

I. DEFINITIONS

A. Generally

“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). The proper standard of review is a question of federal procedure and is therefore governed by federal law. [*Freund v. Nycomed Amersham*, 347 F.3d 752, 762 \(9th Cir. 2003\)](#).

“[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion).” See [*Harman v. Apfel*, 211 F.3d 1172, 1174 \(9th Cir. 2000\)](#). The selection of the appropriate standard of review is contextual. See [*United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 \(9th Cir. 2000\)](#). For example, the de novo standard applies when issues of law predominate in the district court’s decision. *Id.* When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. See *id.*; see also [*Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1180 n.27 \(9th Cir. 2003\)](#) (noting court would apply different standards of review depending on the district court’s intention); [*Navellier v. Sletten*, 262 F.3d 923, 944 \(9th Cir. 2001\)](#) (noting the “standard of review on appeal . . . depends on the nature of the claimed error.”)

The standard of review may be critical to the outcome of the case. See [*Dickinson v. Zurko*, 527 U.S. 150, 152-61 \(1999\)](#) (“The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used.”); [*Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 917 \(9th Cir. 2003\) \(en banc\)](#) (noting “standard of review is important to our resolution of this case”); [*Krull v. SEC*, 248 F.3d 907, 914 \(9th Cir. 2001\)](#) (noting deferential standard of review “constrains us, even if we might decide otherwise were it left to our independent judgment”); [*Payne v. Borg*, 982 F.2d 335, 338 \(9th Cir. 1992\)](#) (“The relevant standards of review are critical to the outcome of this case.”); [*Walsh v. Centeio*, 692 F.2d 1239, 1241 \(9th Cir. 1982\)](#) (“[T]he outcome of the instant case turns on the standard of review . . .”).

In some cases, the court has elected not to decide which standard of review is applicable on the ground that the outcome would not be changed by applying different standards of review. *See, e.g., United States v. Pimentel-Flores*, 339 F.3d 959, 967 n.10 (9th Cir. 2003); *Schikore v. Bankamerica Supplemental Retirement Plan*, 269 F.3d 956, 961 (9th Cir. 2001); *Boeing Co. v. United States*, 258 F.3d 958, 963 (9th Cir. 2001); *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).

For further reading on standards of review generally, *see* Steven Alan Childress & Martha S. Davis, *1 Federal Standards of Review* § 1.01 (2d ed. 1992); Steven Alan Childress, *Primer on Standards of Review in Federal Civil Appeals*, 161 F.R.D. 123, 126 (1995).

B. De Novo

De novo review means that this court views the case from the same position as the district court. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). The appellate court must consider the matter anew, as if no decision previously had been rendered. *See Ness v. Commissioner*, 954 F.2d 1495, 1497 (9th Cir. 1992). Review is “independent,” *see Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002), or “plenary,” *see United States v. Waites*, 198 F.3d 1123, 1126 (9th Cir. 2000). No deference is given to the district court. *See Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) (“When de novo review is compelled, no form of appellate deference is acceptable.”).

1. Questions of Law Reviewed De Novo

- Mootness, Ripeness, Standing. *See Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).
- Statutory Interpretation. *See Beeman v. TDI Managed Care Svcs.*, 449 F.3d 1035, 1038 (9th Cir. 2006).
- Contract Interpretation. *See Milenbach v. Commissioner*, 318 F.3d 924, 930 (9th Cir. 2003).
- Constitutionality of Statute. *See United States v. Carranza*, 289 F.3d 634, 643 (9th Cir. 2002).
- Interpretation of federal rules. *See United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1159 n.4 (9th Cir. 2004) (FRCP).

- Judicial Estoppel. See [Tritchler v. County of Lake, 358 F.3d 1150, 1154 \(9th Cir. 2004\)](#).

2. Mixed Questions of Law and Fact

A mixed question of law and fact arises when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. See [Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 \(1982\)](#); see also [Suzy's Zoo v. Commissioner, 273 F.3d 875, 878](#) (stating that a mixed question “exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute”). Mixed questions of law and fact generally require the consideration of legal concepts and the exercise of judgment about the values that animate legal principles. See [Smith v. Commissioner, 300 F.3d 1023, 1028 \(9th Cir. 2002\)](#). Mixed questions of law and fact are generally reviewed de novo. See [Mathews v. Chevron Corp., 362 F.3d 1172, 1180 \(9th Cir. 2004\)](#). Examples include:

- Whether ERISA fiduciary duties breached. See [Mathews, 362 F.3d at 1180](#).
- Whether marital privilege waived. See [Feldman v. Allstate Ins. Co., 322 F.3d 660, 665 \(9th Cir. 2003\)](#).
- Whether taxpayer is a “producer.” See [Suzy's Zoo, 273 F.3d at 878](#).
- Whether suspect is in custody. See [United States v. Female Juvenile \(Wendy G.\), 255 F.3d 761, 765 \(9th Cir. 2001\)](#).
- Whether right to counsel waived. See [United States v. Percy, 250 F.3d 720, 725 \(9th Cir. 2001\)](#).
- Whether reasonable suspicion exists. See [United States v. Jimenez-Medina, 173 F.3d 752, 754 \(9th Cir. 1999\)](#).

If, however, the application of the law to the facts requires an inquiry that is “essentially factual,” review is for clear error. See [Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1088 \(9th Cir. 2002\)](#); see also [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). For example:

- Whether proximate cause shown. See [Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency](#), 216 F.3d 764, 783 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).
- Whether established facts constitute negligence. See [Sacks v. Commissioner](#), 82 F.3d 918, 920 (9th Cir. 1996).
- Whether individual is “disabled” for purposes of ERISA plan. See [Deegan v. Continental Cas. Co.](#), 167 F.3d 502, 506 (9th Cir. 1999).

C. Clearly Erroneous

A district court’s findings of fact are reviewed under the clearly erroneous standard. See [Fed. R. Civ. P. 52\(a\)](#); [United States v. Cazares](#), 121 F.3d 1241, 1245 (9th Cir. 1997) (standard applied in both civil and criminal proceedings). “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). Special deference is paid to a trial court’s credibility findings. See [Anderson v. City of Bessemer](#), 470 U.S. 564, 573 (1985); [McClure v. Thompson](#), 323 F.3d 1233, 1241 (9th Cir. 2003).

Review under the clearly erroneous standard is significantly deferential, requiring a “definite and firm conviction that a mistake has been committed.” See [Easley v. Cromartie](#), 532 U.S. 234, 242 (2001); [Lentini v. California Center for the Arts, Escondido](#), 370 F.3d 837, 843 (9th Cir. 2004). If the district court’s account of the evidence is plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently. See [Husain v. Olympic Airways](#), 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” [United States v. Elliott](#), 322 F.3d 710, 714 (9th Cir. 2003); see also [Hayes v. Woodford](#), 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation omitted) (“To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish.”)

The court of appeals reviews for clear error where:

- District court adopts proposed findings submitted by parties. See [*Anderson v. Bessemer City*, 470 U.S. 564, 571-73 \(1985\)](#); see also [*Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 \(9th Cir. 2000\)](#) (noting while review is for clear error, the reviewing court will review with “particularly close scrutiny” when findings are adopted).
- Findings of fact are based on stipulations. See [*Smith v. Commissioner*, 300 F.3d 1023, 1028 \(9th Cir. 2002\)](#).
- Findings of fact are based solely on written record. See [*Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 \(9th Cir. 2001\)](#).
- Findings of fact follow a bench trial. See [*Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 \(9th Cir. 2003\)](#); see also [*Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 384 \(9th Cir. 1994\)](#) (“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.”).

D. Abuse of Discretion

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.” [*Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 \(9th Cir. 2003\)](#). Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. See [*SEC v. Coldicutt*, 258 F.3d 939, 941 \(9th Cir. 2001\)](#); [*Harman v. Apfel*, 211 F.3d 1172, 1174 \(9th Cir. 2000\)](#) (noting reversal under abuse of discretion standard is possible only “when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances”). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. See [*Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 \(1990\)](#); [*Grant v. City of Long Beach*, 315 F.3d 1081, 1091 \(9th Cir. 2002\)](#), [*amended by* 334 F.3d 795 \(9th Cir. 2003\)](#).

A district court abuses its discretion when:

- District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See* [Casey v. Albertson's Inc.](#), 362 F.3d 1254, 1257 (9th Cir. 2004).
- District court rules in an irrational manner. *See* [Chang v. United States](#), 327 F.3d 911, 925 (9th Cir. 2003).
- District court makes an error of law. *See* [Koon v. United States](#), 518 U.S. 81, 100 (1996); [United States v. Martin](#), 278 F.3d 988, 1001 (9th Cir. 2002) (applying *Koon*). Thus, the court abuses its discretion by erroneously interpreting a law, [United States v. Beltran-Gutierrez](#), 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003).
- Record contains no evidence to support district court's decision. *See* [Oregon Natural Res. Council v. Marsh](#), 52 F.3d 1485, 1492 (9th Cir. 1995).

E. Arbitrary and Capricious

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\(2\)\(A\)](#); [City of Los Angeles v. United States Dep't of Commerce](#), 307 F.3d 859, 874 (9th Cir. 2002).

Under the arbitrary and capricious standard, a reviewing court must consider whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See* [Environmental Def. Ctr., Inc. v. EPA](#), 344 F.3d 832, 858 n.36 (9th Cir. 2003). The court may reverse only when the agency has relied on impermissible factors, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence or is so implausible it could not be ascribed to a difference in view or to agency expertise. *See* [id.](#) at 428 n.46. The standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *See* [Independent Acceptance Co. v. California](#), 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotations omitted); *see also* [Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife](#),

[273 F.3d 1229, 1236 \(9th Cir. 2001\)](#) (court must determine whether the agency articulated a rational connection between the facts found and the choice made); [Price Rd. Neighborhood Ass'n v. United States Dep't of Transp.](#), [113 F.3d 1505, 1511 \(9th Cir. 1997\)](#) (court must consider whether the agency's decision is based on a reasoned evaluation of the relevant factors).

1. Deference to Agency Interpretation of Statute or Regulation

Generally, an agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to deference. See [Biodiversity Legal Found. v. Badgley](#), [309 F.3d 1166, 1175 \(9th Cir. 2002\)](#).¹

2. Instances Where No Deference Warranted

- Agency rests decision on misinterpretation of Supreme Court precedent. See [Lucas v. NLRB](#), [333 F.3d 927, 931 \(9th Cir. 2003\)](#).
- Agency had no authority to act. See [Northern Plains Res. Council v. Fidelity Exploration and Dev. Co.](#), [325 F.3d 1155](#), 1164 n.4 (9th Cir. 2003).
- "Congress has directly spoken to the precise question at issue." [Community Hosp. of Monterey Peninsula v. Thompson](#), [323 F.3d 782, 789 \(9th Cir. 2003\)](#).
- Agency is merely advancing litigation position, not an official interpretation of its regulation. [United States v. Trident Seafoods Corp.](#), [60 F.3d 556, 559 \(9th Cir. 1995\)](#).
- Agency litigating positions are wholly unsupported by regulations, rulings, or administrative practice. See [Resources Invs., Inc. v. U.S. Army Corps of Eng'rs](#), [151 F.3d 1162, 1165 \(9th Cir. 1998\)](#).
- "Radically inconsistent interpretations of a statute by an agency,

¹ See also [United States v. Mead Corp.](#), [533 U.S. 218](#), 227-31 (2001) (explaining when deference is owed); [Wilderness Society v. U.S. Fish & Wildlife Serv.](#), [353 F.3d 1051, 1059 \(9th Cir. 2003\)](#) (en banc) (explaining [Mead](#) deference), amended by [360 F.3d 1374 \(9th Cir. 2004\)](#); [Pronsolino v. Nastri](#), [291 F.3d 1123, 1131-32 \(9th Cir. 2002\)](#) (explaining levels of deference); [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.").

relied upon in good faith by the public, do not command the usual measure of deference to agency action.” [Pfaff v. United States Dep’t of Housing & Urban Dev.](#), 88 F.3d 739, 748 (9th Cir. 1996).

- State agency interprets federal statute. See [Orthopaedic Hosp. v. Belshe](#), 103 F.3d 1491, 1495 (9th Cir. 1997).

3. Instances Where Less Deference May Be Warranted

- Agency interpretation conflicts with agency’s earlier interpretation. See [Young v. Reno](#), 114 F.3d 879, 883 (9th Cir. 1997); cf. [Irvine Medical Ctr. v. Thompson](#), 275 F.3d 823, 831 n.6 (9th Cir. 2002) (noting agency is not required to establish rules of conduct that last forever); [Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala](#), 65 F.3d 1472, 1480 (9th Cir. 1995) (noting an agency “is not disqualified from changing its mind”).
- “[C]ourts 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).

F. Substantial Evidence

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. See [Richardson v. Perales](#), 402 U.S. 389, 401 (1971); [Howard ex rel. Wolff v. Barnhart](#), 341 F.3d 1006, 1011 (9th Cir. 2003). The court of appeals must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency’s decision. See [Mayes v. Massanari](#), 276 F.3d 453, 459 (9th Cir. 2001). The court 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 contrary conclusions from the evidence. See [Howard](#), 341 F.3d at 1011.²

² See also [Allentown Mack Sales & Serv., Inc. v. NLRB](#), 522 U.S. 359, 366 (1998) (noting 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”); [Edlund v. Massanari](#), 253 F.3d 1152, 1156 (9th Cir. 2001) (noting “[i]f the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the [agency]”).

1. Agency Determinations

An agency's factual findings must be upheld if supported by substantial evidence in the record. See [Dickinson v. Zurko](#), 527 U.S. 150, 152-61 (1999) (rejecting “clearly erroneous” standard and reaffirming substantial evidence standard of review for agency findings); [Bonnichsen v. United States](#), 367 F.3d 864, 979-80 (9th Cir. 2004).³

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), or not supported by specific, cogent reasons. See [Manimbao v. Ashcroft](#), 329 F.3d 655, 658 (9th Cir. 2003); [Reddick v. Chater](#), 157 F.3d 715, 722 (9th Cir. 1998); [DeLeon-Barrios v. INS](#), 116 F.3d 391, 393 (9th Cir. 1997).

2. Jury Verdicts

In a civil case, the court of appeals reviews a jury verdict to determine whether it is supported by substantial evidence. See [Hangarter v. Provident Life and Accident Ins. Co.](#), 373 F.3d 998, 1008 (9th Cir. 2004). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw a contrary conclusion from the evidence. See [Pavao v. Pagay](#), 307 F.3d 915, 918 (9th Cir. 2002). Neither the trial court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. See [Gilbrook v. City of Westminster](#), 177 F.3d 839, 856 (9th Cir. 1999); see also [Three Boys Music Corp. v. Bolton](#), 212 F.3d 477, 482 (9th Cir. 2000) (“The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.”).

In criminal cases, a jury verdict also must stand if it is supported by “substantial evidence.” See, e.g., [United States v. Hanna](#), 293 F.3d 1080, 1088 (9th Cir. 2002). Again, substantial evidence is evidence which reasonable minds might accept as adequate to support a conclusion. See [United States v. Nordbrock](#), 38 F.3d 440, 445 (9th Cir. 1994).

³ See also [Melkonian v. Ashcroft](#), 320 F.3d 1061, 1065 (9th Cir. 2003) (noting agency's factual findings must be upheld “if supported by reasonable, substantial, and probative evidence in the record”).

G. Reasonableness

An agency action raising predominantly legal rather than factual issues may be reviewed under a reasonableness standard. *See, e.g., Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2002); *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002).⁴ 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).

“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 v. FCC*, 4 F.3d 1505, 1511 (9th Cir. 1993). The court may, however, require the agency to provide a reasoned analysis. *See California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994). “Moreover, if the record reveals that the agency has failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before [it], we must find the agency in violation of the APA.” *Id.* (internal quotations omitted).

