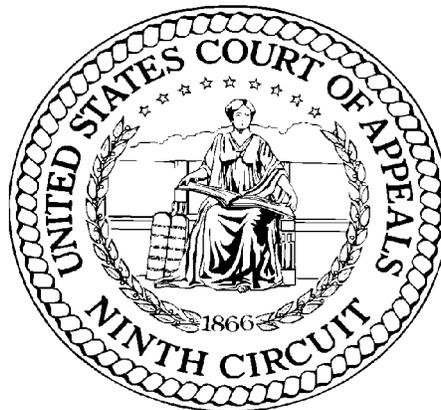


NINTH CIRCUIT COURT OF APPEALS

STANDARDS OF REVIEW

SEPTEMBER 1999



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OUTLINE

STANDARDS OF REVIEW

NINTH CIRCUIT COURT OF APPEALS

SEPTEMBER 1999

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The Standards of Review Outline was first produced in 1984 and has been published annually since 1990. This edition is intended to replace 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 an introductory section 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 Cases may be withdrawn, amended, or overruled.

ACKNOWLEDGMENTS

I have been aided over the years by many. Since the first standards of review outline in 1984, my co-clerks have worked diligently to help me update and distribute the document to judges, law clerks, staff attorneys, law libraries, and lawyers practicing before the court. We have produced an annual outline since 1990. My co-clerks over those years – Fred Isaacs, Tom Bittner, Teresa Ozias, Karen Lundberg, Jane Reyer, Alison Adair, Julie Cobb Martel, Mike Cohen, Jennie Bricker, and Sam Panarella – until now have not been publicly thanked. The tasks could not have been completed without their valuable assistance. My special thanks to them and to the legal secretaries – Betty Brown and Nancy Isaacs – who spent countless hours typing, editing, and proofing. And, of course, none of the outlines could have been produced without the support and encouragement of Judge Skopil, who not only strongly endorsed the product, but also arranged his court duties and case load to allow us time to research and prepare each year's edition.

Over the years, judges and staff have commented on the outline, suggesting useful changes and additions. Some have pointed to errors and omissions, for which I accept responsibility. Comments are strongly solicited from all users. I can be reached by phone: (503-316-8390); by electronic mail (tom_carter@ce9.uscourts.gov) or by mail (827 U.S. Courthouse, 1000 SW Third Ave., Portland, OR 97204).

I hope the outline proves useful to you.

*Tom Carter
9/99*

STANDARDS OF REVIEW OUTLINE

SEPTEMBER 1999

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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, A 1995 Primer on Standards of Review in Federal Civil Appeals, 161 F.R.D. 123, 126 (1995).

One commentator has noted 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

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, Bunnell

v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (en banc); see also 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, 118 S. Ct. 766, 774 (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 relevant standard of review may be critical to the outcome of the case. See 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).

B. De Novo

1. Definitions

De novo review means that this court views the case from the same position as the district court. 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." 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). Thus, no deference is owed to the district court on pure legal questions. See United States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1809 (1999).

2. Applications

Questions of law are reviewed de novo. See 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. 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 reviewed de novo. 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.) (en banc) (implied jury bias), cert. denied, ___ U.S. ___, 119 S. Ct. 575 (1998); 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 justifying an investigatory stop); 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); United States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1809 (1999); 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). 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, whether established facts constitute negligence is 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.'" Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993); 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. Sawyer v. Whitley, 505 U.S. 333, 346 n.14 (1992); 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 Doe, 155 F.3d at 1074 (same quotation). Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be

clearly erroneous." 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); Lawyer v. Department of Justice, 521 U.S. 567, 117 S. Ct. 2186, 2189 (1997); 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), cert. denied, ___ U.S. ___ 119 S. Ct. 1338 (1999); 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), cert. denied, ___ U.S. ___ 119 S. Ct. 2392 (1999). 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., ___ F.3d ___, No. 97-56590 (9th Cir. June 28, 1999) (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). "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. Saltarelli, 35 F.3d at 384; see also 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).

Special deference is paid to a trial court's credibility findings. Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); 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.), cert. denied, ___ U.S. ___ 119 S. Ct. 232 (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. 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." 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. Valley Eng'rs, Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998) (sanctions), cert. denied, ___ U.S. ___ 119 S. Ct. 1455 (1999); 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). 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. 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 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 Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999);

United States v. Banuelos-Rodriguez, 173 F.3d 741, 743 (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. 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 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. Alvarado 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. 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); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998), cert. denied, ___ U.S. ___ 119 S. Ct. 1754 (1999); 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 Env'tl. 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 entitled to a high degree of deference. 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). 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 Hous. & 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." 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"). 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); 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. 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. Lambert v. Ackerley, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc) (jury verdict); 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).

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, ___, 118 S. Ct. 818, 823 (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, ___ U.S. ___, 119 S. Ct. 1816, 1818-20 (1999)

(rejecting “clearly erroneous” review and reaffirming that standard of review an agency’s findings is substantial evidence); 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 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998); 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. 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. Gilbrook, 177 F.3d at 856; Murray, 55 F.3d at 1452; Sanders, 911 F.2d at 194.

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., 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. 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 McLean, 173 F.3d at 1181 (describing 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 Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998).

2. Applications

The adequacy of an EIS is reviewed under the reasonableness standard. See American Rivers v. FERC, ___ F.3d ___, No. 98-70079 (9th Cir. August 11, 1999);

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 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 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).

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. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1338 (1999); 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).

The district court's legal conclusions are reviewed de novo. United States v. Montero-Camargo, 177 F.3d 1113, 1118 (9th Cir. 1999) (investigatory stop); 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. 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 subject to the harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967). See, e.g., United States v. Marsh 144 F.3d 1229, 1240 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 428 (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). Federal Rule of Criminal Procedure 11 specifically allows application of harmless error to uphold guilty pleas when there has been "a minor or technical violation." Fed. R. Crim. P. 11(h); see United States v. Crawford, 169 F.3d 590, 592 (9th Cir. 1999); United States v. Longoria, 113 F.3d 975, 977 (9th Cir. 1997); United States v. Chan, 97 F.3d 1582, 1584 (9th Cir. 1996); United States v. Smith, 60 F.3d 595, 600 (9th Cir. 1995); United States v. Alber, 56 F.3d 1106, 1109 (9th Cir. 1995). "Errors in the grand jury indictment procedure are subject to harmless error analysis unless the structural protections of the grand jury have been compromised as to render the proceedings fundamentally unfair." United States v. Oliver, 60 F.3d 547, 549 (9th Cir. 1995) (internal quotation omitted).

"[M]ost constitutional error can be harmless." See Neder v. United States, ___ U.S. ___, 119 S. Ct. 1827, 1833 (1999). Such error may be disregarded, however, only if it is harmless beyond a reasonable doubt. See id. at 1836 (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)); United States v. Marsh, 144 F.3d 1229, 1240 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 428 (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." Neder, 119 S. Ct. at 1836 (internal quotation omitted).

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, 119 S. Ct. at 1833; Chapman, 386 U.S. at 23 & n.8; see also 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, ___ F.3d ___, No. 97-10443 (9th Cir. August 10, 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, 119 S. Ct. at 1833 (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. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997) (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); 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, ___ U.S. ___, 119 S. Ct. 2090, 2102 (1999) (jury instructions); 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 267 (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).

Plain error is "clear" or "obvious" error that affected the defendant's substantial rights. See Vences, 169 F.3d at 613. Thus, 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, 119 S. Ct. at 2095; see also 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1480 (1999)); 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 public 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.'"), cert. denied, ___ U.S. ___, 118 S. Ct. 1824 (1998); 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 be 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. United States v. Olano, 507 U.S. 725, 736 (1993); 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 applying the plain error standard we consider all circumstances at trial including the strength of the evidence against the defendant." Campbell, 42 F.3d at 1204 (internal quotation omitted).

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, 119 S. Ct. at 2102 (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).

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 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, ___ U.S. ___, 119 S. Ct. 1827, 1833 (1999) (defining structural error). Thus, in these instances, the error is not subject to harmless error analysis. See United States v. Du Bo, ___ F.3d ___, No. 97-10443 (9th Cir. August 10, 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.) (en banc) (biased juror), cert. denied, ___ U.S. ___ 119 S. Ct. 575 (1998); 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

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.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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).

The district court's decision whether to admit or exclude expert testimony is also

reviewed for an abuse of discretion. See United States v. Scholl, 166 F.3d 964, 971-72 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); 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).

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. 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. United States v. Mikaelian, 168 F.3d 380, 388 (9th Cir. 1999), 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. United States v. Steinberg, 99 F.3d 1486, 1489 (9th Cir. 1996). 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.) (citing Kyles, 514 U.S. at 535-36), cert. denied, ___ U.S. ___, 119 S. Ct. 388 (1998).

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.

5. **Competency to Stand Trial**

This court will only reverse the district court's determination that the defendant is competent to stand trial if the determination is clearly erroneous. 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). 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).

6. 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).

7. Continuances

A district court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. 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).

8. **Defenses**

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. 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). The court's 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), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999); United States v. Dominguez-Mestas, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress). Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. United States v. Ripinsky, 109 F.3d 1436, 1440 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998); 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).

9. **Discovery**

A district court's discovery rulings are reviewed for an abuse of discretion. 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. 1999) (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). 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).

The district court's choice of sanctions for a violation of a discovery order is reviewed for an abuse of discretion if the court had a legal basis for imposing the sanction. United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992); see also United States v. McKoy, 78 F.3d 446, 448 (9th Cir. 1996) (Jencks Act violation).

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. United States v. Mikaelian, 168 F.3d 380, 388 (9th Cir. 1999), 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. United States v. Steinberg, 99 F.3d 1486, 1489 (9th Cir. 1996). 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.) (citing Kyles, 514 U.S. at 535-36), cert. denied, ___ U.S. ___, 119 S. Ct. 388 (1998).

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.

c. Confidential Informants

The decision whether to disclose the identity of a confidential informant is reviewed for an abuse of discretion. 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. Stauffer, 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 Roviario 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. 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).

d. Depositions

Denial of a motion to depose a witness pursuant to Federal Rule of Criminal Procedure 15 is reviewed for abuse of discretion. 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. 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**

The applicability of Federal Rule of Criminal Procedure 16 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."). 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).

10. **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. Id. 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).

11. **Evidentiary Hearings**

A district court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. United States v. Smith, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 804 (1999); 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. Stein, 127 F.3d 777, 780 (9th Cir. 1997) (Rule 32 hearing). 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).

12. **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).

13. 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).

14. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 432 (1998); Clarey v. Gregg, 138 F.3d 764, 765 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 131 (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).

15. **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. 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. 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 ruling whether false statements were made intentionally or recklessly is a factual finding reviewed for clear error. United States v. Senchenko, 133 F.3d 1153, 1158 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 171 (1998).

16. **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.) (en banc) (dismissing appeal), cert. denied, ___ U.S. ___, 119 S. Ct. 179 (1998).

17. **Guilty Pleas**

a. **Voluntariness**

The voluntariness of a guilty plea is subject to de novo review. United States v. Kikuyama, 109 F.3d 536, 537 (9th Cir. 1997); United States v. Ulysses-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. 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 Hearing**

The adequacy of a Rule 11 plea hearing is reviewed de novo. 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. 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). Only the record of the plea proceeding is to be considered. See Longoria, 113 F.3d at 976.

18. 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. 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.; 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).

19. 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. 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).

20. Indictments and Informations

a. **Duplicitous Indictments**

Whether an indictment is duplicitous is a question of law reviewed de novo. United States v. McKittrick, 142 F.3d 1170, 1176 (9th Cir. 1998) (multiplicitous), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999); 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).

b. **Misjoinder**

Misjoinder of charges is an issue of law reviewed de novo. 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).

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).

c. **Motions to Dismiss**

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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1100 (1998); 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. 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 an indictment are reviewed for clear error. 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. 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. United States v. Doe, 149 F.3d 945, 947 (9th Cir.) (information), cert. denied, ___ U.S. ___, 119 S. Ct. 457 (1998); 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1100 (1998); 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 Rule 48(a) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. 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 Federal Rule of Criminal Procedure 48(b) for preindictment delay and pretrial delay is reviewed for an abuse of discretion. See United States v. Talbot, 51 F.3d 183, 186 (9th Cir. 1995).

d. **Dismissal for Prosecutorial Misconduct**

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.), cert. denied, ___ U.S. ___, 119 S. Ct. 432 (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. 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).

Whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact reviewed de novo. Rodriguez v. Marshall, 125 F.3d 739, 748 (9th Cir. 1997) (habeas), cert. denied, ___ U.S. ___, 118 S. Ct. 2304 (1998).

e. **Sufficiency**

The sufficiency of an indictment is reviewed de novo. United States v. Neill, 166 F.3d 943, 947 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 2037 (1999); United States v. Ladum, 141 F.3d 1328, 1334 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 549 (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).

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. United States v. Linares, 921 F.2d 841, 843 (9th Cir. 1990).

f. **Validity**

The validity of an indictment is reviewed de novo. 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, ___ F.3d ___, No. 97-10443 (9th Cir. August 10, 1999).

21. **In Limine Orders**

This court reviews the district court's ruling on a motion in limine for an abuse of discretion. 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).

22. **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), cert. denied, ___ U.S. ___, 118 S. Ct. 1101 (1998).

23. **Investigators**

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

24. **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).

25. **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).

26. **Jurisdiction**

The court of appeals generally reviews de novo a district court's assumption of jurisdiction. 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).

27. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 151 (1998).

28. 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).

29. 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. Id.; United States v. Doe, 98 F.3d 459, 460 (9th Cir. 1996). Any statutory interpretation of § 5032 is also reviewed de novo. See United States v. Baker, 10 F.3d 1374, 1396 (9th Cir. 1993).

30. Lack of Prosecution

The district court's denial of a motion to dismiss under Rule 48(b) is reviewed for an abuse of discretion. 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).

31. **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).

32. **Magistrate Judges**

The scope of authority and powers of a magistrate judge are questions of law reviewed de novo. See 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), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999). Factual findings made by a magistrate judge in an extradition proceedings are reviewed for clear error. Marinero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999).

33. **Miranda Rights**

Whether a defendant was constitutionally entitled to Miranda warnings is an issue of law reviewed de novo. United States v. Montero-Camargo, 177 F.3d 1113, 1121 (9th Cir. 1999); 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. 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. 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. 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). 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)). The district court's factual findings underlying its decision, such as what a defendant was told, are subject to clearly erroneous review. United States v. Andaverde, 64 F.3d 1305, 1313 (9th Cir. 1995); United States v. Bland, 908 F.2d 471, 472 (9th Cir. 1990). When there are no factual disputes, however, as to whether warnings were given, what questions were asked, or what answers were given, whether the defendant was subjected to an interrogation is a mixed question of law and fact reviewed de novo. United States v. Mereno-Flores, 33 F.3d 1164, 1168 (9th Cir. 1994).

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. 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.

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. 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).

34. **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).

35. **Out-of-Court Identification**

To determine whether an out-of-court identification procedure is so impermissibly suggestive as to taint subsequent identification testimony in deprivation of a 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 court of appeals reviews the constitutionality of pretrial identification procedures 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. **Plea Agreements**

a. **Breaches/Enforcement**

Alleged violations of plea agreements are reviewed de novo. 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. Fagan, 996 F.2d 1009, 1013 (9th Cir. 1993). 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).

Whether the government violated the terms of the agreement is reviewed de novo. 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. Salemo, 81 F.3d 1453, 1460 (9th Cir. 1996); see also United States v. Martinez, 143 F.3d 1266, 1271 (9th Cir.) (factual issue whether defendant breached plea agreement is reviewed for clear error), cert. denied, ___ U.S. ___, 119 S. Ct. 254 (1998). 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."). Findings regarding the terms of a plea agreement are subject to the clearly erroneous standard of review. 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. United States v. Phillips, 174 F.3d 1074, 1075 (9th Cir. 1999); United States v. Blitz, 151 F.2d 1002, 1005 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 567 (1998); United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997).

37. Preclusion of Defense

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. 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) (necessity). 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). The court's determination that a defendant has the burden of proving his defense is reviewed de novo. United States v. McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999); United States v. Dominguez-Mestas, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress). Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. United States v. Ripinsky, 109 F.3d 1436, 1440 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998); 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).

38. **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. United States v. Doe, 149 F.3d 945, 947 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 457 (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. Montero-Camargo, 177 F.3d 1113, 1119 (9th Cir. 1999); 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.

39. **Pretrial Detention and Release**

Factual findings underlying a district court's 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. 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).

40. **Pretrial Hearings**

A trial court's decision whether to hold a hearing on pretrial motions is reviewed for an abuse of discretion. See, e.g., United States v. Smith, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) (suppression motion), cert. denied, ___ U.S. ___, 119 S. Ct. 804 (1999); 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).

41. **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. Buckner, 179 F.3d 834, 837 (9th Cir. 1999) (warrantless arrest). Thus, probable cause rulings are reviewed de novo. See United States v. Montero-Camargo, 177 F.3d 1113, 1119 (9th Cir. 1999) (warrantless search); United States v. Real Property Known as 22249 Dolorosa St., Woodland Hills, California, 167 F.3d 509, 511 (9th Cir. 1999) (civil forfeiture); 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.) (warrantless arrest), cert. denied, ___ U.S. ___, 119 S. Ct. 54 (1998); United States v. \$129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture), cert. denied, ___ U.S. ___, 118 S. Ct. 1399 (1998); 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) (issuance of 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).

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). Thus, the magistrate judge's original determination of probable cause is accorded significant deference by the reviewing court. See 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. 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).

42. **Recusal**

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. 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).

43. **Regulations**

A district court's interpretation of a federal regulation is reviewed de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999).

44. **Representation**

a. **Conflict-Free Representation**

This court reviews de novo whether a defendant was denied the right to conflict-free representation. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); 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**

Ineffective assistance of counsel claims are ordinarily brought in collateral habeas proceedings because "the appellate record often lacks a sufficient evidentiary basis as to what counsel did, why it was done, and what, if any, prejudice resulted." United States v. Quintero-Barraza, 78 F.3d 1344, 1347 (9th Cir. 1995) (internal quotation omitted). "Nevertheless, where the record adequately sets forth the facts giving rise to a claim of ineffective assistance of counsel, . . . the Court will consider the defendant's argument on direct appeal." Id. Review is de novo. Id.

Whether a defendant received ineffective assistance of counsel is reviewed de novo. See United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal); United States v. Cruz-Mendoza, 147 F.3d 1069, 1072 (9th Cir.) (§ 2255), amended by 163 F.3d 1149 (9th Cir. 1998); 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.) (claim presented mixed question of law and fact reviewed de novo), cert. denied, ___ U.S. ___, 119 S. Ct. 422 (1998); United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994) (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); United States v. Allen, 157 F.3d 661, 665 (9th Cir. 1998); Cruz-Mendoza, 147 F.3d at 1072; Smith v. Lewis, 140 F.3d 1263, 1268 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 336 (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. United States v. Alvarez-Tautimez, 160 F.3d 573 (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. 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. McMullen, 98 F.3d at 1157; United States v. Blaylock, 20 F.3d 1458, 1464 (9th Cir. 1994).

e. **Pro Se Representation**

Factual findings of the district court that are the basis of its decision whether to allow a defendant to proceed pro se are reversible only if they are clearly erroneous. 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 George, 56 F.3d at 1084 (citing United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986)).

f. **Substitution of Counsel**

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. 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. D'Amore, 56 F.3d 1202, 1204 (9th Cir. 1995); 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. Moore, 159 F.3d at 1158-59; Gonzales, 113 F.3d at 1028; George, 85 F.3d at 1438; D'Amore, 56 F.3d at 1204.

g. **Waiver of Representation**

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). 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. Crandell v. Bunnell, 144 F.3d 1213, 1215 (9th Cir. 1998) (habeas).

h. 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.) (habeas), cert. denied, ___ U.S. ___, 119 S. Ct. 422 (1998); United States v. Roston, 986 F.2d 1287, 1292 (9th Cir. 1993) (substitution of new counsel).

45. Search and Seizure

The lawfulness of a search and seizure is a mixed question of law and fact reviewed de novo. 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. 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). A district court's finding of fact that the defendant freely consented to a search is reviewed for clear error. 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).

Probable cause determinations are reviewed de novo. See Ornelas v. United States, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); United States v. Montero-Camargo, 177 F.3d 1113, 1119 (9th Cir. 1999) (warrantless search); 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) (issuance of 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). Findings of fact are reviewed for clear error. United States v. Nance, 962 F.2d 860, 862 (9th Cir. 1992) (per curiam). Thus, a magistrate judge's original finding of probable cause is reviewed for clear error. See United States v. Henson, 123 F.3d 1226, 1238 (9th Cir. 1997); United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995).

The determination of whether property has been abandoned for purposes of establishing a Fourth Amendment privacy right is an issue of fact subject to a clearly

erroneous standard of review. United States v. Gonzales, 979 F.2d 711, 712 (9th Cir. 1992).

This court reviews de novo a district court's ultimate legal conclusion whether a defendant has standing to challenge a search and seizure. 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. 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. 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. **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.

b. **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).

c. **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 under the clearly erroneous standard. See 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. Fiorillo, ___ F.3d ___, No. 97-10551 (9th Cir. July 14, 1999) (describing three-part analysis).

d. Exigent Circumstances

Exigent circumstances present a mixed question of law and fact reviewed de novo. 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.

e. 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. Fultz, 146 F.3d 1102, 1104 (9th Cir. 1998).

f. **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).

g. **Inevitable Discovery**

Rulings regarding inevitable discovery present mixed questions of fact and law that are reviewed for clear error. United States v. Lang, 149 F.3d 1044, 1048 (9th Cir. 1998) (resolving prior unsettled standard), cert. denied, ___ U.S. ___, 119 S. Ct. 1809 (1999); Compare United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 n.8 (9th Cir. 1989) (Whether "review of this mixed question of law and fact should be de novo or for clear error has not been decided in this circuit.") with United States v. Polanco, 93 F.3d 555, 560 (9th Cir. 1996) (reviewing de novo denial of motion to suppress based on inevitable discovery argument); United States v. Boatwright, 822 F.2d 862, 864-65 (9th Cir. 1987) (implicitly reviewing inevitable discovery issue de novo).

h. **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." United States v. Michael R., 90 F.3d 340, 345 (9th Cir. 1996) (quoting 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 Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Montero-Camargo, 177 F.3d 1113, 1118 (9th Cir. 1999); 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). Whether a seizure exceeds the bounds of a valid investigatory stop and becomes a de facto arrest is reviewed de novo. 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. United States v. Chan-Jimenez, 125 F.3d 1324, 1327 (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).

i. Issuance of a Search Warrant

The court of appeals reviews a magistrate judge's issuance of a search warrant for clear error. United States v. Fulbright, 105 F.3d 443, 453 (9th Cir. 1997); United States v. Mendonsa, 989 F.2d 366, 368 (9th Cir. 1993); United States v. Bertrand, 926 F.2d 838, 841 (9th Cir. 1991). The reviewing court must determine whether the magistrate judge had a substantial basis for concluding that the affidavit in support of the warrant established probable cause. Fulbright, 105 F.3d at 453; United States v. Brown, 951 F.2d 999, 1002 (9th Cir. 1991); United States v. Rodriguez, 869 F.2d 479, 484 (9th Cir. 1989). This standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination." United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993). "Significant deference" is given to the magistrate's original determination of probable cause. Fulbright, 105 F.3d at 453. The district court's determination that there was probable cause to issue a search warrant is reviewed de novo. United States v. Real Property Known As 22249 Dolorosa St., 167 F.3d 509, 513 (9th Cir. 1999) (forfeiture); United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996).

