) (en banc). A trial court's conclusion that a Rule 60(b) motion had to comply with the successive petition requirements of the Antiterrorism and Effective Death Penalty Act of 1996 is a question of law reviewed de novo. Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc).

A decision whether to vacate a judgment pursuant to Rule 60(b) is reviewable for an abuse of discretion. See Community Dental Servs. v. Tani, 282 F.3d 1164, 1167 n.7 (9th Cir. 2002) (reversing denial of motion to set aside default); Laurino v. Syringa General Hosp., 279 F.3d 750, 753 (9th Cir. 2002) (reversing denial of motion); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 695 (9th Cir. 2001); In re Stein, 197 F.3d 421, 424 (9th Cir. 1999); Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998); Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991); Molloy v. Wilson, 878 F.2d 313, 315 (9th Cir. 1989). The appellate court reviews de novo, however, the denial of a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one. See FDIC v. Aaronian, 93 F.3d 636, 639 (9th Cir. 1996); United States v. $277,000 U.S. Currency, 69 F.3d 1491, 1492 (9th Cir. 1995); Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1469 (9th Cir. 1995); see also Virtual Vision, Inc. v. Praegitzer Indus., Inc., 124 F.3d 1140, 1143 (9th Cir. 1997) (bankruptcy court). Thus, whether a judgment is void is a legal issue subject to de novo review. Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc., 938 F.2d 136, 137 (9th Cir. 1991). Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. See Aaronian, 93 F.3d at 639; Electrical Specialty Co. v. Road & Ranch Supply, Inc., 967 F.2d 309, 311 (9th Cir. 1992).

A decision on a motion to amend a judgment filed pursuant to Rule 59(e) is reviewed for an abuse of discretion. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1195 (9th Cir. 2002); Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001); Far Out Prod., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001); Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1331 (9th Cir. 1995).

The trial court decision whether to reopen a judgment is also reviewed for an abuse of discretion. See Weeks v. Bayer, 246 F.3d 1231, 1234 (9th Cir. 2001); Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-29 (9th Cir. 2000); Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 464 (9th Cir. 1989).

14. **Mandates**

"[W]e review de novo a district court's compliance with the mandate of an appellate court." United States v. Kellington, 217 F.3d 1084, 1092 (9th Cir. 2000). Note that courts of appeals have inherent power to recall their mandates subject to review by the Supreme Court for an abuse of discretion. Thompson v. Calderon, 523 U.S. 538, 549 (1998) (reversing recall of mandate); see also Thompson v. Calderon, 120 F.3d 1045, 1048 (9th Cir. 1997) (en banc) (noting that decision whether to recall a mandate "is entirely discretionary with the court"), rev'd, 523 U.S. 538 (1998).

15. **New Trials**

A district court's ruling on a motion for new trial pursuant to Rule 59(a) is reviewed for an abuse of discretion. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1189 (9th Cir. 2002); Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886 (9th Cir. 2002); Silver Sage Partners v. City of Desert Hot Springs, 251 F.3d 814, 819 (9th Cir. 2001); Far Out Prod., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001) (listing factors); Unocal Corp v. United States, 222 F.3d 528, 534 (9th Cir. 2000); De Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 880 (9th Cir. 2000); United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999) (discussing factors); Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999); Scott v. Ross, 140 F.3d 1275, 1281 (9th Cir. 1998); see also In re Jess, 169 F.3d 1204, 1209 (9th Cir. 1999) (bankruptcy court).

The district court's decision whether to reopen for additional testimony pursuant to Rule 59(a) is reviewed for and abuse of discretion. See Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-29 (9th Cir. 2000). The denial of a motion for new trial based on alleged juror partiality or bias is reviewed for an abuse of discretion. See

Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1220-21 (9th Cir. 1997).

A conditional grant of a new trial is also reviewed for an abuse of discretion. See Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1229 (9th Cir.) (noting "stringent standard" when motion is based on sufficiency of the evidence), cert. denied, 122 S. Ct. 645 (2001); Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1248 (9th Cir. 1998) (same).

The district court's determination in a diversity action that a jury verdict does not violate state law for excessiveness and therefore does not warrant remittitur or a new trial is reviewed under an abuse of discretion standard. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 417 (1996).

16. **Permanent Injunctions**

A district court's authority to grant an injunction is reviewed de novo, but the court's exercise of that power is reviewed for an abuse of discretion. See Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998) (explaining different standards of review); California v. Campbell, 138 F.3d 772, 776 (9th Cir. 1998). Thus, whether a district court possesses the authority or power to issue an injunction is a question of law reviewed de novo. See Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 874 (9th Cir. 1999); Erickson v. United States ex rel. Dep't of Health & Human Servs., 67 F.3d 858, 861 (9th Cir. 1995); Continental Airlines, Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1102 (9th Cir. 1994); see also Burlington Northern Santa Fe Ry. Co. v. International Bhd. of Teamsters, Local 174, 203 F.3d 703,707 (9th Cir. 2000) (en banc) (noting that existence of "labor dispute" for purposes of applying anti-injunction provisions of the Norris-LaGuardia Act is a question of law reviewed de novo).

The court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion. See Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1056 (9th Cir. 2002); Lavine v. Blaine School Dist., 257 F.3d 981, 987 (9th Cir. 2001); Gomez v. Vernon, 255 F.3d 1118, 1128 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 826 (9th Cir. 2001); Dare v. California, 191 F.3d 1167, 1170 (9th Cir. 1999); Planned Parenthood of S. Arizona v. Lawall, 180 F.3d 1022, 1027 (9th Cir.), amended by 193 F.3d 1042 (9th Cir. 1999); Rolex Watch, 179 F.3d at 708-09; Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999); Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1493 (9th Cir. 1996).

When the court's decision to grant injunctive relief rests on an interpretation of a state statute, review is de novo. A-1 Ambulance Serv., Inc. v. County of Monterey, 90 F.3d 333, 335 (9th Cir. 1996).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000); SEC v. Interlink Data Network, Inc., 77 F.3d 1201, 1204 (9th Cir. 1996); Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 488 (9th Cir. 1996).

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879 (9th Cir. 2000); United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011 (9th Cir. 1999); Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1377 (9th Cir. 1997). The decision whether to issue an injunction that does not violate the Act, however, is reviewed for an abuse of discretion. Alpine Land, 174 F.3d at 1011; Quakenbush, 121 F.3d at 1377.

17. **Reconsideration**

The district court's denial of a motion for reconsideration is reviewed for an abuse of discretion. See Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000); Shalit v. Coppe, 182 F.3d 1124, 1127 (9th Cir. 1999); Minnesota Mut. Life Ins. Co. v. Ensley, 174 F.3d 977, 987 (9th Cir. 1999); 389 Orange St. Partners v. Arnold, 179 F.3d 656, 661 (9th Cir. 1999); Bellus v. United States, 125 F.3d 821, 822 (9th Cir. 1997); Fireman's Fund Ins. Co. v. Alaskan Pride Partnership, 106 F.3d 1465, 1470-71 (9th Cir. 1997); see also Herbst v. Cook, 260 F.3d 1039, 1044 (9th Cir. 2001) (habeas); Lucky Stores, Inc. v. Commissioner, 153 F.3d 964, 967 (9th Cir. 1998) (tax court).

Note that the denial of a motion for reconsideration under Rule 59(e) may be construed as one denying relief under Rule 60(b) and will not be reversed absent an abuse of discretion. See Pasatiempo v. Aizawa, 103 F.3d 796, 801 (9th Cir. 1996); Foster v. Skinner, 70 F.3d 1084, 1087 (9th Cir. 1995); see also School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (listing factors for court to consider). A district court has discretion to decline to consider an issue raised for the first time in a motion for reconsideration. See Novato Fire Protection Dist. v. United States, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999); Columbia Pictures Television v. Krypton Broad., 106 F.3d 284, 290 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 340 (1998).

A motion to reconsider a Bankruptcy Appellate Panel's decision is reviewed for an abuse of discretion. In re Donovan, 871 F.2d 807, 808 (9th Cir. 1989). A bankruptcy court's denial of a motion for reconsideration is also reviewed for an abuse of discretion. In re Kaypro, 218 F.3d 1070, 1073 (9th Cir. 2000); In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998).

18. **Renewed Motions for Judgment as a Matter of Law**

A renewed motion for judgment as a matter of law replaces the former terminology "judgment notwithstanding the verdict" (JNOV). See Fed. R. Civ. P. 50(b). This court reviews de novo the district court's grant or denial of a renewed motion for judgment as a matter. See Johnson v. Paradise Valley Unified School Dist., 251 F.3d 1222, 1226 (9th Cir.), cert. denied, 122 S. Ct. 645 (2001); McLean v. Runyon, 222 F.3d 1150, 1153 (9th Cir. 2000); Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999); Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1046 (9th Cir. 1998); Huffman v. County of Los Angeles, 147 F.3d 1054, 1057 (9th Cir. 1998); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997); EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997); Forrett v. Richardson, 112 F.3d 416, 419 (9th Cir. 1997); Crowe v. Wiltel Communications Sys., 103 F.3d 897, 899 (9th Cir. 1996). The reviewing court's role is the same as that of the district court. See Forrett, 112 F.3d at 419. Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. See McLean, 222 at 1153; Gilbrook v. City of Westminster, 177 F.3d 839, 864 (9th Cir. 1999); Huffman, 147 F.3d at 1057; Omega Envtl., 127 F.3d at 1161; Image Tech. Servs., 125 F.3d at 1203; Forrett, 112 F.3d at 419; Crowe, 103 F.3d at 899.

When a party fails to move for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), its challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 888 (9th Cir. 2002); Image Tech. Servs., 125 F.3d at 1203. Reversal under the plain error standard is proper only for a "manifest miscarriage of justice," Janes, 279 F.3d at 888, or if "there is an absolute absence of evidence to support the jury's verdict," Image Tech. 125 F.3d at 1212 (internal quotation omitted). The failure to make a timely Rule 50(b) motion waives any sufficiency of the evidence argument on appeal. See Saman v. Robbins, 173 F.3d 1150, 1154 (9th Cir. 1999).

19. **Reopening or Supplementing Record**

A decision on a motion to reopen or to supplement the trial record is reviewed for an abuse of discretion. See Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-29 (9th Cir. 2000) (Rule 59(a)); In re Elias, 188 F.3d 1160, 1161 (9th Cir. 1999) (bankruptcy court); In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998) (same); Sheet Metal Workers' Int'l Ass'n Local Union, No. 359 v. Madison Indus., Inc., 84 F.3d 1186, 1192 (9th Cir. 1996); In re Lindsay, 59 F.3d 942, 950 (9th Cir. 1995); see also INS v. Doherty, 502 U.S. 314, 323 (1992) (agency's denial of a motion to reopen is reviewed for an abuse of discretion regardless of the underlying basis of the alien's request for relief); Ontiveros-Lopez v. INS, 213 F.3d 1121, 1124 (9th Cir. 2000) (noting that an abuse of discretion "will be found when the denial was arbitrary, irrational or contrary to law"); Arrozal v. INS, 159 F.3d 429, 432 (9th Cir. 1998) (BIA abuses its discretion when it fails to state its reasons and consider all factors when weighing equities); Shaar v. INS, 141 F.3d 953, 955 (9th Cir. 1998) (denial of motion to reopen deportation proceedings is reviewed for abuse of discretion unless court is required to construe statutory provisions in which case review is de novo); In re Cisneros, 994 F.2d 1462, 1464-65 (9th Cir. 1993) (bankruptcy court's decision to reopen closed case is reviewed for abuse of discretion).

The district court's denial of a motion to reopen discovery is also reviewed for an abuse of discretion. See Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th Cir. 2002).

20. **Sanctions**

Orders imposing sanctions are reviewed for an abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (Rule 11); Liti v. Commissioner, 289 F.3d 1103, 1105 (9th Cir. 2002) (tax court); Christian v. Mattel, Inc., 286 F.3d 1118, 1126 (9th Cir. 2002) (Rule 11); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 788 n.16 (9th Cir.), cert. denied, 122 S. Ct. 545 (2001); Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998); Olson Farms, Inc. v. Barbosa, 134 F.3d 933, 936 (9th Cir. 1998); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1016 (9th Cir. 1997); Montrose Chem. Corp. v. American Motorists Ins. Co., 117 F.3d 1128, 1133 (9th Cir. 1997); Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997). A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. See Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1198 (9th Cir. 1999); Security Farms, 124 F.3d at 1016; Terran, 109 F.3d at 1434. A court's refusal to impose sanctions is also reviewed for an abuse of discretion. See Smith v. Lenches, 263 F.3d 972, 978 (9th Cir. 2001); Ingram v. United States, 167 F.3d 1240, 1246 (9th Cir. 1999).

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. See Big Bear Lodging Assoc. v. Snow Summit, Inc., 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); DeLange v. Dutra Const. Co., 183 F.3d 916, 919 n.2 (9th Cir. 1999) (noting that district courts have "broad discretion in interpreting and applying their local rules"); but see United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict). Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. See Erickson v. Newmar Corp., 87 F.3d 298, 300 (9th Cir. 1996).

A court's imposition of sanctions pursuant to its inherent power is reviewed for an abuse of discretion. See Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991); B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1106-08 (9th Cir. 2002); Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); F.J. Hanshaw Enter. v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 (9th Cir. 2001); Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1117 (9th Cir. 2000); Toumajian v. Frailey, 135 F.3d 648, 652 (9th Cir. 1998); Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997); Trulis v. Barton, 107 F.3d 685, 695 (9th Cir. 1995); see also Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) (dismissing for "judge-shopping"). The district court's findings as to whether an attorney acted recklessly or in bad faith are reviewed for clear error. Pacific Harbor Capital, 210 F.3d at 1117.