The reasonableness standard has been described both as more rigorous than the arbitrary and capricious standard, *see, e.g., Ka Makani*, 295 F.3d at 959 (describing reasonableness standard as “less deferential”), and as “not materially differ[ent] from an ‘arbitrary and capricious’ review,” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). Other decisions have observed that “[t]he rule of reason analysis and the review for an abuse of discretion are essentially the same.” *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).

The reasonableness standard of review has been applied to an agency decision not to prepare an Environmental Impact Statement, *see Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d at 959 n.3; and to the adequacy of an agency EIS, *see Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).

⁴ *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)

II. CRIMINAL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

The district court's findings of fact are reviewed for clear error. *See e.g., United States v. Kimbrew*, 406 F.3d 1149, 1151(9th Cir. 2005) (sentencing); *United States v. Bynum*, 362 F.3d 574, 578 (9th Cir. 2004) (motion to suppress); *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial).⁵ Findings of fact based on stipulations are entitled to the same deference as those based on in-court testimony. *See United States v. Bazuaye*, 240 F.3d 861, 864 (9th Cir. 2001).

The district court's legal conclusions are reviewed de novo. *See United States v. Vesikuru*, 314 F.3d 1116, 1119 (9th Cir. 2002) (motion to suppress).⁶ Thus, the district court's construction or interpretation of a statute is reviewed de novo. *See e.g., United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc) (definition of importation); *United States v. Auld*, 321 F.3d 861, 863 (9th Cir. 2003) (interpreting the Sentencing Guidelines).⁷

The district court's interpretation of the federal rules is reviewed de novo. *See e.g., United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir.

⁵ *See, e.g., United States v. Lam*, 251 F.3d 852, 855 (9th Cir.) (speedy trial), amended by 262 F.3d 1033 (9th Cir. 2001); *United States v. Benboe*, 157 F.3d 1181, 1183 (9th Cir. 1998) (possession of firearm); *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (exculpatory evidence).

⁶ *See, e.g., United States v. Enas*, 255 F.3d 662, 665 (9th Cir. 2001) (en banc) (double jeopardy); *United States v. Silva*, 247 F.3d 1051, 1054 (9th Cir. 2000) (standing); *United States v. Olafson*, 213 F.3d 435, 439 (9th Cir. 2000) (reasonable suspicion); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (joinder); *United States v. Lester*, 85 F.3d 1409, 1410 (9th Cir. 1996) (criminal forfeiture).

⁷ *See United States v. Taylor*, 322 F.3d 1209, 1211 (9th Cir. 2003) (accessory after the fact statute); *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002) (importation statute); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA).

[2004](#)) (Federal Rules of Criminal Procedure); [United States v. Bensimon](#), 172 F.3d 1121, 1125 (9th Cir. 1999) (Federal Rules of Evidence).⁸

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 evidence to support it. See [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. See [United States v. Del Muro](#), 87 F.3d 1078, 1082 (9th Cir. 1996).

2. Harmless Error

An error by a district court may be harmless. See [Neder v. United States](#), 527 U.S. 1, 8-9 (1999) (discussing when harmless error rule applies); [Coleman v. McCormick](#), 874 F.2d 1280, 1288-89 (9th Cir. 1989) (en banc). Constitutional error is harmless only when “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” [Chapman v. California](#), 386 U.S. 18, 23-24 (1967); [United States v. Walters](#), 309 F.3d 589, 593 (9th Cir. 2002), cert. denied, 540 U.S. 846 (2003). “Review for harmless 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.” [United States v. Bishop](#), 264 F.3d 919, 927 (9th Cir. 2001) (quoting [United States v. Harrison](#), 34 F.3d 886, 892 (9th Cir. 1994)); [United States v. Oaxaca](#), 233 F.3d 1154, 1158 (9th Cir. 2000) (noting “the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict”).

A non-constitutional error requires reversal unless there is a “fair assurance” of harmlessness, or stated another way, unless “it is more probable than not that the error did not materially affect the verdict.” See [United States v. Seschillie](#), 310 F.3d 1208, 1214 (9th Cir. 2002), cert. denied, 538 U.S. 953 (2003); [United States v. Morales](#), 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); [United States v. Hitt](#), 981 F.2d 422, 425 (9th Cir. 1992) (describing possible conflict between “fair assurance” and “more

⁸ See [United States v. Finley](#), 301 F.3d 1000, 1007 (9th Cir. 2002) (criminal procedure); [United States v. Angwin](#), 271 F.3d 796, 798 (9th Cir. 2001) (evidence).

probable than not” standards).⁹

In habeas review, the harmless 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 [O’Neal v. McAninch, 513 U.S. 432, 440-41 \(1995\)](#) (“if the harmless of the error is in ‘grave doubt,’ relief must be granted”); [California v. Roy, 519 U.S. 2, 4 \(1996\) \(per curiam\)](#) (rejecting Ninth Circuit’s “modification” of the *Brecht* standard); [Bains v. Cambra, 204 F.3d 964, 977 \(9th Cir. 2000\)](#) (applying *Brecht* to habeas cases under § 2254); [United States v. Montalvo, 331 F.3d 1052, 1057-58 \(9th Cir.\) \(applying Brecht to habeas cases under § 2255\), cert. denied, 541 U.S. 1011 \(2003\)](#).¹⁰

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\(b\)](#); [United States v. Olano, 507 U.S. 725, 730-36 \(1993\)](#) (defining limitations on a reviewing court’s authority to correct plain error). Under the plain error standard, relief is not warranted unless there has been: (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See [United States v. Recio, 371 F.3d 1093, 1099 \(9th Cir. 2004\)](#); ¹¹ see also [United States v. Perez, 116 F.3d 840, 845 \(9th Cir. 1997\)](#)

⁹ [United States v. Mett, 178 F.3d 1058, 1066 \(9th Cir. 1999\)](#); [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); [United States v. Hernandez, 109 F.3d 1450, 1453 \(9th Cir. 1997\)](#) (finding harmless under either “fair assurance” or “more probably than not” standard).

¹⁰ See e.g., [Evanchuk v. Stewart, 340 F.3d 933, 941 n. 3 \(9th Cir. 2003\)](#) (noting this circuit “has not always used the same language in describing the harmless error standard in habeas cases”), *cert. denied*, [124 S. Ct. 2399](#) (2004); [Gill v. Ayers, 342 F.3d 911, 921 \(9th Cir. 2003\)](#) (applying *Brecht*); [Padilla v. Terhune, 309 F.3d 614, 621 \(9th Cir. 2002\)](#) (same).

¹¹ See e.g., [United States v. Delgado, 357 F.3d 1061, 1065 \(9th Cir. 2004\)](#) (jury instructions); [United States v. De La Fuente, 353 F.3d 766, 769](#)

[\(en banc\)](#) (discussing difference between forfeited rights, which are reviewable for plain error, and waived rights, which are not). Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. See [Olano, 507 U.S. at 736 \(1993\)](#).

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. In these instances, the error is not subject to harmless error analysis and requires automatic reversal. See [Chapman v. California, 386 U.S. 18, 23 & n.8 \(1967\)](#); see also [Neder v. United States, 527 U.S. 1, 7 \(1999\)](#) (defining structural error); [United States v. Montalvo, 331 F.3d 1052, 1057 \(9th Cir.\) \(listing structural errors\) cert. denied, 541 U.S. 1011 \(2003\)](#); [United States v. Walters, 309 F.3d 589, 593 \(9th Cir. 2002\) \(same\), cert. denied, 540 U.S. 846 \(2003\)](#). Structural errors “are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible.” [Eslaminia v. White, 136 F.3d 1234, 1237 n.1 \(9th Cir. 1998\)](#) (giving examples).

B. Pretrial Decisions in Criminal Cases

1. Appointment of Expert Witness

The district court’s denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. [United States v. Labansat, 94 F.3d 527, 530 \(9th Cir. 1996\)](#). A district court’s decision whether to appoint an expert witness at court expense pursuant to [Federal Rule of Criminal Procedure 17\(b\)](#) is reviewed for an abuse of discretion. [United States v. Cruz, 783 F.2d 1470, 1473-74 \(9th Cir. 1986\)](#). A district court’s failure to

[\(9th Cir. 2003\)](#) (restitution order); [United States v. Luna-Orozco, 321 F.3d 857, 860 \(9th Cir. 2003\)](#) (plea deficiency); [United States v. Buckland, 289 F.3d 558, 568-69 \(9th Cir. 2002\) \(en banc\)](#) (Apprendi claim); [United States v. Godinez-Rabadan, 289 F.3d 630, 632 \(9th Cir. 2002\)](#) (sufficiency of indictment); [United States v. Antonakeas, 255 F.3d 714, 727 \(9th Cir. 2001\)](#) (sentencing); [United States v. Romero-Avila, 210 F.3d 1017, 1021-22 \(9th Cir. 2000\)](#) (prosecutor’s statements)

rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. See [United States v. Depew](#), 210 F.3d 1061, 1065 (9th Cir. 2000).

The district court's decision whether to admit or exclude expert testimony is also reviewed for an abuse of discretion. See [United States v. Seschillie](#), 310 F.3d 1208, 1211-12 (9th Cir. 2002), *cert. denied*, 538 U.S. 953 (2003); [United States v. Hankey](#), 203 F.3d 1160, 1167-70 (9th Cir. 2000); [United States v. Alatorre](#), 222 F.3d 1098, 1100 (9th Cir. 2000) (noting admission of expert testimony is reviewed for an abuse of discretion "except where no objection is raised, in which case we review for plain error").

2. Bail

Factual findings underlying a district court's pretrial detention order are reviewed under a deferential, "clearly erroneous" standard. [United States v. Gebro](#), 948 F.2d 1118, 1121 (9th Cir. 1991); [United States v. Townsend](#), 897 F.2d 989, 994 (9th Cir. 1990). The court's finding of potential danger to the community is entitled to deference. See [United States v. Fidler](#), 419 F.3d 1026, 1029 (9th Cir. 2005); [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. See [Fidler](#), 419 F.3d at 1029; [United States v. Donaghe](#), 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." [United States v. Fowlie](#), 24 F.3d 1070, 1072 (9th Cir. 1994). A conclusion based on factual findings in a bail hearing presents a mixed question of fact and law. The facts, findings, and record are reviewed de novo to determine whether the detention order is consistent with constitutional and statutory rights. [Townsend](#), 897 F.2d at 994.

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

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

The legal validity of the bond is also reviewed de novo. [Noriega-Sarabia, 116 F.3d at 419.](#)

See also II. Criminal Proceedings, C. Pretrial Decisions in Criminal Cases, 2. Pretrial Detention and Release.

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 \(9th Cir. 1991\).](#) 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 \(9th Cir. 1983\)](#)

4. Brady Violations

Challenges to convictions based on alleged *Brady* violations are reviewed de novo. *See* [United States v. Ross, 372 F.3d 1097, 1107 \(9th Cir. 2004\);](#) [United States v. Smith, 282 F.3d 758, 770 \(9th Cir. 2002\).](#) A district court's denial of a motion for mistrial or new trial based on an alleged *Brady* violation is also reviewed de novo. *See* [United States v. Antonakeas, 255 F.3d 714, 725 \(9th Cir. 2001\);](#) [United States v. Howell, 231 F.3d 615, 624 \(9th Cir. 2000\).](#) The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed, however, for an abuse of discretion. *See* [United States v. Patterson, 292 F.3d 615, 626 \(9th Cir. 2002\).](#)

A district court's ruling on the prosecutor's duty to produce evidence under *Brady* is reviewed de novo. [United States v. Si, 343 F.3d 1116, 1122 \(9th Cir. 2003\);](#) [United States v. Monroe, 943 F.2d 1007, 1011 \(9th Cir. 1991\).](#) The court's decision to allow production of redacted documents is reviewed for clear error. [Si, 343 F.3d at 1122.](#) Thus, the district court's ruling on whether a defendant should have access to particular information in a government document that has been produced pursuant to *Brady*, is reviewed for clear error. [Monroe, 943 F.2d at 1011.](#)

Whether a defendant has waived *Brady* rights in a plea agreement is a question of law reviewed de novo. *See* [United States v. Ruiz, 241 F.3d 1157, 1163 \(9th Cir. 2001\), rev'd on other grounds, 536 U.S. 622 \(2002\).](#)

5. Competency to Stand Trial

A district court's determination that a defendant is competent to stand trial is reviewed for clear error. See [United States v. Friedman](#), 366 F.3d 975, 980 (9th Cir. 2004); [United States v. Gastelum-Almeida](#), 298 F.3d 1167, 1171 (9th Cir. 2002). 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, and will be overturned only if they are not fairly supported by the record. [Moran v. Godinez](#), 57 F.3d 690, 696 (9th Cir. 1994).

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. Confessions

This court reviews de novo the voluntariness of a confession. See [United States v. Haswood](#), 350 F.3d 1024, 1027 (9th Cir. 2003); [Miller v. Fenton](#), 474 U.S. 104, 110 (1985).¹² The district court's factual findings underlying its determination of voluntariness are reviewed for clear error. [Haswood](#), 350 F.3d at 1027; [United States v. Gamez](#), 301 F.3d 1138, 1144 (9th Cir. 2002), *cert. denied*, 538 U.S. 1067 (2003). Special deference is owed to the trial court's credibility determinations. See [United States v. Nelson](#), 137 F.3d 1094, 1110 (9th Cir. 1998).

¹² See also [United States v. Gamez](#), 301 F.3d 1138, 1144 (9th Cir. 2002), *cert. denied*, 538 U.S. 1067 (2003) (due process test considers totality of circumstances); [Pollard v. Galaza](#), 290 F.3d 1030, 1032 (9th Cir. 2002) (habeas).

7. Confidential Informants

The decision whether to disclose the identity of a confidential informant is reviewed for an abuse of discretion. See [United States v. Henderson, 241 F.3d 638, 646 \(9th Cir. 2000\)](#); [United States v. Ramirez-Rangel, 103 F.3d 1501, 1505 \(9th Cir. 1997\)](#); [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 competing interest for “relevant and helpful testimony.” [Ramirez- Rangel, 103 F.3d at 1505](#). Nondisclosure is an abuse of discretion only if “disclosure of an informer’s identity . . . is relevant and helpful to the defense of the accused, or is essential to a fair determination of [the defendant’s] cause.” [Roviaro v. United States, 353 U.S. 53, 62 \(1957\)](#).

The decision whether to hold an in camera hearing regarding disclosure of the informant’s identity is reviewed for an abuse of discretion. See [Henderson, 241 F.3d at 646](#); [United States v. Amador-Galvan, 9 F.3d 1414, 1417 \(1993\)](#).

The district court’s refusal to give an informant credibility jury instruction is also reviewed for an abuse of discretion. See [United States v. Holmes, 229 F.3d 782, 786 \(9th Cir. 2000\)](#).

8. Consolidation of Counts

The trial court’s decision whether to consolidate counts is reviewed de novo. See [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. See [United States v. Nguyen, 88 F.3d 812, 815 \(9th Cir. 1996\)](#).

9. Continuances

A district court’s decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. See [United States v. Nguyen, 262 F.3d 998, 1002 \(9th Cir. 2001\)](#) (listing factors for appellate court to consider); [United States v. 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”). “To reverse a trial court’s denial of a continuance, an

appellant must show that the denial prejudiced [the] defense.” [United States v. Gonzalez-Rincon](#), 36 F.3d 859, 865 (9th Cir. 1994). “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. [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. See [United States v. Lewis](#), 991 F.2d 524, 528 (9th Cir. 1993); [United States v. Monaco](#), 852 F.2d 1143, 1150 (9th Cir. 1988).