Whether probable cause is lacking because of alleged misstatements and omissions in the supporting affidavit is reviewed de novo. Hernandez, 80 F.3d at 1260; United States v. Brady, 993 F.2d 177, 179 (9th Cir. 1993). When reviewing a challenge that the affidavit contained alleged misstatements and omissions, the reviewing court must examine all circumstances set forth in the affidavit. United States v. Johns, 948 F.2d 599, 602 (9th Cir. 1991). In doubtful cases preference should be given to the validity of the warrant. Id. The district court's findings are reviewed for

clear error. United States v. Hernandez, 937 F.2d 1490, 1494 (9th Cir. 1991). Whether misstatements or omissions are material to a finding of probable cause is subject to de novo review. Hernandez, 80 F.3d at 1260; United States v. Bertrand, 926 F.2d 838, 842-43 (9th Cir. 1991). Whether the search warrant describes items to be seized with sufficient specificity is examined de novo. United States v. Noushtar, 78 F.3d 1442, 1447 (9th Cir. 1996); United States v. McLaughlin, 851 F.2d 283, 285 (9th Cir. 1988). Whether police exceeded the scope of the search warrant is reviewed de novo. 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) (standard of review of a district court's determination that government agents flagrantly disregarded the terms of a search warrant is unclear). Whether the agent's reliance was objectively reasonable is reviewed de novo. Johns, 948 F.2d at 602.

j. 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. 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 United States v. Zermeno, 66 F.3d 1058, 1062-63 (9th Cir. 1995) (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); Hudson, 100 F.3d at 1417 (whether exigent circumstances justified a failure to adhere to the knock and announce provisions of 18 U.S.C. § 3109 is a mixed question of fact and law reviewed de novo); United States v. Ramirez, 91 F.3d 1297, 1299 (9th Cir. 1996) (same), rev'd on other grounds, 523 U.S. 65 (1998).

k. 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).

l. Probable Cause Determinations

Probable cause determinations present mixed questions of law and fact in which the legal issues predominate, and they are therefore subject to de novo review. Ornelas v. United States, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); 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. Montero-Camargo, 177 F.3d 1113, 1118 (9th Cir. 1999) (warrantless search); 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.) (warrantless arrest), cert. denied, ___ U.S. ___, 119 S. Ct. 54 (1998); United States v. \$129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture), cert. denied, ___ U.S. ___, 119 S. Ct. 1399 (1998); 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) (issuance of 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).

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). Thus, the magistrate judge's original determination of probable cause is accorded significant deference by the reviewing court. See 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. 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).

m. 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).

n. 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. United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996) ("Whether exigent circumstances justified a failure to adhere to the knock and announce provisions of 18 U.S.C. § 3109 is a mixed question of fact and law that we review de novo."); United States v. Arias, 923 F.2d 1387, 1389 (9th Cir. 1991); see also United States v. Zermeno, 66 F.3d 1058, 1062-63 (9th Cir. 1995) (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).

o. 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).

p. **Terry Stops**

The propriety of a Terry stop is reviewed de novo. 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. 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).

q. **Warrantless Searches and Seizures**

The validity of a warrantless search is reviewed de novo. United States v. Montero-Camargo, 177 F.3d 1113, 1119 (9th Cir. 1999); 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. Montero-Camargo, 177 F.3d at 1119.

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). But whether an area is within the protected curtilage of a home is an essentially factual inquiry reviewed for clear error. United States v. Soliz, 129 F.3d 499, 502 (9th Cir. 1997).

The validity of a warrantless seizure is reviewed de novo. United States v. Aldaz, 921 F.2d 227, 229 (9th Cir. 1990) (seizure of packages by postal officers based on reasonable and articulated suspicion); 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 arrest or seizure is a question of law reviewed de novo. 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).

46. **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. Leidender, 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)).

47. **Severance**

Federal Rule of Criminal Procedure 14 governs the severance of both defendants and charges. United States v. Vasquez-Velasco, 15 F.3d 833, 845 (9th Cir. 1994). A defendant seeking reversal of the denial of a motion to sever bears the burden of proving that the prejudice he or she suffered 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).

A district court's decision whether to sever is reviewed for an abuse of discretion. United States v. Gillam, 167 F.3d 1273, 1276 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 19, 1999) (No. 99-5357); United States v. Nelson, 137 F.3d 1094, 1108 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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 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.

48. **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. 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) (appeal from denial of motion for reduction in sentence); 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 that we review de novo." United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995).

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. 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). 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, ___ U.S. ___, 119 S. Ct. 1887, 1900 (1999); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Shannon, 137 F.3d 1112, 1118 (9th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 2390 (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. 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."); United States v. James, 139 F.3d 709, 713 (9th Cir. 1998); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); United States v. Ripinsky, 109 F.3d

1436, 1455 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998); United States v. Marbella, 73 F.3d 1508, 1513 (9th Cir. 1996).

Confrontation Clause violations are subject, however, to harmless error analysis. See 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). "A Confrontation Clause violation does not require reversal if the error was harmless beyond a reasonable doubt." Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (habeas).

49. **Speedy Trial**

Post-indictment Sixth Amendment speedy trial claims are reviewed de novo. United States v. Manning, 56 F.3d 1188, 1193 (9th Cir. 1995); United States v. Baker, 10 F.3d 1374, 1401 (9th Cir. 1993).

A district court's application of the Speedy Trial Act is reviewed de novo. United States v. Hall, 181 F.3d 1057, 1061 (9th Cir. 1999); United States v. Nelson, 137 F.3d 1094, 1108 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (1998); United States v. Shetty, 130 F.3d 1324, 1327 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1525 (1998); 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. Ortiz-Lopez, 24 F.3d 53, 54 (9th Cir. 1994). Whether a juvenile's speedy trial rights were violated is also reviewed de novo. United States v. Doe, 149 F.3d 945, 948 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 457 (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. United States v. Montero-Camargo, 177 F.3d 1113, 1119 (9th Cir. 1999); 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. 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 determination of a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. United States v. Symington, ___ F.3d ___, No. 98-10070 (9th Cir. June 22, 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. 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. Doe, 149 F.3d at 947; 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).

50. 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).

51. Statutes

The construction or interpretation of a statute is reviewed de novo. See 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), cert. denied,

___ U.S. ___, 119 S. Ct. 1338 (1999); 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. Salerno, 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 constitutionality of a statute is a question of law reviewed de novo. See 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1399 (1998). 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).

52. **Suppression**

Motions to suppress are generally reviewed de novo. See United States v. Montero-Camargo, 177 F.3d 1113, 1118 (9th Cir. 1999); 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. Montero-Camargo, 177 F.3d at 1118; 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).

When reviewing a motion to suppress where the question is the scope of the warrant, review is de novo. United States v. Becker, 929 F.2d 442, 445 (9th Cir. 1991); United States v. McLaughlin, 851 F.2d 283, 285 (9th Cir. 1988). Whether a warrant is sufficiently specific is reviewed de novo. 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).

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), cert. denied, ___ U.S. ___, 119 S. Ct. 804 (1999); 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).

53. **Transfer of Trial**

The district court's denial 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); United States v. Etsitty, 130 F.3d 420, 424 (9th Cir. 1997), amended by 140 F.3d 1274 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 515 (1998); United States v. Herbert, 698 F.2d 981, 984 (9th Cir. 1984).

54. **Venue**

The existence of venue is a question of law reviewed de novo. 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).

55. **Vindictive Prosecution**

The standard of review in a vindictive prosecution case remains unsettled in this circuit. See 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 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).

Note that a claim of vindictive prosecution is not subject to interlocutory appeal because the defendant may raise the claim on appeal from a final judgment. United States v. McKinley, 38 F.3d 428, 431 (9th Cir. 1994); United States v. Moreno-Green, 881 F.2d 680, 681 (9th Cir. 1989).

56. **Voluntariness of a Confession**

This court reviews de novo the voluntariness of a confession. See 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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). 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.

In habeas, a federal court reviewing the admissibility of a confession is not bound by a state court finding but rather has a "duty to make an independent evaluation of the record." Collazo v. Estelle, 940 F.2d 411, 415 (9th Cir. 1991) (en banc). Accordingly, review is de novo. Id.

57. **Waiver of Rights**

A waiver is an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Issues of waiver are reviewed de novo. United States v. Johnson, 67 F.3d 200, 202 n.3 (9th Cir. 1995). Whether a waiver is voluntary is reviewed de novo. 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. 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, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact that we review de novo." 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. 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. 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 by entering into a plea agreement is reviewed de novo. United States v. Phillips, 174 F.3d 1074, 1075 (9th Cir. 1999); United States v. Martinez, 143 F.3d 1266, 1270 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 254 (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. 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 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).

58. Wiretaps

A district court's authorization of a wiretap is reviewed for an abuse of discretion. See 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 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 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

1. Admission of Evidence

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. 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) (court did not abuse its discretion); United States v. Hernandez, 109 F.3d 1450, 1452 (9th Cir. 1997) (court abused its discretion); United States v. Ortlund, 109 F.3d 539, 543 (9th Cir. 1997) (court did not abuse its discretion); see also United States v. Etsitty, 130 F.3d 420, 423 (9th Cir. 1997) (Rule 403), amended by 140 F.3d 1274 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 515 (1998); United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997) (Rule 404); United States v. Crosby, 75 F.3d 1343, 1346 (9th Cir. 1996) (applying Rule 403); United States v. Matta-Ballesteros, 71 F.3d 754, 766 (9th Cir. 1995) (applying Rule 702), amended by 98 F.3d 1100 (9th Cir. 1996). Such decisions will be reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. 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); United States v. Corona, 34 F.3d 876, 882 (9th Cir. 1994).

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. Montero-Camargo, 177 F.3d 1113, 1123 (9th Cir. 1999) (hearsay rule); 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. 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 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).

2. **Allen Charges**

The trial court's decision to instruct the jury with an Allen charge is reviewed for an abuse of discretion. United States v. Nelson, 137 F.3d 1094, 1109 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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." Nelson, 137 F.3d at 1109 (quoting 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).

3. **Authenticity**

A trial court's decision regarding the authenticity of evidence is reviewed for an abuse of discretion. United States v. Workerger, 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).

4. **Batson Claims**

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). 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. United States v. Annigoni, 96 F.3d 1132, 1136 n.3 (9th Cir. 1996) (en banc); see also 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."), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 19, 1999) (No. 99-5357); Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997) (habeas).

5. **Burden of Proof**

The court's 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), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999); 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).

6. **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).

7. Character Evidence

Admission of character evidence is reviewed for an abuse of discretion. See 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.

8. 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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 515 (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.), cert. denied, ___ U.S. ___, 119 S. Ct. 171 (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). Griffin claims are reviewed de novo, unless there was no objection, in which case review is for plain error. Atcheson, 94 F.3d at 1245; United States v. Mayans, 17 F.3d 1174, 1185 (9th Cir. 1994).

9. Credibility Determinations

A trial court's ruling on the credibility of a witness is reviewed for clear error. 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." Id. (internal quotation omitted).

10. 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. 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." Id. (internal quotation omitted). 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. 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).

11. **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).

12. **Confrontation Clause**

Alleged violations of the Confrontation Clause are reviewed de novo. See Lilly v. Virginia, ___ U.S. ___, 119 S. Ct. 1887, 1900 (1999); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Shannon, 137 F.3d 1112, 1118 (9th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 2390 (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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); United States v. Ripinsky, 109 F.3d 1436, 1455 (9th Cir.),

amended by 129 F.3d 518 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998); 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. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 19, 1999) (No. 99-5357); Miguel, 111 F.3d at 671-72; United States v. Vargas, 933 F.2d 701, 704-05 (9th Cir. 1991). "A Confrontation Clause violation does not require reversal if the error was harmless beyond a reasonable doubt." Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (habeas).

13. **Constitutionality of Regulations and Statutes**

The district court's interpretation of a regulation is reviewed de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 806 (1999). Whether a regulation is unconstitutionally vague, overbroad, or creates a "prior restraint" are questions of law subject to de novo review. See United States v. Erickson, 75 F.3d 470, 475 (9th Cir. 1996); United States v. Woodley, 9 F.3d 774, 778 (9th Cir. 1993).

The constitutionality of a statute is a question of law reviewed de novo. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1399 (1998). 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. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1338 (1999); 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.

14. 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, 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).

15. Continuance

A trial court's ruling on a request for a continuance of trial is reviewed for an abuse of discretion. 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).

16. Cross-Examination

A trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); 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), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998); 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 171 (1998).

Whether limitations on cross-examination violated a defendant's right of confrontation is reviewed de novo. 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. 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).

17. **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.) (bank records), cert. denied, ___ U.S. ___, 119 S. Ct. 567 (1998); 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).

18. Double Jeopardy

Whether a defendant's double jeopardy rights have been violated is a question of law reviewed de novo. United States v. McClain, 133 F.3d 1191, 1193 (9th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 2386 (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. McClain, 133 F.3d 1191, 1193 (9th Cir.) (habeas), cert. denied, ___ U.S. ___, 118 S. Ct. 2386 (1998); 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 remains 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).

19. **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), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); United States v. Figueroa-Lopez, 125 F.3d 1241, 1244 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1823 (1998); 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. 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).

20. **Evidentiary Rulings**

A district court's evidentiary rulings during trial are reviewed for an abuse of discretion. See Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997); 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 171 (1998); United States v. Figueroa-Lopez, 125 F.3d 1241, 1244 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1823 (1998); 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." Ramirez, 176 F.3d at 1182; United States v. Worker, 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 28, 1999) (No. 99-5111); United States v. Serang, 156 F.3d 910, 915 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 627 (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. 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. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999) (court considers 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).

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). 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 28, 1999) (No. 99-5033); 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).

21. **Expert Testimony**

A district court's decision to admit expert opinion testimony is reviewed for abuse of discretion. United States v. Burdeau, 168 F.3d 352, 357 (9th Cir. 1999); United States v. Cruz, 127 F.3d 791, 800 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); 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. Scholl, 166 F.3d 964, 971-72 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); 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 a matter within the district court's discretion." 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (1998); United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996).

22. **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).

23. **Fifth Amendment Rights**

Whether there has been a violation of a defendant's Fifth Amendment right is reviewed de novo. 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).

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 1522 n.4. Whether a defendant's testimony is immunized is a question of law reviewed de novo. Id. at 1525.

24. Hearsay

a. Admitting Hearsay

Whether the district court correctly construed the hearsay rule is a question of law reviewable de novo. United States v. Montero-Camargo, 177 F.3d 1113, 1123 (9th Cir. 1999); 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. Montero-Camargo, 177 F.3d at 1123; United States v. Scholl, 166 F.3d 964, 978 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); 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. 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. 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, ___ U.S. ___, 119 S. Ct. 1887, 1900 (1999) (habeas); 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. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); 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), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998).

Confrontation Clause violations are also subject to harmless error analysis. See United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 19, 1999) (No. 99-5357); Miguel, 111 F.3d at 671-72; United States v. Vargas, 933 F.2d 701, 704-05 (9th Cir. 1991). "A Confrontation Clause violation does not require reversal if the error was harmless beyond a reasonable doubt." 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).

25. 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.; 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).

26. Impeachment Evidence

The district court's decision to admit impeachment evidence is reviewed for an abuse of discretion. See 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 28, 1999) (No. 99-5033); 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).

27. 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.

28. 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. 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. Lumitap, 111 F.3d at 83.

29. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are ordinarily brought in collateral habeas proceedings because "the appellate record often lacks a sufficient evidentiary basis as to what counsel did, why it was done, and what, if any, prejudice resulted." United States v. Quintero-Barraza, 78 F.3d 1344, 1347 (9th Cir. 1995) (internal quotation omitted); see also United States v. Burdeau, 168 F.3d 352, 358 n.2 (9th Cir. 1999) (ineffective assistance of counsel claim is properly raised in collateral proceedings). "Nevertheless, where the record adequately sets forth the facts giving rise to a claim of ineffective assistance of counsel, . . . the Court will consider the defendant's argument on direct appeal." Id. Review is de novo. Id.

Whether a defendant received ineffective assistance of counsel is reviewed de novo. See United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal); United States v. Cruz-Mendoza, 147 F.3d 1069, 1072 (9th Cir.) (§ 2255), amended by 163 F.3d 1149 (9th Cir. 1998); 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.) (claim presents mixed question of law and fact reviewed de novo), cert. denied, ___ U.S. ___, 119 S. Ct. 422 (1998); United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994) (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); United States v. Alvarez-Tautimez, 160 F.3d 573, 576-77 (9th Cir. 1998); Cruz-Mendoza, 147 F.3d at 1072; Smith v. Lewis, 140 F.3d 1263, 1268 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 336 (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. Alvarez-Tautimez, 160 F.3d at 575; 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. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (consolidated direct and § 2255 appeals); 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). Whether a defendant has been denied the right to conflict-free representation is reviewed de novo. Moore, 159 F.3d at 1157 (consolidated direct and § 2255 appeals); United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997) (direct appeal), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994) (habeas).

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. McMullen, 98 F.3d at 1157; United States v. Blaylock, 20 F.3d 1458, 1464 (9th Cir. 1994).

30. **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.), cert. denied, ___ U.S. ___, 118 S. Ct. 2390 (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).

31. **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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); 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 judge's denial of a motion for recusal is reviewed for an abuse of discretion. 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); 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 proceeding). 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).

32. **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.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 575 (1998).

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, ___ F.3d ___, No. 98-10070 (9th Cir. June 22, 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, ___ F.3d at ___ (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. Beard, 161 at 1192; 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).

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).

In habeas, whether an instance of juror misconduct was prejudicial to the defendant presents a mixed question of law and fact reviewed de novo. Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2304 (1998).

33. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 267 (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 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 Rrapi, 175 F.3d at 746 (English translation of Albanian wiretap tape recordings).

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).

34. **Jury Inquiries**

A district court's response to a jury's inquiry is reviewed for an abuse of discretion. 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.").

35. **Jury Instructions**

A district court's formulation of jury instructions is reviewed for an abuse of discretion. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 2074 (1998); 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1101 (1998); 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 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), cert. denied, ___ U.S. ___, 118 S. Ct. 870 (1998); United States v. Castaneda, 94 F.3d 592, 596 (9th Cir.

1996) (reviewing rejected instruction); United States v. Chastain, 84 F.3d 321, 323 (9th Cir. 1996); United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994); see also 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. 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.").

In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. 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. 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. 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.

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, ___ U.S. ___, 119 S. Ct. 2090, 2102 (1999); 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1400 (1998); 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 unreviewable 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. 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. Id. The court's "precise formulation" of the instructions is reviewed, however, for an abuse of discretion. Id. Whether a jury instruction misstates elements of the crime is a question of law reviewed de novo. Id. (citing United States v. Duran, 59 F.3d 938, 941 (9th Cir. 1995) (noting prior confusion in circuit)); United States v. Eshkol, 108 F.3d 1025, 1028 (9th Cir. 1997) ("We review de novo a denial of a defendant's jury instruction based on a question of law."); 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. United States v. Nelson, 137 F.3d 1094, 1109 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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." Nelson, 137 F.3d at 1109 (quoting 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.), cert. denied, ___ U.S. ___, 118 S. Ct. 2390 (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, ___ F.3d ___, No. 98-30145 (9th Cir. August 6, 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.").

36. **Jury Selection**

a. **Challenges for Cause**

The district court's denial of a challenge for cause is reviewed for an abuse of discretion. See United States v. Padilla-Mendoza, 157 F.3d 730, 733 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1084 (1999); 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, 146 F.3d 653, 654 (9th Cir. 1998) (holding that 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), cert. granted, ___ U.S. ___, 119 S. Ct. 2365 (June 21, 1999).

b. Jury Composition

The trial court's factual findings regarding purposeful discrimination in jury selection are entitled 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); United States v. Bishop, 959 F.2d 820, 826 (9th Cir. 1992). 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. Bishop, 959 F.2d at 827. 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).

Whether equal protection principles prohibit a party from peremptorily striking venirepersons on the basis of gender is a question of law reviewed de novo. 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1178 (1998).

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. 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.").

"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, 146 F.3d 653, 654 (9th Cir.), cert. granted, ___ U.S. ___, 119 S. Ct. 2365 (1998). The court's findings of fact as to racially discriminatory use of peremptory challenges are reviewed for clear error. Annigoni, 96 F.3d at 1136 n.3; see also Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997) (habeas), cert. denied, ___ U.S. ___, 118 S. Ct. 1178 (1998).

d. **Voir Dire**

A district court's voir dire procedures are reviewed for an abuse of discretion. United States v. Padilla-Mendoza, 157 F.3d 730, 733 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1084 (1999); 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 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).

37. **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)), cert. denied, ___ U.S. ___, 119 S. Ct. 151 (1998).

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, ___ U.S. ___, 119 S. Ct. 1827, 1833-34 (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.), cert. denied, ___ U.S. ___, 119 S. Ct. 211 (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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101). 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).

38. Motion for Acquittal

A trial court's ruling on a Rule 29 motion for acquittal is reviewed de novo. See United States v. Yossunthorn, 167 F.3d 1267, 1270 (9th Cir. 1999); United States v. Neill, 166 F.3d 943, 948 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 2037 (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. United States v. Stoddard, 150 F.3d 1140, 1144 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1089 (1999);

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. 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 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).

39. **Motion to Reopen a Case**

The decision whether to reopen a case is reviewed for an abuse of discretion. See United States v. Tisor, 96 F.3d 370, 380 (9th Cir. 1996) (noting that district court has discretion to allow the government to reopen its case); 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." Kelm, 827 F.2d at 1323.

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).

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. United States v. Burdeau, 168 F.3d 352, 357 (9th Cir. 1999); United States v. Cruz, 127 F.3d 791, 800 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); United States v. Webb, 115 F.3d 711, 713 (9th Cir. (1997)); United States v. Ortlund, 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. Scholl, 166 F.3d 964, 971-72 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); 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 a matter within the district court's discretion." 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (1998); United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996).

b. **Lay Opinion Testimony**

"We review the admission of lay opinion testimony deferentially" under an abuse of discretion standard. 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. 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.) (listing factors), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (1998); 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 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 627 (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 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).

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), cert. denied, ___ U.S. ___, 119 S. Ct. 1359 (1999); United States v. Young, 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

44. **Privileges**

A party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication. United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997); Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1995). Whether the party has met these requirements is reviewed de novo. Bauer, 132 F.3d at 507; Ralls, 52 F.3d at 225. Factual findings are reviewed for clear error. Ralls, 52 F.3d at 225.

The trial court's rulings on the scope of the privilege are 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).

45. **Prosecutorial Misconduct**

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. Scholl, 166 F.3d 964, 974 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); United States v. Peterson, 140 F.3d 819, 821 (9th Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1106 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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. Id. Claims that a prosecutor improperly vouched for the credibility of witnesses is reviewed for plain error when no objection was made by the defendant. 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).

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. 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. United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997). When there is no objection to the prosecutor's comments, review is for plain error. See 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).

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.

Whether a prosecutor's alleged misconduct before a grand jury warrants dismissal of the indictment is reviewed de novo. 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).

46. 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. United States v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999); United States v. Neill, 166 F.3d 943, 946 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 2037 (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); United States v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995). "The district judge is given wide latitude in determining the admissibility of evidence under this standard." Easter, 66 F.3d at 1021 (internal quotation omitted); 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."). 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.

47. Rebuttal and Surrebuttal Evidence

A district court's decision regarding the order of proof is 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 896 (1998); 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." 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. 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. 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.

48. **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).

49. **Recusal and Disqualification of Judge**

A district judge's denial of a motion for recusal is reviewed for an abuse of discretion. United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 14, 1999) (No. 99-101); 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). 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 Scholl, 166 F.3d at 977; United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997) (reciting standard); 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).

50. **Relevancy of Evidence**

The district court's decisions regarding the relevance 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).

51. **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.").

52. **Sanctions**

"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." United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992). 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. 1999), 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).

"This Circuit has not squarely decided the question of what standard of review should govern appeals from decisions imposing sanctions for attorney conduct found

to violate local rules." United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (comparing de novo standard from United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993), with abuse of discretion standard from Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994), and Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713, 715 (9th Cir. 1989)).