A district court's civil contempt order that includes imposition of sanctions is reviewed for an abuse of discretion. See Cacique, Inc. v. Robert Reiser & Co., 169 F.3d 619, 622 (9th Cir. 1999); Hook v. Arizona Dep't of Corrections, 107 F.3d 1397, 1403 (9th Cir. 1997); Reebok Int'l v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir. 1995).

Sanctions imposed pursuant to 28 U.S.C. § 1927 are reviewed for an abuse of discretion. See B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1106-07 (9th Cir. 2002); Gomez v. Vernon, 255 F.3d 1118, 1135 (9th Cir.), cert. denied, 122 S. Ct. 667 (2001); Salstrom v. Citicorp Credit Servs., Inc., 74 F.3d 183, 184 (9th Cir. 1996); GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 (9th Cir. 1994). But see Goehring v. Brophy, 94 F.3d 1294, 1305 (9th Cir. 1996) (stating that appropriateness of sanction imposed under § 1927 is reviewed for an abuse of discretion, but findings underlying decision are reviewed for clear error and legal determinations are reviewed de novo). The denial of sanctions sought under § 1927 is reviewed for an abuse of discretion. See Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998).

The district court's decision whether to order sanctions pursuant to Federal Rule of Civil Procedure 37(c) is reviewed for an abuse of discretion. See Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1021-22 (9th Cir. 2002); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1297 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001); Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997); Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 805 (9th Cir. 1995); Telluride Management Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 465 (9th Cir. 1995); Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994). A trial court's decision to enter a default judgment based on a discovery violation is also reviewed for an abuse of discretion. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002); Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997); see also Valley Eng'r Inc. v. Electric Eng'r Co., 158 F.3d 1051, 1052 (9th Cir. 1998) (reviewing dismissal for discovery violation under abuse of discretion standard). Findings of fact underlying the motion for discovery sanctions are reviewed for clear error. Payne, 121 F.3d at 507; Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1408 (9th Cir. 1990); Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988). If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo. Adriana, 913 F.2d at 1408.

The court's refusal to impose discovery sanctions is reviewed for an abuse of discretion. See Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1200 (9th Cir. 1999). The district court's refusal to impose other sanctions is reviewed for an abuse of discretion. See Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001) (reversing); Coleman, 232 F.3d at 1297 (affirming); Read-Rite Corp., 186 F.3d at 1200; Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998); Murdock v. Stout, 54 F.3d 1437, 1444 (9th Cir. 1995); Larez v. Holcomb, 16 F.3d 1513, 1521 (9th Cir. 1994); see also In re Marino, 37 F.3d 1354, 1358 (9th Cir. 1994) (bankruptcy court's denial of Rule 9011 sanctions is reviewed for an abuse of discretion).

The district court's choice of sanctions is reviewed for an abuse of discretion. United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996). For example, the district court's dismissal of a complaint with prejudice for failure to comply with the court's order to amend the complaint to comply with Federal Rule of Civil Procedure 8 is reviewed for an abuse of discretion. McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996).

The district court's denial of sanctions is reviewed for an abuse of discretion. Ingram v. United States, 167 F.3d 1240, 1246 (9th Cir. 1999); Murdock v. Stout, 54 F.3d 1437, 1444 (9th Cir. 1995); Larez v. Holcomb, 16 F.3d 1513, 1521 (9th Cir. 1994);

see also In re Marino, 37 F.3d 1354, 1358 (9th Cir. 1994) (bankruptcy court's denial of Rule 9011 sanctions is reviewed abuse of discretion).

Whether discovery sanctions against the government are barred by sovereign immunity is a question of law reviewed de novo. United States v. Woodley, 9 F.3d 774, 781 (9th Cir. 1993).

A trial court's decision to enjoin future litigation of factual and legal issues already resolved by litigation is reviewed for an abuse of discretion. Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1035 (9th Cir. 1985).

21. **Settlements**

Whether a district court has subject matter jurisdiction to enforce a settlement is a question of law reviewed de novo. See Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1268 (9th Cir. 1996); Hagestad v. Tragesser, 49 F.3d 1430, 1432-33 (9th Cir. 1995). Generally, a trial court's decision whether to enforce a settlement is reviewed for an abuse of discretion. See Doi v. Halekulani Corp., 276 F.3d 1131, 1137 (9th Cir. 2002); In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1065 (9th Cir. 2001) (bankruptcy court); Hanlon v. Chrylser Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (explaining standard); United States v. Montrose Chem. Corp., 50 F.3d 741, 746 (9th Cir. 1995); Maynard v. City of San Jose, 37 F.3d 1396, 1401 (9th Cir. 1994); but see FDIC v. Garner, 125 F.3d 1272, 1280 (9th Cir. 1997) (treating preliminary injunction as approval of settlement agreement and reviewing for clear error). Nevertheless, "a court has no discretion to enforce a settlement agreement where material facts are in dispute; an evidentiary hearing must be held to resolve such issues." In re City Equities Anaheim, Ltd., 22 F.3d 954, 958 (9th Cir. 1994). The court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. See Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987); see also Doi, 276 F.3d at 1138-39 (explaining Callie).

Review of the district court's decision to approve a class action settlement is extremely limited. In re Mego Financial Corp. Sec. Lit. (Dunleavy v. Nadler), 213 F.3d 454, 458 (9th Cir. 2000); Linney v. Cellular Alaska Part., 151 F.3d 1234, 1238 (9th Cir. 1998); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). The district court's decision to approve or reject a proposed settlement in a class action is committed to the sound discretion of that court. See In re Mego Financial Corp., 213 F.3d at 458; Linney, 151 F.3d at 1238; Class Plaintiffs, 955 F.2d at 1276. The district court's approval of an allocation plan for a settlement in a class action is reviewed for an abuse of discretion. See In re Exxon Valdez, 229 F.3d 790, 795 (9th Cir. 2000); In

re Mego Financial Corp., 213 F.3d at 460; Class Plaintiffs, 955 F.2d at 1284. Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo. Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1374 (9th Cir. 1993). Whether the court has jurisdiction to enforce a class settlement is a question of law reviewed de novo. Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1268 (9th Cir. 1996).

This court exercises considerable restraint in reviewing a district court's approval of a CERCLA settlement. Arizona v. Components, Inc., 66 F.3d 213, 215 (9th Cir. 1995). The court will uphold the district court's decision absent an abuse of discretion. Id.

The interpretation of a settlement agreement based on the language of the contract is reviewed de novo. See In re Sternberg, 85 F.3d 1400, 1407 n.5 (9th Cir. 1996), overruled on other grounds by In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997) (en banc); Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337, 1340 (9th Cir. 1992); Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1394 (9th Cir. 1991). "Thus, the determination of whether contract language is ambiguous is a matter of law. When the interpretation includes a review of factual circumstances surrounding the contract, the principles of contract interpretation applied to those facts present issues of law which this court can freely review. When the inquiry extends beyond the words of the contract and focuses on related facts, however, the trial court's consideration of extrinsic evidence is entitled to great deference and its interpretation of the contract will not be reversed unless it is clearly erroneous." Petro-Ventures, 967 F.2d at 1340. A trial court's finding that a party consented to a settlement and intended to be bound by it must be affirmed unless clearly erroneous. Ahern v. Central Pac. Freight Lines, 846 F.2d 47, 48 (9th Cir. 1988).

22. **Supersedeas Bonds**

A district court's order setting a supersedeas bond is reviewed for an abuse of discretion. See American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1109 (9th Cir. 2000), cert. denied, 532 U.S. 1008 (2001); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1027 (9th Cir. 1991); Rachel v. Banana Rep. Inc., 831 F.2d 1503, 1505 n.1 (9th Cir. 1987); see also Raby v. M/V Pine Forest, 918 F.2d 80, 81 (9th Cir. 1990) ("We review the decision of the district court setting the amount of the bond for abuse of discretion.").

23. **Surety Bonds**

This court reviews de novo a district court's decision to execute a bond. Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency, 89 F.3d 629, 631 (9th Cir. 1996); Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994). A court's refusal to allow the execution of a surety bond is a decision of law to which an appellate court applies de novo review. Matek v. Murat, 862 F.2d 720, 733 (9th Cir. 1988). An allegation that a district court ignored legal procedure in its decision is also reviewed de novo. Nintendo, 16 F.3d at 1036.

24. **Vacatur**

A district court's grant of vacatur is reviewed for an abuse of discretion. American Games, Inc. v. Trade Prods., Inc., 142 F.3d 1164, 1166 (9th Cir. 1998). In the context of arbitration awards, however, the court's decision to deny vacatur and thereby affirm the award is reviewed de novo. See Kyocera Corp. v. Prudential-Bache Trade Servs., 299 F.3d 769, ___ (9th Cir. 2002); Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997); Woods v. Saturn Distrib. Co., 78 F.3d 424, 427 (9th Cir. 1996).

25. **Void Judgments**

Whether a judgment is void is a legal issue subject to de novo review. Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc., 938 F.2d 136, 137 (9th Cir. 1991). Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. FDIC v. Aaronian, 93 F.3d 636, 639 (9th Cir. 1996); Electrical Specialty Co. v. Road & Ranch Supply, Inc., 967 F.2d 309, 311 (9th Cir. 1992). A district court's ruling on a Rule 60(b)(4) motion to set aside a judgment as void is a question of law reviewed de novo. See United States v. $277,000 U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995); Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1487 (9th Cir. 1995); Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994); see also Virtual Vision, Inc. v. Praegitzer Indus., Inc., 124 F.3d 1140, 1143 (9th Cir. 1997) (bankruptcy court).

IV. REVIEW OF AGENCY DECISIONS

A. Introduction

1. Arbitrary and Capricious

The Administrative Procedures Act (APA) sets forth standards governing judicial review of findings of fact made by federal administrative agencies. See Dickinson v. Zurko, 527 U.S. 150, 152 (1999); Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1235 (9th Cir. 2001); Environmental Protection Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1078 (9th Cir. 2001); Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000). Pursuant to the APA, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Arizona Cattle Growers' Ass'n, 273 F.3d at 1236; Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001); Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 471 (9th Cir. 2000); Hells Canyon Alliance, 227 F.3d at 1176-77; United States v. Snoring Relief Lab Inc., 210 F.3d 1081, 1085 (9th Cir. 2000); Balice v. United States Dept. of Agriculture, 203 F.3d 684, 689 (9th Cir. 2000); Aluminum Co. of Amer. v. Administrator, Bonneville Power Admin., 175 F.3d 1156, 1160 (9th Cir. 1999); Wilderness Soc'y v. Dombeck, 168 F.3d 367, 375 (9th Cir. 1999); Anaheim Mem'l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997); R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065 (9th Cir. 1997); Rainsong Co. v. FERC, 106 F.3d 269, 272 (9th Cir. 1997).

The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376 (1989); Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1194 (9th Cir. 2000). Review under the standard is narrow and the reviewing court may not substitute its judgment for that of the agency. See United States Postal Service v. Gregory, 122 S. Ct. 431, 434 (2001); Marsh, 490 U.S. at 378; Arizona Cattle Growers' Ass'n, 273 F.3d at 1236 (noting "narrow scope of review); Hells Canyon Alliance, 227 F.3d at 1177; Ninilchik Traditional Council, 227 F.3d at 1194; Snoring Relief Lab Inc., 210 F.3d at 1085; Balice, 203 F.3d at 689; Aluminum Co. of Amer. 175 F.3d at 1160; Washington v. Daley, 173 F.3d 1158, 1169 (9th Cir. 1999). The agency, however, must articulate a rational connection between the facts found and the conclusions made. See Midwater Trawlers Co-op v. Department of Commerce, 282 F.3d 710, 716 (9th Cir. 2002); Washington, 173 F.3d at 1169; Ross v. National Marine Fisheries Serv., 161 F.3d 584, 590 (9th Cir. 1998); Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Marsh, 490 U.S. at 378; Hells Canyon

Alliance, 227 F.3d at 1177; West v. Secretary of Dep't of Transp., 206 F.3d 920, 924 (9th Cir. 2000); Washington, 173 F.3d at 1170; Gilbert v. National Transp. Safety Bd., 80 F.3d 364, 368 (9th Cir. 1996). The inquiry, though narrow, must be searching and careful. Marsh, 490 U.S. at 378; Brower, 257 F.3d at 1065; Ninilchik Traditional Council, 227 F.3d at 1194. This court may reverse under the arbitrary and capricious standard only if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See Pacific Coast Fed. of Fishermen's Ass'n., Inc. v. National Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001); Brower, 257 F.3d at 1065; Vasudeva v. United States, 214 F.3d 1155, 1159 n.6 (9th Cir. 2000); Alvardo Community Hosp. v. Shalala, 155 F.3d 1115, 1122 (9th Cir. 1998), amended by 166 F.3d 950 (9th Cir. 1999). Finally, an agency's decision can be upheld only on the basis of the reasoning in that decision. Anaheim Mem'l Hosp., 130 F.3d at 849.