10. Defenses

The district court’s decision to preclude a defendant’s proffered defense is reviewed de novo. See [United States v. Batterjee](#), 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment defense); [United States v. Ross](#), 206 F.3d 896, 898 (9th Cir. 2000) (granting motion in limine to preclude presentation of a defense).¹³ Thus, the district court’s failure to instruct on an appropriate defense theory is a question of law reviewed de novo. See [United States v. Hanousek](#), 176 F.3d 1116, 1122 (9th Cir. 1999); [United States v. McGeshick](#), 41 F.3d 419, 421 (9th Cir. 1994). Whether the court’s instructions adequately cover the defendant’s proffered defense is also reviewed de novo. See [United States v. Pierre](#), 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense). Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. See [United States v. Castellanos-Garcia](#), 270 F.3d 773, 775 (9th Cir. 2001); [United States v. Fejes](#), 232 F.3d 696, 702 (9th Cir. 2000); see also [United States v. Hairston](#), 64 F.3d 491, 493-94 (9th Cir.

¹³ See [United States v. Shryock](#), 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration/duress), *cert. denied*, 541 U.S. 965 (2004); [United States v. Arellano-Rivera](#), 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); [United States v. Ramirez-Valencia](#), 202 F.3d 1106, 1109 (9th Cir. 2000) (entrapment by estoppel); [United States v. Moreno](#), 102 F.3d 994, 997 (9th Cir. 1996) (duress).

[1995](#)) (explaining various standards of review depending on focus of inquiry). Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. See [United States v. Iverson](#), 162 F.3d 1015, 1022 (9th Cir. 1998). Finally, a determination that a defendant has the burden of proving a defense is reviewed de novo. See [United States v. Beasley](#), 346 F.3d 930, 933 (9th Cir. 2003), cert. denied, 542 U.S. 921 (2004); [United States v. McKittrick](#), 142 F.3d 1170, 1177 (9th Cir. 1998).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 42. Preclusion of Proffered Defense.

11. Discovery

A district court's discovery rulings are reviewed for an abuse of discretion. See [United States v. Shryock](#), 342 F.3d 948, 983 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004); [United States v. Chon](#), 210 F.3d 990, 994 (9th Cir. 2000); [United States v. Arenas-Ortiz](#), 339 F.3d 1066, 1069 (9th Cir.) (denying discovery on claim that prosecution violated equal protection), cert. denied, 540 U.S. 1084 (2003). 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). “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.” [United States v. de Cruz](#), 82 F.3d 856, 866 (9th Cir. 1996) (internal quotations and citation omitted).

The district court's discovery rulings under [Federal Rule of Criminal Procedure 16](#) are reviewed for an abuse of discretion. See [United States v. Danielson](#), 325 F.3d 1054, 1074 (9th Cir. 2003); [United States v. Mandel](#), 914 F.2d 1215, 1219 (9th Cir. 1990). The district court's interpretation of Rule 16, however, is reviewed de novo. See [Mandel](#), 914 F.2d at 1219 (9th Cir. 1990); [United States v. Finley](#), 301 F.3d 1000, 1007 (9th Cir. 2002). The scope of the district court's authority under Rule 16 is also reviewed de

novus. See [United States v. Hicks](#), 103 F.3d 837, 840-42 (9th Cir. 1996); [United States v. Gonzalez-Rincon](#), 36 F.3d 859, 864 (9th Cir. 1994); but see [Chon](#), 210 F.3d at 994-95 (discussing scope of Rule 16(a)(1)(c) but applying abuse of discretion standard). The court’s conclusion on Rule 16 “materiality” is reviewed, however, for an abuse of discretion. See [United States v. Santiago](#), 46 F.3d 885, 894 (9th Cir. 1995). The propriety of excluding evidence as a sanction under Rule 16 is reviewed for an abuse of discretion. See [Finley](#), 301 F.3d at 1007.

a. Depositions

Denial of a motion to depose a witness pursuant to [Federal Rule of Criminal Procedure 15](#) is reviewed for abuse of discretion. See [United States v. Olafson](#), 213 F.3d 435, 442-43 (9th Cir. 2000); [United States v. Omene](#), 143 F.3d 1167, 1170 (9th Cir. 1998).

b. Jencks Act

A district court’s denial of a discovery motion made pursuant to the Jencks Act is reviewed for an abuse of discretion. See [United States v. Alvarez](#), 358 F.3d 1194, 1210 (9th Cir. 2004); [United States v. Shryock](#), 342 F.3d 948, 983 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004); [United States v. Guagliardo](#), 278 F.3d 868, 871 (9th Cir. 2002). 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).

c. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion. See [United States v. Fernandez](#), 231 F.3d 1240, 1245 (9th Cir. 2000); [United States v. Scholl](#), 166 F.3d 964, 972 (9th Cir. 1999). Whether the district court had any legal basis for its discovery order is reviewed de novo, but if it did, then the court’s imposition of sanctions is reviewed for an abuse of

discretion. See [United States v. Fernandez](#), 231 F.3d 1240, 1245 (9th Cir. 2000); [United States v. Finley](#), 301 F.3d 1000, 1007 (9th Cir. 2002); [United States v. Jennings](#), 960 F.2d 1488, 1490 (9th Cir. 1992). The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. See [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. See [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. See *id.* To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but also that the error resulted in prejudice to substantial rights. See [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).

12. Discriminatory (Selective) Prosecution

Absent a prima facie showing 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. Nelson](#), 137 F.3d 1094, 1105 (9th Cir. 1998); [United States v. Bauer](#), 84 F.3d 1549, 1560 (9th Cir. 1996), *cert. denied*, 519 U.S. 907 (1996). "These are essentially factual determinations which [are] review[ed] for clear error." [United States v. Estrada-Plata](#), 57 F.3d 757, 760 (9th Cir. 1995); [Bauer](#), 84 F.3d at 1560 (applying clear error); [United States v. Davis](#), 36 F.3d 1424, 1432 (9th Cir. 1994) (same). Recently, however, this court noted that it has previously "employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim." [United States v. Culliton](#), 328 F.3d 1074, 1080-81 (9th Cir.) (electing not to resolve conflict).

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. See [Bauer](#), 84 F.3d at 1560.

The court's ruling on a motion for 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). The court's ruling on

the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. See [Candia-Veleta, 104 F.3d at 246](#). 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)).

13. Dismissals

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

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed de novo. See [United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 \(9th Cir. 2004\)](#) (due process); [United States v. Gastelum-Almeida, 298 F.3d 1167, 1174 \(9th Cir. 2002\)](#) (failure to retain a witness); [United States v. Ziskin, 360 F.3d 934, 942-43 \(9th Cir. 2003\)](#) (double jeopardy); [United States v. Hinojosa-Perez, 206 F.3d 832, 835 \(9th Cir. 2000\)](#) (motion to dismiss an information).¹⁴

The district court’s decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed de novo. See, e.g., [United States v. Gorman, 314 F.3d 1105, 1110 \(9th Cir. 2002\)](#) (Speedy Trial Act); [United States v. Boren, 278 F.3d 911, 913 \(9th Cir. 2002\)](#) (18 U.S.C. § 1014); [United States v. Gomez-Rodriguez, 96 F.3d 1262, 1264 \(9th Cir. 1996\)](#) (en banc).

¹⁴ See, e.g., [United States v. Price, 314 F.3d 417, 420 \(9th Cir. 2002\)](#) (double jeopardy); [United States v. Lam, 251 F.3d 852, 855 \(9th Cir.\)](#) (Sixth Amendment), amended by [262 F.3d 1033](#) (9th Cir. 2001); [United States v. Hancock, 231 F.3d 557, 561 \(9th Cir. 2000\)](#) (due process and equal protection); [United States v. Munsterman, 177 F.3d 1139, 1141 \(9th Cir. 1999\)](#) (bills of attainder); [United States v. Romeo, 114 F.3d 141, 142 \(9th Cir. 1997\)](#) (collateral estoppel/double jeopardy); [United States v. Fulbright, 105 F.3d 443, 452 \(9th Cir. 1997\)](#) (Fifth Amendment).

The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. See [Hinojosa-Perez, 206 F.3d at 835](#); [United States v. Lazarevich, 147 F.3d 1061, 1065 \(9th Cir. 1998\)](#).

Whether to dismiss an indictment to remedy a violation of recognized rights, to deter illegal conduct, or to preserve judicial integrity is an exercise of the district court's supervisory powers reviewed for an abuse of discretion. See [United States v. Wilkerson, 208 F.3d 794, 797 \(9th Cir. 2000\)](#); [United States v. Garza-Juarez, 992 F.2d 896, 905 \(9th Cir. 1993\)](#). Thus, the trial court's decision on a defendant's motion to dismiss for impermissible preindictment or preaccusation delay is reviewed for an abuse of discretion. See [United States v. Gregory, 322 F.3d 1157, 1161 \(9th Cir. 2003\)](#); [United States v. Mills, 280 F.3d 915, 920 \(9th Cir. 2002\)](#); [United States v. Doe, 149 F.3d 945, 947 \(9th Cir. 1998\)](#); [United States v. Huntley, 976 F.2d 1290 \(9th Cir. 1992\)](#).

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

A district court's ruling on the government's motion for leave to dismiss filed pursuant to [Federal Rule of Criminal Procedure 48\(a\)](#) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. See [United States v. Garcia-Valenzuela, 232 F.3d 1003, 1007 \(9th Cir. 2000\)](#); [United States v. Gonzalez, 58 F.3d 459, 461 \(9th Cir. 1995\)](#) ("there is a question as to whether a district court may ever deny an uncontested Rule 48(a) motion").

The court's decision to dismiss pursuant to Rule 48(b) for preindictment delay and pretrial delay is also limited and reviewed only for an abuse of discretion; however, dismissal "should be imposed only in extreme circumstances," especially when the dismissal is with prejudice. See [United States v. Jiang, 214 F.3d 1099, 1101 \(9th Cir. 2000\)](#); [United States v. Talbot, 51 F.3d 183, 186 \(9th Cir. 1995\)](#).

The district court's ruling on a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. See [United States v. Gorman, 314 F.3d 1105, 1110 \(9th Cir. 2002\)](#); [United States v. Symington, 195 F.3d 1080, 1090-91 \(9th Cir. 1999\)](#); [United States v. Pena-Carrillo, 46](#)

[F.3d 879, 882 \(9th Cir. 1995\)](#). The decision whether to dismiss with or without prejudice for a Speedy Trial Act violation is reviewed for an abuse of discretion; the district court abuses its discretion when it “fail[s] to set out relevant factual findings and to clearly articulate its application of statutory factors to the facts of the case.” [United States v. White, 864 F.2d 660, 661 \(9th Cir. 1988\)](#) (citing *United States v. Taylor*, 487 U.S. 326, 344 (1988)). However, before a district court can enter a dismissal *without* prejudice, an evidentiary hearing must be held; otherwise, the district court shall enter a dismissal *with* prejudice. See [United States v. Delgado-Miranda, 951 F.2d 1063, 1065 \(9th Cir. 1991\)](#) (*per curiam*).

The district court’s decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed *de novo*. See [United States v. Bridges, 344 F.3d 1010, 1014 \(9th Cir. 2003\)](#); [United States v. Gurolla, 333 F.3d 944, 950 \(9th Cir.\), cert. denied, 540 U.S. 995 \(2003\)](#); [United States v. Edmonds, 103 F.3d 822, 825 \(9th Cir. 1996\)](#), *cf.* [United States v. Ross, 372 F.3d 1097, 1107 \(9th Cir. 2004\)](#) (even where no due process violation exists, reviewing district court’s refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court’s findings are accepted unless clearly erroneous. See [Gurolla, 333 F.3d at 950](#); [United States v. Cuellar, 96 F.3d 1179, 1182 \(9th Cir. 1996\)](#). The court’s decision whether to dismiss based on allegations of prosecutorial misconduct before a grand jury is also reviewed *de novo*. See [United States v. Fuchs, 218 F.3d 957, 964 \(9th Cir. 2000\)](#); [United States v. DeRosa, 783 F.2d 1401, 1404 \(9th Cir. 1986\)](#); see also [United States v. Pang, 362 F.3d 1187, 1194 \(9th Cir. 2004\)](#) (abuse of the grand jury process).

The denial of a motion to dismiss an indictment for an alleged lack of jurisdiction is reviewed *de novo*. See [United States v. Phillips, 367 F.3d 846, 854 \(9th Cir. 2004\)](#); [United States v. Neil, 312 F.3d 419, 421 \(9th Cir. 2002\)](#).

The district court’s refusal to dismiss for a violation of the Interstate Agreement on Detainers Act (IAD) is reviewed *de novo*. [United States v. Lualemaga, 280 F.3d 1260, 1263 \(9th Cir. 2002\)](#).

14. Evidentiary Hearings

A district court’s decision whether to conduct an evidentiary hearing

is generally reviewed for an abuse of discretion. See [United States v. Chacon-Palomares](#), 208 F.3d 1157, 1158-60 (9th Cir. 2000) (habeas); [United States v. Saya](#), 247 F.3d 929, 934 (9th Cir. 2001) (jury misconduct).¹⁵

Note that in some instances the denial of a motion for an evidentiary hearing is reviewed de novo. See [United States v. Meek](#), 366 F.3d 705, 716 (9th Cir. 2004) (*Franks* hearing); [United States v. Chavez-Miranda](#), 306 F.3d 973, 979 (9th Cir. 2002) (*Franks* hearing), *cert. denied*, 537 U.S. 1217 (2003); [United States v. Young](#), 86 F.3d 944, 947 (9th Cir. 1996) (use immunity); *cf.* [Smith](#), 155 F.3d at 1063 n.18 (refusing to extend *Young* to suppression 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). The court's decision regarding the scope of an evidentiary hearing is also reviewed for an abuse of discretion. See [United States v. Hernandez](#), 322 F.3d 592, 600 n.8 (9th Cir.), *cert. denied*, 540 U.S. 1103 (2003).

15. 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).

16. 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. See [Hunter v. Ayers](#), 336 F.3d 1007, 1011 (9th Cir. 2003) (habeas); [United States v. Orland](#), 109 F.3d 539, 543 (9th Cir. 1997); [United States v. DeSalvo](#), 41 F.3d 505, 511 (9th Cir. 1994). A district court's ruling that the ex post facto

¹⁵ See, e.g., [United States v. Leonti](#), 326 F.3d 1111, 1116 (9th Cir. 2003) (habeas); [United States v. Hayes](#), 231 F.3d 1132, 1135 (9th Cir. 2000) (Rule 35 motion); [United States v. Howell](#), 231 F.3d 615, 620 (9th Cir. 2000) (motion to suppress); [United States v. Houston](#), 217 F.3d 1204, 1206-07 (9th Cir. 2000) (sentencing).

clause was not violated is also reviewed de novo. [*United States v. Canon*, 66 F.3d 1073, 1077 \(9th Cir. 1995\)](#); [*United States v. Walker*, 27 F.3d 417, 419 \(9th Cir. 1994\)](#).

17. Extradition

Whether a valid extradition treaty exists is a question of law reviewed de novo. See [*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. Lazarevich*, 147 F.3d 1061, 1063 \(9th Cir. 1998\)](#); [*Clarey v. Gregg*, 138 F.3d 764, 765 \(9th Cir. 1998\)](#).

Whether an offense comes within an extradition treaty requires a 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. See [*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. See [*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. See [*Matter of Requested Extradition of Artt*, 158 F.3d 462, 465 \(9th Cir. 1998\)](#); [*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. See [*Quinn*, 783 F.2d at 817 n.41](#).