53. **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).

54. **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. 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.

55. **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. 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).

56. **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. United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999) (restricting cross-examination of witnesses); 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 of witness); 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.; 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).

D. Post-Trial Decisions

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. 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. 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. United States v. Phillips, 174 F.3d 1074, 1075 (9th Cir. 1999); United States v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998); United States v. Martinez, 143 F.3d 1266, 1270 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 254 (1998); United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997); United States v. Zink, 107 F.3d 716, 717 (9th Cir. 1997).

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. 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).

4. 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).

5. **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).

6. **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).

7. **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. Ladum, 141 F.3d 1328, 1344 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 549 (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, 118 S. Ct. 2028, 2037-38 & n.10 (1998).

8. 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. United States v. Real Property Known As 22249 Dolorosa St., Woodland Hills, Cal., 167 F.3d 509, 511-12 (9th Cir. 1999); 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 22249 Dolorosa St., 167 F.3d at 513; United States v. \$129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1399 (1998); 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).

9. Mistrial

The district court's denial of a motion for mistrial is reviewed for an abuse of discretion. United States v. Ramirez, 176 F.3d 1179, 1183 (9th Cir. 1999); United States v. Randall, 162 F.3d 557, 559 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119

S. Ct. 1480 (1999); United States v. Nelson, 137 F.3d 1094, 1106 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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).

10. Motion to 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. United States v. Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998); United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996).

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). Rule 35 was 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." Id.; see also United States v. Fowler, 794 F.2d 1446, 1449 (9th Cir. 1986) (same standard). The trial court's decision not to hold an evidentiary hearing on a Rule 35 motion is reviewed for an abuse of discretion. United States v. Gonzales, 765 F.2d 1393, 1396 (9th Cir. 1985).

11. New Trial

The denial of a defendant's motion for a new trial is reviewed for an abuse of discretion. 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. 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. 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).

12. 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." DeLancy v. Crabtree, 131 F.3d 780, 787 (9th Cir. 1997) (internal quotation omitted), cert. denied, ___ U.S. ___, 118 S. Ct. 2332 (1998).

13. 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).

14. Restitution

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. United States v. Mikaelian, 168 F.3d 380, 390 (9th Cir. 1999), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1089 (1999); 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. United States v. Allen, 153 F.3d 1037, 1044-45 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1094 (1999); 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 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. United States v. Miguel, 49 F.3d 505, 511 (9th Cir. 1995). The amount of restitution ordered is reviewed for an abuse of discretion. 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). Underlying factual findings are reviewed for clear error. United States v. Sarno, 73 F.3d 1470, 1503 (9th Cir. 1995).

15. 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.

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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 2037 (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. Lara-Aceves, ___ F.3d ___, No. 98-50522 (9th Cir. July 6, 1999); 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. United States v. Estrada-Plata, 57 F.3d 757, 762 (9th Cir. 1995).

The district court's interpretation of the Sentencing Guidelines is reviewed de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1480 (1999); 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 trial court's "grouping of offenses" for purposes of applying the Sentencing Guidelines is reviewed de novo. United States v. Boos, 127 F.3d 1207, 1209 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 734 (1998).

The district court's factual findings in the sentencing phase are reviewed for clear error. See, e.g., United States v. Frega, 179 F.3d 793, 811 n.22 (9th Cir. 1999) (sentence enhancement for 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.) (use of a dangerous weapon), cert. denied, ___ U.S. ___, 119 S. Ct. 2037 (1999); United States v. Ladum, 141 F.3d 1328, 1344 (9th Cir.) (ability to pay fine), cert. denied, ___ U.S. ___, 119 S. Ct. 549 (1998); 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.) (obstruction of justice), cert. denied, ___ U.S. ___, 118 S. Ct. 2390 (1998); 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, supervisory 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. 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); United States v. August, 86 F.3d 151, 153 (9th Cir. 1996) ("Whether the method adopted by the district court to approximate the relevant quantity of drugs is proper under the guidelines is . . . reviewed de novo."). Note 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 7, 1999) (No. 99-5184).

Factual findings by the court must be supported by a preponderance of the evidence. 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." 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. 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. Working, 175 F.3d 1150, 1155 (9th Cir. 1999) (district courts decision to depart deserves substantial deference); 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. United States v. Shetty, 130 F.3d 1324, 1331 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1525 (1998); 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. United States v. Blitz, 151 F.3d 1002, 1009 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 567 (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. Koon v. United States, 518 U.S. 81, 99 (1996); Frega, 179 F.3d at 811 n.22; United States v. Roston, 168 F.3d 377, 378 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 1, 1999) (No. 98-9627); United States v. Lipman, 133 F.3d 726, 729 (9th Cir. 1998) ("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). Accordingly, review of departures from the Sentencing Guidelines under the three-part test established in United States v. Lira-Barraza, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc), is no longer appropriate. See United States v. Banuelos-Rodriguez, 173 F.3d 741, 743 (9th Cir. 1999) (holding that unitary abuse of discretion standard governs review of departure decisions); Roston, 168 F.3d at 378-79 (concluding that Lira-Barraza has been effectively overruled); Sablan, 114 F.3d at 916 ("In light of Koon's mandate that a unitary abuse of discretion standard governs our review of departure decisions, we conclude that Lira-Barraza has been overruled."); United States v. Beasley, 90 F.3d 400, 402-403 (9th Cir. 1996) (holding that Koon overrules Lira-Barraza). But see Lipman, 133 F.3d at 719 (stating that whether a particular factor is a permissible basis for departure is a question of law reviewed de novo); Sablan, 114 F.3d at 916 (same).

A district court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. 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 United States v. Davoudi, 172 F.3d 1130, 1133 (9th Cir. 1999); Tucker, 133 F.3d at 1214; Burger, 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).

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 trial court's conclusion that a prior conviction may be used 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1359 (1999); United States v. Young, 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

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).

Restitution orders are reviewed for an abuse of discretion, provided that they are within the bounds of the statutory framework. See United States v. Mikaelian, 168 F.3d 380, 390 (9th Cir. 1999), amended by 180 F.3d 1091 (9th Cir. 1999); United States v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1089 (1999); 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. United States v. Allen, 153 F.3d 1037, 1044-45 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1094 (1999); Stoddard, 150 F.3d at 1147; United States v. Peterson, 98 F.3d 502, 510 n.7 (9th Cir. 1996). The legality of a sentence, including an order of restitution, is reviewed de novo. United States v. Craig, 181 F.3d 1124, 1126 (9th Cir. 1999); United States v. Meksian, 170 F.3d 1260, 1262 (9th Cir. 1999); Stoddard, 150 F.3d at 1147; United States v. Rutgard, 116 F.3d 1270, 1294 (9th Cir. 1997); United States v. Dayea, 73 F.3d 229, 230 (9th Cir. 1995). Trial courts have broad discretion in ordering restitution. United States v. Miguel, 49 F.3d 505, 511 (9th Cir. 1995). The amount of restitution ordered is reviewed for an abuse of discretion. 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).

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. Ladum, 141 F.3d 1328, 1344 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 549 (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. 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, 118 S. Ct. 2028, 2037-38 & n.10 (1998).

The sentencing court's compliance with Federal Rule of Criminal Procedure 32 is reviewed de novo. United States v. Havier, 155 F.3d 1090, 1092 (9th Cir. 1998); United States v. Stein, 127 F.3d 777, 780 (9th Cir. 1997). The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. Id.

16. Sufficiency of the Evidence

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. Jackson v. Virginia,

443 U.S. 307, 319 (1979); United States v. Symington, ___ F.3d ___, No. 98-10070 (9th Cir. June 22, 1999); United States v. Deeb, 175 F.3d 1163, 1168 (9th Cir. 1999); United States v. Nelson, 137 F.3d 1094, 1103 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 232 (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), cert. denied, ___ U.S. ___, 119 S. Ct. 1338 (1999); United States v. Mayberry, 913 F.2d 719, 721 (9th Cir. 1990).

To preserve the right on appeal to test the sufficiency of the evidence, the defendant must renew or make a motion for acquittal at the close of all evidence. See United States v. Yossunthorn, 167 F.3d 1267, 1270 n.4 (9th Cir. 1999); United States v. Garcia-Guizar, 160 F.3d 511, 516 (9th Cir. 1998); United States v. Blitz, 151 F.3d 1002, 1006 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 567 (1998); Bancalari, 110 F.3d at 1428; United States v. Tisor, 96 F.3d 370, 379 (9th Cir. 1996); United States v. Carpenter, 95 F.3d 773, 775 (9th Cir. 1996); United States v. Oliver, 60 F.3d 547, 550 (9th Cir. 1995). The defendant's failure to do so means that appellate review is for plain error. 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).

When sufficiency of the evidence is properly preserved by making a motion for an acquittal after the close of all evidence, this court's standard is the same as review of the district court's denial of that motion. 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). Thus,

review is de novo. Tucker, 133 F.3d at 1214; Hernandez, 105 F.3d at 1332; Bahena-Cardenas, 70 F.3d at 1072.

17. **Supervised Release**

District courts have wide discretion in fashioning a defendant's obligations during terms of supervised release. United States v. Bee, 162 F.3d 1232, 1234 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1509 (1999); 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. 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 4, 1999) (No. 98-9780); United States v. Johnson, 998 F.2d 696, 697 (9th Cir. 1993). Review is de novo, however, when the challenge is to the interpretation or application of the sentencing guidelines. United States v. Lomayoama, 86 F.3d 142, 146 (9th Cir. 1996); Johnson, 998 F.2d at 697. Similarly, review of jurisdiction issues is de novo. See United States v. Malandrini, 177 F.3d 771, 772 (9th Cir. 1999); United States v. Vallejo, 69 F.3d 992, 994 (9th Cir. 1995).

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. Schmidt, 99 F.3d 315, 320 (9th Cir. 1996). 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. Id.

18. **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. United States v. Fuentes-Montijo, 68 F.3d 352, 353 (9th Cir. 1995); 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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 267 (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).

19. Writ of Audita Querela

"The question of whether a writ of audita querela may issue to vacate a criminal conviction solely on equitable grounds is a question of law that is reviewed de novo by the court of appeals." 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).

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 McLean v. Crabtree, 173 F.3d 1176, 1180 (9th Cir. 1999); Allen v. Crabtree, 153 F.3d 1030, 1032 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 846 (1999); Boyden v. Reno, 106 F.3d 267, 268 (9th Cir. 1997); see also Grady v. Crabtree, 958 F.2d 874, 874 (9th Cir. 1992) (reviewing de novo and granting writ). The court's dismissal of a § 2241 petition is also reviewed de novo. See Zitto v. Crabtree, ___ F.3d ___, No. 98-35518 (9th Cir. July 27, 1999); United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997).

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. Navarro, 160 F.3d 1254, 1255 (9th Cir. 1998) (denial), cert. denied, ___ U.S. ___, 119 S. Ct. 2354 (1999); 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. 1998), 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). The court's factual findings are reviewed for clear error. 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).

To succeed on a § 2255 motion, a petitioner must show “that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” See 28 U.S.C. § 2255. Thus, although collateral review under § 2255 is broad, it does not encompass all claimed errors. See United States v. Addonizio, 442 U.S. 178, 185 (1979); Hamilton v. United States, 67 F.3d 761, 763 (9th Cir. 1995). “If a petitioner does not allege lack of jurisdiction or constitutional error, an error of law will not provide a basis for habeas relief unless that error ‘resulted in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure.’” Hamilton, 67 F.3d at 763-64 (quoting United States v. Timmreck, 441 U.S. 780, 783-84 (1979)).

The district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition is also reviewed de novo. Schell v. Witek, 181 F.3d 1094, 1097 (9th Cir. 1999); McNab v. Kok, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); Bean v. Calderon, 163 F.3d 1073, 1077 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3758 (U.S. May 28, 1999) (No. 98-1931); 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 68 (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); Morales v. Calderon, 85 F.3d 1387, 1389 n.6 (9th Cir. 1996) (dismissal on ground of state procedural default involves issues of law reviewed de novo).

Findings of fact made by the district court relevant to its decision are reviewed for clear error. Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999); Henry v. Kernan, 177 F.3d 1152, 1155 (9th Cir. 1999); Lopez v. Thompson, 175 F.3d 1120, 1125 (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. Martinez-Villareal, 80 F.3d at 1305; Bonin, 59 F.3d at 823.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) may alter habeas review of state convictions brought under § 2254. Note, however, that the Act does not apply to many recent cases because the petitions were filed before the effective date of the Act. See, e.g., Lopez, 175 F.3d at 1124; 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 336 (1998); Ainsworth v. Calderon, 138 F.3d 787, 790 (9th Cir.), amended by 152 F.3d 1223 (9th Cir. 1998); see also Jeffries v. Wood, 103 F.3d 827, 827 (9th Cir. 1996) (en banc) (holding that Act does not apply to cases filed in federal court prior to the Act's April 24, 1996 effective date); see also Belgarde v. Montana, 123 F.3d 1210, 1214 n.5 (9th Cir. 1997) (declining to consider "new" standard of review created by Act when parties failed to raise issue of Act's application); Miles v. Stainer, 108 F.3d 1109, 1112 n.2 (9th Cir. 1997) (same).

“This court has not yet set out a clear delineation of how to conduct § 2254(d) review” under the AEDPA. See Wilson v. Henry, ___ F.3d ___, No. 98-16301 (9th Cir. July 28, 1999). The Act provides that a habeas petition shall not be granted with respect to any claim adjudicated on the merits in a state court unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state court. See 28 U.S.C. § 2254(d); see also Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) (noting that “AEDPA's standard of review provisions ‘reflect the . . . general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court.’”); see also Houston v. Roe, 177 F.3d 901, 905-06 (9th Cir. 1999) (applying standard); Davis v. Kramer, 167 F.3d 494, 500 (9th Cir. 1999) (same), petition for cert. filed, 67 U.S.L.W. 3570 (U.S. March 8, 1999) (No. 98-1427).

There is debate concerning the difference, if any, between "contrary to" and "unreasonable application of" as used in the AEDPA. Compare Davis, 167 F.3d at 500 (“[B]oth terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. . . . [T]he terms are not amenable to a rigid distinction. . . . No

purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other.”) with Furman v. Wood, 169 F.3d 1230, 1232 (9th Cir. 1999) (stating that the standard of "unreasonable application of" governs mixed questions of law and fact, while the standard of "contrary to" applies to pure questions of law); see also Wilson, ___ F.3d at ___ (declining to decide issue). What constitutes "clearly established Federal law" is a question of law that is reviewed de novo. See Canales v. Roe, 151 F.3d 1226, 1228-29 (9th Cir. 1998).

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); Bean v. Calderon, 163 F.3d 1073, 1087 n.3 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3758 (U.S. May 28, 1999) (No. 98-1931); Vargas v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998). Where the state court fails to make findings of fact, however, the reviewing court will grant less deference to the state court's decision. See 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."). Presumably, existing decisional law will continue to define what constitutes factual determinations. See Moran v. Godinez, 57 F.3d 690, 696 (9th Cir. 1994) (presumption of correctness applies to state court's findings regarding competency); Tomlin v. Myers, 30 F.3d 1235, 1242 (9th Cir. 1994) (presumption of correctness applies to state court's findings regarding credibility). Moreover, the presumption apparently will continue not to apply to state courts' resolutions of mixed questions of fact and law. See Thompson v. Keohane, 516 U.S. 99, 112-13 (1995) (state court's conclusion that a defendant was "in custody" for purposes of Miranda rights is a mixed question of law and fact warranting independent review by the federal habeas court); Villafuerte v. Stewart, 111 F.3d 616, 622 (9th Cir. 1997) ("[W]e review de novo a state court's determinations of mixed questions of law and fact."); Powell v. Gomez, 33 F.3d 39, 41 (9th Cir. 1994); Martineau v. Angelone, 25 F.3d 734, 739 (9th Cir. 1994). State court's ruling on questions of state law should continue to be "accepted" by the federal court. See Hartman v. Summers, 120 F.3d 157, 161 (9th Cir. 1997); Moran v. McDaniel, 80 F.3d 1261, 1268 (9th Cir. 1996); Melugin v. Hames, 38 F.3d 1478, 1482 (9th Cir. 1994); see also 28 U.S.C. § 2254(d)(1)(2) (creating presumption of legal correctness rebutted only if the state court's legal analysis constitutes "an unreasonable application" of "clearly established law").

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." 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, 119 S. Ct. 500, 503-04 (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); Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc); Lopez v. Thompson, 175 F.3d 1120, 1124-25 (9th Cir. 1999); Stanton v. Benzler, 146 F.3d 726, 728 (9th Cir. 1998). Trial errors that do not meet this test are deemed harmless. Eslaminia v. White, 136 F.3d 1234, 1237 (9th Cir. 1998); Rice v. Wood, 77 F.3d 1138, 1144 (9th Cir. 1996) (en banc). "In the exceedingly rare case in which a court finds itself utterly unable to determine whether the error was harmless, but is rather in 'grave doubt' about whether the error had substantial and injurious effect on the jury's verdict, the court should not treat the error as harmless." Bonin v. Calderon, 59 F.3d 815, 824 (9th Cir. 1995) (quoting O'Neil v. McAninch, 513 U.S. 432, 435 (1995)). "Structural defects in the constitution of the trial mechanism" also defy use of the harmless error standard. See Mach v. Stewart, 137 F.3d 630, 632 (9th Cir. 1997).

The district court has discretion to conduct an evidentiary hearing on a federal habeas petition. See Seidel v. Merkle, 146 F.3d 750, 753 (9th Cir.) (§ 2254), cert. denied, ___ U.S. ___, 119 S. Ct. 850 (1999); States v. Andrade-Larrios, 39 F.3d 986, 991 (9th Cir. 1994) (§ 2255). Note, however, that the AEDPA may place limitations on the district court decision to conduct evidentiary hearings in § 2254 proceedings. See 28 U.S.C. § 2254(e)(2); see also Baja v. Ducharme, ___ F.3d ___, No. 98-35594 (9th Cir. August 9, 1999) (noting that the 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, ___ F.3d at ___. 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 Young v. Weston, 176 F.3d 1196, 1200 (9th Cir. 1999); Rich v. Calderon, 170 F.3d 1236, 1239 (9th Cir. 1999); Babbitt v. Calderon, 151 F.3d 1170, 1177 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1068 (1999); Turner v. Marshall, 63 F.3d 807, 815 (9th Cir. 1995); Bonin v. Calderon, 59 F.3d 815, 827 (9th Cir. 1995). The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. See Caro v. Calderon, 165 F.3d 1223, 1225-26 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 2414 (1999); Villafuerte v. Stewart, 111 F.3d 616, 633 (9th Cir. 1997); Bonin, 59 F.3d at 839. 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. 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. LaGrand v. Stewart, 133 F.3d 1253, 1270 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 422 (1998).

A district court's decision to grant a conditional writ of habeas corpus is reviewed de novo. McKinney v. Rees, 993 F.2d 1378, 1380 n.1 (9th Cir. 1993); Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987) (discussing release on bail of state prisoner seeking habeas corpus relief in federal court).

A claim of ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. See United States v. Alvarez-Tautimez, 160 F.3d 573, 575 (9th Cir. 1998) (§ 2255); United States v. Cruz-Mendoza, 147 F.3d 1069, 1072 (9th Cir.) (§ 2255), amended by 163 F.3d 1149 (9th Cir. 1998); Seidel v. Merkle, 146 F.3d 750, 753 (9th Cir. 1998) (§ 2254), cert. denied, ___ U.S. ___, 119 S. Ct. 850 (1999); Johnson v. Baldwin, 114 F.3d 835, 838 (9th Cir. 1997) (§ 2254); United States v. Span, 75 F.3d 1383, 1387 (9th Cir. 1996) (§ 2255); Moran v. Godinez, 57 F.3d 690, 699 (9th Cir. 1994) (§ 2254); Maiden v. Bunnell, 35 F.3d 477, 480 (9th Cir. 1994) (§ 2254).

Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. United States v. Benlian, 63 F.3d 824, 826 (9th Cir. 1995) (§ 2255); Frazer v. United States, 18 F.3d 778, 781 (9th Cir. 1994) (same).

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

A district court's decision not to review abusive or successive claims is reviewed for an abuse of discretion. See 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); see also 28 U.S.C. § 2244(b) (AEDPA provides that district court may not consider successive or subsequent petitions without authorization from circuit court); Calderon v. United States Dist. Court for the Cent. Dist. of Cal., 163 F.3d 530, 538 (9th Cir. 1998) (en banc) (discussing new law), cert. denied, ___ U.S. ___, 119 S. Ct. 1377 (1999); United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997) (same). The court's conclusion that a Rule 60(b) motion had to comply with the successive petition requirements of the AEDPA, however, is a question of law reviewed de novo. Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 3 (1998).

The court's decision to permit discovery in habeas proceedings is reviewed for an abuse of discretion. See Rich v. Calderon, 170 F.3d 1236, 1239 (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 denial of a petition for writ of habeas corpus brought pursuant to the Immigration and Naturalization Act, 8 U.S.C. § 1105a(b), is reviewed de novo. Singh v. Reno, 113 F.3d 1512, 1514 (9th Cir. 1997). Note, however, that § 1105a was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, effecting final orders filed after September 30, 1996. See id. at 1513 n.1. Under pre-IIRIRA law, the appropriate

avenue for judicial review of a final order of exclusion was for the alien to file a writ of habeas corpus in the district court. See Hose v. INS, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). Under IIRIRA's transitional rules, jurisdiction over final orders of deportation and exclusion is now vested in the courts of appeals. See id. IIRIRA's permanent rules merge deportation and exclusion proceedings into a broader category called "removal proceedings." Id. at 994 n.1. There is currently a split in the circuits whether habeas relief is still available after IIRIRA. See Reno v. American-Arab Anti-Discrimination Committee, ___ U.S. ___, 119 S. Ct. 936, 942 & n.7 (1999) (noting that Ninth Circuit had ruled in Hose v. INS, 141 F.3d 932, 935 (9th Cir.), withdrawn by 161 F.3d 1225 (9th Cir. 1998), that habeas was not available after IIRIRA).

Dismissal based on grounds of state procedural default presents issues of law reviewed de novo. Fields v. Calderon, 125 F.3d 757, 759-60 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1826 (1998); Morales v. Calderon, 85 F.3d 1387, 1389 n.6 (9th Cir. 1996).

Whether an instance of juror misconduct was prejudicial to a habeas petitioner presents a mixed question of law and fact reviewed de novo. See Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2304 (1998).

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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 1455 (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), cert. denied, ___ U.S. ___, 118 S. Ct. 2334 (1998); Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1213 (9th Cir. 1997); see also Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113 (9th Cir. 1998) (admiralty court's findings); In re Video Depot, Ltd., 127 F.3d 1195, 1197 (9th Cir. 1997) (bankruptcy court's findings). 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 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; Burch v. United States Dep't of Treasury, 120 F.3d 1087, 1089 (9th Cir. 1997); see also 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.) (reviewing BAP's conclusions of law), cert. denied, ___ U.S. ___, 119 S. Ct. 72 (1998).