2. **Substantial Evidence**

An appellate court generally applies the substantial evidence standard when reviewing the factual findings of an agency. See Dickinson v. Zurko, 527 U.S. 150, 153-61 (1999) (rejecting "clearly erroneous" review and reaffirming that standard of review an agency's findings is substantial evidence); Mayes v. Massanari, 276 F.3d 453, 458-59 (9th Cir. 2001); Valderrama v. INS, 260 F.3d 1083, 1085 (9th Cir. 2001); Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001), Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001); Balice v. United States Dept. of Agriculture, 203 F.3d 684, 689 (9th Cir. 2000); Andriasian v. INS, 180 F.3d 1033, 1040 (9th Cir. 1999); Armstrong v. Commissioner of the Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998); California Acrylic Indus. v. NLRB, 150 F.3d 1095, 1098 (9th Cir. 1998); Alderman v. SEC, 104 F.3d 285, 288 (9th Cir. 1997). Substantial evidence means more than a mere scintilla but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See Mayes, 276 F.3d at 459; Edlund, 253 F.3d at 1156; Lewis, 236 F.3d at 509; Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997). Although deferential to the agency, the substantial evidence standard requires the appellate court to review the administrative record as a whole, weighing both the evidence that supports the agency's determination as well as the evidence that detracts from it. Reddick, 157 F.3d at 720; Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also Krull v. SEC, 248 F.3d 907, 911 (9th Cir. 2001) (noting that ("we weigh pros and cons in the whole record with a deferential eye"); Alderman, 104 F.3d at 288 (same). If the evidence is susceptible to more than

one rational interpretation, the court may not substitute its judgment for that of the agency. See Edlund, 253 F.3d at 1156; Lewis, 236 F.3d at 509; Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 2000). A district court's decision to exclude extra-record evidence when reviewing an agency's decision is reviewed for an abuse of discretion. See Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998); Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996).

3. **Statutory Interpretations**

An agency's interpretation or application of a statute is a question of law reviewed de novo. See Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001); Friend v. Reno, 172 F.3d 638, 641 (9th Cir. 1999); Lafarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999); Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998); Forest Guardians v. Dombeck, 131 F.3d 1309, 1311 (9th Cir. 1997); Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1069 (9th Cir. 1997); Conlan v. United States Dep't of Labor, 76 F.3d 271, 274 (9th Cir. 1996). In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (establishing two-part standard for reviewing an agency's interpretation of a statute); Brower, 257 F.3d at 1065; Foothill Presbyterian Hosp. v. Shalala, 152 F.3d 1132, 1134 (9th Cir. 1998); Anaheim Mem'l Hosp. v. Shalala, 130 F.3d 845, 859 (9th Cir. 1997); Santamaria-Ames v. INS, 104 F.3d 1127, 1132 n.7 (9th Cir. 1997). When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. See Chevron, 467 U.S. at 843; Friend, 172 F.3d at 641; Foothill, 152 F.3d at 1134; Partridge, 141 F.3d at 923. Review is limited to whether the agency's conclusion is based on a permissible construction of the statute. Chevron, 467 U.S. at 843; McLean v. Crabtree, 173 F.3d 1176, 1181 (9th Cir. 1999) Ober v. EPA, 84 F.3d 304, 307 (9th Cir. 1996). "In reviewing an administrative agency decision, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." City and County of San Francisco v. United States, 130 F.3d 873, 877 (9th Cir. 1997) (internal quotation omitted).

Thus, a federal agency's interpretation of a statutory provision it is charged with administering may be entitled to deference. See Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1053 (9th Cir. 2002) (noting that deference is owed unless agency's interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); Navaho Nation v. Dept. of Health and Human Servs., 285 F.3d

864, 868 (9th Cir. 2002) (noting that agency's interpretation is entitled to "substantial deference"); Royal Foods Co. v. RJR Holdings Inc., 252 F.3d 1102, 1106 (9th Cir. 2000) (noting that under the two-part Chevron analysis, deference is due the agency's interpretation of a statute unless the plain language is unambiguous "with regard to the precise matter at issue"); CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001) (describing Chevron standard); American Fed. of Government Employees v. FLRA, 204 F.3d 1272, 1274-75 (9th Cir. 2000) (same); American Rivers v. FERC, 201 F.3d 1186, 1194 (9th Cir. 2000) (same); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1162 (9th Cir.) (describing two-step Chevron review, and noting that when Congress leaves a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute), amended by 197 F.3d 1035 (9th Cir. 1999); NLRB v. Kolkka, 170 F.3d 937, 939 (9th Cir. 1999); Herman v. Tidewater, Inc., 160 F.3d 1239, 1241 (9th Cir. 1998); Forest Guardians, 131 F.3d at 1311; Jenkins v. INS, 108 F.3d 195, 200 (9th Cir. 1997); Rainsong Co. v. FERC, 106 F.3d 269, 272 (9th Cir. 1997); see also United States v. Mead Corp., 121 S. Ct. 2164, 2171-73 (2001) (explaining when deference is owed).

Note, however, that when an agency interprets a statute outside of its administration, review is de novo. American Fed. of Government Employees, 204 F.3d at 1275. Moreover, "[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." Pfaff v. United States Dep't of Housing & Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996). Thus, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997) (quoting INS v. Cardozo-Fonseca, 480 U.S. 421, 446 n.30 (1987)); cf. Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala, 65 F.3d 1472, 1480 (9th Cir. 1995) (noting that an agency "is not disqualified from changing its mind"). Similarly, no deference is owed when an agency has not formulated an official interpretation, but is merely advancing a litigation position. See United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995); see also Navaho Nation v. Dept. of Health and Human Servs., 285 F.3d 864, 872-75 (9th Cir. 2002) (discussing Chevron deference when agencies interpret a statute in conflicting way); Resources Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice). Finally, "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n, 83 F.3d

1130, 1133 (9th Cir. 1996). A state agency's interpretation of a federal statute is not entitled to deference. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo). Review of a federal agency's interpretation of its statutory mandate is de novo. See Friends of the Cowitz and CPR-Fish v. FERC, 253 F.3d 1161, 1166 (9th Cir. 2001), amended by 282 F.3d 609 (9th Cir. 2002); American Rivers, 201 F.3d at 1194.

4. **Regulatory Interpretations**

This court defers to an agency's interpretation of its own regulations. See U.S. West Comm., Inc. v. Washington Util. and Transp. Comm., 255 F.3d 990, 997 (9th Cir. 2001) (noting that "substantial deference" is owed to agency's interpretation of its own regulations); Friends of the Cowlitz and CPR-Fish v. FERC, 253 F.3d 1161, 1166 (9th Cir. 2001) (noting that an agency decision interpreting its own regulations is entitled to "substantial deference"), amended by 282 F.3d 609 (9th Cir. 2002); CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001); Eisinger v. FLRA, 218 F.3d 1097, 1100 (9th Cir. 2000); Campbell ex rel. Campbell v. Apfel, 177 F.3d 890, 893 (9th Cir. 1999); Jenkins v. INS, 108 F.3d 195, 201 (9th Cir. 1997); see also United States v. Mead Corp., 121 S. Ct. 2164, 2171-73 (2001) (explaining when deference is owed); Pronsolino v. Nastri, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference).

Unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation, this court will defer to the agency's interpretation. See Singh-Bhathal v. INS, 170 F.3d 943, 945 (9th Cir. 1999) ("We defer to an agency where its interpretation of its own regulations is neither clearly erroneous nor inconsistent with the regulations."); Department of Health & Human Servs. v. Chater, 163 F.3d 1129, 1135 (9th Cir. 1998) ("Deference is also afforded to an agency's construction of its own regulation because its expertise makes it well-suited to interpret its own language."); Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998) (An agency's interpretation of its own regulation is controlling if not "plainly erroneous or inconsistent with the regulation."); Rainsong Co. v. FERC, 106 F.3d 269, 272 (9th Cir. 1997) (An agency's interpretation of a regulation it is charged with administering is entitled to a high degree of deference.); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1162 (9th Cir.) (noting that when Congress has left a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute), amended by 197 F.3d 1035 (9th Cir. 1999). Deference is not afforded, however, to an administrative construction that is contrary to the plain and sensible meaning of the regulation. Santamaria-Ames v. INS, 104 F.3d 1127, 1132 n.7 (9th Cir. 1996). No deference is owed to interpretations by agency appellate counsel where the

agency has not established a position. See Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1542 n.20 (9th Cir. 1993). Finally, no deference is owed to an agency's interpretation of its regulation when the agency has not formulated an official interpretation, but is merely advancing a litigation position. United States v. Trident Seafoods, Inc., 60 F.3d 556, 559 (9th Cir. 1995).

Deference is owed to the agency's regulations interpreting its enabling statute. See Royal Foods Co. v. RJR Holdings Inc., 252 F.3d 1102, 1109 (9th Cir. 2001); Webster v. Public Sch. Employees of Washington, 247 F.3d 910, 914 (9th Cir. 2001). An agency's actions are not entitled to deference, however, where they do not directly involve the interpretation of a statute or regulation. See Racine v. United States, 858 F.2d 506, 508 (9th Cir. 1988) (interpreting contract provisions).

5. **Constitutional Review**

A court may refuse to defer to an agency's interpretation of a statute that raises serious constitutional concerns. See Ma v. Reno, 208 F.3d 815, 821 n.13 (9th Cir. 2000) (noting that Chevron deference is not owed where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe), vacated on other grounds by Zadvydas v. Davis, 121 S. Ct. 2491 (2001); Williams v. Babbitt, 115 F.3d 657, 661-62 (9th Cir. 1997).

Whether a hearing conducted by an agency satisfies the Due Process Clause of the Fifth Amendment is a question of law reviewed de novo. Gilbert v. National Transp. Safety Bd., 80 F.3d 364, 367 (9th Cir. 1996); Henderson v. FAA, 7 F.3d 875, 879 (9th Cir. 1993); see also Adkins v. Trans-Alaska Pipeline Liability Fund, 101 F.3d 86, 89 (9th Cir. 1996) (courts should usually defer to agency's fashioning of hearing procedures). Whether a district court has exceeded its proper scope of review of an administrative record is a question of law reviewed de novo. National Audubon Soc'y v. United States Forest Serv., 46 F.3d 1437, 1446 (9th Cir. 1993).

6. **Sanctions**

An agency's imposition of sanctions is reviewed for an abuse of discretion. See Krull v. SEC, 248 F.3d 907, 912 (9th Cir. 2001) (noting limited scope of review); Atlanta-One, Inc. v. SEC, 100 F.3d 105, 107 (9th Cir. 1996). Thus, a penalty imposed should not be overturned unless it is unwarranted in law or unjustified in fact. See Balice v. United States Dep't of Agriculture, 203 F.3d 684, 689 (9th Cir. 2000); Potato Sales Co. v. Department of Agriculture, 92 F.3d 800, 804 (9th Cir. 1996); Hateley v. SEC, 8 F.3d 653, 655 (9th Cir. 1993).

B. Specific Agency Review

1. Bonneville Power Administration

This court reviews decisions of the BPA pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839f(e)(1)-(3), applying the standards of the Administrative Procedures Act. See Vulcan Power Co. v. Bonneville Power Admin., 89 F.3d 549, 550 (9th Cir. 1996). Thus, the agency's final action may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See M-S-R Public Power Agency, 297 F.3d 833, 841 (9th Cir. 2002) (noting that "review of final BPA actions is extremely limited"); Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin., 261 F.3d 843, 848 (9th Cir. 2001); Aluminum Co. of Amer. v. Administrator, Bonneville Power Admin., 175 F.3d 1156, 1160 (9th Cir. 1999); Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1180 (9th Cir. 1997); Vulcan Power, 89 F.3d at 550; Northwest Resource Info. Ctr., Inc. v. Northwest Power Planning Council, 35 F.3d 1371, 1383 (9th Cir. 1994). Review under this standard is to be searching and careful, but remains narrow, and a court is not to substitute its judgment for that of the agency. Aluminum Co. of Amer., 175 F.3d at 1160; Northwest Resource, 35 F.3d at 1383 (internal quotation omitted). The court will accord "substantial deference" to the BPA's interpretation of the statute and to its application and interpretation of its regulations. Washington Utils. & Transp. Comm'n v. FERC, 26 F.3d 935, 938 (9th Cir. 1994). Thus, to uphold the BPA's interpretation of the Act, "we need only conclude that it is a reasonable interpretation of the relevant provisions." See Northwest Envtl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1530 (9th Cir. 1997); see also Kaiser Aluminum, 261 F.3d at 848-49 (noting that court may reject a construction inconsistent with statutory mandates or that frustrate the statutory policies that Congress sought to implement).

Whether a district court has subject matter jurisdiction under the Northwest Power Planning Act to hear challenges to final agency action by the BPA is a question of law reviewed de novo. See Transmission Agency of California v. Sierra Pacific Power Co., 295 F.3d 918, 925 (9th Cir. 2002).

2. Department of Energy

A decision by the Secretary of Energy will be set aside only if it is arbitrary, capricious, or otherwise not in accordance with law. See Nevada v. United States Dep't of Energy, 133 F.3d 1201, 1204 (9th Cir. 1998). Statutory interpretations are reviewed de novo. Id.; Nevada v. Watkins, 914 F.2d 1545, 1552 (9th Cir. 1990). Nevertheless, the agency's construction of a statute it is implementing should not be set aside unless that construction conflicts with clear congressional intent or is unreasonable. County of Esmeralda v. United States Dep't of Energy, 925 F.2d 1216, 1219 (9th Cir. 1991).