The scope of habeas review of an extradition order is limited. See [*Marinero v. Gregg*, 164 F.3d 1199, 1205 \(9th Cir. 1999\)](#) (explaining

limitations). Factual findings made by a magistrate judge in an extradition proceeding 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.*

18. *Faretta* Requests (Waive Counsel)

Faretta v. California, 422 U.S. 806, 835 (1975), states that before a district court may grant a defendant’s request to proceed pro se, there must be a showing that the defendant “knowingly and intelligently” waived the right to counsel. The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. See *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004); *United States v. Lopez-Osuna*, 232 F.3d 657, 663-64 (9th Cir. 2000). Factual findings supporting the district court’s decision are reviewed for clear error. See *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

This circuit has not settled whether to apply de novo or abuse of discretion review in determining whether the facts support the grant or denial of a *Faretta* request. See *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001) (“[W]e have not yet clarified whether denial of a *Faretta* request is reviewed de novo or for abuse of discretion.”); *George*, 56 F.3d at 1084 (citing *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986)).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, e. Pro Se Representation.

19. *Franks* Hearing

The district court’s refusal to conduct a *Franks* hearing is reviewed de novo. See *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004). The court’s underlying factual findings are reviewed for clear error. See *Meek*, 366 F.3d at 716; *Shryock*, 342 F.3d at 975; *United States v. Jordan*, 291 F.3d 1091, 1099 (9th Cir. 2002).

20. 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. See *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. See [United States v. Parretti](#), 143 F.3d 508, 510 (9th Cir. 1998) (*en banc*) (dismissing appeal).

21. Grand Juries

The district court’s refusal to dismiss an indictment based on alleged instructional errors to the grand jury is reviewed de novo. See [United States v. Marcucci](#), 299 F.3d 1156, 1158 (9th Cir. 2002). The court’s decision whether to dismiss an indictment because of prosecutorial misconduct before a grand jury is reviewed de novo. See [United States v. Fuchs](#), 218 F.3d 957, 964 (9th Cir. 2000); *see also* [United States v. Pang](#), 362 F.3d 1187, 1194 (9th Cir. 2004) (reviewing alleged governmental abuse of grand jury proceedings). Note that errors in the grand jury indictment procedures are subject to harmless error review “unless the structural protections of the grand jury have been compromised.” See [United States v. Du Bo](#), 186 F.3d 1177, 1180 n.1 (9th Cir. 1999); [United States v. Oliver](#), 60 F.3d 547, 549 (9th Cir. 1995).

The district court’s denial of a defendant’s motion to disclose grand jury testimony is reviewed for an abuse of discretion. [United States v. Nash](#), 115 F.3d 1431, 1440 (9th Cir. 1997); [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*). The court’s resolution of a petition for disclosure of grand jury materials pursuant to [Federal Rule of Criminal Procedure 6\(e\)](#) is reviewed for an abuse of discretion. See [In re Grand Jury Proceedings](#), 62 F.3d 1175, 1178 (9th Cir. 1995). The denial of a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. See [In re Grand Jury Subpoena](#), 357 F.3d 900, 906 (9th Cir. 2004); [United States v. Chen](#), 99 F.3d 1495, 1499 (9th Cir. 1996).

A court’s imposition of contempt sanctions related to grand jury proceedings is also reviewed for an abuse of discretion. See [In re Grand Jury Proceedings](#), 40 F.3d 959, 961 (9th Cir. 1994) (refusal to sign disclosure directive); [In re Grand Jury Proceedings](#), 33 F.3d 1060, 1061

[\(9th Cir. 1994\)](#) (refusal to produce records); [In re Grand Jury Proceedings](#), 9 F.3d 1389, 1390 (9th Cir. 1993) (refusal to testify).

22. Guilty Pleas

a. Rule 11

The adequacy of a Rule 11 plea hearing is reviewed de novo. See [United States v. Villalobos](#), 333 F.3d 1070, 1073 (9th Cir. 2003); [United States v. Pena](#), 314 F.3d 1152, 1155 (9th Cir. 2003). Whether the trial court's colloquy with the defendant satisfies the requirements of Rule 11 is also reviewed de novo. See [United States v. Barragan-Espinoza](#), 350 F.3d 978, 981 (9th Cir. 2003); [United States v. King](#), 257 F.3d 1013, 1021 (9th Cir. 2001); see also [United States v. Barrios-Gutierrez](#), 255 F.3d 1024, 1027-28 (9th Cir. 2001) (en banc) (discussing Rule 11's requirements).

When a defendant fails to object, this court's review is limited to plain error. See [United States v. Benitez](#), 542 U.S. 74, 83 (2004) (noting defendant's burden); [United States v. Vonn](#), 535 U.S. 55, 58 (2002); [Barragan-Espinoza](#), 350 F.3d at 981; [United States v. Pina-Jaime](#), 332 F.3d 609, 611 (9th Cir. 2003). The appellate court may review, however, "the entire record, from the defendant's first appearance to his plea colloquy." See [United States v. Vonn](#), 294 F.3d 1093, 1093-94 (9th Cir. 2002) (on remand).

b. Voluntariness

The voluntariness of a guilty plea is subject to de novo review. See [United States v. Gaither](#), 245 F.3d 1064, 1068 (9th Cir. 2001); [United States v. Kaczynski](#), 239 F.3d 1108, 1114 (9th Cir. 2001); [United States v. Kikuyama](#), 109 F.3d 536, 537 (9th Cir. 1997); see also [Sanchez v. United States](#), 50 F.3d 1448, 1454 (9th Cir. 1995) (habeas).

c. Withdrawal

A district court's decision whether to grant a motion for withdrawal of a guilty plea is reviewed for an abuse of discretion. See [United States v. Reyna-Tapia](#), 328 F.3d 1114, 1117 (9th Cir.) (en banc) (applying "fair and just" standard), cert. denied, 540 U.S. 900 (2003); [United States v. Nostratis](#), 321 F.3d 1206, 1208 (9th Cir. 2003); [United States v. Ruiz](#), 257 F.3d 1030,

[1032-33 \(9th Cir. 2001\) \(en banc\)](#) (clarifying that “fair and just” rather than “manifest injustice” standard should be applied by district court); [United States v. King, 257 F.3d 1013, 1022 \(9th Cir. 2001\)](#).

23. Immunity Agreements

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

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

The district court’s finding that the government’s evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. See [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. See [United States v. Cooper, 173 F.3d 1192, 1203 \(9th Cir. 1999\)](#). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. [United States v. Alvarez, 358 F.3d 1194, 1216 \(9th Cir. 2004\)](#). Underlying factual findings are reviewed for clear error. *Id.*

24. 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. Alvarez, 358 F.3d 1194, 1208 \(9th Cir. 2004\)](#); [United States v. Henderson, 241 F.3d 638, 646 \(9th Cir. 2000\)](#); [United States v. Chen, 99 F.3d 1495, 1502 \(9th Cir.](#)

1996) (crime fraud exception). The decision to seal documents is reviewed for an abuse of discretion. [United States v. Shryock, 342 F.3d 948, 983 \(9th Cir. 2003\)](#), *cert. denied*, 541 U.S. 965 (2004); [United States v. Mann, 829 F.2d 849, 853 \(9th Cir. 1987\)](#).

Whether the court erred by not allowing defense counsel to participate in an in camera proceeding is 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. See [In re Grand Jury Subpoena 92-1\(SJ\), 31 F.3d 826, 829 \(9th Cir. 1994\)](#).

25. Indictments and Informations

a. Constructive Amendments

Whether an indictment was constructively amended is reviewed de novo. See [United States v. Pang, 362 F.3d 1187, 1193 \(9th Cir. 2004\)](#) (information); [United States v. Shryock, 342 F.3d 948, 988 \(9th Cir. 2003\)](#), *cert. denied*, 541 U.S. 965 (2004); [United States v. Adamson, 291 F.3d 606, 612 \(9th Cir. 2002\)](#). When the defendant fails to object, review is limited to plain error. See [United States v. Shipsey, 190 F.3d 1081, 1085 \(9th Cir. 1999\)](#).

b. Dismissals

See II. Criminal Proceedings, B. Pretrial Decisions, 13. Dismissals.

c. Duplicitous/Multiplicitous

Whether an indictment is multiplicitous – charging a single offense in more than one count—is reviewed de novo. See [United States v. Vargas-Castillo, 329 F.3d 715, 718-19 \(9th Cir.\)](#), *cert. denied*, 540 U.S. 998 (2003); [United States v. McKittrick, 142 F.3d 1170, 1176 \(9th Cir. 1998\)](#). Whether an indictment is duplicitous – charging more than one violation in each count—is reviewed de novo. See [United States v. Martin, 4 F.3d 757, 759 \(9th Cir. 1993\)](#) (duplicitous); [United States v. Yarborough, 852 F.2d 1522, 1530 \(9th Cir.\)](#), *cert. denied*, 488 U.S. 866 (1988). The court's decision not to dismiss an allegedly duplicitous indictment is reviewed de novo. See [United States v. Ramirez-Martinez, 273 F.3d 903, 913 \(9th Cir.2001\)](#).

d. Misjoinder

Misjoinder of charges under [Fed. R. Crim. P. 8\(a\)](#) is an issue of law reviewed de novo. See [United States v. VonWillie](#), 59 F.3d 922, 929 (9th Cir. 1995); [United States v. Terry](#), 911 F.2d 272, 276 (9th Cir. 1990); [United States v. Sanchez-Lopez](#), 879 F.2d 541 (9th Cir. 1989) (distinguishing between Rule 8(a) and 8(b)). Misjoinder of defendants under [Fed. R. Crim. P. 8\(b\)](#) is also a question of law reviewed de novo. See [United States v. Sarkisian](#), 197 F.3d 966, 975 (9th Cir. 1999); [United States v. Golb](#), 69 F.3d 1417, 1425 (9th Cir. 1995); [United States v. Vasquez-Velasco](#), 15 F.3d 833, 843 (9th Cir. 1994). Improper joinder is subject to harmless error review – reversal is required only if misjoinder result in actual prejudice because it had a “substantial and injurious effect or influence in determining the jury’s verdict.” [United States v. Lane](#), 474 U.S. 438, 449 (1986).

The district court’s order that two indictments be tried together under [Fed. R. Crim. P. 13](#) is reviewed for an abuse of discretion. [United States v. Nguyen](#), 88 F.3d 812, 815 (9th Cir. 1996).

e. Prosecutorial Misconduct

The district court’s decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. See [United States v. Bridges](#), 344 F.3d 1010, 1014 (9th Cir. 2003); [United States v. Gurolla](#), 333 F.3d 944, 950 (9th Cir.), cert. denied, 540 U.S. 995 (2003); [United States v. Edmonds](#), 103 F.3d 822, 825 (9th Cir. 1996), cf. [United States v. Ross](#), 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court’s refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court’s findings are accepted unless clearly erroneous. See [Gurolla](#), 333 F.3d at 950; [United States v. Cuellar](#), 96 F.3d 1179, 1182 (9th Cir. 1996).

Allegations of prosecutorial misconduct before a grand jury are also reviewed de novo. See [United States v. Fuchs](#), 218 F.3d 957, 964 (9th Cir. 2000); [United States v. DeRosa](#), 783 F.2d 1401, 1404 (9th Cir. 1986); see also [United States v. Pang](#), 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

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

f. Sufficiency

The sufficiency of an indictment is reviewed de novo. See [United States v. Rodriguez](#), 360 F.3d 949, 958 (9th Cir. 2004); [United States v. Shryock](#), 342 F.3d 948, 988 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004). When defendant fails to object to the sufficiency of the indictment in the district court, review is for plain error. See [Rodriguez](#), 360 F.3d at 958; [United States v. Leos-Maldonado](#), 302 F.3d 1061, 1064 (9th Cir. 2002); *but see* [United States v. Lo](#), 231 F.3d 471, 481 (9th Cir. 2000) (reviewing de novo when issue raised for the first time on appeal).

Whether a criminal information complies with constitutional requirements is examined de novo. See [Givens v. Housewright](#), 786 F.2d 1378, 1380 (9th Cir. 1986). Whether an information is sufficient to charge a defendant in a particular situation is a question of law reviewed de novo. See [United States v. Hamilton](#), 208 F.3d 1165, 1168 (9th Cir. 2000); [United States v. Linares](#), 921 F.2d 841, 843 (9th Cir. 1990).

g. Validity

The validity of an indictment is reviewed de novo. See [United States v. Juan-Cruz](#), 314 F.3d 384, 387 (9th Cir. 2002); [United States v. Matsumaru](#), 244 F.3d 1092, 1099 (9th Cir. 2001); [United States v. Rosi](#), 27 F.3d 409, 414 (9th Cir. 1994). A claim that an indictment is defective may be raised at any time, *see* [United States v. Leos-Maldonado](#), 302 F.3d 1061, 1064 (9th Cir. 2002); however, “review of an untimely objection to the sufficiency of the indictment is limited to the plain error test.” *Id.*; [United States v. Cotton](#), 535 U.S. 625 (2002). A “terminally defective” indictment constitutes a deficiency that is not subject to harmless error analysis. See [United States v. Du Bo](#), 186 F.3d 1177, 1179 (9th Cir. 1999). Technical deficiencies, however, are subject to harmless error review. See [United States v. Fleming](#), 215 F.3d 930, 935-36 (9th Cir. 2000).

26. In Limine Orders

This court generally reviews the district court's ruling on a motion in

limine for an abuse of discretion. See [United States v. Geston](#), 299 F.3d 1130, 1138 (9th Cir. 2002); [United States v. Ross](#), 206 F.3d 896, 898 (9th Cir. 2000). The trial court's decision to change an in limine ruling is also reviewed for an abuse of discretion. [United States v. Bensimon](#), 172 F.3d 1121, 1127 (9th Cir. 1999).

A district court's order precluding certain testimony is an evidentiary ruling subject to review for an abuse of discretion. [United States v. Ravel](#), 930 F.2d 721, 726 (9th Cir. 1991). If the order precludes the presentation of a defense, however, review is de novo. See [Ross](#), 206 F.3d at 898-99.

27. 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. See [United States v. Petrosian](#), 126 F.3d 1232, 1234 n.3 (9th Cir. 1997). The district court's decision not to declare a mistrial based on alleged interpreter's mistake is reviewed for an abuse of discretion. See [United States v. Long](#), 301 F.3d 1095, 1105 (9th Cir. 2002), *cert. denied*, 537 U.S. 1216 (2003).

28. Investigators

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

29. Judicial Estoppel

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

30. Judicial Notice

A district court's decision to take judicial notice is reviewed for an abuse of discretion. See [United States v. Daychild](#), 357 F.3d 1082, 1099

n.26 (9th Cir. 2004); [United States v. Chapel](#), 41 F.3d 1338, 1342 (9th Cir. 1994).

31. Jurisdiction

Jurisdictional issues are reviewed de novo. See [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004); [United States v. Neil](#), 312 F.3d 419, 421 (9th Cir. 2002); [United States v. Errol D. Jr.](#), 292 F.3d 1159, 1161 (9th Cir. 2002). Whether a district court has jurisdiction is reviewed de novo. See [United States v. Pena](#), 319 F.3d 509, 511 (9th Cir. 2003); [United States v. Monreal](#), 301 F.3d 1127, 1130 (9th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003). The assumption of jurisdiction by a district court is reviewed de novo. See [United States v. Ross](#), 372 F.3d 1097, 1105 (9th Cir. 2004); [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). 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).

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).

32. Jury Demand

A defendant's entitlement to a jury trial is a question of law reviewed de novo. See [United States v. Male Juvenile](#), 280 F.3d 1008, 1021 (9th Cir. 2002); [United States v. Clavette](#), 135 F.3d 1308, 1309 (9th Cir. 1998).