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 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); Granite State Ins. Co. v. Smart Modular Techs., Inc., 76 F.3d 1023, 1026 (9th Cir. 1996); Pentax Corp. v. Myhra, 72 F.3d 708, 710 (9th Cir. 1995). Summary judgment may be affirmed on any ground supported by the record, even if not relied upon by the district court. See Lujan v. Pacific Maritime Ass'n, 165 F.3d 738, 741 (9th Cir. 1999); Far W. Fed. Bank v. Thift Supervision-Dir., 119 F.3d 1358, 1364 (9th Cir. 1997); S & N Equip. Co. v. Casa Grande Cotton Fin. Co., 97 F.3d 337, 345

(9th Cir. 1996); Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1420 (9th Cir. 1996); Bras v. California Pub. Util. Comm'n, 59 F.3d 869, 872 (9th Cir. 1995); Rhoden v. United States, 55 F.3d 428, 431 n.3 (9th Cir. 1995). 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), petition for cert. filed, 67 U.S.L.W. 3733 (U.S. May 21, 1999) (No. 98-1883); 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

1. Abstention

This court reviews de novo whether abstention is required. See Woodfeathers, Inc. v. Washington County, Oregon, 180 F.3d 1017, 1020 (9th Cir. 1999) (Younger abstention); Martinez v. Newport Beach City, 125 F.3d 777, 781 (9th Cir. 1997) (Younger and Colorado River abstention); Fireman's Fund Ins. Co. v. Quakenbush, 87 F.3d 290, 294 (9th Cir. 1996) (Burford and Colorado River abstention); Fort Belknap Indian Community v. Mazurek, 43 F.3d 428, 431 (9th Cir. 1994) (Younger abstention); Wiener v. County of San Diego, 23 F.3d 263, 266 (9th Cir. 1994) (Younger abstention). Whether the requirements for abstention have been met is reviewed de novo. Fireman's Fund, 87 F.3d at 294; Agriesti v. MGM Grand Hotels, Inc., 53 F.3d 1000, 1001 (9th Cir. 1995) (Younger abstention); see also O'Neill v. United States, 50 F.3d 677, 688 n.6 (9th Cir. 1995) (describing requirements for different types of abstention). There is no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked. Martinez, 125 F.3d at 780; Garamendi v. Allstate Ins. Co., 47 F.3d 350, 354 (9th Cir. 1995) (Burford abstention), aff'd, 517 U.S. 706 (1996).

When the requirements for abstention have been met, the district court's decision whether to abstain is reviewed for an abuse of discretion. Martinez, 125 F.3d at 780; Fireman's Fund, 87 F.3d at 294; Garamendi, 47 F.3d at 354; Lind v. Grimmer, 30 F.3d 1115, 1121 (9th Cir. 1994) (Pullman abstention); see also Wilton v. Seven Falls Co., 515 U.S. 277, 289-90 (1995) (noting that trial court's decision not to consider

declaratory judgment action during pendency of parallel state proceedings is reviewed for an abuse of discretion); Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc) (noting that review of district court's decision to entertain an action under the Declaratory Judgment Act is under the deferential abuse of discretion standard). The district court must exercise its discretion, however, within the narrow and confined limits prescribed by the particular abstention doctrine invoked. See Privitera v. California Bd. of Med. Quality Assurance, 926 F.2d 890, 895 (9th Cir. 1991). Accordingly, some cases have simply stated that "abstention decisions are reviewed de novo." Dubinka v. Judges of Superior Court, 23 F.3d 218, 221 (9th Cir. 1994) (Younger abstention); see also Delta Dental Plan, Inc. v. Mendoza, 139 F.3d 1289, 1294 (9th Cir. 1998) ("We review de novo the district court's refusal to abstain under Younger.").

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. See El Paso Natural Gas Co. v. Neztosie, 136 F.3d 610, 613 (9th Cir. 1998), rev'd on other grounds, ___ U.S. ___, 119 S. Ct. 1430 (1999); Burlington N. R.R. v. Red Wolf, 106 F.3d 868, 869 (9th Cir.) (en banc), vacated, ___ U.S. ___, 118 S. Ct. 37 (1997).

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). A question concerning the waiver of an affirmative defense involves an interpretation of Federal Rule of Civil Procedure 8(c), and as such, is a question of law reviewed de novo. 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 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. May 18, 1999) (No. 99-182); 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. 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." 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)).

A district court's order denying a Rule 15(b) motion to conform the pleadings to the evidence is also 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 district court's dismissal of the 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).

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).

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), cert. denied, ___ U.S. ___, 119 S. Ct. 2392 (1999); \$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. 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. 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 Env'tl. 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 Quackenbush, 121 F.3d at 1380 (quoting Moses H. Cone Mem'l Hosp.); 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); Line Drivers, Pickup and Delivery, Local No. 81 v. Roadway Express, Inc., 152 F.3d 1098, 1099 (9th Cir. 1998) (confirmation); Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997) (confirmation); International Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1411 (9th Cir. 1997) (confirmation); Sheet Metal Workers' Int'l Ass'n v. Madison Indus., Inc., 84 F.3d 1186, 1190 (9th Cir. 1996) (confirmation); Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 830 (9th Cir. 1995) (confirmation). 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. This court has indicated that judicial review of an arbitration award is "limited and highly deferential." Sheet Metal Workers', 84 F.3d at 1190; see also SFIC Properties, Inc. v. International Ass'n of Machinists, Local 311, 103 F.3d 923, 924 (9th Cir. 1996) (review of arbitrator's decision is "extremely narrow"); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1402 (9th Cir. 1992) (judicial review is "quite limited"). "[T]he court may not review the merits [of the award], but must ask only whether the grievance is governed by the contract and whether the parties agreed to arbitrate the dispute." Sheet Metal Workers', 84 F.3d at 1190. An

award will not be set aside unless it manifests a complete disregard for the law. Id.; United Food & Commercial Workers Int'l Union v. Foster Poultry Farms, 74 F.3d 169, 173 (9th Cir. 1995) (noting that an award must be confirmed if arbitrator even arguably construed or applied the contract and acted within his scope of authority); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) (citing the "Steelworkers Trilogy"). "The courts should not reverse even in the face of erroneous interpretations of the law." A.G. Edwards, 967 F.2d at 1403.

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. 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. 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).

9. Case Management

The trial court's decision regarding management of litigation is reviewed only for an abuse of discretion. See 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. Amarel v. Connell, 102 F.3d 1494, 1513 (9th Cir. 1996).

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).

11. Claim Preclusion

"Claim preclusion" is another term for res judicata. See Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1193 (9th Cir. 1997); Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 281 (9th Cir. 1997). This court, in fact, has expressed a preference for use of the term claim preclusion. See Robi v. Five Platters, Inc., 838 F.2d 318, 321 n.2 (9th Cir. 1988). The trial court's determination that claim preclusion or res judicata applies is reviewed de novo. See 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, 123 F.3d at 1192; 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. Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 283 (9th Cir. 1997); Hiser v. Franklin, 94 F.3d 1287, 1290 (9th Cir. 1996).

12. Class Actions

A district court's decision regarding class certification is reviewed for an abuse of discretion. See Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 811 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2060 (1998); 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 Valentino, 97 F.3d at 1234; Barber, 42 F.3d at 1197. 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. Torrissi 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. 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. 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. Id. at 1284. Whether the court has jurisdiction to enforce a 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. See 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. Hanlon, 150 F.3d at 1029; In Re FPI/Agretech Sec. Litig., 105 F.3d at 472.

13. Collateral Estoppel

This court applies a de novo standard for reviewing the question of the availability of collateral estoppel. See 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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 68 (1998).

Once it is determined that collateral estoppel is available, the decision to apply the doctrine is left to the district court's discretion. See In re Daily, 47 F.3d 365, 368 (9th Cir. 1995); Miller, 39 F.3d at 1032; Town of N. Bonneville, 10 F.3d at 1508. District courts have broad discretion to determine when to apply offensive collateral estoppel. Spink v. Lockheed Corp., 60 F.3d 616, 624 (9th Cir. 1995), rev'd on other grounds, 517 U.S. 882 (1996).

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).

The district court's consolidation of bankruptcy proceedings is reviewed for an abuse of discretion. 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 regulations 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 United States v. \$129,727.00 U.S. Currency, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture), cert. denied, ___ U.S. ___, 118 S. Ct. 1399 (1998); 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 ruling on the constitutionality of a state statute is reviewed de novo. See California Democratic Party v. Jones, 169 F.3d 646, 647 (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.), cert. denied, ___ U.S. ___, 119 S. Ct. 446 (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 & Prof'l Publications, Inc. v. Multistate Legal Studies, Inc., 26 F.3d 948, 953 (9th Cir. 1994). Whether the district court provided the alleged contemner 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. Continuance

The decision to grant or deny a continuance is in the sound discretion of the trial court and will not be overturned except upon a showing of clear abuse. See 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 Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 8, 1999) (No. 99-78); 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). "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.), cert. denied, ___ U.S. ___, 119 S. Ct. 405 (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**

Review of a decision to grant or deny declaratory relief is de novo. See Bernstein v. United States Dep't of Justice, 176 F.3d 1132, 1146 (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). "Although the decision to grant or deny declaratory relief . . . is a matter initially committed to the discretion of the district court, on appeal we exercise our own 'sound discretion' to determine the propriety of the district court's grant or denial of declaratory relief. In effect, then, we review de novo the district court's ruling below." Dexter v.

Kirschner, 984 F.2d 979, 982 (9th Cir. 1992) (quoting Fireman's Fund, 860 F.2d at 354).

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).

The trial court's decision whether to exercise jurisdiction to decide a declaratory judgment action is reviewed for an abuse of discretion. Wilton v. Seven Falls Co., 515 U.S. 277, 289-90 (1995); 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).

20. **Discovery**

The court of appeals reviews the district court's rulings concerning discovery for an abuse of discretion. See 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. 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. 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 Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 8, 1999) (No. 99-78); 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.) (quoting Qualls, 22 F.3d at 844), cert. denied, ___ U.S. ___, 119 S. Ct. 405 (1998); see also 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 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. Empire

Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc., 62 F.3d 1217, 1219 (9th Cir. 1995).

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.

The trial court's ruling limiting the scope of discovery is reviewed for an abuse of discretion. 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).

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.) (habeas), cert. denied, ___ U.S. ___, 119 S. Ct. 422 (1998). 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. 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). "Recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that [the] judge's impartiality might reasonably be questioned." Moideen, 55 F.3d at 1482 (internal quotation omitted); see also Voigt v. Savell, 70 F.3d 1552, 1565 (9th Cir. 1995). On collateral review, whether a state court judge should have been recused is reviewed for an abuse of discretion. Poland v. Stewart, 117 F.3d 1094, 1103 (9th Cir. 1997).

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. Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995); Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987).

23. Dismissals

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. Arnett v. California Pub. Employees Retirement Sys. (PERS), 179 F.3d 690, 694 (9th Cir. 1999); 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 Rogstad, 126 F.3d 1224, 1228 (9th Cir. 1997) (noting that bankruptcy court's decision to dismiss an action for failure to state a claim is reviewed de novo). Dismissal based on judicial immunity is reviewed de novo. Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996). A dismissal pursuant to the Feres doctrine is also reviewed de novo. Bowen v. Oistead, 125 F.3d 800, 803 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2343 (1998). Dismissals based on res judicata are reviewed de novo. See Cabrera, 159 F.3d at 381; 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). 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. Steckman, 143 F.3d at 1295.

Rule 12(c) dismissals are reviewed de novo. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 444 (1998); Brennan v. Southwest Airlines Co., 134 F.3d 1405, 1412 (9th Cir.), amended by 140 F.3d 849 (9th Cir. 1998); Smith v. National Steel & Shipbuilding Co., 125 F.3d 751, 753 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1559 (1998); 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. 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 present questions of law reviewed de novo. Ellis v. City of San Diego, 176 F.3d 1183, 1188 (9th Cir. 1999); Cabrera v. City of Huntington Park, 159 F.3d 374, 378 (9th Cir. 1998); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998); Torres v. City of Santa Ana, 108 F.3d 224, 226 (9th Cir. 1997); Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996); Washington v. Garrett, 10 F.3d 1421, 1429 (9th Cir. 1993).

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).

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). Dismissals pursuant to that section are reviewed de novo. See Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1058 (1999); 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, 42 U.S.C. § 1997e(a)); 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).

An involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b) is viewed as a judgment in a defendant's favor after a bench trial. Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 671 (9th Cir. 1988). A dismissal pursuant to Rule 41(b) is reviewed for abuse of discretion. 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) (dismissal based on deficient pleadings); Al-Torki v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996) (dismissal for failure to prosecute); In re Dominguez, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings). But see Tony 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1455 (1999); 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. Westlands Water Dist. v. United States, 100 F.3d 94, 96 (9th Cir. 1996); Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir. 1994). In making the decision, the court must consider whether the defendant will suffer legal prejudice as a result of the dismissal. Westlands Water Dist., 100 F.3d at 96; 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. Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993).

A district court's order dismissing an action for lack of prosecution is reviewed for an abuse of discretion. 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 reviewed for an abuse of discretion. McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996).

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). 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. 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). "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." Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1196 (9th Cir. 1998) (internal quotation omitted); Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996) (same). 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. Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1151 (9th Cir. 1998). Note that in some instances, a dismissal with leave to amend is not a final, appealable order. See, e.g., 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).

The district court's dismissal of the 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).

24. **Exhaustion**

Whether exhaustion of administrative remedies is required as a matter of law is reviewed de novo. See 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. 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).

25. **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. Arnett v. California Pub. Employees Retirement Sys., 179 F.3d 690, 694 (9th Cir. 1999); 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); see also In re Rogstad, 126 F.3d 1224, 1228 (9th Cir. 1997) (bankruptcy court); Bowen v. Oistead, 125 F.3d 800, 803 (9th Cir. 1997) (dismissal pursuant to Feres doctrine is treated as a Rule 12(b)(6) dismissal and reviewed de novo), cert. denied, ___ U.S. ___, 118 S. Ct. 2343 (1998).

Review is limited to the contents of the complaint. See 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 Federal Rule of Civil Procedure 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. 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. 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 Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. May 27, 1999) (No. 98-1906); 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).

26. **Forum Non Conveniens**

A forum non conveniens determination is committed to the sound discretion of the district court. 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).

27. **Forum Selection Clauses**

A district court's decision whether to enforce a forum selection clause is reviewed for an abuse of discretion. See Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 365 (1998); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 275 (1998). 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.

28. **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. Dismissals pursuant to that section are reviewed de novo. See Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1058 (1999); but see 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).

29. **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).

30. **Immunities**

Whether a state is immune from suit under the Eleventh Amendment is a question of law reviewed de novo. 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), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. May 27, 1999) (No. 98-1906); 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); Hyland v. Wonder, 117 F.3d 405, 413 (9th Cir.), amended by 127 F.3d 1135 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1166 (1998); Micomonaco v. Washington, 45 F.3d 316, 319 (9th Cir. 1995). Whether a party is immune under the Eleventh Amendment is also reviewed de novo. California v. Campbell, 138 F.3d 784, 786 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 173 (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. 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. Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989). A dismissal based on judicial immunity is reviewed de novo. Franceschi v. Schwartz, 57 F.3d 828, 830 (9th Cir. 1995).

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. Elder v. Holloway, 510 U.S. 510, 516 (1994); Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999); Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1998); Hyland v. Wonder, 117 F.3d 405, 409 (9th Cir.), amended by 127 F.3d 1135 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1166 (1998); Newell v. Sauser, 79 F.3d 115, 116 (9th Cir. 1996); Neely v. Feinstein, 50 F.3d 1502, 1507 (9th Cir. 1995). The type of immunity to which a public official is entitled is a question of law reviewed de novo. Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 n.7 (9th Cir. 1987).

Whether the United States has waived its sovereign immunity is a question of law reviewed de novo. 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 Clinton v. Babbitt, 180 F.3d 1081, 1086 (9th Cir. 1999) (noting that issue of sovereign immunity is 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1512 (1998); Montes v. United States, 37 F.3d 1347, 1351 (9th Cir. 1994) (whether the United States is immune from liability 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. United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992); Burlington N. R.R. v. Blackfoot 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. Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir. 1995).

31. **In Forma Pauperis Status**

The district court's denial of leave to proceed in forma pauperis is reviewed for an abuse of discretion. See 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. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 2392 (1999).

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. Dismissals pursuant to that section are reviewed for an abuse of discretion. See Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1058 (1999); but see 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).

32. **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 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) (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); 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).

"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).

33. **Injunctions**

A district court's order regarding preliminary injunctive relief is subject to limited review. See 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, ___ U.S. ___, 119 S. Ct. 1518 (1999); FDIC v. Garner, 125 F.3d 1272, 1276 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1299 (1998). 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. 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).

Recently, this court reasoned that this abuse of discretion standard applies even when an issue of law underlies the district court's decision. See 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 Roe); but see Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046 (reviewing de novo legal issues underlying injunction because “[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law.”); 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).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1140 (1999); 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. ACF Indus. Inc. v. California State Bd. of Equalization, 42 F.3d 1286, 1289 (9th Cir. 1994) (modify); Tracer Research Corp. v. National Env'tl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve).

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). 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.

The court's grant of permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. Planned Parenthood of S. Arizona v. Lawall, 180 F.3d 1022, 1027 (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. 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).

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. 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 & Reservoir Co., 174 F.3d at 1011; Quackenbush, 121 F.3d at 1377.

34. 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. 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. Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996).

35. **Intervention**

Whether the legal requirements of Federal Rule of Civil Procedure 24(a) have been met is reviewed de novo. 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. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1377 (1999); 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. 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. 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. Washington, 86 F.3d at 1507; Northwest Forest, 82 F.3d at 836; Beckman Indus., Inc. v. International Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992). Review of the coverage and interpretation of the federal rules is de novo; therefore, whether Rule 24(b) permits intervention for a stated purpose is reviewed de novo. Beckman, 966 F.2d at 472

(whether Rule 24(b) permits intervention for the purpose of seeking a modification of a protective order is reviewed de novo).

36. **Involuntary Dismissal**

An involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b) is viewed as a judgment in a defendant's favor after a bench trial. Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 671 (9th Cir. 1988). Dismissal pursuant to Rule 41(b) is reviewed for abuse of discretion. See Bishop v. Lewis, 155 F.3d 1094, 1096 (9th Cir. 1998) (reversing dismissal); 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) (dismissal based on deficient pleadings); Al-Torki v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996) (dismissal for failure to prosecute); In re Dominguez, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings). But see Tonry v. Sec. Experts, Inc., 20 F.3d 967, 971 (9th Cir. 1994) (findings of fact reviewed for clear error, questions of law reviewed de novo). Abuse of discretion is also applied when reviewing the district court's dismissal as a sanction. Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996).

37. **Issue Preclusion**

"Issue preclusion" is another term for collateral estoppel. See Dodd v. Hood River County, 136 F.3d 1219, 1224 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 278 (1998). This court, in fact, has expressed a preference for the term issue preclusion. See id.; Robi v. Five Platters, Inc., 838 F.2d 318, 321 n.2 (9th Cir. 1988). A de novo standard applies when reviewing the question of the availability of issue preclusion. See Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996); McInnes v. California, 943 F.2d 1088, 1093 (9th Cir. 1991); see also Zamarripa v. City of Mesa, 125 F.3d 792, 793 (9th Cir. 1997) (collateral estoppel); Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997) (same); Trevino v. Gates, 99 F.3d 911, 923 (9th Cir. 1996) (same); In re Russell, 76 F.3d 242, 244 (9th Cir. 1996) (same); Pardo v. Olson & Sons, Inc., 40 F.3d 1063, 1066 (9th Cir. 1994) (same); Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994) (same); Haupt v. Dillard, 17 F.3d 285, 288 (9th Cir. 1994) (same). The preclusive effect of a prior judgment is a question of law reviewed de novo. 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.) (en banc) (state jury verdict) (citing Schiro v. Farley, 510 U.S. 222, 232 (1994)), amended by 138 F.3d 1280 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 68 (1998).

Once it is determined that collateral estoppel is available, the decision to apply the doctrine is left to the district court's discretion. In re Daily, 47 F.3d 365, 368 (9th Cir. 1995); Miller, 39 F.3d at 1032; Town of N. Bonneville, 10 F.3d at 1508. District courts have broad discretion to determine when to apply offensive collateral estoppel. Spink v. Lockheed Corp., 60 F.3d 616, 624 (9th Cir. 1995), rev'd on other grounds, 517 U.S. 882 (1996); Robi, 838 F.2d at 327.

38. Joinder/Indispensable Party

A district court's decision concerning joinder pursuant to Federal Rule of Civil Procedure 19 is generally reviewed for an abuse of discretion. 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. Clinton v. Babbitt, 181 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). 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. 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 is a question of law reviewed de novo. Id.

39. Judicial Estoppel

The district court's decision to invoke judicial estoppel is reviewed for an abuse of discretion. United States ex rel. Sequoia Orange Co. v. Strathmore Packing House Co., 151 F.3d 1139, 1146 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 794 (1999); Johnson v. Oregon Dep't of Human Resources, 141 F.3d 1361, 1364 (9th Cir. 1998).

40. **Judicial Notice**

The district court's decision to take judicial notice is reviewed for an abuse of discretion. Ritter v. Hughes Aircraft Co., 58 F.3d 454, 458 (9th Cir. 1995).

41. **Judgment on the Pleadings**

Federal Rule of Civil Procedure 12(c) dismissals are reviewed de novo. See Arnett v. California Pub. Employees Retirement Sys. (PERS), 179 F.3d 690, 694 (9th Cir. 1999); Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 444 (1998); Brennan v. Southwest Airlines Co., 134 F.3d 1405, 1412 (9th Cir.), amended by 140 F.3d 849 (9th Cir. 1998); Smith v. National Steel & Shipbuilding Co., 125 F.3d 751, 753 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1559 (1998); 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. 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.

42. **Jurisdiction**

A district court's determination that personal jurisdiction properly can be exercised is a question of law reviewable de novo when the underlying facts are undisputed. Panavision Int'l L.P. v. Toppfen, 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). 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 446 (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), cert. denied, ___ U.S. ___, 118 S. Ct. 2334 (1998).

The existence of subject matter jurisdiction is a question of law reviewed de novo. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 70 (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). Dismissal for lack of subject matter jurisdiction is reviewed de novo. See United States v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1213 (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), cert. denied, ___ U.S. ___, 199 S. Ct. 58 (1998); 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. Central Green Co. v. United States, 177 F.3d 834, 835 (9th Cir. 1999); Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998); H2O 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 Lockheed Missiles, 171 F.3d at 1213; 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 decision to retain jurisdiction over supplemental (pendent) claims when the original federal claims are dismissed is reviewed for an abuse of discretion. 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). This court reviews the district court's decision for a "clear error of judgment." Brady, 51 F.2d at 816.

The district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. See Lockheed Missiles, 171 F.3d at 1213; 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 Exclusivas 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.) (reviewing district court's authority to decide Rule 60(b) motion de novo), cert. denied, ___ U.S. ___, 119 S. Ct. 3 (1998). 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).

A tribal court's exercise of jurisdiction over a non-Indian is a question of federal law reviewed de novo. Montana v. Gilham, 133 F.3d 1133, 1135 (9th Cir. 1998).

43. **Jury Demand**

Entitlement to a jury trial in federal court is a question of law reviewed de novo. 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 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).

44. **Laches**

Whether laches may be a defense to an action is a question of law reviewed de novo. Jackson v. Axton, 25 F.3d 884, 886 (9th Cir. 1994). The standard of review of the district court's decision that laches applies to a particular action may be unsettled. See id. at 888 (citing conflicting cases but not resolving apparent conflict). In Telink, Inc. v. United States, 24 F.3d 42, 47 (9th Cir. 1994), however, the court stated that review of the district court's application of laches is for an abuse of discretion. The court also 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." Id. 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." 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).

45. **Lack of Prosecution**

A district court's order dismissing an action for lack of prosecution is reviewed for an abuse of discretion. 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).

46. **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 Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088, 1093 (9th Cir.) (citing United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)),

cert. denied, ___ U.S. ___, 119 S. Ct. 541 (1998); Thomas v. Bible, 983 F.2d 152, 155 (listing factors for district court to consider); Milgard Tempering, Inc. v. Selas Corp., 902 F.3d 703, 715 (9th Cir. 1990) (same).

47. **Leave to Amend**

Leave to amend is generally within the discretion of the district court. 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). The district court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. May 18, 1999) (No. 99-182); In re Daisy Sys., 97 F.3d at 1175; Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 888 (9th Cir. 1996); United States v. County of San Diego, 53 F.3d 965, 969 n.6 (9th Cir. 1995). The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint. 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. Fed. R. Civ. P. 15(a); 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. 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. Griggs, 170 F.3d at 879; 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). "[D]ismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." Griggs, 170 F.3d at 879 (internal quotation omitted); Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996) (same). 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. Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1196 (9th Cir. 1998); 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). Dismissals with leave to amend are also reviewed de novo. See San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998).