3. **Environmental Protection Agency**

Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act. See Ober v. Whitman, 243 F.3d 1190, 193 (9th Cir. 2001); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1162 (9th Cir.), amended by 197 F.3d 1035 (9th Cir. 1999); Western States Petroleum Ass'n v. EPA, 87 F.3d 280, 283 (9th Cir. 1996). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de novo. See City of San Diego v. Whitman, 242 F.3d 1097, 1101 (9th Cir. 2001). The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Ober, 243 F.3d at 1193; Exxon Mobil Corp. v. EPA, 217 F.3d 1246, 1248 (9th Cir. 2000); Defenders of Wildlife, 191 F.3d at 1162; Ober v. EPA, 84 F.3d 304, 307 (9th Cir. 1996). Deference is owed to the EPA's interpretation of its own regulations if those regulations are not unreasonable. See Western States, 87 F.3d at 283; see also Pronsolino v. Nastri, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

4. **Federal Communications Commission**

FCC decisions may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See California v. FCC, 75 F.3d 1350, 1358 (9th Cir. 1996); California v. FCC, 39 F.3d 919, 925 (9th Cir. 1994). Under that standard, this court must determine whether the FCC's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. California, 75 F.3d at 1358; California, 39 F.3d at 925. "The scope of judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference." California, 39 F.3d at 925; see also Howard v. American Online Inc., 208 F.3d 741, 752-53 (9th Cir. 2000) (upholding FCC's "reasonable" interpretation of the Communications Act).

Whether a district court has subject matter jurisdiction to enforce orders of the FCC is a question of law reviewed de novo. See United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002) (reviewing district court's refusal to dismiss for lack of jurisdiction). The district court's decision whether to stay enforcement proceedings is reviewed for an abuse of discretion. Id. at 838.

5. **Federal Energy Regulatory Commission**

FERC's findings of fact are conclusive if supported by substantial evidence. Skokomish Indian Tribe v. FERC, 121 F.3d 1303, 1306 (9th Cir. 1997); Muckleshoot Indian Tribe v. FERC, 993 F.2d 1428, 1430 (9th Cir. 1993). Review of the agency's decision is limited to the arbitrary, capricious, abuse of discretion standard. See Friends of the Cowlitz and CPR-Fish v. FERC, 253 F.3d 1161, 1166 (9th Cir. 2000), amended by 282 F.3d 609 (9th Cir. 2002); Rainsong Co. v. FERC, 106 F.3d 269, 272 (9th Cir. 1997); City of Seattle v. FERC, 923 F.2d 713, 715 (9th Cir. 1991).

Deference is owed to FERC's interpretation of its own regulations unless plainly erroneous. See Friends of the Cowlitz, 253 F.3d at 1166; Skokomish, 121 F.3d at 1306; Rainsong, 106 F.3d at 272. Deference is also owed to FERC's interpretation of the law it is charged with administering. See Friends of the Cowlitz, 253 F.3d at 1166; Muckleshoot, 993 F.2d at 1430; Seattle, 923 F.2d at 715; see also Skokomish, 121 F.3d at 1306 (FERC's interpretation of a statute is a question of law reviewed de novo).

6. **Federal Labor Relations Authority**

Review of decisions issued by the Federal Labor Relations Authority is in accordance with 5 U.S.C. § 706, which directs that agency action can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See Department of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994). Deference is owed to the FLRA's interpretation of the statute that is administers. See Eisinger v. FLRA, 218 F.3d 1097, 1100 (9th Cir. 2000) (noting that agency is owed "considerable discretion"). No deference is owed, however, when the FLRA interprets executive orders that it does not administer; rather, review is de novo. See American Fed. of Gov. Employees. v. FLRA, 204 F.3d 1272, 1275 (9th Cir. 2000).

7. **Federal Trade Commission**

FTC's factual findings are conclusive if supported by evidence sufficient to permit a reasonable mind to accept the Commission's conclusions. Southwest Sunsites,

Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir. 1986); accord Litton Indus., Inc. v. FTC, 676 F.2d 364, 368 (9th Cir. 1982). The Commission's findings of fact are reviewed under the substantial evidence standard. California Dental Ass'n v. FTC, 128 F.3d 720, 725 (9th Cir. 1997), vacated on other grounds, 526 U.S. 756 (1999); Olin Corp. v. FTC, 986 F.2d 1295, 1297 (9th Cir. 1993). Under that standard, the Commission's findings of fact will be upheld if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." California Dental Ass'n, 128 F.3d at 725; Olin, 986 F.2d at 1297.

Legal issues are for the courts to resolve, although even in considering such issues the court is to give deference to the Commission's informed judgments. California Dental Ass'n, 128 F.3d at 725; Olin, 986 F.2d at 1297; see also United States v. Louisiana-Pac. Corp., 754 F.2d 1445, 1447 (9th Cir. 1985) (great deference should be given to the FTC's interpretation of the Federal Trade Commission Act). Whether a district court has given the FTC's findings of fact and conclusions of law appropriate weight is reviewed de novo. See Pool Water Products v. Olin Corp., 258 F.3d 1024, 1030 (9th Cir. 2001).

8. **Immigration and Naturalization Service**

The BIA's determination of purely legal questions regarding the Immigration and Nationality Act is reviewed de novo. See Molina-Estrada v. INS, 293 F.3d 1089, 1093 (9th Cir. 2002); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc); Andreiu v. Ashcroft, 253 F.3d 477, 482 (9th Cir. 2001) (en banc); Chowdhury v. INS, 249 F.3d 970, 972 (9th Cir. 2001); Pondoc Hernaez v. INS, 244 F.3d 752, 756 (9th Cir. 2001); Cervantes-Gonzales v. INS, 244 F.3d 1001, 1004 (9th Cir. 2001); Ram, 243 F.3d at 513-14; Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Larita-Martinez, 220 F.3d at 1095; Pichardo v. INS, 216 F.3d 1198, 1200 (9th Cir. 2000); Ye, 214 F.3d at 1131; Ladha v. INS, 215 F.3d 889, 896 (9th Cir. 2000); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000).

Claims of due process violations in INS proceedings are reviewed de novo. See Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222 (9th Cir. 2002); Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001); Chowdhury v. INS, 249 F.3d 970, 972 (9th Cir. 2001); Abovian v. INS, 219 F.3d 972, 978 (9th Cir.), amended by, 228 F.3d 1127 (9th Cir. 2000); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000); Perez-Lastor v. INS, 208 F.3d 773, 777 (9th Cir. 2000); Andriasian, 180 F.3d at 1040. The availability of a writ of audita querela for purposes of immigration is also reviewed de novo. Beltran-Leon v. INS, 134 F.3d 1379, 1380 (9th Cir. 1998). Whether the BIA had

jurisdiction to consider an untimely appeal is a question of law reviewed de novo. Da Cruz v. INS, 4 F.3d 721, 722 (9th Cir. 1993).

The BIA's interpretation and application of the immigration laws are nevertheless entitled to deference. See Socop-Gonzalez, 272 F.3d at 1187 (noting limits of deference); Otarola v. INS, 270 F.3d 1272, 1275 (9th Cir. 2001); Chowdhury, 249 F.3d at 972; Pondoc Hernaez, 244 F.3d at 756; Ladha, 215 F.3d at 896. This court is not obligated, however, to accept an interpretation that is demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute. See Chowdhury, 249 F.3d at 972; Bui v. INS, 76 F.3d 268, 269-70 (9th Cir. 1996); Navarro-Aispura v. INS, 53 F.3d 233, 235 (9th Cir. 1995); see also Beltran-Tirado v. INS, 213 F.3d 1179, 1185 (9th Cir. 2000) (noting that no deference is owed when the intent of Congress is clear).

When the BIA does not perform an independent review of the IJ's decision and instead defers to the IJ's exercise of discretion, the court of appeals reviews the IJ's decision. See Gui v. INS, 280 F.3d 1217, 1225 (9th Cir. 2002); Ochave v. INS, 254 F.3d 859, 862 (9th Cir. 2001); Campos-Granillo v. INS, 12 F.3d 849, 852 (9th Cir. 1993); Yepes-Prado v. INS, 10 F.3d 1363, 1366-67 (9th Cir. 1993); see also Lopez-Reyes v. INS, 79 F.3d 908, 911 (9th Cir. 1996) (We review the IJ's decision if the BIA clearly incorporated it and fails to perform an independent review of the record.). Conversely, when the BIA conducts an independent review of the IJ's findings, this court reviews the BIA's decision and not that of the IJ. See Salazar-Paucar v. INS, 281 F.3d 1069, 1073 (9th Cir.), amended by 290 F.3d 964 (9th Cir. 2002); Dillingham v. INS, 267 F.3d 996, 1004 (9th Cir. 2001); Lal v. INS, 255 F.3d 998, 1001 (9th Cir.), amended by 268 F.3d 1148 (9th Cir. 2001); Molina-Morales v. INS, 237 F.3d 1048, 1050 (9th Cir. 2001); Kaur v. INS, 237 F.3d 1098, 1099 (9th Cir.), amended by, 249 F.3d 830 (9th Cir. 2001); Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Sidhu v. INS, 220 F.3d 1085, 1088 (9th Cir. 2000); Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000); Vongsakdy v. INS, 171 F.3d 1203, 1206 (9th Cir. 1999); Garrovillas v. INS, 156 F.3d 1010, 1013 (9th Cir. 1998). To the extent that the BIA incorporates the IJ's decision as its own, the court should treat the IJ's statements of reasons as the BIA's, and review the IJ's decision. See Gonzalez v. INS, 82 F.3d 903, 907 (9th Cir. 1996). When neither the BIA or the IJ makes an explicit finding that a petitioner's testimony is not credible, the court is required to accept the petitioner's testimony as true. See Leiva-Montalvo v. INS, 173 F.3d 749, 750 (9th Cir. 1999).

Review is limited to the administrative record. See Chouchkov v. INS, 220 F.3d 1077, 1080 (9th Cir. 2000); Ratnam v. INS 154 F.3d 990, 994 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998). Findings made by the BIA are reviewed under the deferential "substantial evidence" standard and will be upheld "unless the

evidence compels a contrary conclusion." See Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Andriasian v. INS, 180 F.3d 1033, 1040 (9th Cir. 1999); Meza-Manay v. INS, 139 F.3d 759, 762 (9th Cir. 1998).

Note that judicial review of deportation and exclusion orders was substantially altered by passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). See Pazcoguin v. Radcliffe, 292 F.3d 1209, 1211-12 (9th Cir. 2002) (reviewing jurisdictional limitations of IIRIRA); Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1140-44 (9th Cir. 2002) (same); Torres-Aguilar v. INS, 246 F.3d 1267, 1269 (9th Cir. 2001) (same); Palma-Rojas v. INS, 244 F.3d 1191, 1192 (9th Cir. 2001) (same); Castro-Cortez v. INS, 239 F.3d 1037, 1043 (9th Cir. 2001) (noting that "IIRIRA significantly revised the . . . procedures for judicial review"); Alfaro-Reyes v. INS, 224 F.3d 916, 920 (9th Cir. 2000) (noting that "IIRIRA changed the judicial review structure through its permanent and transitional rules); Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000) (noting that IIRIRA stripped court of jurisdiction to review agency's discretionary decisions); Ye v. INS, 214 F.3d 1128, 1131 (9th Cir. 2000) (noting that IIRIRA limits review); Beltran-Tirado v. INS, 213 F.3d 1179, 1182 (9th Cir. 2000) (noting that transitional rules deprives court of jurisdiction to review the discretionary denial of suspension of deportation and voluntary departure); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000) (noting that IIRIRA substantially restricts the scope of judicial review); Lafarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999) (noting that IIRIRA may prohibit review of discretionary decisions, but that direct review remains "as to those elements of statutory eligibility . . . which do not involve the exercise of discretion"); Antonio-Cruz v. INS, 147 F.3d 1129, 1130 (9th Cir. 1998) (IIRIRA's transitional rules preclude review of denial of voluntary departure); Kalaw v. INS, 133 F.3d 1147, 1149-50 (9th Cir. 1997) (discussing nature and scope of judicial review under IIRIRA transitional rules). The jurisdictional limitations of IIRIRA present questions of law reviewed de novo. See Pondoc Hernaez v. INS, 244 F.3d 752, 756 (9th Cir. 2001); Luu-Le v. INS, 224 F.3d 911, 914 (9th Cir. 2000).

Whether IIRIRA applies depends on when immigration proceedings were commenced and when the final agency order was issued. See Socop-Gonzalez v. INS, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc) (applying transitional rules); Ram v. INS, 243 F.3d 510, 512-13 (9th Cir. 2001) (explaining when different rules apply); Alfaro-Reyes, 224 F.3d at 920 (same); see also Ochave v. INS, 254 F.3d 859, 868 (9th Cir. 2001) (applying transitional rules); Park v. INS, 252 F.3d 1018, 1021 n.3 (9th Cir. 2001) (same); Scales v. INS, 232 F.3d 1159, 1161 n.2 (9th Cir.) (same) Abovian v. INS, 219 F.3d 972, 975, n.1 (9th Cir. 2000) (same), amended by, 228 F.3d 1127 (9th Cir. 2000); Rivera-Moreno v. INS, 213 F.3d 481, 485 n.3 (9th Cir. 2000) (applying pre-amendment

law); Belayneh v. INS, 213 F.3d 488, 490 n.1 (9th Cir. 2000) (same); Yazitchian v. INS, 207 F.3d 1164, 1167 n.2 (9th Cir. 2000) (same); Duarte de Guinac v. INS, 179 F.3d 1156, 1158 n.2 (9th Cir. 1999) (same); Romani v. INS, 146 F.3d 737, 738 n.1 (9th Cir. 1998) (same). Whether application of the permanent rules is impermissibly retroactive presents a question of law reviewed de novo. See Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 599-600 (9th Cir. 2000). Note that IIRIRA did not repeal the statutory habeas corpus remedy provided by 28 U.S.C. § 2241. See INS v. St. Cyr, 121 S. Ct. 2271 (2001); Cruz-Aguilera v. INS, 245 F.3d 1070, 1073 (9th Cir. 2001); Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000); Sulit v. Schiltgen, 213 F.3d 449, 453 (9th Cir. 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1136 (9th Cir. 2000).