33. Jury Waiver

The adequacy of a defendant's jury waiver presents a mixed question of law and fact reviewed de novo. See [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. See [United States v. Reyes](#), 8 F.3d 1379, 1383 (9th Cir. 1993).

34. Juveniles

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 \(9th Cir. 1999\)](#). Jurisdictional issues are reviewed de novo. See [United States v. Error D., Jr., 292 F.3d 1159, 1161 \(9th Cir. 2002\)](#); [Doe, 170 F.3d at 1165](#). Compliance with § 5032 is a question of statutory interpretation reviewed de novo. See [United States v. Male Juvenile \(Pierre Y.\), 280 F.3d 1008, 1014 \(9th Cir. 2002\)](#); [United States v. Juvenile Male \(Kenneth C.\), 241 F.3d 684, 686 \(9th Cir. 2001\)](#). Questions regarding the constitutionality of § 5032 are also reviewed de novo. See [United States v. Juvenile, 228 F.3d 987, 990 \(9th Cir. 2000\)](#). Note that compliance with § 5032 is subject to harmless error review if defendant objects and plain error review if no objection is made. See [United States v. Doe, 366 F.3d 1069, 1077 & n.10 \(9th Cir. 2004\) \(en banc\)](#).

The district court's decision to transfer a juvenile to adult court is reviewed for an abuse of discretion. See [United States v. Juvenile Male, 336 F.3d 1107, 1110 \(9th Cir. 2003\)](#), *overruled on other grounds by Doe, 366 F.3d at 1078*; [United States v. Gerald N., 900 F.2d 189, 191 \(9th Cir. 1990\)](#). Review of a juvenile delinquency sentence that falls within the sentencing guidelines is also abuse of discretion. See [United States v. Juvenile, 347 F.3d 778, 784 \(9th Cir. 2003\)](#).

Section 5033 requires that federal law enforcement agents notify parents of a juvenile's rights "immediately" after the juvenile is taken into custody. See [United States v. Female Juvenile \(Wendy G.\), 255 F.3d 761, 765 \(9th Cir. 2001\)](#). The district court's ultimate determination that notification was "immediate" is reviewed de novo. See [Wendy G., 255 F.3d at 765](#). Whether a juvenile's parents have been notified pursuant to § 5033 is a predominantly factual question that is reviewed for clear error. See [United States v. Juvenile \(RRA-A\), 229 F.3d 737, 742 \(9th Cir. 2000\)](#); [United States v. Doe, 219 F.3d 1009, 1014 \(9th Cir. 2000\)](#).

Whether a juvenile has been arraigned without unreasonable delay is a mixed question of law and fact reviewed de novo. See [Doe, 219 F.3d at 1014](#). Whether a juvenile is "in custody" is also a mixed question of law and fact reviewed de novo. [Wendy G., 255 F.3d at 765](#). The court also reviews de novo whether a juvenile's speedy trial rights were violated. See [Juvenile RRA-A, 229 F.3d at 742](#) (applying Juvenile Delinquency Act).

34. Lack of Prosecution

A district court's denial of a motion to dismiss under [Federal Rule of Criminal Procedure 48\(b\)](#) is reviewed for abuse of discretion. See [United States v. Barken](#), 412 F.3d 1131, 1136 (9th Cir. 2005) (most recent case); [United States v. Sears, Roebuck & Co.](#), 877 F.2d 734, 737-78 (9th Cir. 1989) (frequently cited and fullest discussion of standard). A Rule 48(b) dismissal should only be granted "in extreme circumstances." [Barken](#), 412 F.3d at 1136.

35. Law of the Case

A district court's decision whether to apply the law-of-the-case doctrine is reviewed for an abuse of discretion. See [United States v. Alexander](#), 106 F.3d 874, 876 (9th Cir. 1997) (listing five different conditions allowing a court to stray from the law of the case). "Failure to apply the . . . law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

36. Lineups

Whether a pretrial lineup was impermissibly suggestive, and violates due process, is reviewed de novo. See [United States v. Bowman](#), 215 F.3d 951, 965 n.9 (9th Cir. 2000); [United States v. Montgomery](#), 150 F.3d 983, 992 (9th Cir. 1998). In making this determination, we review the totality of the circumstances. [United States v. Jones](#), 84 F.3d 1206, 1209 (9th Cir. 1996).

When a defendant fails to object to the lineup identification by way of a pretrial suppression motion, he waives his right to challenge it absent a showing of prejudice. See [United States v. Atcheson](#), 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit or deny in-court identification testimony is reviewed for abuse of discretion. See [United States v. Dixon](#), 201 F.3d 1223, 1229 (9th Cir. 2000). The court's ruling regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for abuse of discretion. See [United States v. Rincon](#), 28 F.3d 921, 923 (9th Cir. 1994).

37. Magistrate Judges

The delegation of authority and the scope of powers of a magistrate judge are questions of law reviewed de novo. See [United States v. Rivera-Guerrero](#), 377 F.3d 1064, 1067 (9th Cir. 2004); [United States v. Colacurcio](#), 84 F.3d 326, 328 (9th Cir. 1996). Whether a magistrate judge has jurisdiction is also a question of law reviewed de novo. [United States v. Carr](#), 18 F.3d 738, 740 (9th Cir. 1994).¹⁶ Whether a magistrate judge’s “precise formulation” of a jury instruction is sufficient is reviewed for an abuse of discretion. [United States v. McKittrick](#), 142 F.3d 1170, 1176 (9th Cir. 1998).

Factual findings made by a magistrate judge are reviewed for clear error. See [Wildman v. Johnson](#), 261 F.3d 832, 836 (9th Cir. 2001) (habeas); [Marinero v. Gregg](#), 164 F.3d 1199, 1205 (9th Cir. 1999) (extradition proceedings). A magistrate judge’s decision whether to conduct an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. See [United States v. Howell](#), 231 F.3d 615, 620-21 (9th Cir. 2000).

A district court’s decision regarding the scope of review of a magistrate judge’s decision is reviewed for an abuse of discretion. See [Brown v. Roe](#), 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court’s denial of a motion to reconsider a magistrate’s pretrial order will be reversed only if “clearly erroneous or contrary to law.” See [Rivera v. NIBCO, Inc.](#), 364 F.3d 1057, 1063 (9th Cir. 2004) (quoting Fed. R. Civ. P. 72(a)); [Osband v. Woodford](#), 290 F.3d 1036, 1041 (9th Cir. 2002) (habeas).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. [United States v. Fernandez](#), 388 F.3d 1199, 1252 (9th Cir. 2004). More specifically, “a magistrate judge’s finding of probable cause to issue a search warrant is reviewed for clear error” [United States v. Nielsen](#), 371 F.3d 574, 579 (9th Cir. 2004). Thus, the magistrate judge’s original determination of probable cause is accorded “significant deference.” See [United States v. Leasure](#), 319 F.3d 1092, 1099 (9th Cir. 2003). “This standard of review is less probing than de novo review and shows deference to the issuing magistrate’s determination.” [Fernandez](#), 388 F.3d at 1252

¹⁶ See also [United States v. Real Property](#), 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

(internal quotation marks omitted).

38. *Miranda* Rights

Whether a defendant was constitutionally entitled to *Miranda* warnings is an issue of law reviewed de novo. See [United States v. Crawford](#), 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc); [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 or suppress a statement that may have been obtained in violation of *Miranda* is also reviewed de novo. See [United States v. Rodriguez-Rodriguez](#), 393 F.3d 849, 855 (9th Cir. 2005).¹⁷

The adequacy of a *Miranda* warning is a legal issue reviewed de novo. See [United States v. Williams](#), 435 F.3d 1148, 1151 (9th Cir. 2006); [United States v. San Juan-Cruz](#), 314 F.3d 384, 387 (9th Cir. 2002) (explaining why de novo review is appropriate). Factual findings underlying the adequacy challenge are reviewed for clear error. See [United States v. Lares-Valdez](#), 939 F.2d 688, 689 (9th Cir. 1991).

The voluntariness of a waiver of *Miranda* rights is reviewed de novo. See [United States v. Williams](#), 435 F.3d 1148, 1151 (9th Cir. 2006); [United States v. Bautista](#), 362 F.3d 584, 589 (9th Cir. 2004). Whether waiver was voluntary is a mixed question of fact and law reviewed de novo. [United States v. Rodriguez-Preciado](#), 399 F.3d 1118, 1127 (9th Cir. 2005). Whether the waiver was knowing and intelligent is reviewed for clear error. See *id.*

Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact reviewed de novo. See [United States v. Cervantes-Flores](#), 421 F.3d 825, 830 (9th Cir. 2005); [United States v. Kim](#), 292 F.3d 969, 973 (9th Cir. 2002) (key case noting prior conflict and reaffirming de novo review). The district court's factual findings underlying that decision, such as what a defendant was told, are reviewed for clear error. See [Kim](#), 292 F.3d at 973.

¹⁷ Admission of statements made in violation of *Miranda* are subject to harmless error review. [United States v. Williams](#), 435 F.3d 1148, 1151 (9th Cir. 2006).

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. Younger*, 398 F.3d 1179, 1185 \(9th Cir. 2005\)](#); [*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. [*Younger*, 398 F.3d at 1185](#); [*Ogbuehi*, 18 F.3d at 812](#).

Whether the public safety exception applies to the failure to give a *Miranda* warning is a mixed question of fact and law reviewed de novo. See [*United States v. Reilly*, 224 F.3d 986, 992 \(9th Cir. 2000\)](#); [*United States v. Brady*, 819 F.2d 884, 886 \(9th Cir. 1987\)](#).

Whether the prosecution's references to a defendant's retention of counsel and silence after a *Miranda* warning violates the Fifth Amendment is reviewed de novo. See [*United States v. Ross*, 123 F.3d 1181, 1187 \(9th Cir. 1997\)](#).

On habeas corpus review, 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. See [*Pollard v. Galaza*, 290 F.3d 1030, 1032 \(9th Cir. 2002\)](#); [*Collazo v. Estelle*, 940 F.2d 411, 415 \(9th Cir. 1991\) \(en banc\)](#). Whether a defendant's *Miranda* waiver was knowing and intelligent is a factual issue reviewed for clear error. See [*Collazo*, 940 F.2d at 416](#). Whether a defendant was "in custody" for purposes of *Miranda* is a mixed question of law and fact reviewed de novo. [*Bains v. Cambra*, 204 F.3d 964, 972 \(9th Cir. 2000\)](#).

39. Motion to Quash

The abuse of discretion standard applies to review of a trial court's decision to grant the government's motion to quash a subpoena under [*Federal Rule of Criminal Procedure 17\(c\)*](#). See [*United States v. George*, 883 F.2d 1407, 1418 \(9th Cir. 1989\)](#). The district court's decision whether or not to quash a grand jury subpoena is reviewed for an abuse of discretion. [*In re Grand Jury Subpoena*, 357 F.3d 900, 906 \(9th Cir. 2004\)](#); [*Ralls v. United States*, 52 F.3d 223, 225 \(9th Cir. 1995\)](#) (denial of motion to quash reviewed for abuse of discretion);

Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. See [*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. See [*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. See [*United States v. Blackman*, 72 F.3d 1418, 1422 \(9th Cir. 1995\)](#); [*Fortney v. United States*, 59 F.3d 117, 119 \(9th Cir. 1995\)](#) (applying clear error review to district court's denial of petition to quash); *but see* [*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 denying petition to squash IRS subpoena).

40. Out-of-Court Identification

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

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

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. See [*United States v. Hicks*, 103 F.3d 837, 847 \(9th Cir. 1996\)](#).

41. Plea Agreements

a. Breaches/Enforcement

Alleged violations of plea agreements are reviewed de novo. See [*United States v. Gamez*, 301 F.3d 1138, 1144 \(9th Cir. 2002\)](#). Whether the

district court must enforce a plea agreement is a question of law reviewed de novo. See [United States v. Patterson](#), 381 F.3d 859, 863 (9th Cir. 2004). Whether a district court is bound by the sentencing range in plea agreement is also reviewed de novo. See [United States v. Perez-Corona](#), 295 F.3d 996, 1000 (9th Cir. 2002).

The district court's grant or denial of a defendant's motion to compel specific performance of a plea agreement is reviewed for abuse of discretion. See [United States v. Transfiguracion](#), 442 F.3d 1222, 1228 (9th Cir. 2006) (reviewing grant of motion); [United States v. Anthony](#), 93 F.3d 614, 616 (9th Cir. 1996) (reviewing denial of motion). Whether a district court has jurisdiction to enforce a plea agreement is reviewed de novo. See [United States v. Monreal](#), 301 F.3d 1127, 1130 (9th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003).

A defendant's failure to argue breach of the plea agreement before the district court limits appellate review to plain error. See [United States v. Maldonado](#), 215 F.3d 1046, 1051 (9th Cir. 2000).

Whether the government violated the terms of the agreement is reviewed de novo. See [United States v. Clark](#), 218 F.3d 1092, 1095 (9th Cir. 2000). However, factual issues underlying an alleged breach of a plea agreement are reviewed for clear error. [United States v. Martinez](#), 143 F.3d 1266, 1271 (9th Cir. 1998); *but see* [United States v. Franco-Lopez](#), 312 F.3d 984, 988 (9th Cir. 2002) (noting inconsistency with de novo review established in [United States v. Schuman](#), 127 F.3d 815, 817 (9th Cir.1997)).

A district court has broad discretion in fashioning a remedy for breach of a plea agreement. See [United States v. Chiu](#), 109 F.3d 624, 626 (9th Cir. 1997).

b. Interpretation

The district court's legal interpretations of a plea agreement are reviewed de novo. See [United States v. Reyes](#), 313 F.3d 1152, 1156 (9th Cir. 2002); [United States v. Quach](#), 302 F.3d 1096, 1100 (9th Cir. 2002). Underlying factual findings are reviewed for clear error. See [Reyes](#), 313 F.3d at 1156 (“[A] district court's construction of a plea agreement is reviewed for clear error.”); [United States v. Clark](#), 218 F.3d 1092, 1095 (9th Cir. 2000). Whether language in a plea agreement is ambiguous is reviewed

de novo. See [Clark](#), 218 F.3d at 1095.

c. Negotiations

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

d. Waiver

Whether a defendant has waived his statutory right to appeal by plea agreement is reviewed de novo. See [United States v. Speelman](#), 431 F.3d 1226, 1229 (9th Cir. 2005); [United States v. Bynum](#), 362 F.3d 574, 583 (9th Cir. 2004). The validity of a waiver in a plea agreement is reviewed de novo. See [United States v. Ruiz](#), 241 F.3d 1157, 1163 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 622 (2002); [United States v. Littlejohn](#), 224 F.3d 960, 964 (9th Cir. 2000). Whether a defendant may waive the prohibition against the introduction of plea negotiation statements is a question of law reviewed de novo. See [United States v. Rebbe](#), 314 F.3d 402, 405 (9th Cir. 2002).

42. Preclusion of Proffered Defense

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. [United States v. Gurolla](#), 333 F.3d 944, 952 n.8 (9th Cir. 2003); [United States v. Ramirez-Valencia](#), 202 F.3d 1106, 1109 (9th Cir. 2000).¹⁸ Whether the court's instructions adequately cover the defendant's proffered defense is also reviewed de novo. See [United States v. Bello-Bahena](#), 411 F.3d 1083, 1089 (9th Cir. 2005). However, whether a

¹⁸ For specific defenses, see [United States v. Batterjee](#), 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment); [United States v. Shryock](#), 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration & duress), *cert. denied*, 541 U.S. 965 (2004); [United States v. Pierre](#), 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense); [United States v. Arellano-Rivera](#), 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); [United States v. Ross](#), 206 F.3d 896, 898 (9th Cir. 2000) (motion in limine); [United States v. de Cruz](#), 82 F.3d 856, 867 (9th Cir. 1996) (mistake of law).

defendant has made the required factual foundation to support a requested jury instruction is reviewed for abuse of discretion. See *id.*; 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).

Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. See [United States v. Iverson](#), 162 F.3d 1015, 1022 (9th Cir. 1998); [United States v. Amlani](#), 111 F.3d 705, 716 n.5 (9th Cir. 1997). Finally, a determination that a defendant has the burden of proving a defense is reviewed de novo. [United States v. Beasley](#), 346 F.3d 930, 933 (9th Cir. 2003), *cert. denied*, 542 U.S. 921 (2004); [United States v. McKittrick](#), 142 F.3d 1170, 1177 (9th Cir. 1998); [United States v. Dominguez-Mestas](#), 929 F.2d 1379, 1381 (9th Cir. 1991) (duress).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 10. Defenses.

43. Pre-indictment Delay

The district court's decision on a defendant's motion to dismiss for pre-indictment delay is reviewed for abuse of discretion. See [United States v. Gregory](#), 322 F.3d 1157, 1160-61 (9th Cir. 2003); [United States v. Mills](#), 280 F.3d 915, 920 (9th Cir. 2002).

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 [Gregory](#), 322 F.3d at 1160-61; [United States v. Lam](#), 251 F.3d 852, 855 (9th Cir.), *amended by* 262 F.3d 1033 (9th Cir. 2001). A finding of prejudice is reviewed under the clearly erroneous standard. [Gregory](#), 322 F.3d at 1161; [United States v. Doe](#), 149 F.3d 945, 948 (9th Cir. 1998).

44. Pretrial Detention and Release

Factual findings underlying a district court's detention order are reviewed under a deferential, clearly erroneous standard. See [United States v. Fidler](#), 419 F.3d 1026, 1029 (9th Cir. 2005). The court's finding of potential danger to the community is entitled to deference. See *id.*; [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. See Fidler, 419 F.3d at 1029; 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).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 2. Bail.

45. Pretrial Hearings

A trial court’s decision whether to hold a hearing on pretrial motions is reviewed for an abuse of discretion. See United States v. Hagage, 437 F.3d 943, 951 (9th Cir. 2006); United States v. Hernandez, 424 F.3d 1056, 1058 (9th Cir. 2005) (suppression motion); United States v. Alatorre, 222 F.3d 1098, 1099 (9th Cir. 2000) (evidentiary ruling); United States v. Hernandez, 80 F.3d 1253, 1261 (9th Cir. 1996) (hearing on double jeopardy); United States v. Andrade-Larrious, 39 F.3d 986, 991 (9th Cir. 1994) (habeas). But see United States v. Chavez-Miranda, 306 F.3d 973, 979 (9th Cir. 2002) (denial of *Franks* hearing is reviewed de novo), *cert. denied*, 537 U.S. 1217 (2003); United States v. Young, 86 F.3d 944, 947 (9th Cir. 1996) (denial of evidentiary hearing on use immunity is reviewed de novo).

The trial court’s decision whether to reopen a hearing is reviewed for an abuse of discretion. See United States v. Jordan, 291 F.3d 1091, 1100 (9th Cir. 2002).

46. Pretrial Identifications

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

amended by 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. See United States v. Montgomery, 150 F.3d 983, 992 (9th Cir. 1998). 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. See United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit in-court identification testimony is reviewed for an abuse of discretion. United States v. Dixon, 201 F.3d 1223, 1229 (9th Cir. 2000). The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. See United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994).

47. Probable Cause

The determination of probable cause is a mixed question of law and fact reviewed de novo. See Ornelas v. United States, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); United States v. Dorsey, 418 F.3d 1038, 1042 (9th Cir. 2005) (warrantless arrest). Thus, probable cause rulings are reviewed de novo. See United States v. Williamson, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006) (search warrant); United States v. Sandoval-Venegas, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest).¹⁹ However, underlying historical facts are reviewed for clear error. See Williamson, 439 F.3d at 1135 n.8; Sandoval-Venegas, 292 F.3d at 1104; United States v. Parks, 285 F.3d 1133, 1141 (9th Cir. 2002).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See United States v. Fernandez, 388 F.3d 1199, 1252 (9th Cir.

¹⁹ For specific examples see, e.g., United States v. Parks, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); United States v. Real Property Located at 22 Santa Barbara Drive, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); Picray v. Sealock, 138 F.3d 767, 770-71 (9th Cir. 1998) (warrantless arrest in § 1983 action); United States v. Jones, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest).

2004); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003).²⁰ Thus, the magistrate judge’s determination of probable cause is accorded deference by the reviewing court. See *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) (“great deference”); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (“significant deference”). 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). Thus, the standard of review is “less probing than de novo review and shows deference to the issuing magistrate’s determination.” *Pitts*, 6 F.3d at 1369; *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991).

A district court’s determination of probable cause in a case with a redacted affidavit is reviewed de novo. See *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also* *United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. See *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003), *cert. denied*, 540 U.S. 862 (2003); *Bowman*, 215 F.3d at 963 n.6; *see also* *Liston v. County of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997) (civil rights action based on unlawful search).

48. Recusal

A district court’s decision whether to grant a motion for recusal is

²⁰ See also *Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006) (noting magistrate judge’s finding of probable cause is reviewed for clear error); *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

reviewed for an abuse of discretion. See [United States v. Martin](#), 278 F.3d 988, 1005 (9th Cir. 2002); [United States v. Silver](#), 245 F.3d 1075, 1078 (9th Cir. 2001); [United States v. Scholl](#), 166 F.3d 964, 977 (9th Cir. 1999).²¹

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

49. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. See [United States v. Bucher](#), 375 F.3d 929, 931 (9th Cir. 2004); [United States v. Willfong](#), 274 F.3d 1297, 1300 (9th Cir. 2001); [United States v. Ani](#), 138 F.3d 390, 391 (9th Cir. 1998).²² An agency's interpretation of regulations, however, is entitled to deference. [United States v. Bowen](#), 172 F.3d 682, 685 (9th Cir. 1999); [United States v. McKittrick](#), 142 F.3d 1170, 1173 (9th Cir. 1998). Whether a regulation is unconstitutionally vague is a question of law reviewed de novo. See [United States v. Elias](#), 269 F.3d 1003, 1014 (9th Cir. 2001); [United States v. Coutchavlis](#), 260 F.3d 1149, 1155 (9th Cir. 2001).

50. Representation

a. Conflict-Free Representation

This court reviews de novo whether a defendant was denied the right to conflict-free representation. See [United States v. Baker](#), 256 F.3d 855, 859 (9th Cir. 2001) (habeas); [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).

²¹ 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).

²² See also [Santiago v. Rumsfeld](#), 425 F.3d 549, 556 n.5 (9th Cir. 2005) (habeas corpus).

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. Frega](#), 179 F.3d 793, 799 (9th Cir. 1999); [United States v. Stites](#), 56 F.3d 1020, 1024 (9th Cir. 1995).

c. Hybrid Representation

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

d. Ineffective Representation

Whether a defendant received ineffective assistance of counsel is reviewed de novo both in direct appeals and on habeas.

- Direct appeals: [United States v. Labrada-Bustamante](#), 428 F.3d 1252, 1260 (9th Cir. 2005); [United States v. Mack](#), 164 F.3d 467, 471 (9th Cir. 1999).
- Habeas: [Earp v. Ornoski](#), 431 F.3d 1158, 1182 (9th Cir. 2005); [Allen v. Woodford](#), 395 F.3d 979, 992 (9th Cir. 2005) (§ 2254); [Stankewitz v. Woodford](#), 365 F.3d 706, 714 (9th Cir. 2004) (§ 2254); [United States v. Rodrigues](#), 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); [United States v. Alaimalo](#), 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255), *cert. denied*, 540 U.S. 895 (2003).

Ineffective assistance of counsel claims are mixed questions of fact and law to be reviewed de novo. See [Earp](#), 431 F.3d at 1182; [Labrada-Bustamante](#), 428 F.3d at 1260; [Dubria v. Smith](#), 224 F.3d 995, 1000 (9th Cir. 2000) (en banc).

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. See [United States v. Alferahin](#), 433 F.3d 1148, 1160 n.6 (9th Cir. 2006) (noting when direct review is permissible and

accepting review); [Hoffman v. Arave](#), 236 F.3d 523, 530 n.7 (9th Cir. 2001); [United States v. Sager](#), 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review).

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. See [Strickland v. Washington](#), 466 U.S. 668, 687-690 (1984); [Perez v. Rosario](#), 449 F.3d 954, 957 (9th Cir. 2006); [Alferahin](#), 433 F.3d at 1160-61; [Summerlin v. Schriro](#), 427 F.3d 623, 629 (9th Cir. 2005) (en banc).

The district court's findings of fact are reviewed under the clearly erroneous standard. See [Summerlin](#), 427 F.3d at 629; [Allen](#), 395 F.3d at 992; [United States v. Alvarez-Tautimez](#), 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. See [Perez](#), 449 F.3d at 964 (§ 2254); [United States v. Leonti](#), 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); [Christakis](#), 238 F.3d at 1168 (§ 2255).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, f. Right to Counsel.

e. Pro Se Representation

Factual findings supporting the district court's decision whether to allow a defendant to proceed pro se are reviewed for clear error. See [United States v. George](#), 56 F.3d 1078, 1084 (9th Cir. 1995); [United States v. Kienenberger](#), 13 F.3d 1354, 1356 (9th Cir. 1994).

This circuit has not settled whether to use de novo review or abuse of discretion review in determining whether the facts support the grant or denial of the motion. See [United States v. Kaczynski](#), 239 F.3d 1108, 1116 (9th Cir. 2001) (“[W]e have not yet clarified whether denial of a *Faretta* request is reviewed de novo or for abuse of discretion.”); [George](#), 56 F.3d at 1084 (citing [United States v. Smith](#), 780 F.2d 810, 811 (9th Cir. 1986)). However, the validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. See [United States v. Erskine](#), 355 F.3d 1161, 1166

[\(9th Cir. 2004\)](#).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 18. *Faretta* Requests.

f. Right to Counsel

Whether a defendant was denied Sixth Amendment rights to counsel is a question of law reviewed de novo. See [United States v. Danielson](#), 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); [United States v. Christakis](#), 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); [United States v. Ortega](#), 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); [United States v. Mett](#), 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis)

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. See [United States v. Younger](#), 398 F.3d 1179, 1185 (9th Cir. 2005). Whether those words actually invoked the right to counsel is reviewed de novo. [Younger](#), 398 F.3d at 1185; [United States v. Williams](#), 291 F.3d 1180, 1190 (9th Cir. 2002); [United States v. Doe](#), 170 F.3d 1162, 1166 (9th Cir. 1999).

g. Substitution of Counsel

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. See [United States v. Prime](#), 431 F.3d 1147, 1154 (9th Cir. 2005); [United States v. McKenna](#), 327 F.3d 830, 843 (9th Cir. 2003); [United States v. Smith](#), 282 F.3d 758, 763 (9th Cir. 2002); [United States v. Corona-Garcia](#), 210 F.3d 973, 976 (9th Cir. 2000); [United States v. Moore](#), 159 F.3d 1154, 1159 n.3 (9th Cir. 1998).

In reviewing the district court's exercise of discretion, the court of appeals considers three factors: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the extent of conflict between the defendant and counsel; and (3) the timeliness of the motion and the extent of resulting inconvenience and delay. See [Prime](#), 431 F.3d at 1154; [McKenna](#), 327 F.3d at 843; [Smith](#), 282 F.3d at 763.

Note that this court clarified that, in habeas review of a state court's denial of a motion to substitute counsel, review is not for an abuse of discretion, but whether the error violated the defendant's constitutional

rights. See [Schell v. Witek](#), 218 F.3d 1017, 1024-25 (9th Cir. 2000) (en banc) (overruling [Crandell v. Bunnell](#), 144 F.3d 1213, 1215 (9th Cir. 1998)).

h. Waiver of Representation

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

i. Withdrawal of Counsel

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

51. Sealed Materials

The district court's decision whether to seal documents is reviewed for an abuse of discretion. See [United States v. Shryock](#), 342 F.3d 948, 983 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004); [United States v. Mann](#), 829 F.2d 849, 853 (9th Cir. 1987).

52. Search and Seizure

The lawfulness of a search and seizure is reviewed de novo. See [United States v. Stafford](#), 416 F.3d 1068, 1073 (9th Cir. 2005); [United States v. Deemer](#), 354 F.3d 1130, 1132 (9th Cir. 2004); [United States v. Nerber](#), 222 F.3d 597, 599 (9th Cir. 2000).

The trial court's underlying factual findings are reviewed for clear error. See [Stafford](#), 416 F.3d at 1073; [Deemer](#), 354 F.3d at 1132; [United States v. Mendoza-Ortiz](#), 262 F.3d 882, 885 (9th Cir. 2001). "Where no

findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it." [United States v. Becker](#), 23 F.3d 1537, 1539 (9th Cir. 1994).

This court reviews de novo a district court's ultimate legal conclusion whether a defendant has standing to challenge a search and seizure. See [United States v. Gonzalez, Inc.](#), 412 F.3d 1102, 1116 (9th Cir. 2005); [United States v. Silva](#), 247 F.3d 1051, 1054 (9th Cir. 2001); [United States v. Sarkisian](#), 197 F.3d 966, 986 (9th Cir. 1999); [United States v. Armenta](#), 69 F.3d 304, 306-07 (9th Cir. 1995). The district court's factual findings underlying its decision on standing are reviewed for clear error. See [Gonzales](#), 412 F.3d at 1116; [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 to be reviewed de novo. See [United States v. Becerra-Garcia](#), 397 F.3d 1167, 1170 (9th Cir. 2005); [United States v. Enslin](#), 327 F.3d 788, 792-93 (9th Cir. 2003); [United States v. Cormier](#), 220 F.3d 1103, 1110 (9th Cir. 2000). However, the district court's underlying findings of fact are reviewed for clear error. See [Becerra-Garcia](#), 397 F.3d at 1172; [Cormier](#), 220 F.3d at 1110.

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. See [Franklin v. Foxworth](#), 31 F.3d 873, 875 (9th Cir. 1994) (civil rights action). The court's determination of "reasonableness" is reviewed de novo. See *id.*

a. Abandonment

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

b. Border Searches

The legality of a border search is reviewed de novo. See [United States v. Cortez-Rocha](#), 394 F.3d 1115, 1118 (9th Cir. 2005) (car tire); [United](#)

States v. Bennett, 363 F.3d 947, 950 (9th Cir. 2004) (boat).²³ Whether a border detention was based on reasonable suspicion is reviewed de novo. See *United States v. Nava*, 363 F.3d 942, 944 (9th Cir. 2004); *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. See *United States v. Camacho*, 368 F.3d 1182, 1183 (9th Cir. 2004); *Gonzalez-Rincon*, 36 F.3d at 863.

c. Coast Guard Searches

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

d. Consent to Search

A district court's determination whether a defendant voluntarily consented to a search depends on the totality of circumstances and is a question of fact reviewed for clear error. See *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125-26 (9th Cir. 2005); *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004) (discussing five factors to consider). 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. See *United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998); *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. See *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).

²³ See e.g., *United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003) (vehicle); *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002) (plane); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998) (mail); *United States v. Nates*, 831 F.2d 860, 862 (9th Cir. 1987).