A denial of a Rule 15(c) relation back amendment is reviewed for an abuse of discretion. 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 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.").

48. **Local Rules**

Broad deference is owed to the district court's interpretation of its local rules. See DeLange v. Dutra Const. Co., ___ F.3d ___, No. 96-17270 (9th Cir. June 11, 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), reversed on other grounds, ___ U.S. ___, 119 S. Ct. 755 (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).

“This Circuit has not squarely decided the question of what standard of review should govern appeals from decisions imposing sanctions for attorney conduct found to violate local rules.” United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (comparing de novo standard from United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993), with abuse of discretion standard from Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994), and Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713, 715 (9th Cir. 1989)); but see Big Bear Lodging Assoc. v. Snow Summit, Inc., ___ F.3d ___, No. 97-56042 (9th Cir. July 8, 1999) (applying abuse of discretion standard to district court’s decision to impose sanctions pursuant to local rule).

49. **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 Mainero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999) (extradition proceeding). A magistrate judge’s findings adopted by the district court are also reviewed for clear error. See Seidel v. Merkle, 146 F.3d 750, 753 (9th Cir. 1998) (habeas), cert. denied, ___ U.S. ___, 119 S. Ct. 850 (1999).

50. **Mandamus**

The extraordinary remedy of mandamus traditionally lies within the court's discretion. Ada v. Government of Guam, 179 F.3d 672, 676 (9th Cir. 1999); 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); see also Calderon v. United States Dist. Court for the Central Dist. of Cal., 163 F.3d 530, 534 (9th Cir. 1998) (en banc) (characterizing mandamus as an “extraordinary or drastic” remedy and discussing factors that court must consider before issuing writ), cert. denied, ___ U.S. ___, 119 S. Ct. 1377 (1999).

A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard. Ada, 179 F.3d at 676; Independence Mining, 105 F.3d at 505; Garcia, 40 F.3d at 301.

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 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). The court of appeals reviews de novo the district court's dismissal for lack of mandamus jurisdiction. 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).

51. Mootness

Mootness is a question of law reviewed de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 2367 (1999); 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), cert. denied, ___ U.S. ___, 118 S. Ct. 2060 (1998); 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).

52. Oral Argument

A trial court's decision whether to permit oral argument is reviewed for an abuse of discretion. See 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) .

53. **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 Binder v. Gillespie, ___ F.3d ___, No. 97-35943 (9th Cir. July 26, 1999); Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1102 (9th Cir. 1995); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (listing factors).

Note, however, that a district court has no discretion to retain state law claims when the sole federal claim is dismissed for lack of jurisdiction. See Harris v. Provident Life and Accident Ins. Co., 26 F.3d 930, 934 (9th Cir. 1994). A district court's refusal to exercise supplemental jurisdiction is also reviewed for abuse of discretion. San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 478 (9th Cir. 1998); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996). This court reviews the district court's decision for a "clear error of judgment." Brady, 51 F.2d at 817.

54. **Personal Jurisdiction**

A district court's determination that personal jurisdiction properly can be exercised is a question of law reviewable de novo when the underlying facts are undisputed. 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). 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 446 (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), cert. denied, ___ U.S. ___, 118 S. Ct. 2334 (1998).

55. Preemption

The district court's decision regarding preemption is reviewed de novo. See 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1377 (1999); Ward v. Management Analysis Co., 135 F.3d 1276, 1279 (9th Cir. 1998) (ERISA), aff'd in part, rev'd in part, ___ U.S. ___, 119 S. Ct. 1380 (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).

56. Preliminary Injunctions

A district court's order regarding preliminary injunctive relief is subject to limited review. See FTC v. Affordable Media, 179 F.3d 1228, 1233 (9th Cir. 1999); Roe v. Anderson, 134 F.3d 1400, 1402 n.1 (9th Cir. 1998), aff'd, ___ U.S. ___, 119 S. Ct. 1518 (1999); FDIC v. Garner, 125 F.3d 1272, 1276 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1299 (1998). 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. Affordable Media, 179 F.3d at 1233; Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 732 (9th Cir. 1999) (concluding that district court abused its

discretion by issuing preliminary injunction); Brookfield Comm., Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046 (9th Cir. 1999); 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).

This court has reasoned that this abuse of discretion standard applies even when an issue of law underlies the district court's decision. See Roe, 134 F.3d at 1402 n.1 (advocating unitary standard); see also Bay Area, 179 F.3d at 732 (applying Roe); but see Gorbach v. Reno, 179 F.3d 1111, 1118 (9th Cir. 1999) (stating that when reviewing district court's grant of a preliminary injunction, "we review its findings for clear error, its legal premises de novo, and its decision to grant the relief requested for an abuse of discretion"); Brookfield Communications, 174 F.3d at 1046 (reviewing de novo legal issues underlying injunction because "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law."); Foti v. City of Menlo Park, 146 F.3d 629, 635 (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."); 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).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. SEC v. Interlink Data Network, 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. ACF Indus. Inc. v. California State Bd. of Equalization, 42 F.3d 1286, 1289 (9th Cir. 1994) (modify); Tracer Research Corp. v. National Envntl. Servs., Inc., 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve).

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).

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.

57. Pretrial Orders

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.), cert. denied, ___ U.S. ___, 119 S. Ct. 405 (1998). The district 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 Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998). Note that this court lacks jurisdiction to conduct interlocutory review of pretrial discovery orders. Marchetti v. Bitterolf, 968 F.2d 963, 967 (9th Cir. 1992).

58. Protective Orders

This court reviews the grant of a protective order for an abuse of discretion. See 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. Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc., 62 F.3d 1217, 1219 (9th Cir. 1995).

59. Qualified Immunity

A district court's decision on qualified immunity in a Bivens or 42 U.S.C. § 1983 action is reviewed de novo. Elder v. Holloway, 510 U.S. 510, 516 (1994); Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999); Ferguson v. City of Phoenix, 157 F.3d 668, 676 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2049 (1999); Hyland v. Wonder, 117 F.3d 405, 409 (9th Cir.), amended by 127 F.3d 1135 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1166 (1998); 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 or deny summary judgment on the ground of qualified immunity is also reviewed de novo. See Moran v. Washington, 147 F.3d 839, 844 (9th Cir. 1998) (denial); Knox v. Southwest Airlines, 124 F.3d 1103, 1105 (9th Cir. 1997) (denial); Blueford v. Prunty, 108 F.3d 251, 253 (9th Cir. 1997) (grant of summary judgment); Trevino v. Gates, 99 F.3d 911, 916 (9th Cir. 1996) (same). 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 Oona, R.-S.-by Kate S. v. McCaffrey, 143 F.3d 473, 475 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2039 (1999).

60. **Recusal**

The denial of a recusal motion is reviewed for an abuse of discretion. See Stanley v. University of S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999) (applying abuse of discretion standard); United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999) (criminal proceeding), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 14, 1999) (No. 99-101); United States ex rel. Hochman v. Nackman, 145 F.3d 1069, 1076 (9th Cir. 1998); Hirsh v. Justices of Supreme Court, 67 F.3d 708, 715 (9th Cir. 1995); Moideen v. Gillespie, 55 F.3d 1478, 1482 (9th Cir. 1995); United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995); see also Voigt v. Savell, 70 F.3d 1552, 1565 (9th Cir. 1995) (judge's refusal to disqualify herself under 28 U.S.C. § 455 is reviewed for an abuse of discretion); E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1294 (9th Cir. 1992) (same). "Recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that [the] judge's impartiality might reasonably be questioned." Moideen, 55 F.3d at 1482 (internal quotation omitted); see also Voigt, 70 F.3d at 1565. "A [trial] judge is required to disqualify himself if his impartiality might reasonably be questioned, or if he has a personal bias or prejudice concerning a party." Gonzales v. Parks, 830 F.2d 1033, 1037 (9th Cir. 1987). Recusal is not required when the alleged bias arises from

"conduct or rulings made during the course of the proceeding." Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988).

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. Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995); Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987).

61. Removal

Removal is a question of federal subject matter jurisdiction reviewed de novo. See 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). The district court's denial of a motion to remand a removed case is also reviewed de novo. 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); Duncan v. Stuetzle, 76 F.3d 1480, 1484 n.4 (9th Cir. 1996); Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777 (9th Cir. 1994); but see Bruns v. National Credit Union Admin., 122 F.3d 1251, 1253 (9th Cir. 1997) (stating that circuit had not yet articulated a standard of review for a trial court's failure to remand as required by 28 U.S.C. § 1447(c)). The trial court's decision to remand a removed case is also reviewed de novo. 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 K.V. Mart Co. v. United Food and Comm. Workers, Local 324, 173 F.3d 1221, 1223 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 6, 1999) (No. 99-96).

62. Res Judicata

The trial court's determination that res judicata (claim preclusion) applies is reviewed de novo. See 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 res judicata grounds 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, 1192 (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 Bianchi v. Walker, 163 F.3d 564, 569 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3718 (U.S. May 18, 1999) (No. 98-1860); Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 283 (9th Cir. 1997); Hiser v. Franklin, 94 F.3d 1287, 1290 (9th Cir. 1996).

63. Ripeness

Ripeness is a question of law reviewed de novo. Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1754 (1999); 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).

64. Sanctions

Orders imposing Federal Rule of Civil Procedure 11 sanctions are reviewed for an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); 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); In re Keegan Management Co., Sec. Litig., 78 F.3d 431, 433 (9th Cir. 1996). 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; Mark Indus., Ltd. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995); see also Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 n.1 (9th Cir. 1995). 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).

"This Circuit has not squarely decided the question of what standard of review should govern appeals from decisions imposing sanctions for attorney conduct found to violate local rules." United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (comparing de novo standard from United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993), with abuse of discretion standard from Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994), and Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713, 715 (9th Cir. 1989)); but see Big Bear Lodging Assoc. v. Snow Summit, Inc., ___ F.3d ___, No. 97-56042 (9th Cir. July 8, 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); DeLange v. Dutra Const. Co., ___ F.3d ___, No. 96-17270 (9th Cir. June 11, 1999) (noting that district courts have "broad discretion in interpreting and applying their local rules"). Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. See, e.g., 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); 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); see also Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) (dismissal for "judge-shopping").

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 Salstrom v. Citicorp Credit Servs., Inc., 74 F.3d 183, 184 (9th Cir. 1996); Air Separation, 45 F.3d at 291; 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 district court's imposition of sanctions pursuant to Federal Rule of Civil Procedure 37 is reviewed for an abuse of discretion. See Valley Eng'rs, Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1052 (9th Cir. 1998) (dismissal), cert. denied, ___ U.S. ___, 119 S. Ct. 1455 (1999); 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. Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997).

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. 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).

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).

65. Severance

This court will set aside a severance order only for an abuse of discretion. See Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997) (Fed. R. Civ. P. 20); Davis v. Mason County, 927 F.2d 1473, 1479 (9th Cir. 1991) (Fed. R. Civ. P. 42(b)). The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. 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.

66. Sovereign Immunity

Questions involving principles of sovereign immunity are reviewed de novo. See Clinton v. Babbitt, 180 F.3d 1081, 1086 (9th Cir. 1999); Blue Fox Inc. v. Small Bus. Admin., 121 F.3d 1357, 1360 (9th Cir. 1997), rev'd on other grounds, ___ U.S. ___, 119 S. Ct. 687 (1999). Thus, whether the United States has waived its sovereign immunity is a question of law reviewed de novo. 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 U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995); see also Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998) (whether the United States is immune from liability in FTCA action 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1512 (1998).

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).

Whether a state is immune from suit under the Eleventh Amendment is a question of law reviewed de novo. See 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), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. May 27, 1999) (No. 98-1906); 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); Hyland v. Wonder, 117 F.3d 405, 413 (9th Cir.), amended by 127 F.3d 1135 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1166 (1998); Micomonaco v. Washington, 45 F.3d 316, 319 (9th Cir. 1995); Harrison v. Hickel, 6 F.3d 1347, 1352 (9th Cir. 1993). Whether a party is immune under the Eleventh Amendment is also reviewed de novo. California v. Campbell, 138 F.3d 784, 786 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 173 (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).

The district court's determination regarding legislative immunity is 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, 1482 (9th Cir. 1994).

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. 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 reviewed de novo. 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).

67. **Special Masters**

A 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).

68. Standing

Standing is a question of law reviewed de novo. McBride v. PLM Int'l, Inc., 179 F.3d 737, 748 (9th Cir. 1999); United States v. Real Property Known as 22249 Dolorosa St., Woodland Hills, California, 167 F.3d 509, 511 (9th Cir. 1999) (noting that “[s]tanding is a threshold issue which we review de novo”); 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 405 (1998); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997); Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1068 (9th Cir. 1997).

Whether a particular party has standing is also reviewed de novo. 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).

69. 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).

70. Statutes of Limitation

The district court's dismissal on statute of limitations grounds presents a question of law reviewed de novo. 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). A ruling on the appropriate statute of limitations is a question of law reviewed de novo. See 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). When the

statute of limitations begins to run is a question of law reviewed de novo. 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. 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. Telink, Inc. v. United States, 24 F.3d 42, 46 (9th Cir. 1994).

71. Stay Orders

A district court's stay order is reviewed for an abuse of discretion. See 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 than 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. 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. 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 Lowenschuss (Lowenschuss v. Selnick), 170 F.3d 923, 928 (9th Cir. 1999); In re National Env'tl. Waste Corp., 129 F.3d 1052, 1055 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2368 (1998); 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, 117 S. Ct. 1636, 1651 (1997).

72. Subject Matter Jurisdiction

The existence of subject matter jurisdiction is a question of law reviewed de novo. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 70 (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). Questions relating to subject matter jurisdiction are reviewed de novo. McBride v. PLM Int'l, Inc., 179 F.3d 737, 748 (9th Cir. 1999); Toumajian v. Frailey, 135 F.3d 648, 652 (9th Cir. 1998).

Dismissal for lack of subject matter jurisdiction is reviewed de novo. United States ex. rel Newsham v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1213 (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), cert. denied, ___ U.S. ___, 119 S. Ct. 58 (1998); 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. Central Green Co. v. United States, 177 F.3d 834, 835 (9th Cir. 1999); Leisnoi, Inc. v. United States, 170 F.3d 1188, 1191 n.4 (9th Cir. 1999); Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998); Schultz v. PLM Int'l, Inc., 127 F.3d 1139, 1141 (9th Cir. 1997); H2O 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. Lockheed Missiles, 171 F.3d at 1213; United States v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1998); Tucson Airport Auth., 136 F.3d at 644; Schultz, 127 F.3d at 1141; H2O Houseboat Vacations, 103 F.3d at 916; Wilson, 87 F.3d at 396.

73. Subpoenas

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). The trial court's denial of a motion to quash a grand jury subpoena is reviewed, however, 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).

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 of summary judgment).

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).

74. **Summary Judgment**

A grant of summary judgment is reviewed de novo. 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 Filtercorp, Inc., 163 F.3d 570, 578 (9th Cir. 1998) (review of bankruptcy court's grant of summary judgment is de novo); 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) (review of tax court's grant of summary judgment is de novo); Talley Indus. Inc. v. Commissioner, 116 F.3d 382, 385 (9th Cir. 1997) (same).

The appellate court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. May 10, 1999) (No. 98-1902); 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 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; see also Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (defining "genuine"). 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. 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. Colacurcio v. City of Kent, 163 F.3d 545, 549 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3008 (June 23, 1999) (No. 98-2053); 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.

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.), cert. denied, ___ U.S. ___, 119 S. Ct. 64 (1998). The grant of "partial" summary judgment is also reviewed de novo. Adair v. City of Kirkland, ___ F.3d ___, No. 98-35019 (9th Cir. August 6, 1999); Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 991 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1032 (1999); 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 Weatherhead v. United States, 157 F.3d 735, 737 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. May 27, 1999) (No. 98-1904); Frazer 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 Weatherhead, 157 F.3d at 737; Fraze, 97 F.3d at 370.

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 Bank of Am. v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 8, 1999) (No. 99-78); 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 405 (1998) (quoting Qualls, 22 F.3d at 844); see also PENGWIN, 175 F.3d at 1118 (applying same standard). 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." 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.

The district court's order excluding evidence in the context of summary judgment is reviewed for an abuse of discretion. Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1577 (1999); 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 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).

75. 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).

76. 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).

77. Supplemental Jurisdiction

Whether a district court has supplemental jurisdiction is a question of law reviewed de novo. Hoeck v. City of Portland, 57 F.3d 781, 784-85 (9th Cir. 1995). 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. Binder v. Gillespie, ___ F.3d ___, No. 97-35943 (9th Cir. July 26, 1999); Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998); Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (en banc); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1102 (9th Cir. 1995); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (listing factors). A district court's refusal to exercise supplemental jurisdiction is reviewed for abuse of discretion. San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 478 (9th Cir. 1998); Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996). This court reviews the district court's decision for a "clear error of judgment." Brady, 51 F.2d at 817.

78. **Venue**

"So long as the underlying facts are not in dispute, we review the district court's venue determination de novo." Columbia Pictures Television v. Krypton Broad., Inc., 106 F.3d 284, 288 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 340 (1998). The trial court's factual findings are reviewed for clear error. Id. 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 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).

79. **Voir Dire**

A trial court's conduct during civil voir dire is reviewed for abuse of discretion. 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). A district court's order to parties to make their opening statements to the entire

prospective jury panel before voir dire was 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).

80. Voluntary Dismissals

The trial court's decision to grant voluntary dismissal is reviewed for abuse of discretion. 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. 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. 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).

C. Trial Decisions

1. Alter Ego

A district court's application of the alter ego doctrine is reviewed for clear error. Commodity Futures Trading Comm. v. Topworth Int'l, Ltd., ___ F.3d ___, No. 97-56590 (9th Cir. June 28, 1999); 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), petition for cert. filed, 67 U.S.L.W. 3733 (U.S. May 21, 1999) (No. 98-1883). Following a bench trial, the judge's findings of fact, whether based on oral or documentary evidence, are reviewed for clear error. See 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), cert. denied, ___ U.S. ___, 118 S. Ct. 2359 (1998); 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 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. 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).

The district court's conclusions of law are reviewed de novo. 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. 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. 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 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). Even when the district court's determination of choice of law is not in dispute, the court's application of the facts in determining the choice of law is still reviewed de novo. Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 644-45 (9th Cir. 1988).

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.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 365 (1998); 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. Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 365 (1998); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 275 (1998). Interpretations of state law are reviewed de novo. State Farm Mut. Automotive Ins. Co. v. Davis, 937 F.2d 1415, 1418 (9th Cir. 1991).

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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 22, 1999) (No. 99-47).

7. 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. Gibrasco, Inc., 847 F.2d 530, 534 (9th Cir. 1988).

8. Directed Verdict

A motion for directed verdict has been renamed a motion for judgment as a matter of law. See Fed. R. Civ. P. 50(a). The standard for reviewing the district court's grant of a directed verdict is de novo. See Amarel v. Connell, 102 F.3d 1494, 1517 (9th Cir. 1996); Washington v. Lambert, 98 F.3d 1181, 1185 (9th Cir. 1996); Pierce v. Multnomah County, 76 F.3d 1032, 1037 (9th Cir. 1996); Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); see also Saman v. Robbins, 173 F.3d 1150, 1155 (9th Cir. 1999) (district court's decision to grant or deny a motion for judgment as a matter of law is reviewed de novo). A directed verdict is proper when the evidence permits only one reasonable conclusion. Amarel, 102 F.3d at 1517; Pierce, 76 F.3d at 1037. "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." Amarel, 102 F.3d at 1517-18; Berry, 39 F.3d at 1057. If conflicting inferences may be drawn from the facts, the case must go to the jury. Pierce, 76 F.3d at 1037.

A denial of a motion for a directed verdict is also reviewed de novo. See Oglesby v. Southern Pac. Transp. Co., 6 F.3d 603, 605 (9th Cir. 1993); see also Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999) (judgment as a matter of law); Desrosiers v. Flight Int'l of Florida, Inc., 156 F.3d 952, 957 (9th Cir.) (same), cert. dismissed, ___ U.S. ___, 119 S. Ct. 634 (1998); Scott v. Ross, 140 F.3d 1275, 1281 (9th Cir. 1998) (same), cert. denied, ___ U.S. ___, 119 S. Ct. 1285 (1999); McClaran v. Plastic Indus., Inc., 97 F.3d 347, 354 (9th Cir. 1996) (same).

9. Evidentiary Rulings

Evidentiary rulings are reviewed for an abuse of discretion. See 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); Masson v. New Yorker Magazine, Inc., 85 F.3d 1394, 1399 (9th Cir. 1996); Long Beach v. Standard Oil Co., 46 F.3d 929, 936 (9th Cir. 1995); Monotype Corp. v. International Typeface Corp., 43 F.3d 443, 448 (9th Cir. 1994); see also General Elec. Co. v. Joiner, 522 U.S. 136, ___, 118 S. Ct. 512, 517 (1997) (exclusion of expert testimony is reviewed for an abuse of discretion); Lambert v. Ackerley, 180 F.3d 997, 1009 n.12 (9th Cir. 1999 (en banc) (admission of testimony is reviewed for an abuse of discretion); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1011 (9th Cir. 1997) (court's evidentiary rulings are reviewed for an abuse of discretion) (Fed. R. Evid. 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 Gilbrook, 177 F.3d at 858; Evanow, 163 F.3d at 1113.

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. 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 Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1577 (1999); 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 district court's hearsay rulings are also reviewed for an abuse of discretion. See 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. Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996).

10. Experts

The trial court's rulings on the admissibility of expert testimony under Federal Rule of Evidence 702 are reviewed for an abuse of discretion. See Kumho Tire Co. v. Carmichael, ___ U.S. ___, 119 S. Ct. 1167, 1171 (1999); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 517 (1997); 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.), cert. dismissed, ___ U.S. ___, 119 S. Ct. 634 (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), cert. denied, ___ U.S. ___,

119 S. Ct. 1577 (1999); 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 Rule 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).

11. Foreign Law

A district court's determination and interpretation of foreign law are questions of law reviewed under the de novo standard. 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. Adler v. Federal Rep. of Nig., 107 F.3d 720, 723 (9th Cir. 1997); In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539, 543 (9th Cir. 1996).

12. Judgment as a Matter of Law

Judgment as a matter of law replaces the former term "directed verdict." See Fed. R. Civ. P. 50(a). The standard for reviewing the district court's grant of judgment as a matter of law is de novo. Saman v. Robbins, 173 F.3d 1150, 1155 (9th Cir. 1999); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998); EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997); Forrett v. Richardson, 112 F.3d 416, 419 (9th Cir. 1997); Pierce v. Multnomah County, 76 F.3d 1032, 1037 (9th Cir. 1996) (directed verdict). Such judgment is proper when the evidence permits only one reasonable conclusion. Lawson, 139 F.3d at 692; Crowe v. Wiltel Communications Sys., 103 F.3d 897, 899 (9th Cir. 1996). 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. Amarel v. Connell, 102 F.3d 1494, 1521 (9th Cir. 1996); Electro Source, Inc. v. United Parcel Serv., Inc., 95 F.3d 837, 838 (9th Cir. 1996). If conflicting inferences may be drawn from the facts, the case must go to the jury. Pierce, 76 F.3d at 1037.

A denial of a motion for judgment as a matter of law is reviewed de novo. Saman, 173 F.3d at 1155; 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.), cert. dismissed, ___ U.S. ___, 119 S. Ct. 634 (1998); Scott v. Ross, 140 F.3d 1275, 1281 (9th Cir. 1998); McClaran v. Plastic Indus., Inc., 97 F.3d 347, 354 (9th Cir. 1996).