IIRIRA replaced deportation and exclusion proceedings with "removal." See Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 597 (9th Cir. 2002); Angulo-Dominguez v. Ashcroft, 290 F.3d 1147, 1149 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1183 n.5 (9th Cir. 2001). Legal determinations regarding an alien's eligibility for cancellation of removal are reviewed de novo. See Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1145 (9th Cir. 2002) (reviewing whether petitioner's daughter was a qualifying "child"). The BIA's decision whether to withhold removal is reviewed for substantial evidence. See Molina-Estrada v. INS, 293 F.3d 1089, 1093 (9th Cir. 2002). Whether a particular offense constitutes an aggravated felony for which an alien is subject to removal is reviewed de novo. See Ye v. INS, 214 F.3d 1128, 1131 (9th Cir. 2000).

A deportation order is reviewed to determine if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." See Lopez-Chavez v. INS, 259 F.3d 1176, 1180 (9th Cir. 2001); Singh v. Ilchert, 63 F.3d 1501, 1506 n.1 (9th Cir. 1995); Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994). Factual findings underlying the BIA's decision are reviewed for substantial evidence. See Espinoza-Casro v. INS, 242 F.3d 1181, 1185 (9th Cir. 2001). The BIA's decision whether to withhold deportation is also reviewed for substantial evidence. See Del Carmen Molina v. INS, 170 F.3d 1247, 1249 (9th Cir. 1999); Vang v. INS, 146 F.3d 1114, 1116 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Mejia-Paiz v. INS, 111 F.3d 720, 722 (9th Cir. 1997); Aruta v. INS, 80 F.3d 1389, 1393 (9th Cir. 1996). Legal issues such as whether a statute defines a crime involving moral turpitude are reviewed de novo. Goldeshtein v. INS, 8 F.3d 645, 647 (9th Cir. 1993). Whether a particular conviction is a deportable offense is a question of law reviewed de novo. See Park v. INS, 252 F.3d 1018, 1021 (9th Cir. 2001); Luu-Le v. INS, 224 F.3d 911, 914 (9th Cir. 2000); Albillo-Figueroa v. INS, 221 F.3d 1070, 1071 (9th Cir. 2000); Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997). The Board's

interpretation of the statutory requirements for establishing eligibility for withholding of deportation is reviewed de novo. See Aguirre-Aguirre v. INS, 121 F.3d 521, 523 (9th Cir. 1997), rev'd on other grounds, 526 U.S. 415 (1999).

Note that IIRIRA eliminated judicial review of the BIA's discretionary denials of suspension of deportation and voluntary departure. See Ochave v. INS, 254 F.3d 859, 868 (9th Cir. 2001) (suspension of deportation); Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000) (suspension of deportation); Beltran-Tirado v. INS, 213 F.3d 1179, 1182 (9th Cir. 2000) (both). Formerly, these decisions were reviewed for an abuse of discretion. See Cheo v. INS, 162 F.3d 1227, 1230 (9th Cir. 1998) (voluntary departure); Ordonez v. INS, 137 F.3d 1120, 1123 (9th Cir. 1998) (suspension of deportation); Astrero v. INS, 104 F.3d 264, 266 (9th Cir. 1996) (suspension of deportation; Perez v. INS, 96 F.3d 390, 391 (9th Cir. 1996) (suspension of deportation); Rashtabadi v. INS, 23 F.3d 1562, 1566 (9th Cir. 1994) (voluntary departure); Casem v. INS, 8 F.3d 700, 702 (9th Cir. 1993) (waiver of deportation).

IIRIRA did not eliminate judicial review of the denial of registry. See Beltran-Tirado, 213 F.3d at 1182-83. Where the agency's denial of the alien's application for registry is based on the agency's conclusion that the alien is statutorily ineligible, this court reviews to ensure that the decision is supported by reasonable, substantial, and probative evidence on the record considered as a whole. See Manzo-Fontes v. INS, 53 F.3d 280, 282 (9th Cir. 1995). When a decision is discretionary, "we review the Board's exercise of discretion to determine whether that discretion has been abused." Beltran-Tirado, 213 F.3d at 1185.

The BIA's decision that an alien has not established eligibility for asylum is reviewed under the substantial evidence standard. See Cardenas v. INS, 294 F.3d 1062, 1065 (9th Cir. 2002); Al-Saher v. INS, 268 F.3d 1143, 1145 (9th Cir. 2001); Ochave v. INS, 254 F.3d 859, 861-62 (9th Cir. 2001); Kataria v. INS, 232 F.3d 1107, 1112 (9th Cir. 2000); Rivera-Moreno v. INS, 213 F.3d 481, 485 (9th Cir. 2000); Andriasian, 180 F.3d at 1040; Ortiz v. INS, 179 F.3d 1148, 1154 (9th Cir. 1999); Singh v. INS, 134 F.3d 962, 966 (9th Cir. 1998) (defining standard). The BIA's determination must be upheld if supported by reasonable, substantial, and probative evidence in the record. See INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); Cardenas, 294 F.3d at 1065; Gui v. INS, 280 F.3d 1217, 1228 (9th Cir. 2002); Maini v. INS, 212 F.3d 1167, 1173 (9th Cir. 2000); Leiva-Montalvo v. INS, 173 F.3d 749, 750 (9th Cir. 1999); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Astrero v. INS, 104 F.3d 264, 265 (9th Cir. 1996); Lopez-Galarza v. INS, 99 F.3d 954, 958 (9th Cir. 1996). Thus, factual findings underlying the denial of asylum are reviewed for substantial evidence. See Gui v. INS, 280 F.3d 1217, 1228 (9th Cir. 2002); Popova v. INS, 273 F.3d 1251, 1257 (9th Cir.

2001); Hernandez-Montiel v. INS, 225 F.3d 1084, 1090 (9th Cir. 2000); Navas v. INS, 217 F.3d 646, 657 (9th Cir. 2000); Prasad v. INS, 101 F.3d 614, 616-17 (9th Cir. 1996); Aruta v. INS, 80 F.3d 1389, 1393 (9th Cir. 1996); Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995); Prasad v. INS, 47 F.3d 336, 338-39 (9th Cir. 1995) (citing Elias-Zacarias, 502 U.S. at 483-84, and explaining standard). Adverse credibility determinations are also reviewed under this same substantial evidence standard. See Gui, 280 F.3d at 1225 (noting that IJ must provide "specific and cogent" reasons); Valderrama v. INS, 260 F.3d 1083, 1085 (9th Cir. 2001) (same); Lata v. INS, 204 F.3d 1241, 1245 (9th Cir. 2000); Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000). Nonetheless, "[w]e give 'special deference' to a credibility determination that is based on demeanor." Singh-Kaur v. INS, 183 F.3d 1147, 1151 (9th Cir. 1999). This "special deference" accorded to an IJ's credibility finding does not apply, however, to the BIA's independent, adverse credibility determination. See Abovian v. INS, 219 F.3d 972, 978 (9th Cir.), amended by, 228 F.3d 1127 (9th Cir. 2000).

The BIA's discretionary decision to deny asylum to an eligible petitioner is reviewed for an abuse of discretion. See Andriasian v. INS, 180 F.3d 1033, 1041 (9th Cir. 1999) (noting that "BIA must exercise its discretion 'within the constraints of law'"); Stoyanov v. INS, 149 F.3d 1226, 1227 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1310 (9th Cir. 1998) (noting that BIA abuses its discretion if its decision is "arbitrary, irrational, or contrary to law"); Mejia-Paiz v. INS, 111 F.3d 720, 722 (9th Cir. 1997); see also Belayneh v. INS, 213 F.3d 488, 491 (9th Cir. 2000) (humanitarian asylum). Note that IIRIRA may alter this standard of review. See 8 U.S.C. § 1254(b)(4)(D) (providing that "the Attorney General's discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion") (emphasis added).

The BIA's decision denying reconsideration is reviewed for an abuse of discretion. Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994), overruled on other grounds by Stone v. INS, 514 U.S. 386 (1995). Under the abuse of discretion standard, the decision of the BIA "will be upheld unless it is arbitrary, irrational, or contrary to law." Id. (internal quotation omitted).

The BIA's decision on an applicant's motion to reopen is reviewed for an abuse of discretion. See INS v. Doherty, 502 U.S. 314, 324 (1992) (agency's denial of a motion to reopen is reviewed for an abuse of discretion regardless of the underlying basis of the alien's request for relief); INS v. Rios-Pineda, 471 U.S. 444, 449-50 (1985); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222 (9th Cir. 2002); Gui v. INS, 280 F.3d 1217, 1230 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc); Garcia v. INS, 222 F.3d 1208, 1209 (9th Cir. 2000); Singh v. INS, 213 F.3d

1050, 1052 (9th Cir. 2000); Varela v. INS, 204 F.3d 1237, 1239 (9th Cir. 2000) (noting that any underlying issues of law are reviewed de novo); Konstantinova v. INS, 195 F.3d 528, 529 (9th Cir. 1999); Arrozal v. INS, 159 F.3d 429, 432 (9th Cir. 1998); Urbina-Osejo v. INS, 124 F.3d 1314, 1317 (9th Cir. 1997); Arrieta v. INS, 117 F.3d 429, 430 (9th Cir. 1997); Gutierrez-Centeno v. INS, 99 F.3d 1529, 1531 (9th Cir. 1996). The BIA abuses its discretion when it fails to offer a reasoned explanation for its decision, or distorts or disregards important aspects of the alien's claim. See Konstantinova, 195 F.3d at 529; Gutierrez-Centeno, 99 F.3d at 1531; see also Singh, 213 F.3d at 1052 (noting that BIA's ruling should not be disturbed unless it acted "arbitrarily, irrationally, or contrary to law"); Ontiveros-Lopez v. INS, 213 F.3d 1121, 1124 (9th Cir. 2000) (concluding that BIA abused its discretion); Arrozal, 159 F.3d at 432-33 (discussing abuse of discretion standard).

The Board's denial of a motion to remand is reviewed for an abuse of discretion. See Popova v. INS, 273 F.3d 1251, 1257 (9th Cir. 2001); Castillo-Perez v. INS, 212 F.3d 518, 523 (9th Cir. 2000); Konstantinova v. INS, 195 F.3d 528, 529 (9th Cir. 1999)

The IJ's decision not to issue a subpoena for the production of documents is reviewed for an abuse of discretion. See Kaur v. INS, 237 F.3d 1098, 1099 (9th Cir.), amended by, 249 F.3d 830 (9th Cir. 2001). The IJ's decision whether to take administrative notice, whether to allow rebuttal evidence of the noticed facts, and whether the parties must be notified that notice will be taken is also reviewed for an abuse of discretion. See Castillo-Villagra v. INS, 972 F.2d 1017, 1028 (9th Cir. 1992); see also Getachew v. INS, 25 F.3d 841, 845 (9th Cir. 1994) (administrative notice).

This circuit has not clearly articulated the proper standard for reviewing the BIA's summary dismissals. See Vargas-Garcia v. INS, 287 F.3d 882, 884 (9th Cir. 2002) (noting that review is whether summary dismissal is "appropriate"). Castillo-Manzanarez v. INS, 65 F.3d 793, 794 (9th Cir. 1995); Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994) (noting that circuit has previously reviewed such dismissal for "appropriateness" but other circuits apply abuse of discretion standard), overruled on other grounds by Stone v. INS, 514 U.S. 386 (1995).

9. **Interior Board of Land Appeals (IBLA)**

Decisions of the IBLA are reversed only if "arbitrary, capricious, not supported by substantial evidence, or contrary to law." Akootchook v. United States, 271 F.3d 1160, 1164 (9th Cir. 2001); Hjelvik v. Babbitt, 198 F.3d 1072, 1074-75 (9th Cir. 1999)

(noting limited standard of review.); Hoefler v. Babbitt, 139 F.3d 726, 727 (9th Cir. 1998) (noting that review is under the APA). To make that determination, "[t]his court carefully search[es] the entire record to determine whether it contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of relevant factors." Akootchook, 271 F.3d at 1164 (quoting Hjelvik, 198 F.3d at 1074).

10. **Labor Benefits Review Board (LBRB)**

The Board's decisions in LHWCA cases are reviewed for errors of law and adherence to the substantial evidence standard. See Johnson v. Director, OWCP, 280 F.3d 1272, 1275 (9th Cir. 2002); Matson Terminals, Inc. v. Berg, 279 F.3d 694, 696 (9th Cir. 2002); Marine Power & Equipment v. Department of Labor, 203 F.3d 664, 667 (9th Cir. 2000); Healy Tibbitts Builders, Inc. v. Cabral, 201 F.3d 1090, 1092 (9th Cir. 2000); Duhagon v. Metropolitan Stevedore Co., 169 F.3d 615, 618 (9th Cir. 1999); Alcala v. Director, OWCP, 141 F.3d 942, 944 (9th Cir. 1998); Sproull v. Director, OWCP, 86 F.3d 895, 898 (9th Cir. 1996); Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 889 (9th Cir. 1993). The Board must accept the ALJ's findings of fact unless they are contrary to law, irrational, or unsupported by substantial evidence in the record considered as a whole. Sestich v. Long Beach Container Terminal, 289 F.3d 1157, 1159 (9th Cir. 2002); Matson Terminals, 279 F.3d at 696; Marine Power & Equipment, 203 F.3d at 667; Duhagon, 169 F.3d at 618; Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1275 (9th Cir. 1998); Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683, 687 (9th Cir. 1997); Sproull, 86 F.3d at 898.