A district court's determination regarding authority to consent to a search is a mixed question of fact and law reviewed de novo. See [United States v. Ruiz](#), 428 F.3d 877, 880 (9th Cir. 2005); [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. See [Ruiz](#), 428 F.3d at 880; [United States v. Enslin](#), 327 F.3d 788, 792 (9th Cir. 2003); [United States v. Reid](#), 226 F.3d 1020, 1025 (9th Cir. 2000); [United States v. Fiorillo](#), 186 F.3d 1136, 1144 (9th Cir. 1999) (describing three-part analysis).

e. Exclusionary Rule

Whether the exclusionary rule is applicable to a given case is reviewed de novo while underlying factual findings are reviewed for clear error. See [United States v. Crawford](#), 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc); [United States v. Hammett](#), 236 F.3d 1054, 1057 (9th Cir. 2001). Whether the rule applies to revocation hearings is reviewed de novo. See [United States v. Hebert](#), 201 F.3d 1103, 1104 (9th Cir. 2000); see also [Grimes v. Commissioner](#), 82 F.3d 286, 288 (9th Cir. 1996) (reviewing de novo whether rule applies to civil tax proceedings). 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' conduct was sufficiently egregious to require application of the exclusionary rule is reviewed de novo. [Gonzalez-Rivera v. INS](#), 22 F.3d 1441, 1449 (9th Cir. 1994).

f. Exigent Circumstances

Exigent circumstances present a mixed question of law and fact reviewed de novo. See [United States v. Russell](#), 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); [United States v. Bynum](#), 362 F.3d 574, 578-79 (9th Cir. 2004); [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. [Russell](#), 436 F.3d at 1089 n.4; [VonWillie](#), 59 F.3d at 925.

g. 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. Gust](#), 405 F.3d 797, 799 (9th Cir. 2005); [United States v. Shryock](#), 342 F.3d 948, 977 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004). A finding that an individual had a subjective expectation of privacy is reviewed for clear error. See [United States v. Gooch](#), 6 F.3d 673, 677 (9th Cir. 1993).

h. 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).

i. Inevitable Discovery

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

j. Investigatory Stops

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

The specific question of whether reasonable suspicion existed under given facts is a legal conclusion subject to de novo review. See [United States v. Arvizu](#), 534 U.S. 266, 275 (2002) (reaffirming de novo standard); [Ornelas v. United States](#), 517 U.S. 690, 699 (1996); [United States v. Miguel](#), 368 F.3d 1150, 1153 (9th Cir. 2004); [United States v. Colin](#), 314 F.3d 439, 442 (9th Cir. 2002); [United States v. Fuentes](#), 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo).²⁴ Underlying factual findings are reviewed for clear error. See [Colin](#), 314 F.3d at 442; [United](#)

²⁴ See also [Gonzalez-Rivera v. INS](#), 22 F.3d 1441, 1445 (9th Cir. 1994) (immigration law).

[States v. Chavez-Valenzuela](#), 268 F.3d 719, 723 (9th Cir. 2001), amended by 279 F.3d 1062 (9th Cir. 2002); [United States v. Lopez-Soto](#), 205 F.3d 1101, 1103 (9th Cir. 2000).

Whether a seizure exceeds the bounds of a valid investigatory stop and becomes a de facto arrest is reviewed de novo. See [United States v. Thompson](#), 282 F.3d 673, 676 (9th Cir. 2002); [United States v. Torres-Sanchez](#), 83 F.3d 1123, 1127 (9th Cir. 1996). Whether the scope of a vehicle stop exceeded the permissible scope of a traffic stop is reviewed de novo. [United States v. Garcia-Rivera](#), 353 F.3d 788, 791 (9th Cir. 2003). Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact reviewed by this court de novo. See [United States v. Becerra-Garcia](#), 397 F.3d 1167, 1170 (9th Cir. 2005); [United States v. Stephens](#), 206 F.3d 914, 917 (9th Cir. 2000). 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).

k. Issuance of a Search Warrant

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See [United States v. Fernandez](#), 388 F.3d 1199, 1252 (9th Cir. 2004); [United States v. Bridges](#), 344 F.3d 1010, 1014 (9th Cir. 2003).²⁵ Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. See [United States v. Meek](#), 366 F.3d 705, 712 (9th Cir. 2004) ("great deference"); [United States v. Leasure](#), 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference"). 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). 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

²⁵ See also [Dawson v. City of Seattle](#), 435 F.3d 1054, 1062 (9th Cir. 2006) (noting magistrate judge's finding of probable cause is reviewed for clear error); [United States v. Nielsen](#), 371 F.3d 574, 579 (9th Cir. 2004) (same); [United States v. Leasure](#), 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

[1490, 1494 \(9th Cir. 1991\)](#).

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. See [United States v. Huguez-Ibarra](#), 954 F.2d 546, 551 (9th Cir. 1992); [United States v. Grandstaff](#), 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); see also [United States v. Barajas-Avalos](#), 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); [United States v. Castillo](#), 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. See [United States v. Elliott](#), 322 F.3d 710, 714 (9th Cir. 2003), cert. denied, 540 U.S. 862 (2003); [Bowman](#), 215 F.3d at 963 n.6.²⁶

I. Knock and Announce

Compliance with “knock and announce” standards established by statute is reviewed de novo. See [United States v. Chavez-Miranda](#), 306 F.3d 973, 980 (9th Cir. 2002), cert. denied, 537 U.S. 1217 (2003); [United States v. Granville](#), 222 F.3d 1214, 1217 (9th Cir. 2000); [United States v. Hudson](#), 100 F.3d 1409, 1417 (9th Cir. 1996) (reviewing de novo the validity of a protective sweep, including compliance with knock and announce requirements). Underlying factual findings are reviewed for clear error. See [Chavez-Miranda](#), 306 F.3d at 980; [Banks](#), 282 F.3d at 703; [Granville](#), 222 F.3d at 1217. Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. See [United States v. Bynum](#), 362 F.3d 574, 578-79 (9th Cir. 2004); [United States v. Peterson](#), 353 F.3d 1045, 1048 (9th Cir. 2004); [United States v. Reilly](#), 224 F.3d 986, 991 (9th Cir. 2000); [Hudson](#), 100 F.3d at 1417.

²⁶ See also [Liston v. County of Riverside](#), 120 F.3d 965, 973 (9th Cir. 1997) (civil rights action based on unlawful search).

m. 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. See [United States v. Reed](#), 15 F.3d 928, 930 (9th Cir. 1994).

n. 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. See [Ornelas v. United States](#), 517 U.S. 690, 699 (1996) (warrantless search of vehicle); [United States v. Dorsey](#), 418 F.3d 1038, 1042 (9th Cir. 2005) (warrantless arrest). Thus, probable cause rulings are reviewed de novo. See [United States v. Williamson](#), 439 F.3d 1125, 1135 n.8 (9th Cir. 2006) (search warrant); [United States v. Sandoval-Venegas](#), 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); [United States v. Parks](#), 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); [United States v. Real Property Located at 22 Santa Barbara Drive](#), 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); [Picray v. Sealock](#), 138 F.3d 767, 770-71 (9th Cir. 1998) (warrantless arrest in § 1983 action); [United States v. Jones](#), 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest). However, underlying historical facts are reviewed for clear error. See [Williamson](#), 439 F.3d at 1135 n.8; [Sandoval-Venegas](#), 292 F.3d at 1104; [Parks](#), 285 F.3d at 1141.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 52. Search and Seizure, k. Issuance of a Search Warrant.

o. Probation/Parole Searches

The denial of a motion to suppress the fruits of a warrantless parole search is reviewed de novo. See [United States v. Hebert](#), 201 F.3d 1103, 1104 (9th Cir. 2000). The district court's factual determination that a probation search was not impermissible is reviewed for clear error. See [United States v. Watts](#), 67 F.3d 790, 794 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148 (1997). The district court's determination of the reasonable scope of a probation search is a mixed question of fact and law reviewed de novo. [United States v. Davis](#), 932 F.2d 752, 756 (9th Cir. 1991). Whether a probation search was a subterfuge for a criminal investigation is a factual determination that is reviewed for clear error. See

United States v. Knights, 219 F.3d 1138, 1141 (9th Cir. 2000), rev'd on other grounds, 534 U.S. 112 (2001).

p. Protective Sweeps

De novo review applies to a trial court's determination of the validity of a protective sweep, including compliance with statutory "knock and announce" requirement. See *United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996); *United States v. Arias*, 923 F.2d 1387, 1389 (9th Cir. 1991).²⁷ Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. See *United States v. Bynum*, 362 F.3d 574, 578-79 (9th Cir. 2004); *United States v. Peterson*, 353 F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).

q. Reasonable Suspicion

The specific question of whether reasonable suspicion existed under given facts is a legal conclusion subject to de novo review. See *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo).²⁸ Underlying factual findings are reviewed for clear error. See *Colin*, 314 F.3d at 442; *United States v. Chavez-Valenzuela*, 268 F.3d 719, 723 (9th Cir. 2001), amended by 279 F.3d 1062 (9th Cir. 2002); *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

²⁷ See also *United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002) (noting compliance with "knock and announce" standards is reviewed de novo), *cert. denied*, 123 S. Ct. 1317 (2003); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting de novo review applies to legal conclusion that "knock and announce" statute was violated while clear error review applies to findings of historical facts underlying conclusion).

²⁸ See also *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1445 (9th Cir. 1994) (immigration law)

r. Rule 41(e) Motions

A district court's interpretation of [Federal Rule of Criminal Procedure 41\(e\)](#) is reviewed de novo. See [United States v. Kaczynski](#), 416 F.3d 971, 974 (9th Cir. 2005); [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 [Kaczynski](#), 416 F.3d at 974; [United States v. Ritchie](#), 342 F.3d 903, 906 (9th Cir. 2003); [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 hold an evidentiary hearing on a Rule 41(e) motion is reviewed for an abuse of discretion. See [Center Art Galleries–Haw., Inc. v. United States](#), 875 F.2d 747, 753 (9th Cir. 1989).

s. Suppression Motions

Motions to suppress are reviewed de novo. See [United States v. Decoud](#), 456 F.3d 996, 1007 (9th Cir. 2006); [United States v. Adjani](#), 452 F.3d 1140, 1143 (9th Cir. 2006); [United States v. Thomas](#), 447 F.3d 1191, 1196 n.7 (9th Cir. 2006); [United States v. Marquez](#), 410 F.3d 612, 615 (9th Cir. 2005); [United States v. Crawford](#), 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc).

The trial court's factual findings are reviewed for clear error. See [United States v. Howard](#), 447 F.3d 1257, 1262 n.4 (9th Cir. 2006); [Thomas](#), 447 F.3d 1191, 1196 n.7; [United States v. Gorman](#), 314 F.3d 1105, 1110 (9th Cir. 2002); [United States v. Mattarolo](#), 209 F.3d 1153, 1155-56 (9th Cir. 2000); [United States v. Noushfar](#), 78 F.3d 1442, 1447 (9th Cir. 1996).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. See [United States v. Hernandez](#), 424 F.3d 1056, 1058 (9th Cir. 2005); [United States v. Smith](#), 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. See [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. See [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. See [United States v. Alexander](#), 106 F.3d 874, 876 (9th Cir. 1997). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. See [United States v. Jordan](#), 291 F.3d 1091, 1100 (9th Cir. 2002) (no abuse); [United States v. Hobbs](#), 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

t. Terry Stops

The propriety of a *Terry* stop is reviewed de novo. See [United States v. \\$109,179 in U.S. Currency](#), 228 F.3d 1080, 1083-84 (9th Cir. 2000); [United States v. Fuentes](#), 105 F.3d 487, 490 (9th Cir. 1997). The determination whether an investigatory stop is a warrantless arrest or a *Terry* stop, a mixed question of law and fact, is reviewed de novo. See [United States v. Charley](#), 396 F.3d 1074, 1079 (9th Cir. 2005); [\\$109,179 in U.S. Currency](#), 228 F.3d at 1084; [United States v. Harrington](#), 923 F.2d 1371, 1773 (9th Cir. 1991). A trial judge's determination of reasonable suspicion to stop based on specific, articulated facts is reviewed de novo. See [United States v. Thompson](#), 282 F.3d 673, 678 (9th Cir. 2002); [United States v. King](#), 244 F.3d 736, 738 (9th Cir. 2001); [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).²⁹

u. Warrantless Searches and Seizures

The validity of a warrantless search is reviewed de novo. See [United States v. Dorsey](#), 418 F.3d 1038, 1042 (9th Cir. 2005); [United States v. Johnson](#), 256 F.3d 895, 905 (9th Cir. 2001) (en banc); [United States v. Hinton](#), 222 F.3d 664, 673 (9th Cir. 2000). Underlying factual findings are reviewed for clear error. See [Dorsey](#), 418 F.3d at 1042.

²⁹ See also [United States v. Fernandez-Castillo](#), 324 F.3d 1114, 1117 (9th Cir.) (reviewing de novo whether investigatory stop was supported by reasonable suspicion under the totality of the circumstances), *cert. denied*, [540 U.S. 959](#) (2003).

The validity of a warrantless entry into a residence is reviewed de novo. See [United States v. Huguez-Ibarra](#), 954 F.2d 546, 551 (9th Cir. 1992). Whether an area is within the protected curtilage of a home is also reviewed de novo. See [United States v. Barajas-Avalos](#), 377 F.3d 1040, 1054 (9th Cir. 2004); [United States v. Cannon](#), 264 F.3d 875, 879 (9th Cir. 2001); [United States v. Johnson](#), 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); but see [United States v. Romero](#), 337 F.3d 1104, 1107-08 n.2 (9th Cir. 2003) (questioning *Johnson*).

The validity of a warrantless seizure is reviewed de novo. See [United States v. Hernandez](#), 313 F.3d 1206, 1208 (9th Cir. 2002) (package), cert. denied, 538 U.S. 1023 (2003); [United States v. Gill](#), 280 F.3d 923, 928 (9th Cir. 2002) (mail); [United States v. Linn](#), 880 F.2d 209, 214 (9th Cir. 1989) (automobile exception); [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. Howard](#), 828 F.2d 552, 554 (9th Cir. 1987) (exigent circumstances and consent).

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

Whether exigent circumstances justify a warrantless search or seizure is a question of law reviewed de novo. See [United States v. Russell](#), 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); [United States v. Furrow](#), 229 F.3d 805, 811 (9th Cir. 2000); [United States v. Gooch](#), 6 F.3d 673, 679 (9th Cir. 1993). Whether probable cause supports a warrantless search of an automobile is a question of law reviewed de novo. See [Ornelas v. United States](#), 517 U.S. 690, 699 (1996); [United States v. Ibarra](#), 345 F.3d 711, 715 (9th Cir. 2003); [United States v. Dunn](#), 946 F.2d 615, 619 (9th Cir. 1991). Whether probable cause supports a warrantless arrest is also reviewed de novo, while underlying facts reviewed for clear error. See [United States v. Collins](#), 427 F.3d 688, 691 (9th Cir. 2005); [United States v. Dorsey](#), 418 F.3d 1038, 1042 (9th Cir. 2005).

53. Selective Prosecution

Recently, this court noted that it “has employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim.” See [United States v. Culliton](#), 328 F.3d 1074, 1080-81 (9th Cir. 2003) (electing not to resolve conflict); see also [United States v. Moody](#), 778 F.2d 1380, 1385 (9th Cir. 1985) (noting but not resolving conflict between clear error and abuse of discretion standards). Before, however, this court reviewed for clear error. See [United States v. Estrada-Plata](#), 57 F.3d 757, 760 (9th Cir. 1995); [United States v. Davis](#), 36 F.3d 1424, 1432 (9th Cir. 1994); [United States v. Leidender](#), 779 F.2d 1417, 1418 (9th Cir. 1986); [United States v. Wilson](#), 639 F.2d 500, 503 n.2 (9th Cir. 1981) (explaining that clear error standard was chosen because “selective prosecution, more than vindictive prosecution, lends itself to the factfinding standard”).

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. See [United States v. Bauer](#), 84 F.3d 1549, 1560 (9th Cir. 1996). The court’s ruling on a motion for 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). The court’s ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. See [Candia-Veleta](#), 104 F.3d at 246. Discovery should be permitted when the defendant can 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)).