13. **Juror Partiality or Bias**

The court has broad discretion in dealing with matters of juror bias. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1220 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998). "The trial judge, who observes the demeanor and credibility of a juror, is best suited to determine a juror's impartiality." Id. at 1220-21. The district court also has broad discretion in how to conduct voir dire. See 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).

14. **Jury Instructions**

A district court's formulation of civil jury instructions is reviewed for an abuse of discretion. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1285 (1999); Abromson v. American Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997); Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1129 (9th Cir. 1997); Fikes v. Cleghorn, 47 F.3d 1011, 1013 (9th Cir. 1995). Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. Gilbrook, 177 F.3d at 860; Mockler v. Multnomah County, 140 F.3d 808, 812 (9th Cir. 1998); Abromson, 114 F.3d at 898; Fikes, 47 F.3d at 1013. The instructions must allow the jury to determine the issues presented intelligently. Fikes, 47 F.3d at 1013. 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. 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998); Fireman's Fund Ins. Cos. v. Alaskan Pride Partnership, 106 F.3d 1465, 1469 (9th Cir. 1997); Masson, 85 F.3d at 1397; Gizoni, 56 F.3d at 1142 n.5.

An error in instructing the jury in a civil case does not require reversal if it is harmless. See 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. Lambert, 180 F.3d at 1008 n.11.

15. Jury Selection

A trial court's conduct during civil voir dire is reviewed for abuse of discretion. See Paine v. City of Lompoc, 160 F.3d 562, 564-65 (9th Cir. 1998) (district court did not abuse its discretion); 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. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1220 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998).

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).

16. Jury Verdicts

The standard for reviewing jury verdicts is whether they are supported by "substantial evidence" -- that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. See 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. Laborers Union Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995); see also Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (jury verdicts and findings are reviewed for substantial evidence). 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).

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 Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998). Reversal under the plain error standard is proper only if "there is an absolute absence of evidence to support the jury's verdict." Id. 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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 68 (1998).

17. **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).

18. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. Parravano v. Babbitt, 70 F.3d 539, 543 (9th Cir. 1995); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 918 (9th Cir. 1995). The constitutionality of a regulation is reviewed de novo. See Bernstein v. United States Dep't of Justice, 176 F.3d 1132, 1138 (9th Cir. 1999); Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999).

19. State Law

A district court's interpretation of state law is reviewed under the same independent de novo standard as are questions of federal law. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991); 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. 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 also reviewed de novo. 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).

20. Statutes

The interpretation and construction of statutes are questions of law reviewed de novo. 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) (fee shifting provisions of the 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); Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997) (state law); 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).

State statutes are also reviewed de novo. See Planned Parenthood of S. Arizona v. Lawall, 180 F.3d 1022, 1027 (9th Cir. 1999) (parental consent law); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998) (Civil Service Act).

Questions of statutory construction are reviewed de novo. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

A district court's decision on whether a statute may be applied retrospectively is a question of law reviewed de novo. 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).

21. Substantive Areas of Law

a. Admiralty

This court reviews findings of fact made by admiralty trial courts 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 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. H2O 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.

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. Evanow, 163 F.3d at 113. The court will not reverse absent some prejudice. Id. 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 8, 1999) (No. 99-78). 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.

b. Americans with Disabilities Act (ADA)

An interpretation of the ADA is reviewed de novo. See Bay Area Addiction Research and Treatment, Inc., 179 F.3d 725, 730 (9th Cir. 1999). 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 Act 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. Fuller v. Frank, 916 F.2d 558, 562 n.6 (9th Cir. 1990).

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. 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 denial of a motion for judgment as a matter of law is reviewed de novo. Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997) (noting specific factors for antitrust cases), cert. denied, ___ U.S. ___, 119 S. Ct. 46 (1998). 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998).

Dismissal of a complaint alleging antitrust violations is reviewed de novo. See Big Bear Lodging Assoc. v. Snow Summit, Inc., ___ F.3d ___, No. 97-56042 (9th Cir. July 8, 1999) (noting that dismissal was without leave to amend).

d. **Bankruptcy**

This court reviews the district court's decision on an appeal from a bankruptcy court de novo. 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 In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998) (noting that legal conclusions are reviewed de novo; factual questions are reviewed for clear error, and mixed questions of law and fact are reviewed de novo), cert. denied, ___ U.S. ___, 119 S. Ct. 2029 (1999); 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); Siragusa, 27 F.3d at 407-08 (applying abuse of discretion to the bankruptcy court's decision to abstain based on comity). "We independently review the bankruptcy court's determinations and do not give deference to the district court." 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); see also In re George, 177 F.3d 885, 887 (9th Cir. 1999) (“The role[s] of the district court and this court are basically the same in the bankruptcy appellate process.”); In re Dak Indus, Inc., 170 F.3d 1197, 1199 (9th Cir. 1999) (“We review the bankruptcy court’s factual findings for clear error, without deference to the decision of the district court.”); In re Michael, 163 F.3d 526, 529 (9th Cir. 1998) (“We are in as good a position as the BAP to review the bankruptcy court’s decision, and so we review the review the decision independently.”); In re Lewis, 113 F.3d 1040, 1043 (9th Cir. 1997) (“We review the bankruptcy court’s decision independently of the district court’s decision.”).

This court applies a clearly erroneous standard to the bankruptcy court’s findings of fact and review its conclusions of law de novo. See 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 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). A bankruptcy court’s decision to dismiss an action for failure to state a claim is reviewed de novo. In re Rogstad, 126 F.3d 1224, 1228 (9th Cir. 1997). The bankruptcy court’s grant of summary judgment is reviewed de novo. Filtercorp, 163 F.3d at 578; In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243, 1245 (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 In re 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. Id. at 779.

The bankruptcy court’s evidentiary rulings are reviewed for an abuse of discretion. 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 claim compromise as a part

of a plan is also reviewed for an abuse of discretion. See 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 27, 1999) (No. 99-187). 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).

Decisions of the Bankruptcy Appellate Panel are reviewed de novo. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 592 (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. 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 72 (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). BAP's findings of fact are reviewed for clear error. Weisberg, 136 F.3d at 657.

The bankruptcy court's interpretation of the Bankruptcy Code is reviewed de novo. In re Been, 153 F.3d 1034, 1036 (9th Cir. 1998); In re Parker, 139 F.3d 668, 672 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 592 (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 a bankruptcy rule is also reviewed de novo. 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 2334 (1998). Domicile is a question of fact reviewed for clear error. In re Lowenschuss, 171 F.3d 673, 684 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 27, 1999) (No. 99-187).

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).

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 by the appellate court 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).

Whether the automatic stay provisions of 11 U.S.C. § 362(a) have been violated is a question of law reviewed de novo. 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 Lowenschuss, 170 F.3d 923, 928 (9th Cir. 1999); In re National Env'tl. Waste Corp., 129 F.3d 1052, 1054 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2368 (1998); 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. 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). 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).

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. 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 Bammer, 131 F.3d 788, 790 (9th Cir. 1997) (en banc) (overruling In re Sternberg, 85 F.3d 1400, 1404-05 (9th Cir. 1996) (abuse of discretion), and In re Roosevelt, 87 F.3d 311, 314 n.2 (9th Cir.), amended by 98 F.3d 1169 (9th Cir. 1996) (explaining that "gross abuse" standard is the same as reviewing findings of fact for clear error and conclusions of law de novo)). 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. 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. Stone v. City of Prescott, 173 F.3d 1172, 1174 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 29, 1999) (No. 99-46); Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999); Picray v. Sealock, 138 F.3d 767, 770 (9th Cir. 1998). A court's decision to dismiss a § 1983 action pursuant to Rule 12(b)(6) is also reviewed de novo. See Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999); Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 538 (1998).

A district court's decision on qualified immunity in a § 1983 action is reviewed de novo. Elder v. Holloway, 510 U.S. 510, 516 (1994); Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999); Ferguson v. City of Phoenix, 157 F.3d 668, 676 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2049 (1999); Jensen v. Oxnard, 145 F.3d 1078, 1082 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 540 (1998); Hyland v. Wonder, 117 F.3d 405, 409 (9th Cir.), amended by 127 F.3d 1135 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1166 (1998); 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 Herb Hallman Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 641 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 2, 1999) (No. 99-52); 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 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 Oona, R.-S.- by Kate S. v. McCaffrey, 143 F.3d 473, 475 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2039 (1999).

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 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.), cert. denied, ___ U.S. ___, 119 S. Ct. 405 (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); Herb Hallman Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 642 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 2, 1999) (No. 99-52); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997), cert. denied, ___ U.S. ___, 119 S. Ct. 75 (1998); 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 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. 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. 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). 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). 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. Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998); Atonio, 827 F.2d at 443.

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); 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. 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. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997), cert. denied, ___ U.S. ___, 119 S. Ct. 75 (1998); 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).

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. 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); Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 55 (9th Cir. 1995). The constitutionality of a statute is reviewed de novo. California Democratic Party v. Jones, 169 F.3d 646, 647 (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. California Democratic Party, 169 F.3d at 647; 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 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.”).

h. Contracts

The interpretation and meaning of contract provisions are questions of law reviewed de novo. See 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).

The determination of whether contract language is ambiguous is also a question of law reviewed de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1495 (1999); 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. 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).

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).

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).

i. **Copyright/Trademark**

In copyright infringement actions, when the issue is whether two works are substantially similar, 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." Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) (internal quotation omitted). Thus, summary judgment is not highly favored on questions of substantial similarity. Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996). Review of summary judgment is de novo. Id.; Kouf, 16 F.3d at 1044. Issues of access and substantial similarity are 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). Fair use is a mixed question of law and fact reviewed de novo. See Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998), cert. denied, ___ U. S. ___, 119 S. Ct. 1032 (1999).

District courts have wide discretion in setting the amount of statutory damages under the Copyright Act. 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).

The district court's decision whether to award attorneys fees under the Copyright Act is reviewed for an abuse of discretion. See Dolman, 157 F.3d at 715; Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 152 F.3d 1171, 1171 (9th Cir. 1998); 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 or 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. Rolux 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).

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 under the trademark laws for clear error. Brookfield Comm., Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1061 (9th Cir. 1999); Murray v. Cable Nat'l Broad. Co., 86 F.3d 858, 860 (9th Cir. 1996); Pacific Telesis Group v. International Telesis Comm., 994 F.2d 1364, 1367 (9th Cir. 1993); 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 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).

The scope of injunctive relief granted by the district court is reviewed for an abuse of discretion. See Rolex Watch, 179 F.3d at 708.

Findings on the elements of nonfunctionality, secondary meaning, and likelihood of confusion are 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).

j. **Declaratory Judgment Act**

The trial court's decision whether to exercise jurisdiction to decide a declaratory judgment action is reviewed for an abuse of discretion. Wilton v. Seven Falls Co., 515 U.S. 277, 289-90 (1995); see American Cas. Co. v. Krieger, 181 F.3d 1113, 1117 (9th Cir. 1999); 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). The court's decision to decline jurisdiction is also reviewed

for an abuse of discretion. See Snodgrass v. Provident Life and Accident Ins. Co., 147 F.3d 1163, 1166-67 (9th Cir. 1998).

k. Defamation

Appellate courts conduct "independent review" of a jury's finding of actual malice in a defamation action. 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 Northcoast Env'tl. 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). In reviewing the adequacy of an agency's environmental impact statement (EIS), this circuit applies a "rule of reason" standard "that asks whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997) (internal quotation omitted); see also American Rivers v. FERC, ___ F.3d ___, No. 98-70079 (9th Cir. August 11, 1999) (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 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. Northcoast, 136 F.3d at 665.

An agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2337 (1999); Northwest Env'tl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997). Using this standard, this court considers only whether the agency's decision is based on a "reasoned evaluation of the relevant factors." Northwest Env'tl. 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." 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, ___ F.3d ___, No. 98-15788 (9th Cir. July 7, 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 ____.

m. **ERISA**

The interpretation of ERISA, a federal statute, is a question of law reviewed de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 903 (1999); 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).

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." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 27, 1999) (No. 99-186); 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., ___ F.3d ___, No. 98-35986 (9th Cir. August 9, 1999) (explaining that Kearney overruled Snow).

When such discretion exists, the district court reviews the administrator's determinations for an abuse of discretion. See Bendixen v. Standard Ins. Co., ___ F.3d ___, No. 97-55572 (9th Cir. Aug. 2, 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); Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1009 (9th Cir. 1997) (en banc) (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. Friedrich, 181 F.3d at 1109; Lang v. Long-Term Disability Plan, 125 F.3d 794, 797 (9th Cir. 1997). Note, however, that this abuse of discretion standard can be "heightened" by the presence of a serious conflict of interest by the administrator of the plan. See Bendixen, ___ F.3d at ___; 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).

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 Saffle v. Sierra Pac. Power Co., 85 F.3d 455, 456 (9th Cir. 1996); see also Ward v. Management Analysis Co. Employee Disability Benefit Plan, 135 F.3d 1276, 1284 n.7 (9th Cir. 1998) (explaining Saffle), aff'd in part, rev'd in part, ___ U.S. ___, 119 S. Ct. 1380 (1999). This court's review of the district court's applications of this deferential standard is de novo. Canseco v. Construction Laborers Pension Trust, 93 F.3d 600, 605 (9th Cir. 1996); Snow, 87 F.3d at 331; Saffle, 85 F.3d at 455; Taft, 9 F.3d at 1471.

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.

Whether ERISA preempts state law is a question of law reviewed de novo. 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), cert.

denied, ___ U.S. ___, 119 S. Ct. 1495 (1999); 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 to award prejudgment interest to an ERISA plaintiff is a question of fairness lying within the district court's sound discretion. Landwehr v. DuPree, 72 F.3d 726, 739 (9th Cir. 1995). An award of attorneys fees reviewed for an abuse of discretion. See 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).

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).

o. **Fair Labor Standards Act**

"We review the district court's findings of fact for clear error and its interpretation of the FLSA de novo." Berry v. County of Sonoma, 30 F.3d 1174, 1180 (9th Cir. 1994). The facts necessary to a proper determination of the legal question regarding the applicability of the FLSA are reviewed under the clearly erroneous standard. Barner v. Novato, 17 F.3d 1256, 1258 (9th Cir. 1994) (citing Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 713 (1986)). See, e.g., Berry, 30 F.3d at 1180 (whether employees are able to use on-call time for personal activities); 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). Questions of law are reviewed de novo. Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997) (whether an entity is a joint employer for purposes of FLSA is a question of law reviewed de novo); Reich v. American Driver Serv., Inc., 33 F.3d 1153, 1155 (9th Cir. 1994) (whether certain employees are exempt from the maximum hours provision of

the FLSA is a question of law reviewed de novo). A district court's decision regarding exemptions to the FLSA is also reviewed de novo. Magana v. Commonwealth of N. Mariana Islands, 107 F.3d 1436, 1438 (9th Cir. 1997); but see Adair v. City of Kirkland, ___ F.3d ___, No. 98-35019 (9th Cir. August 6, 1999) (noting that whether an employer meets its burden of establishing that it qualifies for an exemption is generally a question of fact).

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), cert. denied, ___ U.S. ___, 119 S. Ct. 794 (1999); 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).

Jurisdictional issues are reviewed de novo. See United States ex rel. Newsham v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1213 (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 Newsham, 171 F.3d at 1213; United States ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1998). A decision regarding whether a particular document triggers the jurisdictional bar of the Act is a mixed question of law and fact also reviewed de novo. 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.

The denial of costs is reviewed for an abuse of discretion. See Newsham, 171 F.3d at 1213. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1336 (1999). 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1512 (1998).

The district court's determination of subject matter jurisdiction under the Act is reviewed de novo. Gager v. United States, 149 F.3d 918, 920 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 412 (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). Thus, "[w]e review de novo the district court's determination that the actions and omissions of the government . . . fall outside the scope of 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. Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996). 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. McMillan v. United States, 112 F.3d 1040, 1043-44 (9th Cir. 1997) (applying federal standard of review).

s. **Feres Doctrine**

The question whether the Feres doctrine is applicable to facts reflected in the record of a case is a question of law reviewed de novo. Gregory v. Windall, 153 F.3d 1071, 1074 (9th Cir. 1998); Bowen v. Oistead, 125 F.3d 800, 803 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2343 (1998); 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)**

"[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]." Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405, 1409 (9th Cir. 1996); see also Weatherhead v. United States, 157 F.3d 735, 738 (9th Cir. 1998) ("We review de novo the district court's determination that a requested document is exempt from disclosure."), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. May 27, 1999) (No. 98-1904); 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.").

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 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, this court employs the following two-step standard. First, the court inquires whether an adequate factual basis supports the district court's ruling. If such a basis exists, the court will overturn the ruling only if it is clearly erroneous. Weatherhead, 157 F.3d at 737; Rosenfeld, 57 F.3d at 807. But see Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1082, 1085 (9th Cir. 1997) (standard is "unclear" in light of Minier v. Central Intelligence Agency, 88 F.3d 796, 800 (9th Cir. 1996) (reciting two-step test but applying de novo review)).

FOIA fee waiver decisions are reviewed de novo, with review limited to the record before the agency. Friends of the Coast Fork v. United States Dep't of Interior, 110 F.3d 53, 55 (9th Cir. 1997). A district court may, within its discretion, award attorneys fees to a claimant who "substantially prevails" under FOIA. GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1116 (9th Cir. 1994).

u. **Immigration**

i. **Board of Immigration Appeals (BIA)**

(a) **IIRIRA/AEDPA**

The availability of judicial review of the BIA's deportation and exclusion orders has been 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 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). Recent cases have not applied IIRIRA, however, because they concern immigration proceedings that commenced prior to April 1, 1997,

the effective date of the Act. See, e.g., Duarte de Guinac v. INS, 179 F.3d 1156, 1158 n.2 (9th Cir. 1999); Romani v. INS, 146 F.3d 737, 738 n.1 (9th Cir. 1998). Note, however, that provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), as amended by IIRIRA, do apply retroactively to pending deportation hearings, and bar judicial review of final deportation orders against aliens convicted of certain crimes. See Sarmadi v. INS, 121 F.3d 1319, 1320-21 (9th Cir. 1997); Perez v. INS, 116 F.3d 405, 407-08 (9th Cir. 1997). Although direct review is precluded, this court has held that “serious constitutional questions” would arise if courts were barred from reviewing “colorable constitutional claims.” See Chavez-Murillo v. INS, 181 F.3d 997, 1000-02 (9th Cir. 1999) (reviewing removal order for compliance with due process, equal protection, double jeopardy, and ex post facto law).

“IIRIRA unified judicial review procedures applicable to final orders of deportation and exclusion.” Hose v. INS, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). The Act repealed 8 U.S.C. § 1105a(b), that had provided for review of final exclusion orders by writ of habeas corpus in the district court. See id. IIRIRA’s transitional rules now vest jurisdiction in the court’s of appeal for review of final orders of deportation and exclusion. Id. Note that there is currently a split in the circuits whether habeas relief is still available after IIRIRA. See Reno v. American-Arab Anti-Discrimination Committee, ___ U.S. ___, 119 S. Ct. 936, 942 & n.7 (1999) (noting that Ninth Circuit had ruled in Hose v. INS, 141 F.3d 932, 935 (9th Cir.), withdrawn by 161 F.3d 1225 (9th Cir. 1998), that habeas was not available after IIRIRA).

(b) **Pre-IIRIRA**

This court reviews de novo the BIA's determination of purely legal questions regarding the requirements of the Immigration and Nationality Act. Ratnam v. INS, 154 F.3d 990, 994 (9th Cir. 1998); Vang v. INS, 146 F.3d 1114, 1116 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997); Arrieta v. INS, 117 F.3d 429, 430 (9th Cir. 1997); Singh v. INS, 94 F.3d 1353, 1358 (9th Cir. 1996); Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc); Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995). Thus, the BIA's interpretation of a statute is reviewed de novo. LaFarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999); Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996); Tang v. Reno, 77 F.3d 1194, 1196 (9th Cir. 1996).

The BIA's interpretation and application of the immigration laws are nevertheless entitled to deference. Coronado-Durazo, 123 F.3d at 1325; Fisher, 79 F.3d at 961; Ghaly, 58 F.3d at 1429; Mendoza v. INS, 16 F.3d 335, 337 (9th Cir. 1994). 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. Coronado-Durazo v. INS, 123 F.3d 1322, 1324 (9th Cir. 1997); Bui v. INS, 76 F.3d 268, 269-70 (9th Cir. 1996); Navarro-Aispura v. INS, 53 F.3d 233, 235 (9th Cir. 1995). 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 must review the IJ's decision. 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* Vongsakdy v. INS, 171 F.3d 1203, 1206 (9th Cir. 1999); Garrovillas v. INS, 156 F.3d 1010, 1013 (9th Cir. 1998); Perez v. INS; 96 F.3d 390, 392 (9th Cir. 1996). 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. 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. Ratnam, 154 F.3d at 994; Velarde, 140 F.3d at 1309. 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* Andriasian v. INS, 180 F.3d 1033, 1040 (9th Cir. 1999); Meza-Manay v. INS, 139 F.3d 759, 762 (9th Cir. 1998).

Claims of due process violations in deportation proceedings are reviewed de novo. Andriasian, 180 F.3d at 1040; Sharma, 89 F.3d at 547; Carr v. INS, 86 F.3d 949, 951 (9th Cir. 1996); Burgos-Abril v. INS, 58 F.3d 475, 476 (9th Cir. 1995).

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 order denying adjustment of status is reviewed for abuse of discretion. Rashtabadi v. INS, 23 F.3d 1562, 1566 (9th Cir. 1994).

The BIA's decision that an alien has not established eligibility for asylum is reviewed under the substantial evidence standard. 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). Thus, the BIA's determination that an alien is not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence in the record. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); 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). Review is limited to the administrative record. Velarde, 140 F.3d at 1309; Aruta v. INS, 80 F.3d 1389, 1393 (9th Cir. 1996).

Factual findings, including whether the alien has proved a well-founded fear of persecution, are reviewed for substantial evidence. 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). Under this standard, a court must review "the findings by a slightly stricter scrutiny than the clear error standard." Aruta, 80 F.3d at 1393; see also Prasad, 47 F.3d at 338-39 (noting that Elias-Zacarias did not change standard of review). The BIA's determination should be reversed only if the evidence presented by the alien was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed. Elias-Zacarias, 502 U.S. at 481; Aruta, 80 F.3d at 1393; Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc). The meaning of the term "persecution" is a legal question reviewed de novo. Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).

Once an alien is determined to be statutorily eligible for asylum, the BIA's discretionary decision to grant or deny asylum is reviewed for an abuse of discretion. Andriasian, 180 F.3d at 1040; Stoyanov v. INS, 149 F.3d 1226, 1227 (9th Cir. 1998);

Lopez-Galarza v. INS, 99 F.3d 954, 960 (9th Cir. 1996); Surita v. INS, 95 F.3d 814, 818 (9th Cir. 1996); Rodriguez-Matamoros v. INS, 86 F.3d 158, 160 (9th Cir. 1996). The BIA abuses its discretion if its decision is "arbitrary, irrational, or contrary to law." Lopez-Galarza, 99 F.3d at 960 (internal quotation omitted). The BIA's exercise of discretion must be "within the constraints of law." Singh v. INS, 94 F.3d 1353, 1358 (9th Cir. 1996).

The BIA's decision whether to withhold deportation is reviewed for substantial evidence. 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). Factual findings by the Board are "conclusive" if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." Singh v. Ilchert, 63 F.3d 1501, 1506 n.1 (9th Cir. 1995); Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994) (quoting 8 U.S.C. § 1105a(a)(4)). 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. 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. Aguirre-Aguirre v. INS, 121 F.3d 521, 523 (9th Cir. 1997), rev'd on other grounds, ___ U.S. ___, 119 S. Ct. 1439 (1999).