The Board's interpretation of the LHWCA is a question of law reviewed de novo. See Gilliland v. E.J. Bartells Co., 270 F.3d 1259, 1261 (9th Cir. 2001). No special deference is owed to the Board's interpretation of the Act. See Johnson, 280 F.3d at 1275; Matson Terminals, 279 F.3d at 696; Gilliland, 270 F.3d at 1261; Healy Tibbitts Builders, 201 F.3d at 1093; A-Z Int'l v. Phillips, 179 F.3d 1187, 1190 (9th Cir. 1999); Moyle v. Director, OWCP, 147 F.3d 1116, 1119 (9th Cir. 1998); Port of Portland v. Director, OWCP, 932 F.2d 836, 838 (9th Cir. 1991). Rather, this court accords "considerable weight" to the construction of the statute urged by the Director, charged with its administration. See Matson Terminals, 279 F.3d at 696; Healy Tibbitts Builders, 201 F.3d at 1093; Moyle, 147 F.3d at 1119; Force v. Director, OWCP, 938 F.2d 981, 983 (9th Cir. 1991); Sproull, 86 F.3d at 898 ("We give no special deference to the Board's interpretations of the Longshore and Harbor Workers Act, but do defer to the Director's

interpretations. Although we respect the Board's reasonable interpretations, the distinction in the deference owed the Director and the Board . . . is significant where their positions conflict with respect to the issues raised on appeal."); see also Metropolitan, 11 F.3d at 889; but see Alcala, 141 F.3d at 944 ("The court defers to the Board's interpretation of the LHWCA if it is reasonable and reflects the underlying policy of the statute."). Thus, although decisions of the Board are reviewed for errors of law, "considerable weight is accorded to the statutory construction of the LHWCA urged by the Director." Mallott & Peterson v. Director, OWCP, 98 F.3d 1170, 1172 (9th Cir. 1996). The Director, as the policymaking authority, is to be accorded deference. Id. This deference extends not only to regulations articulating the Director's interpretation, but also to litigating positions asserted by the Director in the course of administrative adjudications, since administrative adjudications. Moyle, 147 F.3d at 1119; Mallott & Peterson, 98 F.3d at 1172; see also Transbay Container Terminal v. United States Dep't of Labor Benefits Review Bd., 141 F.3d 907, 910 (9th Cir. 1998) (deference is owed to Director's litigation positions). Note, however, that whatever deference is owed, the Director's interpretation cannot contravene plain statutory language. See Ramey v. Stevedoring Servs. of Amer., 134 F.3d 954, 959 (9th Cir. 1998).

When the Board's affirmance is mandated by Public Law No. 104-134 rather than by deliberate adjudication, this court will review the ALJ's decision directly under the substantial evidence standard. Matulic v. Director, OWCP, 154 F.3d 1052, 1055 (9th Cir. 1998); Transbay, 141 F.3d at 910; Jones Stevedoring, 133 F.3d at 687.

11. **Federal Mine Safety and Health Review Commission**

The Mine Safety and Health Administration's decisions are reviewed under the arbitrary and capricious standard. See Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm'n, 142 F.3d 1179, 1182 (9th Cir. 1998). Findings of fact are reviewed for substantial evidence. Id. This court will defer to the agency's interpretation of its regulations. See D.H. Blattner & Sons, Inc. v. Secretary of Labor, Mine Safety and Health Comm., 152 F.3d 1102, 1105 (9th Cir. 1998) (noting that interpretations must be "reasonable" and "conform" to the purpose and wording of the regulations).

12. **National Labor Relations Board (NLRB)**

Decisions of the NLRB will be upheld on appeal if its findings of fact are supported by substantial evidence and if the agency correctly applied the law. See

NLRB v. Calkins, 187 F.3d 1080, 1085 (9th Cir. 1999); Northern Montana Health Care Ctr. v. NLRB, 178 F.3d 1089, 1093 (9th Cir. 1999); Retlaw Broad. Co. v. NLRB, 172 F.3d 660, 664 (9th Cir. 1999); California Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1098 (9th Cir. 1998); NLRB v. Iron Workers of Cal., 124 F.3d 1094, 1098 (9th Cir. 1997); Gardner Mechanical Servs., Inc. v. NLRB, 115 F.3d 636, 640 (9th Cir. 1997); Associated Ready Mixed Concrete, Inc. v. NLRB, 108 F.3d 1182, 1184 (9th Cir. 1997); Walnut Creek Honda Assocs. 2, Inc. v. NLRB, 89 F.3d 645, 648 (9th Cir. 1996); California Pac. Med. Ctr. v. NLRB, 87 F.3d 304, 307 (9th Cir. 1996); Tualatin Elec., Inc. v. NLRB, 84 F.3d 1202, 1205 (9th Cir. 1996); Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 (9th Cir. 1995); but see TCI West, Inc. v. NLRB, 145 F.3d 1113, 1115 (9th Cir. 1998) ("The Board's decision to certify a union is reviewed for an abuse of discretion.").

The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record. See Iron Workers, 125 F.3d at 1098; California Pac., 87 F.3d at 307; NLRB v. Unbelievable, Inc., 71 F.3d 1434, 1438 (9th Cir. 1995). "A reviewing court may not displace the NLRB's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Walnut Creek, 89 F.3d at 648 (internal quotation omitted); see also Retlaw Broad., 53 F.3d at 1005. The Supreme Court noted that under the substantial evidence standard, the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366 (1998).

Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect. Underwriter's Lab., Inc. v. NLRB., 147 F.3d 1048, 1051 (9th Cir. 1998); NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995); see also Nabors Alaska Drilling, Inc. v. NLRB, 190 F.3d 1008, 1013 (9th Cir. 1999) ("credibility findings are entitled to special deference"); California Acrylic Indus., 150 F.3d at 1099 ("We must accord substantial deference to the ALJ's evaluation of the testimonial evidence."); Walnut Creek, 89 F.3d at 648; Retlaw Broad., 53 F.3d at 1005 ("Credibility determinations by the ALJ are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.") (internal quotation omitted).

The court of appeals should defer to the NLRB's reasonable interpretation and application of the National Labor Relations Act. See Allentown Mack, 522 U.S. at 364 (noting that deference is owed if Board's "explication is not inadequate, irrational or arbitrary"); United Food & Commercial Workers Union v. NLRB, 284 F.3d 1099, 1105-06 (9th Cir. 2002) (en banc) (explaining when deference is owed); NLRB v. Advanced

Stretchforming Int'l, Inc., 233 F.3d 1176, 1180 (9th Cir. 2000) (noting that deference is owed as long as the Board's interpretation is reasonable and not precluded by Supreme Court precedent), cert. denied, 122 S. Ct. 341 (2001); Nabors, 190 F.3d at 1013; Calkins, 187 F.3d at 1085 (noting that the Board's interpretation of the NLRA is accorded deference as long as it is "rational and consistent" with the statute); Northern Montana Health Care Ctrs., 178 F.3d at 1093; NLRB v. Kolkka, 170 F.3d 937, 939 (9th Cir. 1999); Iron Workers, 124 F.3d at 1098; Unbelievable, Inc., 71 F.3d at 1438; Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1087 (9th Cir. 1995); Retlaw Broad., 53 F.3d at 1005; Wagon Wheel Bowl, Inc. v. NLRB, 47 F.3d 332, 334 (9th Cir. 1995). Thus, "[t]his Court will uphold a Board rule as long as it is rational and consistent with the Act, . . . even if we would have formulated a different rule had we sat on the Board." Gardner Mechanical Servs., 115 F.3d at 640 (internal quotation omitted). "Even if a Board rule represents a departure from the Board's previous policy, it is entitled to deference." Id. The Board's decision to apply a case ruling retroactively is also entitled to deference, "absent manifest injustice." Saipan Hotel Corp. v. NLRB, 114 F.3d 994, 998 (9th Cir. 1997) (internal quotation omitted).

A district court's decision denying enforcement of an NLRB subpoena is reviewed de novo. NLRB v. The Bakersfield Californian, 128 F.3d 1339, 1341 (9th Cir. 1997). The denial of § 10(j) injunction will be reversed only if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." See Scott ex. rel. NLRB v. Stephen Dunn & Assocs., 241 F.3d 652, 659 (9th Cir. 2001) (internal quotation omitted).

13. **National Transportation Safety Board (NTSB)**

Review of an order of the NTSB is "narrowly circumscribed." See Olsen v. NTSB, 14 F.3d 471, 474 (9th Cir. 1994). Review is conducted in accordance with the APA; this court must affirm unless the NTSB's order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Gilbert v. NTSB, 80 F.3d 364, 368 (9th Cir. 1996); Borregard v. NTSB, 46 F.3d 944, 945 (9th Cir. 1995). The NTSB's decision must be based on the relevant factors and may not constitute a clear error of judgment. Gilbert, 80 F.3d at 368. The Board's factual findings are conclusive if supported by substantial evidence. Borregard, 46 F.3d at 945; Olsen, 14 F.3d at 474. Pure legal questions are reviewed de novo. Wagner v. NTSB, 86 F.3d 928, 930 (9th Cir. 1996); Borregard, 46 F.3d at 945. The agency's interpretations of its own organic statute and regulations, however, are accorded deference, unless the administrative construction is clearly contrary to the plain and sensible meaning of the statute or regulation. Borregard, 46 F.3d at 945; Reno v. National Transp. Safety Bd., 45 F.3d

1375, 1378 (9th Cir. 1995). The Board's award of attorneys fees is reviewed for an abuse of discretion. See Mendenhall v. NTSB, 213 F.3d 464, 470 (9th Cir. 2000).

14. **Occupational Safety and Health Review Commission**

"We must uphold a decision of the OSHRC unless it is arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by the OSHA. We review the Commission's factual findings under the substantial evidence standard; and we accept reasonable factual inferences drawn by the Commission. We must uphold the factfinder's determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw different conclusions from the evidence." Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 941 (9th Cir. 1994) (citations omitted). Thus, the Commission's findings must be affirmed "if supported by substantial evidence on the record considered as a whole." See Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (internal quotation omitted).

"While the proper interpretation of a statute is a question of law reviewed de novo, the court must give deference to [OSHRC's] interpretation of statutes that it administers." Herman v. Tidewater Pac., Inc., 160 F.3d 1239, 1241 (9th Cir. 1998) (citations omitted). Note, however, that where interpretations of the Secretary of Labor and the Commission are in conflict, this court must defer to the Secretary's reasonable interpretation. Chao, 242 F.3d at 897; Herman, 160 F.3d at 1241. When the meaning of regulatory language is ambiguous, the Secretary's interpretation controls "so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." Crown Pacific v. OSHRC, 197 F.3d 1036, 1038 (9th Cir. 1999) (internal quotation omitted); see also Choa, 242 F.3d at 897 (noting that deference is owed only if the Secretary's interpretation is reasonable).

15. **Railroad Retirement Board**

The RRB's findings of fact are conclusive "if supported by evidence and in the absence of fraud." 45 U.S.C. § 355(f). This circuit has construed this standard to be a "substantial evidence" test. See Calderon v. Railroad Retirement Bd., 780 F.2d 812, 813 (9th Cir. 1986); Estes v. Railroad Retirement Bd., 776 F.2d 1436, 1437 (9th Cir. 1985). The Board's application of a regulation will be upheld if it is a permissible construction of the Railroad Retirement Act. Capovilla v. Railroad Retirement Bd., 924 F.2d 885, 887 (9th Cir. 1991).

16. **Railway Adjustment Board**

The scope of review of Adjustment Board awards under the Railway Labor Act (RLA) is "among the narrowest known to the law." Fennessy v. Southwest Airlines, 91 F.3d 1359, 1362 (9th Cir. 1996); English v. Burlington N. R.R., 18 F.3d 741, 742 (9th Cir. 1994). The RLA allows the court to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. Fennessy, 91 F.3d at 1361; English, 18 F.3d at 742. Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. Association of Flight Attendants v. Horizon Air Indus., Inc., 280 F.3d 901, 904 (9th Cir. 2002).

17. **Securities Exchange Commission**

The Securities Exchange Commission's factual findings are reviewed for substantial evidence. See Krull v. SEC, 248 F.3d 907, 911 (9th Cir. 2001); Alderman v. SEC, 104 F.3d 285, 288 (9th Cir. 1997). Deference is owed to the agency's construction of its own regulations unless its interpretation is "unreasonable" or "plainly erroneous." Alderman, 104 F.3d at 288. This court reviews the SEC's affirmance of sanctions for an abuse of discretion. Alderman, 104 F.3d at 288; Atlanta-One, Inc. v. SEC, 100 F.3d 105, 107 (9th Cir. 1996). A court's disgorgement order is reviewed for an abuse of discretion. SEC v. First Pac. Bancorp, 142 F.3d 1186, 1190 (9th Cir. 1998); SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998).

18. **Social Security Administration**

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. See Moore v. Commissioner of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002); Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001); Pagter v. Massanari, 250 F.3d 1255, 1258 (9th Cir. 2001); Holohan v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001); Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001); Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Gatliff v. Commissioner of the Soc. Sec. Admin., 172 F.3d 690, 692 (9th Cir. 1999); Morgan v. Commissioner of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Sousa v. Callahan, 143 F.3d 1240, 1243 (9th Cir. 1998); Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997); Sandgathe v.