A discretionary decision not to order deportation is reviewed for an abuse of discretion. See Stoyanov v. INS, 149 F.3d 1226 (9th Cir. 1998) (withholding of deportation); 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) (same); Perez v. INS, 96 F.3d 390, 391 (9th Cir. 1996) (same); Casem v. INS, 8 F.3d 700, 702 (9th Cir. 1993) (waiver of deportation). That standard requires the BIA to take into account all relevant factors without acting in an arbitrary, illegal, or irrational fashion. Casem, 8 F.3d at 702.

A finding that an alien is statutorily ineligible for voluntary departure is reviewed for substantial evidence. See Bernal v. INS, 154 F.3d 1020, 1022 (9th Cir. 1998). Review of the BIA's discretionary denial of voluntary departure is for an abuse of

discretion. Cheo v. INS, 162 F.3d 1227, 1230 (9th Cir. 1998) (noting that review may be abuse of discretion or arbitrary and capricious); Rashtabadi v. INS, 23 F.3d 1562, 1566 (9th Cir. 1994) (abuse of discretion).

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. 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); 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); Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996); Caruncho v. INS, 68 F.3d 356, 360 (9th Cir. 1995); Delmundo v. INS, 43 F.3d 436, 439 (9th Cir. 1994). 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. Gutierrez-Centeno, 99 F.3d at 1531; see also Arrozal, 159 F.3d at 432-33 (discussing abuse of discretion standard).

This court reviews for an abuse of discretion the agency'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. 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 court reviews the agency's adjudication of the facts on an application for Special Agricultural Workers (SAW) status for an abuse of discretion. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991). Constitutional or statutory claims are reviewed de novo. Id. at 494.

This circuit has not clearly articulated the proper standard for reviewing the BIA's summary dismissals. Castillo-Manzanarez v. INS, 65 F.3d 793, 794 (9th Cir. 1995). The BIA's summary dismissals should probably be reviewed under an abuse of discretion standard. See Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994) (noting that Ninth Circuit has previously reviewed such dismissal for "appropriateness" but that other circuits apply abuse of discretion standard), overruled on other grounds by Stone v. INS, 514 U.S. 386 (1995).

Review of the BIA's denial of registry relief depends on the basis for the denial. Manzo-Fontes v. INS, 53 F.3d 280, 282 (9th Cir. 1995). Where the agency's denial of the alien's application for registry under § 249 is based on the agency's conclusion that the alien is statutorily ineligible, the court reviews to ensure that it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. Id.

ii. District Court Appeals

The denial of a petition for writ of habeas corpus brought pursuant to the Immigration and Naturalization Act, 8 U.S.C. § 1105a(b), is reviewed de novo. 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). "The issues before this court are thus in the same posture as those before the district court and require us to consider the rulings of the BIA." Id. (internal quotation omitted). "Review of a final order of exclusion is based solely on the evidence adduced before the Immigration Judge as contained in the administrative record." Barney v. Rogers, 83 F.3d 318, 320 (9th Cir. 1996). The BIA's factual findings are reviewed for substantial evidence; questions of law are reviewed de novo. Barney, 83 F.3d at 320; Singh, 69 F.3d at 378.

Note, however, that § 1105a was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, effecting final orders filed after September 30, 1996. See id. at 1513 n.1. Under pre-IIRIRA law, the appropriate avenue for judicial review of a final order of exclusion was for the alien to file a writ of habeas corpus in the district court. See Hose v. INS, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). Under IIRIRA's transitional rules, jurisdiction over final orders of deportation and exclusion is now vested in the courts of appeals.

See id. IIRIRA's permanent rules merge deportation and exclusion proceedings into a broader category called "removal proceedings." Id. at 994 n.1. There is currently a split in the circuits whether habeas relief is still available after IIRIRA. See Reno v. American-Arab Anti-Discrimination Committee, ___ U.S. ___, 119 S. Ct. 936, 942 & n.7 (1999) (noting that Ninth Circuit had ruled in Hose v. INS, 141 F.3d 932, 935 (9th Cir.), withdrawn by 161 F.3d 1225 (9th Cir. 1998), that habeas was not available after IIRIRA).

The district court's decision to dismiss for lack of subject matter jurisdiction is reviewed de novo. Abboud v. INS, 140 F.3d 843, 846 (9th Cir. 1998); Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1273 (9th Cir. 1996) (Questions of subject matter jurisdiction are reviewed de novo.); Wang v. Reno, 81 F.3d 808, 813 (9th Cir. 1996) (same); Nakaranurack v. United States, 68 F.3d 290, 293 (9th Cir. 1995); see also Ortiz v. Meissner, 179 F.3d 718, 721-23 (9th Cir. 1999) (discussing when district court has jurisdiction over exclusion and deportation orders).

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).

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 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, 1999 (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 hearing 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). The appropriateness of an educational program is reviewed de novo. 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. Doe v. Arizona Dep't of Educ., 111 F.3d 678, 681 (9th Cir. 1997). 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 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**

"We review de novo the construction of the collective bargaining and trust agreements." Carpenters Health & Welfare Trust Fund v. Bla-Delco Constr., Inc., 8 F.3d 1365, 1367 (9th Cir. 1993). The scope of an arbitration clause is reviewed de novo. Moore v. Local 569 of Int'l Bhd. of Elec. Workers, 53 F.3d 1054, 1055 (9th Cir. 1995). The legality of an arbitration provision is also reviewed de novo. Id. at 1056. Whether a dispute is subject to arbitration is an issue for the courts rather than for an arbitrator to decide. Beach Air Conditioning & Heating, Inc. v. Sheet Metal Workers' Int'l Ass'n Local Union No. 102, 55 F.3d 474, 476 (9th Cir. 1995). We review de novo a district court's determination that a dispute is subject to arbitration. See Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999); Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1049 (9th Cir. 1996). Interpretation of the parties' agreement is de novo. Id. The district court's decision to confirm an arbitration award is reviewed de novo while underlying facts are reviewed for clear error. International Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1410 (9th Cir. 1997) (citing First Options, Inc. v. Kaplan, 514 U.S. 938, 948 (1995)); see also Line Drivers, Pickup and Delivery, Local Union No. 81 v. Roadway Express, Inc., 152 F.3d 1098, 1099 (9th Cir. 1998) ("We review de novo the district court's grant of summary judgment confirming an arbitration award.").

A district court's conclusion that a union's claims of fraud and misrepresentation are within § 301(a) jurisdiction and not within the primary jurisdiction of the NLRB is a question of law reviewed de novo. International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co., 50 F.3d 770, 773 (9th Cir. 1995); see also Niehaus v. Greyhound Lines, Inc., 173 F.3d 1207, 1211 (9th Cir. 1999) (§ 301 preemption is reviewed de novo); Associated Builders & Contractors, Inc. v. Local 302 Int'l Bhd. of Elec. Workers, 109 F.3d 1353, 1355 (9th Cir. 1997) (same).

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." Department of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994).

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 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. Duhagon, 169 F.3d at 618; Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1275 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 866 (1999); Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683, 687 (9th Cir. 1997); Sproull, 86 F.3d at 898. No special deference, however, is owed to the Board's interpretation of the Act. See 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. Moyle v. Director, OWCP, 147 F.3d 1116, 1119 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1454 (1999); 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 are agency action, not post hoc rationalizations for it." Id.; 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); Moyle, 147 F.3d at 1119 (explaining that deference is owed to the Director's interpretation of regulations and to litigating positions, but no deference is owed to agency's resolution of statutory conflicts). 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. 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), amended by 164 F.3d 480 (9th Cir. 1999), petition for cert. filed, 67 U.S.L.W. 3643 (U.S. April 12, 1999) (No. 98-1649).

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. 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. 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. 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 ___, 118 S. Ct. 818, 823 (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 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, 118 S. Ct. at 822 (noting that deference is owed if Board's "explication is not inadequate, irrational or arbitrary"); 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).

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., ___ F.3d ___, No. 96-17270 (9th Cir. June 11, 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).

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.*

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* Catalina Cruises, 137 F.3d at 1425 (standard of care is a question of law reviewed de novo); Exxon, 54 F.3d at 576 (findings regarding proximate cause are reviewed for clear error).

A tax court's finding that understatement of tax liability was due to negligence is reviewed under the clearly erroneous standard. 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* In re Silicon Graphics Inc. Securities Litigation, ___ F.3d ___, No. 97-16204 (9th Cir. July 2, 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). 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. SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998). A grant of summary judgment is reviewed de novo. 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. Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1211 (9th Cir. 1998).

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, ___ F.3d at ___.

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, ___ F.3d ___, No. 97-35943 (9th Cir. July 26, 1999)

The Securities Exchange Commission's factual findings are reviewed for substantial evidence. 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." Id. This court reviews the SEC's affirmance of sanctions for an abuse of discretion. Id.; Atlanta-One, Inc. v. SEC, 100 F.3d 105, 107 (9th Cir. 1996).

A disgorgement order is reviewed for an abuse of discretion. SEC v. First Pac. Bancorp, 142 F.3d 1186, 1190 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 902 (1999); 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.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 365 (1998).

z. Social Security

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. See 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); Andrews v. Shalala, 53 F.3d 1035, 1039 n.1 (9th Cir. 1995); Travers v. Shalala, 20 F.3d 993, 995-96 (9th Cir. 1994).

The scope of appellate review, however, is limited: the decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. 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; Flaten v. Secretary, 44 F.3d 1453, 1457 (9th Cir. 1995). 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. 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; Saelee, 94 F.3d at 522. 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; Flaten, 44 F.3d at 1457; Travers, 20 F.3d at 996.

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. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at 720; Flaten, 44 F.3d at 1457. The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. Reddick, 157 F.3d at 720; Andrews, 53 F.3d at 1039. 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 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.

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**

We review decisions of the United States Tax Court on the same basis as decisions in civil bench trials in the United States District Court. 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 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1755 (1999); Rapp, 140 F.3d at 1215; Rankin v. Commissioner, 138 F.3d 1286, 1288 (9th Cir. 1998); Harbor Bancorp & Subsidiaries v. Commissioner, 115 F.3d 722, 727 (9th Cir. 1997); Condor Int'l, 78 F.3d at 1358; Kelley, 45 F.3d at 350; Ann Jackson Family Found. v. Commissioner, 15 F.3d 917, 920 (9th Cir. 1994).

The tax court's jurisdictional determination is reviewed de novo. I & O Pub. Co. v. Commissioner, 131 F.3d 1314, 1315 (9th Cir. 1997); Condor Int'l, 78 F.3d at 1358; Correia v. Commissioner, 58 F.3d 468, 469 (9th Cir. 1995). The tax court's

construction of the tax code is also reviewed de novo. See Leslie v. Commissioner, 146 F.3d 643, 650 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 803 (1999); 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 tax court's interpretation of a statute is reviewed de novo. Leslie, 146 F.3d at 648; Williamson v. Commissioner, 974 F.2d 1525, 1529 (9th Cir. 1992). 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 also reviewed de novo. Whitmire v. Commissioner, 178 F.3d 1050, 1051 (9th Cir. 1999); Talley Indus. Inc. v. Commissioner, 116 F.3d 382, 385 (9th Cir. 1997); Sierra Club, Inc. v. Commissioner, 86 F.3d 1526, 1530 (9th Cir. 1996).

Although a presumption exists that the tax court correctly applied the law, no special deference is given to the tax court's decisions. 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) (noting prior ambiguity in circuit regarding deference to tax court decisions; reaffirming de novo review of tax court's conclusions of law); 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 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.) (location of "tax home"), cert. denied, ___ U.S. ___, 119 S. Ct. 181 (1998); 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); Citrus Valley, 49 F.3d at 1415; Erhard v. Commissioner, 46 F.3d 1470, 1476, 1479 (9th Cir. 1995); 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. 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). 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).

Discretionary decisions are reviewed for abuse of discretion. See 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); Erhard, 46 F.3d at 1479. The tax court's exclusion of evidence is reviewed for an abuse of discretion. Little, 106 F.3d at 1449.

A district court's decision on an agency's request for attorneys fees is reviewed for an abuse of discretion. Estate of Merchant v. Commissioner, 947 F.2d 1390, 1392 (9th Cir. 1991); Bertolino v. Commissioner, 930 F.2d 759, 761 (9th Cir. 1991).

A district court's determination of the appropriate interest rate to be applied to unpaid taxes is a legal issue reviewed de novo. Oregon Short Line R.R. v. Dep't of Revenue Or., 139 F.3d 1259, 1263 (9th Cir. 1998).

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 in civil rights actions brought under Title VII are reviewed de novo, while a district court's underlying findings of fact are subject to clearly erroneous

review. 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), petition for cert. filed, 67 U.S.L.W. 3749 (U.S. May 10, 1999) (No. 98-1902).

Findings of actual discriminatory intent are subject to review for clear error. Pullman-Standard v. Swint, 456 U.S. 273, 288-90 (1982); Edwards v. Occidental Chem. Corp., 892 F.2d 1442, 1447 (9th Cir. 1990). 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. 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 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); Gilligan, 81 F.3d at 838; see also Edwards, 892 F.2d at 1449 (resolving prior conflict). Whether an employer has made reasonable efforts to accommodate an employee is a question of fact reviewed under the clearly erroneous standard. Heller, 8 F.3d at 1439-40.

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. Mockler, 140 F.3d at 808; Crowe v. Witel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996).

The district court's choice of remedies in a Title VII action is reviewed for abuse of discretion. Eldredge, 94 F.3d at 1369; Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1495 (9th Cir. 1995). Whether punitive damages are available is a question of law reviewed de novo. See EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 992 (9th Cir. 1998).

An award of attorneys fees under Title VII is reviewed for an abuse of discretion. Crowe, 103 F.3d at 900; McGrath v. County of Nev., 67 F.3d 248, 252 (9th Cir. 1995); Odima, 53 F.3d at 1498. The decision to grant a defendant's motion to strike which effectively dismissed all of a plaintiff's claims is reviewed de novo. Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1482-83 (9th Cir. 1997).

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.

22. **Territorial Laws**

Appeals from the Superior Court of Guam are made to the Appellate Division of the District Court of Guam. 48 U.S.C. § 1424-3(b). This court reviews de novo interpretations of Guam law by the District Court of Guam Appellate Division. Phoenix Eng'g & Supply, Inc. v. Universal Elec. Co., 104 F.3d 1137, 1140 (9th Cir. 1997); Cristobal v. Siegel, 26 F.3d 1488, 1491 (9th Cir. 1994) (citing Guam v. Yang, 850 F.2d 507, 511 (9th Cir. 1988) (en banc)); see also Camacho v. Du Sung Corp., 121 F.3d 1315, 1317 (9th Cir. 1997) ("We do not defer to the interpretation of Guam law by the appellate division of the district court."). The superior court's findings of fact are reviewed for clear error. Phoenix Eng'g, 104 F.3d at 1140.

Whether the Commonwealth of the Northern Mariana Islands Supreme Court possessed jurisdiction to decide a case is a question of law reviewed de novo. Aldan-Pierce v. Mafnas, 31 F.3d 756, 758 (9th Cir. 1994); cf. Commonwealth of N. Mariana Islands v. Magofna, 919 F.2d 103, 104 (9th Cir. 1990) (interpretation of local law is reviewed de novo). 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).

Whether Congress intended to exercise the full scope of its prescriptive jurisdiction is a matter of subject matter jurisdiction reviewed de novo. Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535, 1538 (9th Cir. 1994) (addressing whether Bank Holding Company Act, 12 U.S.C. §§ 1971-78, applies to the Republic of the Marshall Islands).

23. **Treaties**

The interpretation or application of a treaty or related executive order requires de novo review. See 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 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 Extradiction of Kevin Artt, 158 F.3d 462, 465 (9th Cir. 1998); United States v. Lazarevich, 147 F.3d 1061, 1063 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 432 (1998); Clarey v. Gregg, 138 F.3d 764, 765 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 131 (1998). An extradition tribunal's factual determinations are reviewed for clear error. Artt, 158 F.3d at 465.

24. **Tribal Courts**

A tribal court's exercise of jurisdiction over non-Indians is a question of federal law reviewed de novo. Montana v. Gilham, 133 F.3d 1133, 1135 (9th Cir. 1998); see also 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).

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. Neztosie, 136 F.3d 610, 613 (9th Cir. 1998), rev'd on other grounds, ___ U.S. ___, 119 S. Ct. 1430 (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, ___ U.S. ___, 118 S. Ct. 37 (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 determined de novo. Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 951 (9th Cir. 1998).

25. 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 22, 1999) (No. 99-47).

D. Post-Trial Decisions

1. Attorneys Fees

Attorneys fees awards are generally reviewed for an abuse of discretion. See 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), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 2, 1999) (No. 99-52); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 75 (1998); 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). This court reviews supporting findings of fact for clear error. See 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. 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. 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. 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1512 (1998).

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. 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).

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); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 75

(1998); 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. 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. 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 is reviewed for an abuse of discretion. See 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. 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. Dolman v. Agee, 157 F.3d 708, 715 (9th Cir. 1998); Columbia Pictures Television v. Krypton Broad. Inc., 152 F.3d 1171, 1171 (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. Entertainment Research, 122 F.3d at 1216. The court's refusal to award fees is reviewed for an abuse of discretion. 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. 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).

g. Environmental Laws

Many environmental statutes permit an award of attorneys fees "where appropriate." See Marbled Murrelet v. Babbitt, ___ F.3d ___, No. 98-15788 (9th Cir. July 7, 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 ___.

h. Equal Access to Justice Act

The decision whether to award fees under the EAJA is reviewed for an abuse of discretion. See 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). In particular, this court reviews for an abuse of discretion the district court's conclusion that the government's position is substantially justified. 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 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. 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. 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 Env'tl. 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. 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 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. 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). 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. The district court's denial of fees is 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).

j. **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); Masalosaló 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).

k. 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). A trial court's conclusion that Rule 68 authorizes an award of attorneys fees is a question of law reviewed de novo. 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.

l. Social Security

In addition to awards made pursuant to the Equal Access to Justice Act, awards may also be made pursuant to the Social Security Act, which provides for attorneys fees payable out of past due benefits. 42 U.S.C. § 406(b)(1). This court reviews an award pursuant to the Social Security Act for an abuse of discretion. 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.

m. State Law

An award of attorneys fees made pursuant to state law is reviewed for an abuse of discretion. 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. 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).

n. **Tax**

The district court's decision on the Commissioner's request for attorneys fees is reviewed for abuse of discretion. Estate of Merchant v. Commissioner, 947 F.2d 1390, 1392 (9th Cir. 1991); 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 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 denial of fees is also reviewed for an abuse of discretion. See Bertolino, 930 F.2d at 761.

o. **Title VII**

An award of attorneys fees under Title VII is reviewed for an abuse of discretion. 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.

2. **Bonds**

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.

"This court reviews supersedeas bond orders for abuse of discretion." 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. United States v. Amwest Surety Ins. Co., 54 F.3d 601, 602 (9th Cir. 1995).

3. **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. 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. Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996).

4. **Consent Decrees**

Interpretation of a consent decree is a question of law reviewed de novo. 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. Gates, 60 F.3d at 530; Gila Valley Irrigation Dist., 31 F.3d at 1432.

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. 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) (noting that a court may “decide in its discretion to reopen and set aside a consent decree”) (en banc).

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).

5. **Costs**

The district court's award of costs is reviewed for an abuse of discretion. See K.V. Mart Co. v. United Food and Commercial Workers Int'l Union, Local No. 324, 173 F.3d 1221, 1223 (9th Cir. 1999), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 6, 1999) (No. 99-96); 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); Schwarz v. Secretary of Health & Human Servs., 73 F.3d 895, 900 (9th Cir. 1995); National Info. Servs., Inc. v. TRW, Inc., 51 F.3d 1470, 1471 (9th Cir. 1995). Whether the district court has the authority to award costs, however, is a question of law reviewed de novo. United States v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1213 (9th Cir. 1999); Evanow, 163 F.3d at 1113; Russian River, 142 F.3d at 1144; United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1412 n.13 (9th Cir. 1995). Denial of costs is also reviewed for an abuse of discretion. See Stanley v. University of S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999); Lockheed Missiles, 171 F.3d at 1213; Crowe v. Witel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996); Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 806 (9th Cir. 1995). 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), cert. denied, ___ U.S. ___, 119 S. Ct. 75 (1998).

6. Damages

The district court's award of damages is reviewed for an abuse of discretion. See 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 Television v. Krypton Broad., 106 F.3d 284, 296 (9th Cir. 1997) (court has wide discretion in determining statutory damages under the Copyright Act), rev'd on other grounds, 523 U.S. 340 (1998); 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. 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 Marsu v. Walt Disney Co., ___ F.3d ___, No. 97-56547 (9th Cir. July 18, 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); see also Fireman's Fund Ins. Cos. v. Big Blue Fisheries, Inc., 143 F.3d 1172, 1177 (9th Cir. 1998) (admiralty court).

This court reviews de novo the district court's legal conclusion that damages are available. 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. 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; R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991); 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 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, ___ U.S. ___, 119 S. Ct. 1624 (1999); Los Angeles Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1360 (9th Cir. 1986). But in antitrust cases, the plaintiff need only provide sufficient evidence to permit a just and reasonable estimate of the damages. Los Angeles Mem'l Coliseum, 791 F.2d at 1360. 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. 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”), cert. denied, ___ U.S. ___, 119 S. Ct. 1032 (1999); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1032 (1999); 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 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 Browning-Ferris 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). But see 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).

Whether the district court's award of punitive damages is an unreasonable amount is reviewed for an abuse of discretion. EEOC v. Farmer Bros. Co., 31 F.3d 891, 903 (9th Cir. 1994); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 455-57 (1993) (identifying factors for trial court to consider).

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). 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, ___ U.S. ___, 119 S. Ct. 1624 (1999).

7. Equitable Orders

A trial court's equitable order is reviewed for an abuse of discretion. United States v. Washington, 157 F.3d 630, 642 (9th Cir. 1998). 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).

8. 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).

9. Default

An entry of default under Federal Rule of Civil Procedure 55(a) may be set aside "[f]or good cause shown." Fed. R. Civ. P. 55(c). A motion to set aside an entry of default is reviewed for an abuse of discretion. O'Connor v. Nevada, 27 F.3d 357, 364 (9th Cir. 1994). The trial court's discretion, however, is "especially broad where . . . it is entry of default that is being set aside, rather than a default judgment." Id. 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.

If judgment by default has been entered against a party under Rule 55(b), the judgment may be set aside for "mistake, inadvertence, surprise, or excusable neglect, or fraud, misrepresentation or other misconduct of an adverse party." Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988) (internal quotation omitted); see Fed. R. Civ. P. 55(c) (incorporating Rule 60(b) standards); Al-Torki v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996). This court reviews a trial court's decision to grant or deny a Rule 60(b) motion to reopen a default judgment for an abuse of discretion. See 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 trial court's decision to set aside a default judgment is reviewed for "a clear showing of abuse of discretion." Price v. Seydel, 961 F.2d 1470, 1473 (9th Cir. 1992). Denial of a motion to set aside a default judgment is also reviewed for a clear showing of abuse of discretion. United States v. Real Property, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture). A decision to impose a default judgment as a sanction is reviewed for an abuse of discretion. Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997).

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).

10. Interest

An award of prejudgment interest is reviewed for an abuse of discretion. 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 Acequia, 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 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. 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 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).

11. 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. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1333 (1999); Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998); Omega Env'tl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997), cert. denied, ___ U.S. ___, 119 S. Ct. 46 (1998); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998); 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); Acosta v. City & County of San Francisco, 83 F.3d 1143, 1145 (9th Cir. 1996). The reviewing court's role is the same as that of the district court. 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 Gilbrook v. City of Westminster, 177 F.3d 839, 864 (9th Cir. 1999); Huffman, 147 F.3d at 1057; Omega Env'tl., 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; Acosta, 83 F.3d at 1145. When a party fails to move for judgment as a matter of law pursuant to Rule 50(a), its challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See Image Tech. Servs., 125 F.3d at 1212. Reversal under the plain error standard is proper only if "there is an absolute absence of evidence to support the jury's verdict." Id. (internal quotation omitted). The failure to file a timely Rule 50(b) motion precludes review of the sufficiency of the evidence. See Saman v. Robbins, 173 F.3d 1150, 1154 (9th Cir. 1999).

12. **Judgments (Granting, Amending, Vacating)**

In reviewing a judgment entered pursuant to Rule 52(c) following a bench trial, this court reviews the district court's findings of fact for clear error and its legal conclusions de novo. Price v. United States Navy, 39 F.3d 1011, 1019 (9th Cir. 1994); see also Howard v. United States, 181 F.3d 1064, 1066 (9th Cir. 1999) (factual findings after a bench trial are reviewed for clear error).

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 some abuse an

discretion. See 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. 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.) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 3 (1998).

A decision regarding a motion to vacate a judgment pursuant to Rule 60(b) is reviewable for a clear showing of abuse of discretion. See Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1336 (1999); 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. 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).

A decision on a motion to amend the judgment is reviewable for abuse of discretion. See Kingvision Pay-Per-View, 168 F.3d at 350; Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1331 (9th Cir. 1995).

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. Aaronian, 93 F.3d at 639; 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 also a question of law reviewed de novo. \$277,000, 69 F.3d at 1493; Export Group, 54 F.3d at 1469; Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994).

13. Mandates

Courts of Appeals have an 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, ___, 118 S. Ct. 1489, 1498 (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, 118 S. Ct. 1489 (1998).

14. Motions for Reconsideration

The district court's denial of a motion for reconsideration is reviewed for an abuse of discretion. See 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); Sheet Metal Workers' Int'l Ass'n Local Union, No. 359 v. Madison Indus., Inc., 84 F.3d 1186, 1192 (9th Cir. 1996); see also In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998) (bankruptcy court); Lucky Stores, Inc. v. Commissioner, 153 F.3d 964, 967 (9th Cir. 1998) (tax court), cert. denied, ___ U.S. ___, 119 S. Ct. 1755 (1999). A denial of a motion for reconsideration under Rule 59(e) is construed as one denying relief under Rule 60(b) and will not be reversed absent an abuse of discretion. Pasatiempo v. Aizawa, 103 F.3d 796, 801 (9th Cir. 1996); Foster v. Skinner, 70 F.3d 1084, 1087 (9th Cir. 1995); Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994); 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. Novato Fire Protection Dist. v. United States, ___ F.3d ___, No. 98-15441 (9th Cir. July 7, 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); Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 912 (9th Cir. 1995); Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995).

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 Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998).

15. Motions to Reopen or Supplement Record

A decision on a motion to reopen or to supplement the trial record is reviewed for an abuse of discretion. See In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998) (bankruptcy court); 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); 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).

16. New Trials

A district court's ruling on a motion for new trial pursuant to Federal Rule of Civil Procedure 59 is reviewed for an abuse of discretion. See Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1285 (1999); EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997); Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1055 (9th Cir. 1997); Sheet Metal Workers' Int'l Ass'n Local Union, No. 359 v. Madison Indus., Inc.,

84 F.3d 1186, 1192 (9th Cir. 1996); see also In re Jess, 169 F.3d 1204, 1209 (9th Cir. 1999) (bankruptcy court). 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998); see also Saman v. Robbins, 173 F.3d 1150, 1154 n.4 (9th Cir. 1999) (noting “great deference” is owed when denial is based on sufficiency of evidence).

A conditional grant of a new trial made pursuant to Federal Rule of Civil Procedure 50(c)(1) is also reviewed for an abuse of discretion. Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1248 (9th Cir.) (noting that although standard is abuse of discretion, "a stringent standard applies when the motion is based on insufficiency of the evidence"), cert. denied, ___ U.S. ___, 119 S. Ct. 338 (1998).

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).

17. **Permanent Injunctions**

A district court's ability 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1140 (1999); California v. Campbell, 138 F.3d 772, 776 (9th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 64 (1998). Thus, whether a district court possesses the authority or power to issue an injunction is a question of law reviewed de novo. 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). The district court's decision whether to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 708-09 (9th Cir. 1999); 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. 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 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; Quackenbush, 121 F.3d at 1377.

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 the district court's grant or denial of a renewed motion for judgment as a matter of law de novo. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1333 (1999); 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), cert. denied, ___ U.S. ___, 119 S. Ct. 46 (1998); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1560 (1998); 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); Acosta v. City & County of San Francisco, 83 F.3d 1143, 1145 (9th Cir. 1996). The reviewing court's role is the same as that of the district court. 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 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; Acosta, 83 F.3d at 1145. When a party fails to move for judgment as a matter of law pursuant to Rule 50(a), its challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See Image Tech. Servs., 125 F.3d at 1212. Reversal under the plain error standard is proper only if "there is an absolute absence of evidence to support the jury's verdict." Id. (internal quotation omitted). The failure to file a timely Rule 50(b) motion precludes review of the sufficiency of the evidence. See Saman v. Robbins, 173 F.3d 1150, 1154 (9th Cir. 1999). The district court's determination that a party has procedurally defaulted their sufficiency-of-the-evidence contention is reviewed for an abuse of discretion. See Gilbrook, 177 F.3d at 864.

19. 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); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1197 (9th Cir. 1999); 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); In re Keegan Management Co. Sec. Litig., 78 F.3d 431, 433 (9th Cir. 1996). 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. Weissman, 179 F.3d at 1198; Security Farms, 124 F.3d at 1016; Terran, 109 F.3d at 1434; Mark Indus. Ltd. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995); see also Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 n.1 (9th Cir. 1995).

"This Circuit has not squarely decided the question of what standard of review should govern appeals from decisions imposing sanctions for attorney conduct found to violate local rules." United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (comparing de novo standard from United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993), with abuse of discretion standard from Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994), and Guam Sasaki

Corp. v. Diana's, Inc., 881 F.2d 713, 715 (9th Cir. 1989)); but see Big Bear Lodging Assoc. v. Snow Summit, Inc., ___ F.3d ___, No. 97-56042 (9th Cir. July 8, 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); DeLange v. Dutra Const. Co., ___ F.3d ___, No. 96-17270 (9th Cir. June 11, 1999) (noting that district courts have "broad discretion in interpreting and applying their local rules"). Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. See, e.g., 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); see Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1197 (9th Cir. 1999); Toumajian v. Frailey, 135 F.3d 648, 652 (9th Cir. 1998); Primus Automotive Fin. Serv., 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); see also Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) (dismissal for "judge-shopping").

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 Salstrom v. Citicorp Credit Servs., Inc., 74 F.3d 183, 184 (9th Cir. 1996); Air Separation, 45 F.3d at 291; 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 pursuant to § 1927 is reviewed for an abuse of discretion. See Barbara v. Miller, 146 F.3d 707, 709 (9th Cir. 1998).

The district court's decision whether to award fees and costs pursuant to Federal Rule of Civil Procedure 37(c) is reviewed for an abuse of discretion. 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. 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1455 (1999).

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).

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).

20. 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 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), cert. denied, ___ U.S. ___, 118 S. Ct. 1299 (1998). 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. Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987).

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). 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). This court's review of the district court's decision to approve a class action settlement is for an abuse of discretion. Id. at 1375 (noting factors); see also Linney v. Cellular Alaska Partnership, 151 F.3d 1234, 1238 (9th Cir. 1998) (describing "very limited" standard of review).

21. **Supersedeas Bonds**

"This court reviews supersedeas bond orders for abuse of discretion." 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.").

22. **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.

23. **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. 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).

24. **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. 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).

E. Administrative Decisions

1. Arbitrary and Capricious

Pursuant to the Administrative Procedures Act, 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); Aluminum Co. of Amer. v. Administration, 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); In re Transcon Lines, 89 F.3d 559, 563 (9th Cir. 1996); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1401 (9th Cir. 1995); Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517, 1521 (9th Cir. 1995). The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376 (1989). Purely legal questions are reviewed de novo. Wagner v. National Transp. Safety Bd., 86 F.3d 928, 930 (9th Cir. 1996); but see Friend v. Reno, 172 F.3d 638, 641 (9th Cir. 1999) (noting that when a statute is silent or ambiguous, the court will defer to the agency's interpretation unless it is arbitrary or capricious).

Review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency. Marsh, 490 U.S. at 378; Aluminum Co. of Amer. 175 F.3d at 1160; Washington v. Daley, 173 F.3d 1158, 1169 (9th Cir. 1999); O'Keeffe's v. United States Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996); Transcon Lines, 89 F.3d at 563; Dioxin/Organochlorine Ctr., 57 F.3d at 1521. The agency, however, must articulate a rational connection between

the facts found and the conclusions made. See 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); Transcon Lines, 89 F.3d at 563. 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; Washington, 173 F.3d at 1170; Gilbert v. National Transp. Safety Bd., 80 F.3d 364, 368 (9th Cir. 1996); Clouser v. Espy, 42 F.3d 1522, 1537 (9th Cir. 1994). The inquiry, though narrow, must be searching and careful. Marsh, 490 U.S. at 378; Clouser, 42 F.3d at 1537. 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 Alvarado Community Hosp. v. Shalala, 155 F.3d 1115, 1122 (9th Cir. 1998), amended by 166 F.3d 950 (9th Cir. 1999); O'Keeffe's, 92 F.3d at 942; Transcon Lines, 89 F.3d at 563-64; Dioxin/Organochlorine Ctr., 57 F.3d at 1521. 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, ___ U.S. ___, 119 S. Ct. 1816, 1818-20 (1999) (rejecting “clearly erroneous” review and reaffirming that standard of review an agency’s findings is substantial evidence); 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); William G. Tadlock Constr. v. United States Dep't of Defense, 91 F.3d 1335, 1338 (9th Cir. 1996); In re Transcon Lines, 89 F.3d 559, 564 (9th Cir. 1996); Hawaii Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 215 (9th Cir. 1995); Paredes-Urrestarazu v. INS, 36 F.3d 801, 807 (9th Cir. 1994). 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. 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); Baria v. Reno, 94 F.3d 1335, 1340 (9th Cir. 1996); Transcon Lines, 89 F.3d at 564; Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). 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); Orteza v. Shalala, 50 F.3d 748, 749 (9th Cir. 1995); see also Alderman, 104 F.3d at 288 ("we weigh pros and cons in the whole record with a deferential eye"). 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. 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, 843 n.9 (1984); 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) (noting that otherwise, deference is owed); Santamaria-Ames v. INS, 104 F.3d 1127, 1132 n.7 (9th Cir. 1997); Trustees of Cal. State Univ. v. Riley, 74 F.3d 960, 963 (9th Cir. 1996); Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517, 1525 (9th Cir. 1995). When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. Chevron, 467 U.S. at 843; see Friend, 172 F.3d at 641; Foothill, 152 F.3d at 1134; Partridge, 141 F.3d at 923; Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 354 (9th Cir. 1996). 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); Dioxin/Organochlorine Ctr., 57 F.3d at 1525. "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).

A federal agency's interpretation of a statutory provision it is charged with administering is entitled to deference. See 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). A state agency's interpretation of a federal statute is, however, reviewed de novo. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997).

4. **Regulatory Interpretations**

This court defers to an agency's interpretation of its own regulations. 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); Providence Hosp. v. Shalala, 52 F.3d 213, 216 (9th Cir. 1995); Citizens for Clean Air v. EPA, 959 F.2d 839, 844 (9th Cir. 1992). 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. In re Transcon Lines, 89 F.3d 559, 567 (9th Cir. 1996); Providence Hosp., 52 F.3d at 216; see also 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.). 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).

An agency's actions are not entitled to deference, however, where they do not directly involve the interpretation of a statute or regulation. Racine v. United States, 858 F.2d 506, 508 (9th Cir. 1988) (interpretation of contract provisions). Courts do not give deference to interpretations by agency appellate counsel where the agency has not established a position. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1542 n.20 (9th Cir. 1993). An administrative agency is not disqualified from changing its interpretation of a statute, and when it does, "the courts still sit In review of the administrative decision and should not approach the statutory construction . . . without regard to the administrative understanding of the statutes." Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (internal quotation omitted). 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).

5. **Constitutional Review**

A court may refuse to defer to an agency's interpretation of a statute that raises serious constitutional concerns. See 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. **Specific Agency Review**

a. **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 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." Northwest Env'tl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1530 (9th Cir. 1997).

b. **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. 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).

c. **Environmental Protection Agency**

Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act. Western States Petroleum Ass'n v. EPA, 87 F.3d 280, 283 (9th Cir. 1996). 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. 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. Western States, 87 F.3d at 283; Ober, 84 F.3d at 307.

d. **Federal Communications Commission**

FCC decisions may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 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.

e. **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. 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. 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. 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).

f. **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, ___ U.S. ___, 119 S. Ct. 1604 (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).

g. **Immigration and Naturalization Service**

i. **IIRIRA/AEDPA**

The availability of judicial review of the BIA's deportation and exclusion orders has been 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 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). Recent cases have not applied IIRIRA, however, because they concern immigration proceedings that commenced prior to April 1, 1997, the effective date of the Act. See, e.g., Duarte de Guinac v. INS, 179 F.3d 1156, 1158

n.2 (9th Cir. 1999); Romani v. INS, 146 F.3d 737, 738 n.1 (9th Cir. 1998). Note, however, that provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), as amended by IIRIRA, do apply retroactively to pending deportation hearings, and bar judicial review of final deportation orders against aliens convicted of certain crimes. See Sarmadi v. INS, 121 F.3d 1319, 1320-21 (9th Cir. 1997); Perez v. INS, 116 F.3d 405, 407-08 (9th Cir. 1997). Although direct review is precluded, this court has held that “serious constitutional questions” would arise if courts were barred from reviewing “colorable constitutional claims.” See Chavez-Murillo v. INS, 181 F.3d 997, 1000-02 (9th Cir. 1999) (reviewing removal order for compliance with due process, equal protection, double jeopardy, and ex post facto law).

“IIRIRA unified judicial review procedures applicable to final orders of deportation and exclusion.” Hose v. INS, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). The Act repealed 8 U.S.C. § 1105a(b), that had provided for review of final exclusion orders by writ of habeas corpus in the district court. See id. IIRIRA’s transitional rules now vest jurisdiction in the court’s of appeal for review of final orders of deportation and exclusion. Id. Note that there is currently a split in the circuits whether habeas relief is still available after IIRIRA. See Reno v. American-Arab Anti-Discrimination Committee, ___ U.S. ___, 119 S. Ct. 936, 942 & n.7 (1999) (noting that Ninth Circuit had ruled in Hose v. INS, 141 F.3d 932, 935 (9th Cir.), withdrawn by 161 F.3d 1225 (9th Cir. 1998), that habeas was not available after IIRIRA).

ii. Pre-IIRIRA/AEDPA

This court reviews de novo the BIA's determination of purely legal questions regarding the requirements of the Immigration and Nationality Act. Ratnam v. INS, 154 F.3d 990, 994 (9th Cir. 1998); Vang v. INS, 146 F.3d 1114, 1116 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1309 (9th Cir. 1998); Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997); Arrieta v. INS, 117 F.3d 429, 430 (9th Cir. 1997); Singh v. INS, 94 F.3d 1353, 1358 (9th Cir. 1996); Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc); Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995). Thus, the BIA's interpretation of a statute is reviewed de novo. LaFarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999); Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996); Tang v. Reno, 77 F.3d 1194, 1196 (9th Cir. 1996).

The BIA's interpretation and application of the immigration laws are nevertheless entitled to deference. Coronado-Durazo, 123 F.3d at 1325; Fisher, 79 F.3d at 961; Ghaly, 58 F.3d at 1429; Mendoza v. INS, 16 F.3d 335, 337 (9th Cir. 1994). 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. Coronado-Durazo v. INS, 123 F.3d 1322, 1324 (9th Cir. 1997); Bui v. INS, 76 F.3d 268, 269-70 (9th Cir. 1996); Navarro-Aispura v. INS, 53 F.3d 233, 235 (9th Cir. 1995). 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 must review the IJ's decision. 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 Vongsakdy v. INS, 171 F.3d 1203, 1206 (9th Cir. 1999); Garrovillas v. INS, 156 F.3d 1010, 1013 (9th Cir. 1998); Perez v. INS; 96 F.3d 390, 392 (9th Cir. 1996). 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. 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. Ratnam, 154 F.3d at 994; Velarde, 140 F.3d at 1309. 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 Andriasian v. INS, 180 F.3d 1033, 1040 (9th Cir. 1999); Meza-Manay v. INS, 139 F.3d 759, 762 (9th Cir. 1998).

Claims of due process violations in deportation proceedings are reviewed de novo. Andriasian, 180 F.3d at 1040; Sharma, 89 F.3d at 547; Carr v. INS, 86 F.3d 949, 951 (9th Cir. 1996); Burgos-Abril v. INS, 58 F.3d 475, 476 (9th Cir. 1995).

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 order denying adjustment of status is reviewed for abuse of discretion. Rashtabadi v. INS, 23 F.3d 1562, 1566 (9th Cir. 1994).

The BIA's decision that an alien has not established eligibility for asylum is reviewed under the substantial evidence standard. 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). Thus, the BIA's determination that an alien is not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence in the record. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); 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). Review is limited to the administrative record. Velarde, 140 F.3d at 1309; Aruta v. INS, 80 F.3d 1389, 1393 (9th Cir. 1996).

Factual findings, including whether the alien has proved a well-founded fear of persecution, are reviewed for substantial evidence. 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). Under this standard, a court must review "the findings by a slightly stricter scrutiny than the clear error standard." Aruta, 80 F.3d at 1393; see also Prasad, 47 F.3d at 338-39 (noting that Elias-Zacarias did not change standard of review). The BIA's determination should be reversed only if the evidence presented by the alien was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed. Elias-Zacarias, 502 U.S. at 481; Aruta, 80 F.3d at 1393; Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc). The meaning of the term "persecution" is a legal question reviewed de novo. Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).

Once an alien is determined to be statutorily eligible for asylum, the BIA's discretionary decision to grant or deny asylum is reviewed for an abuse of discretion.

Andriasian, 180 F.3d at 1040; Stoyanov v. INS, 149 F.3d 1226, 1227 (9th Cir. 1998); Lopez-Galarza v. INS, 99 F.3d 954, 960 (9th Cir. 1996); Surita v. INS, 95 F.3d 814, 818 (9th Cir. 1996); Rodriguez-Matamoros v. INS, 86 F.3d 158, 160 (9th Cir. 1996). The BIA abuses its discretion if its decision is "arbitrary, irrational, or contrary to law." Lopez-Galarza, 99 F.3d at 960 (internal quotation omitted). The BIA's exercise of discretion must be "within the constraints of law." Singh v. INS, 94 F.3d 1353, 1358 (9th Cir. 1996).

The BIA's decision whether to withhold deportation is reviewed for substantial evidence. 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). Factual findings by the Board are "conclusive" if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." Singh v. Ilchert, 63 F.3d 1501, 1506 n.1 (9th Cir. 1995); Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994) (quoting 8 U.S.C. § 1105a(a)(4)). 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. 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. Aguirre-Aguirre v. INS, 121 F.3d 521, 523 (9th Cir. 1997), rev'd on other grounds, ___ U.S. ___, 119 S. Ct. 1439 (1999).

A discretionary decision not to order deportation is reviewed for an abuse of discretion. See Stoyanov v. INS, 149 F.3d 1226 (9th Cir. 1998) (withholding of deportation); 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) (same); Perez v. INS, 96 F.3d 390, 391 (9th Cir. 1996) (same); Casem v. INS, 8 F.3d 700, 702 (9th Cir. 1993) (waiver of deportation). That standard requires the BIA to take into account all relevant factors without acting in an arbitrary, illegal, or irrational fashion. Casem, 8 F.3d at 702.

A finding that an alien is statutorily ineligible for voluntary departure is reviewed for substantial evidence. See Bernal v. INS, 154 F.3d 1020, 1022 (9th Cir. 1998).

Review of the BIA's discretionary denial of voluntary departure is for an abuse of discretion. Cheo v. INS, 162 F.3d 1227, 1230 (9th Cir. 1998) (noting that review may be abuse of discretion or arbitrary and capricious); Rashtabadi v. INS, 23 F.3d 1562, 1566 (9th Cir. 1994) (abuse of discretion); see also Lafarga v. INS, 170 F.3d 1213, 1216 (9th Cir. 1999) (reviewing post-IIRIRA denial of voluntary departure for abuse of discretion); but see Antonio-Cruz v. INS, 147 F.3d 1129, 1130 (9th Cir. 1998) (court lacks jurisdiction under IIRIRA to review discretionary denial of voluntary departure).

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. 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); 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); Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996); Caruncho v. INS, 68 F.3d 356, 360 (9th Cir. 1995); Delmundo v. INS, 43 F.3d 436, 439 (9th Cir. 1994). 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. Gutierrez-Centeno, 99 F.3d at 1531; see also Arrozal, 159 F.3d at 432-33 (discussing abuse of discretion standard).

This court reviews for an abuse of discretion the agency'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. 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 court reviews the agency's adjudication of the facts on an application for Special Agricultural Workers (SAW) status for an abuse of discretion. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991). Constitutional or statutory claims are reviewed de novo. Id. at 494.

This circuit has not clearly articulated the proper standard for reviewing the BIA's summary dismissals. Castillo-Manzanarez v. INS, 65 F.3d 793, 794 (9th Cir. 1995). The BIA's summary dismissals should probably be reviewed under an abuse of discretion standard. See Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994) (noting that Ninth Circuit has previously reviewed such dismissal for "appropriateness" but that other circuits apply abuse of discretion standard), overruled on other grounds by Stone v. INS, 514 U.S. 386 (1995).

Review of the BIA's denial of registry relief depends on the basis for the denial. Manzo-Fontes v. INS, 53 F.3d 280, 282 (9th Cir. 1995). Where the agency's denial of the alien's application for registry under § 249 is based on the agency's conclusion that the alien is statutorily ineligible, the court reviews to ensure that it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. Id.

h. 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. 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. Duhagon, 169 F.3d at 618; Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1275 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 866 (1999); Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683, 687 (9th Cir. 1997); Sproull, 86 F.3d at 898.

No special deference, however, is owed to the Board's interpretation of the Act. See 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), cert. denied, ___ U.S. ___, 119 S. Ct. 1454 (1999); 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 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 Alcalá, 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; Mallot & 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.

i. **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).

j. **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. 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. 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. 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, ___, 118 S. Ct. 818, 823 (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 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, 118 S. Ct. at 822 (noting that deference is owed if Board's "explication is not inadequate, irrational or arbitrary"); 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).

k. National Transportation Safety Board (NTSB)

Review of an order of the NTSB is "narrowly circumscribed." Olsen v. National Transp. Safety Bd., 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. Gilbert v. National Transp. Safety Bd., 80 F.3d 364, 368 (9th Cir. 1996); Borregard v. National Transp. Safety Bd., 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).

1. **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). "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, we must defer to the Secretary's reasonable interpretation. Id.

m. **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).

n. **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.

o. **Securities Exchange Commission**

The Securities Exchange Commission's factual findings are reviewed for substantial evidence. 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." Id. This court reviews the SEC's affirmance of sanctions for an abuse of discretion. Id.; 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), cert. denied, ___ U.S. ___, 119 S. Ct. 902 (1999); SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998).

p. **Social Security Administration**

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. 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); Andrews v. Shalala, 53 F.3d 1035, 1039 n.1 (9th Cir. 1995); Travers v. Shalala, 20 F.3d 993, 995-96 (9th Cir. 1994). The scope of appellate review, however, is limited: the decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. 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; Flaten v. Secretary, 44 F.3d 1453, 1457 (9th Cir. 1995). 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. 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; Saelee, 94 F.3d at 522. 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; Flaten, 44 F.3d at 1457; Travers, 20 F.3d at 996.

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. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at 720; Flaten, 44 F.3d at 1457. The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. Reddick, 157 F.3d at 720; Andrews, 53 F.3d at 1039. 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 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.