Chater, 108 F.3d 978, 979 (9th Cir. 1997); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

The decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. See Moore, 278 F.3d at 924; Pagter, 250 F.3d at 1258; Holohan, 246 F.3d at 1201; Lewis, 236 F.3d at 509; Tackett, 180 F.3d at 1097; Morgan, 169 F.3d at 999; Reddick, 157 F.3d at 720; Sousa, 143 F.3d at 1243; Smolen, 80 F.3d at 1279. When reviewing factual determinations by the Commissioner, acting through the administrative law judge, this court affirms if substantial evidence supports the determinations. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996).

Substantial evidence is more than a mere scintilla, but less than a preponderance. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); Edlund, 253 F.3d at 1156; Holohan, 246 F.3d at 1201; Lewis, 236 F.3d at 509; Tackett, 180 F.3d at 1098; Tidwell, 161 F.3d at 601; Reddick, 157 F.3d at 720; Sousa, 143 F.3d at 1243; Jamerson, 112 F.3d at 1066. Substantial evidence, considering the entire record, is relevant evidence which a reasonable person might accept as adequate to support a conclusion. Morgan, 169 F.3d at 999; Reddick, 157 F.3d at 720; Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279.

If the evidence can reasonably support either affirming or reversing the Secretary's conclusion, the court may not substitute its judgment for that of the Secretary. See Mayes, 276 F.3d at 459; Edlund, 253 F.3d at 1156; Holohan, 246 F.3d at 1201; Lewis, 236 F.3d at 509; Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at 720. The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. See Edlund, 253 F.3d at 1156; Lewis, 236 F.3d at 509; Reddick, 157 F.3d at 720. The ALJ, however, cannot discount a claim of excess pain without making specific findings justifying that decision. Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1996). These findings must be supported by clear and convincing reasons and substantial evidence in the record as a whole. Id. The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. See Edlund, 253 F.3d at 1156; McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000).

The Commissioner's interpretation of social security statutes or regulations is entitled to deference. See Campbell ex rel. Campbell v. Apfel, 177 F.3d 890, 893 (9th Cir. 1999) (regulation and statute); Jamerson, 112 F.3d at 1066 (statute); Esselstrom v. Chater, 67 F.3d 869, 872 (9th Cir. 1995) (regulations); Flaten, 44 F.3d at 1460; Peura

v. Mala, 977 F.2d 484, 487 (9th Cir. 1992) (statute). A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulations or statute under which the regulations were promulgated. Esselstrom, 67 F.3d at 872.

Whether new evidence justifies a remand to the Commissioner is reviewed de novo. See Mayes, 276 F.3d at 461-62 (clarifying standard); Harman, 211 F.3d at 1174. Whether the claimant has shown good cause is reviewed, however, for an abuse of discretion. Mayes, 276 F.3d at 462. The district court's decision whether to remand for further proceedings or for immediate payment of benefits is reviewed for an abuse of discretion. See Harman, 211 F.3d at 1175-78.

An award of attorneys fees under the Social Security Act is reviewed for an abuse of discretion. See Gisbrecht v. Apfel, 238 F.3d 1196, 1197 (9th Cir. 2000), rev'd on other grounds, 122 S. Ct. 1817, 1829 (2002) (noting that 42 U.S.C. § 406(b) fee awards must also be reviewed for "reasonableness"); Widrig v. Apfel, 140 F.3d 1207, 1209 (9th Cir. 1998); Allen v. Shalala, 48 F.3d 456, 457 (9th Cir. 1995). "An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact." Allen, 48 F.3d at 457. The court's interpretation of the Social Security Act's attorneys fees provision, however, is reviewed de novo. Id.

INDEX

A

abandonment of property, 71
abstention, 173
abuse of discretion standard,
    applied, 10
    defined, 9
acquittals, 93
ADA, 263
administrative decisions, generally, 349-55
    arbitrary and capricious review, 349
    constitutional review, 354
    regulatory interpretations, 353
    sanctions, 355
    statutory interpretations, 351
    substantial evidence standard, 350
administrative law judges, 15, 16, 301, 302, 303, 307, 308, 367, 368, 369, 373
Administrative Procedure Act, 18, 281, 349, 355, 357, 366, 370
admiralty law, 261
admission of evidence,
    civil, 249
    criminal, 94
admitting hearsay,
    civil, 250
    criminal, 111
AEDPA, 86, 167, 168, 169, 170
affirmative defenses, 174
affirming on alternative grounds, 173
ALJ, 15, 16, 301, 302, 303, 307, 308, 367, 368, 369, 373
Allen charges, 95
allocution, 142
alter ego, 244
amended complaints, 174
amended judgments, 338
Americans with Disabilities Act, 263
Anti-Injunction Act, 204, 206, 340
antitrust law, generally, 264
    attorneys fees, 319
APA, 18, 281, 349, 355, 357, 366, 370
appeals,
    certified, 327
    civil, 317
    criminal, 142
    excusable neglect,
        civil, 334
        criminal, 145
    interlocutory, 206
appointments,

counsel, 175
expert witness,
civil, 250-51
criminal, 27
forma pauperis, 202
guardian ad litem, 176
special masters, 233
Apprendi violations, 143
arbitrary and capricious standard,
administrative review, 349
applied, 13
defined, 12
arbitration, 176
arguments,
closing,
civil, 247,
criminal, 97
opening,
civil, 257
criminal, 128
oral, 220
arrest of judgment, 143
arrests,
de facto, 73
false, 271
probable cause, 64, 75
attorneys fees, generally, 317-19
antitrust, 319
bankruptcy, 319
civil rights, 319
class actions, 320
contract provision, 320
copyright, 321
criminal, 144
EAJA, 322
environmental laws, 322
ERISA, 323
FOIA, 324
inherent powers, 324
removal, 324
Rule 68, 325
social security, 325
state law, 325
tax court, 326
Title VII, 326
trademark, 321

authentication,
civil, 244
criminal, 95

B

bail,
pending appeal, 144
pending sentence, 144
pending trial, 27
Bankruptcy Act, 235
bankruptcy law, generally, 264-69
attorneys fees, 319
Batson claims, 96
bench trials, civil, 245
bifurcation, civil, 178
bill of particulars, 28
Board of Immigration Appeals, 290-96
bonds, generally, 326
supersedeas, 347
surety, 348
Bonneville Power Administration, 355
border searches, 71
Brady,
materials, 34
violations, 29
Bruton violations, 96
burden of proof,
civil, 178
criminal, 96

C

case management, civil, 179
certification to state court, 179
certified appeals, 327
chain of custody, 97
challenges for cause, 124
character evidence, 97
choice of laws, 246
civil rights law, generally, 270
attorneys fees, 319

claim preclusion, 180
class actions, generally, 180
attorneys fees, 320
clear error standard,
applied, 8
defined, 7
clearly erroneous standard,
applied, 8
defined, 7
closing arguments,
civil, 247
criminal, 97
Coast Guard searches, 71
coconspirator statements, 98
collateral estoppel, 181
comments on the evidence, 100
competency to stand trial, 30
complaints,
amended, 174
leave to amend, 215
supplemental, 242
composition of jury, 125
conclusions of law,
civil, 172
criminal, 20
confessions, generally, 30
voluntariness, 88
confidential informants, 35
conflict-free representation, 66
Confrontation Clause, 100
consent decrees, 328
consent to search, 71

consolidation,
civil, 182
criminal, 31
constitutional issues, generally, 274
administrative, 354
regulations,
civil, 183
criminal, 101
statutes,
civil, 183
criminal,101
contempt,
civil, 184

criminal, 102
continuances,
civil, 184
criminal, 31, 103
contract law, generally, 275-76
attorneys fees, 320
Copyright Act, 277, 278, 321
copyrights, generally, 277-79
attorneys fees, 321
correction of sentence, 147
costs, 329
counsel, civil,
appointment, 175
disqualifying, 188
counsel, criminal, generally, 66-69
conflict-free, 66
disqualification, 66
hybrid, 66
ineffective, 66
pro se, 68
substitution, 69
waiver, 69
withdrawal, 69
credibility findings,
administrative, 16-17
civil, 247
criminal, 98
cross-examination,
civil, 248
criminal, 103

D

damages, generally, 329-31
liquidated, 331
punitive, 332
remittitur, 333
Declaratory Judgment Act, 279
declaratory relief, 185
defamation, 279
defaults, 334
defenses,
civil, 174
criminal, 32

entrapment, 106
preclusion, 61
de novo standard,
applied, 5
defined, 4
Department of Energy, 356
depositions, criminal, 35
directed verdicts, 248
disciplinary orders, 145
discovery,
civil, 186
criminal, 33
discrimination claims, 272
discriminatory prosecution, 37
dismissals,
civil, generally, 189-95
failure to state a claim, 189
Feres doctrine, 190
frivolousness, 192, 199
involuntary, 208
judicial immunity, 190, 200
lack of prosecution, 193, 215
leave to amend, 175, 195, 216
legislative immunity, 200
Noerr-Pennington immunity, 190
personal jurisdiction, 190
res judicata, 180, 191, 228
ripeness, 190
Rule 12(c) 191, 210
Rule 41(b), 193
statute of limitations, 234
subject matter jurisdiction, 236
untimely summons, 192, 197
venue, 194, 243
voluntary, 193, 244
criminal, generally, 37-40
constitutional rights, 38
double jeopardy, 40
government misconduct, 40
indictments, generally, 46-49
lack of prosecution, 54
preindictment delay, 38, 39
prosecutorial misconduct, 134
speedy trial, 39, 85
supervisory power, 38
without prejudice, 39

disqualification,
counsel,
civil, 188
criminal, 66
judge,
civil, 189
criminal, 136
diversity jurisdiction, 195
documentary evidence, 104
double jeopardy, 105
duplicitous indictments, 49

E

EAJA, 322
entrapment, 106
environmental law, generally, 280-82
attorneys fees, 322
Environmental Protection Agency, 357
Equal Access to Justice Act, 322
Equal Pay Act, 274
equitable relief, 333
ERISA, generally, 282-85
attorneys fees, 323
estoppel,
collateral, 181
judicial,
civil, 210
criminal, 52
evidence,
administrative, generally, 15-16
credibility findings, 17
substantial, 350
civil, generally, 248-50
authentication, 244
hearings, 195
jury verdicts, 17
criminal, generally, 94-95
authenticity, 95
character, 97
comments, 100
credibility, 30, 89, 98
documentary, 104
expert opinions, 128

expert testimony, 108
extrinsic, 108
hearings, 40, 56, 68, 78, 111
hearsay, 111
impeachment, 108, 114, 130
jury examination, 119
lay opinions, 129
photographs, 130
prior crimes, wrongs, acts, 130
probative value, 135
rebuttal, 135
relevancy, 137
rule of completeness, 138
sufficiency, 160
surrebuttal, 135
evidentiary hearings,
civil, 195
criminal, 40
evidentiary rulings,
civil, 249
criminal, 106
examination of evidence, 119
excusable neglect,
civil, 334
criminal, 145
exhaustion, 195
exigent circumstances, 72
ex parte hearings, 41

experts,
civil, 250
criminal, 108, 128
ex post facto, 41 expectation of privacy, 72
expungement, 145
extradition, 42
extrinsic evidence, criminal, 110

F

failure to state a claim, 196
Fair Debt Collection Practices Act, 285
Fair Labor Standards Act, 285
False Claims Act, 286

false statements, 127
Faretta requests, 43
Federal Communications Commission, 357
Federal Employers' Liability Act, 287
Federal Energy Regulatory Comm., 358
Federal Labor Relations Authority, 358
Federal Rules, generally, 8, 21,94, 107, 126
Federal Rules of Civil Procedure,
Rule 4(j) 197
Rule 8 231, 345
Rule 9(b) 305
Rule 11 229, 343
Rule 12(b)(6) 189, 196, 270, 305
Rule 12(c) 191, 210
Rule 12(f) 174
Rule 14 199
Rule 15(a) 216
Rule 15(b) 175
Rule 15(c) 217
Rule 15(d) 175, 242
Rule 16 224
Rule 24(a) 207
Rule 24(b) 208
Rule 25(c) 238
Rule 37(c) 344
Rule 41(a) 193, 244
Rule 41(b) 193, 208
Rule 42(b) 178, 246
Rule 44.1 247
Rule 48(a) 39, 48
Rule 48(b) 39, 48, 54
Rule 50(a) 255, 337, 342
Rule 50(b) 255, 336, 341, 342
Rule 52(a) 8
Rule 52(b) 24
Rule 54(b) 206, 327
Rule 56(c) 239
Rule 56(f) 185, 187, 240, 241
Rule 59(a) 339, 342
Rule 59(e) 338, 341
Rule 60(b) 213, 334, 337, 348
Rule 65(c) 206, 224, 326
Rule 68 325
Federal Rules of Criminal Procedure,
Rule 11 45
Rule 12.1(e) 140
Rule 15 35

Rule 16 33, 36, 138
Rule 17(b) 27
Rule 17(c) 58
Rule 18 87
Rule 25(b) 152
Rule 32 22, 151, 154
Rule 35 147, 152
Rule 41(e) 78
Rule 46 144
Rule 48 39, 48
Federal Rules of Evidence,
Rule 403 135
Rule 404 94, 130
Rule 406 108
Rule 609 94, 130, 131
Rule 611 135
Rule 702 94, 250
Rule 706(a) 251
Rule 803 111
Rule 901(a) 95
Federal Tort Claims Act, 287
Federal Trade Commission, 358
FELA, 287
FERC, 358
Feres doctrine, 288
Fifth Amendment rights, 110

findings of fact,
civil, 172
criminal, 20
fines, 145
FLSA, 285
FOIA, generally, 289-90
attorneys fees, 324
foreign laws, 251
Foreign Sovereign Immunities Act, 211, 251
forfeiture, 146
forum non conveniens, 198
forum selection clauses, 198
Franks hearing, 43
Freedom of Information Act, 289-90
attorneys fees, 324
frivolousness, 199
FTC, 358
FTCA, 287
fugitive status, 44

G

governmental conduct, 72
guardian ad litem, 176
Guam Organic Act, 314
guilty pleas, generally, 44-46
    Rule 11 requirements, 45
    voluntariness, 44
    withdrawal, 44

H

habeas corpus, generally, 164-71
    AEDPA 167
    IIRIRA 165
    immigration 293
    § 2241 164
    § 2254 166
    § 2255 165
harmless error, 22
Health Care Quality Improvement Act, 319

hearings,
    civil, 195
    criminal,
        evidentiary, 40, 56, 68, 78, 111
        ex parte, 41
        Faretta, 43
        Franks, 43
        pretrial, 62
        Rule 11, 45
hearsay, generally, 111-13
    admission, 111
    confrontation rights, 112
    unavailability of witness, 113
hybrid representation, 66

I

IDEA, 298
identifications, pretrial, 63
IIRIRA, 165, 292, 293, 294, 295, 297, 361, 362, 363, 365

Immigration and Nationality Act, 165, 290, 297, 359
Immigration and Naturalization Service, 359
immigration law, generally, 290-98
asylum, 294-295
continuances, 298
deference owed, 290-91
deportation, 293-94
due process violations, 290
habeas review, 297-98
IIRIRA, 292-93
reconsideration, 295
registry, 294
remand, 296
removal, 293
reopening, 296
summary dismissals, 297
suspension of deportation, 294
voluntary departure, 294
immunity, generally, 200-02
agreements, 45
from prosecution, 113
judicial, 200
qualified, 225
sovereign, 232
witnesses, 141
impeachment evidence, 114
impleader, 199
in absentia proceedings, 114
in camera proceedings, criminal, 46
in-court identification, 114
Indian Civil Rights Act, 316
indictments, generally, 46-52
constructive amendments, 46
dismissals, 46
duplicitous/multiplicitous, 49
misjoinder, 50
prosecutorial misconduct, 50
sufficiency, 51
validity, 51
indispensable parties, 209
Individuals with Disabilities Ed. Act, 298
ineffective assistance of counsel, 66, 115
inevitable discovery, 73
informants, 35
in forma pauperis status, 202
informations, 46
inherent powers,

attorneys fees, 324
exercise, 203
injunctions, generally, 204-06
permanent, 339
preliminary, 222
in limine orders, 52
interest, 335
Interior Board of Land Appeals, 366
interlocutory appeals, 206
interpreters, 52
Interstate Agreement on Detainers Act, 40, 85, 170
intervention, 207
investigators, 52
investigatory stops, 73
involuntary dismissals, 208
issuance of a search warrant, 74
issue preclusion, 208

J

Jencks Act, 36, 139
Jewell instructions, 116
joinder, 208
JNOV, 336
Jones Act, 262, 303
judges,
comments on the evidence, 100
disqualification,
civil, 189
criminal, 136
misconduct, 116
recusal,
civil, 226
criminal 136
supervision of trial, civil, 314
judgments, generally, 337-38
amended, 338
as a matter of law, 252
default, 334
notwithstanding the verdict, 336
on the pleadings, 210
renewed as a matter of law, 341
reopening, 338
vacating, 337
void, 348

judicial estoppel,
civil, 210
criminal, 52
judicial misconduct,
civil, 189, 226
criminal, 116, 137
judicial notice,
civil, 210
criminal, 53
jurisdiction,
civil, generally, 211-14
bankruptcy, 267
declaratory judgments, 279
diversity, 195
pendent, 220
personal, 221
subject matter, 236
supplemental, 242
criminal, generally, 53
jurors,
civil, generally, 252-53
bias, 252
misconduct, 252
partiality, 252
jurors,
criminal, generally, 117-19
jury demand,
civil, 214
criminal, 53
jury examination of evidence, 119
jury inquiries, 20
jury instructions,
civil, generally, 253-54
supplemental, 314
criminal, generally, 120-24
Jewell instruction, 116
supplemental, 139
jury selection,
civil, 254
criminal, generally, 124-27
challenges for cause, 124
composition, 125
peremptory challenges, 126
voir dire, 126
jury verdicts, 17, 255
jury waiver, 53

juvenile certification, 54

K

knock and announce, 75

L

Labor Benefits Review Board, 367
labor law, generally, 299-304
    arbitration, 299
    Jones Act, 303
    LHWCA, 301
    LMRDA, 300
    NLRB, 302-03
    Railway Labor Act, 304
    § 301, 300
laches, 214
lack of prosecution,
    civil, 215
    criminal, 54
Lanham Act, 277, 278, 321
law of the case,
    civil, 215
    criminal, 55
lay opinions, 129
LBRB, 367
leave to amend, 215
lineups, 55
liquidated damages, 331
local rules, civil, 218

M

magistrate judges,
    civil, 218
    criminal, 55
mandamus, 219
mandates, 338
materiality of false statement, 127
Mine Safety and Health Rev. Comm'n, 368
Miranda rights, 56

misconduct,
attorneys, 324
judges, 116
jurors, 117
prosecutors, 50, 133
misjoinder, 50
mistrials, 146
mootness, 220
motions,
acquittal, 93
appointment of counsel, civil, 175
appointment of expert, criminal, 27
arrest of judgment, 143
bill of particulars, 28
compel arbitration, 176
consolidation, civil, 182
continuances,
civil, 184
criminal, 31, 103
correct sentence, 147
default, 334
depositions, criminal, 35
directed verdict, 248

motions, continued
discovery,
civil, 186-88
criminal, 33-37
dismissals,
civil, generally, 189-95
criminal, generally, 39-40
enforce plea agreement, 59
extension of time, 143, 145, 317
in limine, criminal, 52
JNOV, 336
judgment as a matter of law, 252
leave to amend, civil, 215
mistrial, 146
modify pretrial order, 224
new trial,
civil, 339
criminal, 147
pretrial,
civil, 224
criminal, 62, 63

quash,
civil, 237
criminal, 58
reconsideration, 341
recusal,
civil, 226
criminal, 65, 136
reduce sentence, 147
removal, 227
renewed motion as matter of law, 341
reopen,
civil, 342
criminal, 138
return of property, 78
Rule 12(b)(6), 189
Rule 41(e), 78
Rule 59(e), 338, 341
Rule 60(b), 335, 337
severance,
civil, 231
criminal, 81
subpoena, 237
substitute counsel, criminal, 69
summary judgment, 238
motions, continued
supplement record, 342
suppression, 78, 86
transfer trial, criminal, 87
venue,
civil, 243
criminal, 87
waiver of presence, criminal, 90, 131
withdrawal of counsel,
civil, 188
criminal, 69
withdrawal of plea, 44

N

National Environmental Policy Act, 280
National Labor Relations Board, 368
National Transportation Safety Board, 370
negligence, 304
NEPA, 280
new trials,

civil, 339
criminal, 147
NLRB, 368
Norris-LaGuardia Act, 206

O

OSHRC, 371
opening statements,
civil, 257
criminal, 128
opinion evidence, 128
oral arguments, 220
out-of-court identifications, 59

P

Pacific Northwest Power Planning and Conservation Act, 355
parol evidence, 257
parole, 148
party substitution, 238,
pendent jurisdiction, 220
peremptory challenges, 126
permanent injunctions, 339
personal jurisdiction, 221
photographs, criminal, 130
plain error, generally, 24-26
plea agreements, generally, 59-61
breaches, 59
enforcement, 59
negotiations, 60
terms, 60
PLRA, 192, 199
preclusion of defense, criminal, 61
preemption, 222
preindictment delays, 62
preliminary injunctions, 222
presence of defendant, 131
pretrial,
conferences, civil, 224
detention, criminal, 62
hearings, criminal, 62
identifications, criminal, 63
motions,

civil, 224
criminal, 62-63
orders, civil, 224
release, criminal, 62
prior crimes, wrongs or acts, 130
Prison Litigation Reform Act, 192, 199
private searches, 75
privileges, criminal, 131
probable cause, 64, 75
probation, 149
probation searches, 77
probative value vs. prejudicial harm, 135
property, abandonment, 71
prosecutorial misconduct, 133
pro se representation, 68
protective orders, 225
protective sweeps, 77
proximate cause, 257
punitive damages, 332

Q

qualified immunity, 225
quash,
civil, 237
criminal, 58

R

Railroad Retirement Board, 371
Railway Adjustment Board, 372
Railway Labor Act, 304, 372
reasonableness standard,
applied, 19
defined, 18
reasonable suspicion, 77
rebuttal evidence, criminal, 135
recesses, 136
reconsideration, 341
records,
reopening, 342
supplementing, 342
recusals,

civil, 226
criminal, 65, 136
reduction of sentence, 147
regulations,
constitutionality,
civil, 183
criminal, 101
interpretations,
administrative, 353
civil, 257
criminal, 64
relevancy of evidence, criminal, 137
remittitur, 333
removal, immigration, 293
removal of cases, 227
attorneys fees, 324
renewed judgment as matter of law, 341
reopening,
civil judgments, 337
civil records, 342
criminal cases, 138
representation, criminal, generally, 66-70
resentencing, 159
res judicata, 228
restitution, 150
right of confrontation, 100
right to counsel, generally, 66-69
conflict-free, 66
disqualification, 66
hybrid, 66
ineffective, 66
pro se, 68
substitution, 69
waiver, 69
withdrawal, 69
ripeness, 228
rule of completeness, 138

S

sanctions,
administrative, 355
civil, generally, 229, 343
contempt, 184
discovery, 186

failure to appear, 224
inherent powers, 203, 324
local rules, 218
Rule 11, 229
criminal, generally, 36, 138
contempt, 102
discovery, 36
Jencks Act, 36
search and seizure, generally, 70-81
abandonment of property, 71
borders, 71
Coast Guard, 71
consent, 71
exigent circumstances, 72
expectation of privacy, 72
governmental conduct, 72
inevitable discovery, 73
investigatory stops, 73
issuance of warrant, 74
knock and announce, 75
private searches,75
search and seizure, continued
probable cause, 75
probation searches, 77
protective sweeps, 77
reasonable suspicion, 77
Rule 41(e) motions, 78
suppression motions, 78
Terry stops, 79
warrantless, 80
warrants, 74
securities, 305
Securities Exchange Commission, 372
seizures, warrantless, 80
selective prosecution, 37, 81
sentencing, generally, 151-60
motion to correct, 147
motion to reduce, 147
parole, 148
pre-guidelines, 151
probation, 149
Rule 32, 151
Sentencing Guidelines, generally, 152-60
applications, 157
constitutionality, 153
departures, 158-59

enhancements, 154
findings, 155-57
interpretations, 153
legality, 152, 153, 160
service of process, 231
settlements, 346
severance,
civil, 231
criminal, 81
shackling, 139
Sherman Act, 264
Sixth Amendment rights, 82
Social Security Act, 308, 374
Social Security Administration, 372
social security law, generally, 306-08
attorneys fees, 325
sovereign immunity, 232
special masters, 233
Speedy Trial Act, 39, 48, 84
speedy trial rights, 84
SSA, 372
standard of review,
applied, 2
defined, 1
standing, 233
stare decisis, 234
state law,
attorneys fees, 325
interpretations, 258
statutes of limitation,
civil, 234
criminal, 85
statutes,
interpretations,
administrative, 351
civil, 259
criminal, 85
constitutionality,
civil, 183
criminal, 101
stay orders, 235
structural error, 26
subject matter jurisdiction, 236
subpoenas, 237
substantial evidence standard,
administrative review, 350

applied, 16
defined, 15
jury verdicts, 17
substitution of counsel, criminal, 69
substitution of parties, 238
sufficiency of the evidence, criminal, 160
summary judgment, 238
summons, 242
supersedeas bonds, 347
supervised release, 161
supervising trials, civil, 314
supplemental complaints, 242
supplemental jurisdiction, 242
supplemental jury instructions,
civil, 314
criminal, 139
supplementing records, 342
suppression, 78, 86
surety bonds, 348
surrebuttal evidence, criminal, 135

T

tariffs, 308
tax law, generally, 309
attorneys fees, 326
territorial laws, 314
Terry stops, 79
Title VII, generally, 312
attorneys fees, 326
trademarks, 277
attorneys fees, 321
transcripts, 162
transfer of trial, criminal, 87
treaties, 315
tribal courts, 316

U

unavailability of a witness, criminal, 113

V

vacating judgments, 337
vacatur, 348
venue,
civil, 243
criminal, 87
verdicts,
civil, 317
criminal, 139
vexatious litigants, 243
vindictive prosecution, 88
void judgments, 348
voir dire,
civil, 243
criminal, 126
voluntariness,
confessions, 88
guilty plea, 44
voluntary dismissals, 244
vouching, 140

W

waivers,
counsel, 69
jury, 53
rights, 89
warrantless searches, 80
warrantless seizures, 80
warrants, generally, 91-92
Warsaw Convention, 313
wiretaps, 92
withdrawal of counsel, criminal, 69
witnesses, generally, 140-42
immunity, 141
unavailability, 113
vouching, 140
writ ad testificandum, 163
writ of audita querela, 64
writ of coram nobis, 164

X, Y, Z

Younger absention, 173