54. Severance

A district court’s decision on a motion for severance is reviewed for an abuse of discretion. See [United States v. Decoud](#), 456 F.3d 996, 1008 (9th Cir. 2006) (defendants); [United States v. Alvarez](#), 358 F.3d 1194, 1206 (9th Cir. 2004) (defendants); [United States v. Vargas-Castillo](#), 329 F.3d 715, 722 (9th Cir.) (counts), cert. denied, 540 U.S. 998 (2003); [United States v. Sarkisian](#), 197 F.3d 966, 978 (9th Cir. 1999); [United States v. Gillam](#), 167 F.3d 1273, 1276 (9th Cir. 1999); [United States v. Cruz](#), 127 F.3d 791, 798 (9th Cir. 1997) (articulating application of abuse of discretion standard).

The test for abuse of discretion is whether a joint trial was so manifestly prejudicial as to require the trial court to exercise its discretion in but one way, by ordering a separate trial. See [Decoud](#), 456 F.3d at 1008; [United States v. Johnson](#), 297 F.3d 845, 855 (9th Cir. 2002); [United States v. Nelson](#), 137 F.3d 1094, 1108 (9th Cir. 1998); [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. See [United States v. Ponce](#), 51 F.3d 820, 831 (9th Cir. 1995). The defendant must prove that prejudice from the joint trial was so “clear, manifest or undue” that he or she was denied a fair trial. See [United States v. Throckmorton](#), 87 F.3d 1069, 1071-72 (9th Cir. 1996); see also [Alvarez](#), 358 F.3d at 1206 (defendant has burden of proving “clear, manifest, or undue prejudice” from joint trial).

55. Sixth Amendment Rights

Whether a defendant was denied Sixth Amendment rights to counsel is a question of law reviewed de novo. See [United States v. Danielson](#), 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); [United States v. Christakis](#), 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).³⁰ Whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. See [United States v. Percy](#), 250 F.3d 720, 725 (9th Cir. 2001); [United States v. Lopez-Osuna](#), 242 F.3d 1191, 1198 (9th Cir. 2001); [United States v. Springer](#), 51 F.3d 861, 864 (9th Cir. 1995). Whether a defendant has been denied the right to a public trial is reviewed de novo. [United States v. Shryock](#), 342 F.3d 948, 974 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004).

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. Younger](#), 398 F.3d 1179, 1185 (9th Cir. 2005); [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. [Younger](#), 398 F.3d at 1185; [Ogbuehi](#), 18 F.3d at 812.

³⁰ See, e.g., [United States v. Ortega](#), 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); [United States v. Mett](#), 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis); [United States v. Benlian](#), 63 F.3d 824, 826 (9th Cir. 1995) (ineffective assistance of counsel claim)

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

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. See [United States v. Prime](#), 431 F.3d 1147, 1154 (9th Cir. 2005); [United States v. McKenna](#), 327 F.3d 830, 843 (9th Cir. 2003); [United States v. Smith](#), 282 F.3d 758, 763 (9th Cir. 2002); [United States v. Corona-Garcia](#), 210 F.3d 973, 976 (9th Cir. 2000); [United States v. Moore](#), 159 F.3d 1154, 1159 n.3 (9th Cir. 1998).

A district court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. See [United States v. Musa](#), 220 F.3d 1096, 1102 (9th Cir. 2000). Whether a defendant has a Sixth Amendment right to counsel in a civil forfeiture proceeding is reviewed de novo. See [United States v. \\$292,888.04 in U.S. Currency](#), 54 F.3d 564, 566 (9th Cir. 1995).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. See [Lilly v. Virginia](#), 527 U.S. 116, 136-37 (1999); [United States v. Ballesteros-Selinger](#), 454 F.3d 973, 974 n.2 (9th Cir. 2006); [United States v. Nielsen](#), 371 F.3d 574, 581 (9th Cir. 2004); [United States v. Murillo](#), 288 F.3d 1126, 1137 (9th Cir. 2002); [United States v. Ortega](#), 203 F.3d 675, 682 (9th Cir. 2000).³¹

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. Shryock](#), 342 F.3d 948, 979 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004); [United States v. Adamson](#), 291 F.3d 606, 612 (9th Cir. 2002); [Ortega](#), 203 F.3d at 682; [United States v. James](#), 139 F.3d 709, 713 (9th Cir. 1998); [United States v. Ripinsky](#), 109 F.3d 1436, 1455 (9th Cir.), *amended by* 129 F.3d 518 (9th Cir. 1997); *see also* [United States v. Rodriguez-Rodriguez](#), 393 F.3d 849, 856 (9th Cir. 2005) (noting but not resolving conflict); [United States v. Lo](#), 231 F.3d 471, 482 (9th Cir. 2000) (applying abuse of discretion standard); [United States v. Bensimon](#), 172 F.3d 1121, 1128 (9th Cir. 1999) (noting that de novo review applies to determination of

³¹ 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 violated right to confrontation but that “[t]he district court, however, has considerable discretion in restricting cross-examination, and this court will find error only when that discretion has been abused.”).

Confrontation Clause violations are subject, however, to harmless error analysis. See [Nielsen](#), 371 F.3d at 581; [Shryock](#), 342 F.3d at 979; [Ortega](#), 203 F.3d at 682; [United States v. Comito](#), 177 F.3d 1166, 1170 (9th Cir. 1999).³²

56. Speedy Trial

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. Gregory](#), 322 F.3d 1157, 1160-61 (9th Cir. 2003); [United States v. Lam](#), 251 F.3d 852, 855 (9th Cir.), amended by 262 F.3d 1033 (9th Cir. 2001). A finding of prejudice is reviewed under the clearly erroneous standard. See [Gregory](#), 322 F.3d at 1161; [United States v. Doe](#), 149 F.3d 945, 948 (9th Cir. 1998).

The district court’s application of the Speedy Trial Act is reviewed de novo. See [United States v. Vo](#), 413 F.3d 1010, 1014 (9th Cir. 2005); [United States v. Martinez-Martinez](#), 369 F.3d 1076, 1084 (9th Cir. 2004); [United States v. Pitner](#), 307 F.3d 1178, 1182 (9th Cir. 2002); [United States v. Ramirez-Cortez](#), 213 F.3d 1149, 1153 (9th Cir. 2000); [United States v. Hall](#), 181 F.3d 1057, 1061 (9th Cir. 1999) (noting that questions of law under the Speedy Trial Act reviewed de novo). The court’s interpretation of the Speedy Trial Act is also reviewed de novo. See [United States v. Boyd](#), 214 F.3d 1052, 1054 (9th Cir. 2000); [Hall](#), 181 F.3d at 1061; [United States v. Ortiz-Lopez](#), 24 F.3d 53, 54 (9th Cir. 1994).

The district court’s factual findings under the Speedy Trial Act are reviewed for clear error. See [Vo](#), 413 F.3d at 1014; [Martinez-Martinez](#), 369 F.3d at 1084; [United States v. Contreras](#), 63 F.3d 852, 855 (9th Cir. 1995); [Ortiz-Lopez](#), 24 F.3d at 54. A district court’s finding of an “ends of justice” exception will be reversed only if there is clear error. [Ramirez-Cortez](#), 213

³² See also [Hernandez v. Small](#), 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); [Whelchel v. Washington](#), 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

F.3d at 1153; [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 made in the same case by another judge. The revocation will be upheld only if the second judge specifically determines that the fact findings of the judge granting the continuance were clearly in error. See [Murray](#), 771 F.2d at 1327.

The district court's decision on a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. See [United States v. Daychild](#), 357 F.3d 1082, 1089 n.5 (9th Cir. 2004); [United States v. Gorman](#), 314 F.3d 1105, 1110 (9th Cir. 2002); [Pitner](#), 307 F.3d at 1182; [United States v. Symington](#), 195 F.3d 1080, 1090-91 (9th Cir. 1999); [United States v. Pena-Carrillo](#), 46 F.3d 879, 882 (9th Cir. 1995). To dismiss *without* prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors; otherwise, dismissal shall be entered *with* prejudice. See [United States v. Delgado-Miranda](#), 951 F.2d 1063, 1065 (9th Cir. 1991); *but see* [United States v. Clymer](#), 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide whether to dismiss indictment with or without prejudice if all relevant facts have been presented).

Whether a juvenile's speedy trial rights were violated is reviewed de novo. See [United States v. Juvenile \(RRA-A\)](#), 229 F.3d 737, 742 (9th Cir. 2000) (applying Juvenile Delinquency Act); [United States v. Doe](#), 149 F.3d 945, 948 (9th Cir. 1998); [United States v. Eric B.](#), 86 F.3d 869, 872 (9th Cir. 1996).

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. See [United States v. Collins](#), 90 F.3d 1420, 1425 (9th Cir. 1996).

Note that a trial court's decision on a defendant's motion to dismiss charges for *preindictment delay* is reviewed for an abuse of discretion. See [United States v. DeGeorge](#), 380 F.3d 1203, 1210 (9th Cir. 2004); [United States v. Gregory](#), 322 F.3d 1157, 1161 (9th Cir. 2003); [United States v. Doe](#), 149 F.3d 945, 947 (9th Cir. 1998). The denial of a motion to dismiss based on *preaccusation delay* is reviewed for an abuse of discretion. See [Doe](#), 149 F.3d at 947.

57. Statutes

The construction or interpretation of a statute is reviewed de novo. See [United States v. Cabaccang](#), 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc); [United States v. Carranza](#), 289 F.3d 634, 642 (9th Cir. 2002). Specific statutes follow.

- **Sentencing (Statutes & Guidelines).** See, e.g., [United States v. Leon H.](#), 365 F.3d 750, 752 (9th Cir. 2004); [United States v. Auld](#), 321 F.3d 861, 863 (9th Cir. 2003); [United States v. Kakatin](#), 214 F.3d 1049, 1051 (9th Cir. 2000); [United States v. Hunter](#), 101 F.3d 82, 84 (9th Cir. 1996).
- **State law.** See, e.g., [United States v. Davidson](#), 246 F.3d 1240, 1246 (9th Cir. 2001) (California); [United States v. Ramos](#), 39 F.3d 219, 220 (9th Cir. 1994) (Arizona).
- **Specific statutes & phrases.** See, e.g., [United States v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725](#), 416 F.3d 977, 979 (9th Cir. 2005) (“destructive device”); [United States v. 144,774 pounds of Blue King Crab](#), 410 F.3d 1131, 1133 (9th Cir. 2005) (contraband); [United States v. Kranovich](#), 401 F.3d 1107, 1111 (9th Cir. 2005) (theft involving federal funds/programs); [United States v. Shipsey](#), 363 F.3d 962, 968 n.4 (9th Cir. 2004) (statute of limitation); [Cabaccang](#), 332 F.3d at 624-25 (importation) [United States v. Migi](#), 329 F.3d 1085, 1087 (9th Cir. 2003) (playground); [United States v. Lincoln](#), 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA); [United States v. Pluff](#), 253 F.3d 490, 492 (9th Cir. 2001) (Major Crimes Act); [United States v. Kaluna](#), 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc) (three-strikes law); [United States v. Frega](#), 179 F.3d 793, 802 n.6 (9th Cir. 1999) (mail fraud); [United States v. Doe](#), 136 F.3d 631, 634 (9th Cir. 1998) (arson); [United States v. DeLaCorte](#), 113 F.3d 154, 155 (9th Cir. 1997) (carjacking); [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) (“access device”).

The applicability of a statute to a particular case is a question of law reviewed de novo. See [United States v. Villa-Gonzalez](#), 208 F.3d 1160, 1165

(9th Cir. 2000) (AEDPA).

The constitutionality of a statute is a question of law reviewed de novo. See [United States v. Huerta-Pimental](#), 445 F.3d 1220, 1222 (9th Cir. 2006); [United States v. Perlaza](#), 439 F.3d 1149, 1158 n.11 (9th Cir. 2006); [United States v. Jensen](#), 425 F.3d 698, 706-07 (9th Cir. 2005); [United States v. Younger](#), 398 F.3d 1179, 1192 (9th Cir. 2005); see also [United States v. \\$129,727.00 U.S. Currency](#), 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture).

Whether a statute is void for vagueness is a question of law reviewed de novo. [United States v. Rodriguez](#), 360 F.3d 949, 953 (9th Cir. 2004); [United States v. Naghani](#), 361 F.3d 1255, 1259 (9th Cir. 2004); [United States v. Cooper](#), 173 F.3d 1192, 1202 (9th Cir. 1999); [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. See [United States v. Hill](#), 279 F.3d 731, 736 (9th Cir. 2002); [United States v. Hanousek](#), 176 F.3d 1116, 1121 (9th Cir. 1999). A district court's refusal to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. See [United States v. Akins](#), 276 F.3d 1141, 1146 (9th Cir. 2002).

58. Statutes of Limitation

The district court's conclusion that a particular statute of limitation applies is reviewed de novo. See [United States v. Leo Sure Chief](#), 438 F.3d 920, 922 (9th Cir. 2006).³³ When a statute of limitation began to run is also a question of law reviewed de novo. See [Orr v. Bank of America, NT & SA](#), 285 F.3d 764, 780 (9th Cir. 2002).³⁴

59. Suppression

Motions to suppress are reviewed de novo and the trial court's factual findings are reviewed for clear error. See [United States v. Howard](#), 447 F.3d

³³ [United States v. Shipsey](#), 363 F.3d 962, 968 n.4 (9th Cir. 2004).

³⁴ [Oja v. U.S. Army Corps of Engineers](#), 440 F.3d 1122, 1127 (9th Cir. 2006) (“We review de novo the question of when a cause of action accrues and whether a claim is barred by the statute of limitations.”).

[1257](#), [1262 n.4 \(9th Cir. 2006\)](#) (reversing district court); [United States v. Gorman](#), [314 F.3d 1105](#), [1110 \(9th Cir. 2002\)](#) (same).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. See [United States v. Hernandez](#), [424 F.3d 1056](#), [1058 \(9th Cir. 2005\)](#).³⁵ Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. See [United States v. Mejia](#), [69 F.3d 309](#), [314 \(9th Cir. 1995\)](#) (listing factors).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. See [United States v. Buffington](#), [815 F.2d 1292](#), [1298 \(9th Cir. 1987\)](#). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. See [United States v. Jordan](#), [291 F.3d 1091](#), [1100 \(9th Cir. 2002\)](#) (no abuse); [United States v. Hobbs](#), [31 F.3d 918](#), [923 \(9th Cir. 1994\)](#) (court abused its discretion).

60. Transfer of Trial

The district court's denial of a motion to transfer trial pursuant to [Federal Rule of Criminal Procedure 18](#) is reviewed for an abuse of discretion. See [United States v. Murillo](#), [288 F.3d 1126](#), [1140 \(9th Cir. 2002\)](#); [United States v. Scholl](#), [166 F.3d 964](#), [969 \(9th Cir. 1999\)](#).

61. Venue

In criminal cases, venue is a question of law reviewed de novo. [United States v. Valdez-Santos](#), [457 F.3d 1044](#), [1046 \(9th Cir. 2006\)](#) (reversing district court); [United States v. Williams](#), [291 F.3d 1180](#), [1188 \(9th Cir. 2002\)](#). The trial court's denial of a motion for change of venue, however, is reviewed for an abuse of discretion. See [Valdez-Santos](#), [457 F.3d at 1046](#); [United States v. Croft](#), [124 F.3d 1109](#), [1115 n.2 \(9th Cir. 1997\)](#); [United States v. Collins](#), [109 F.3d 1413](#), [1416 \(9th Cir. 1997\)](#).

³⁵ [United States v. Howell](#), [231 F.3d 615](#), [620 \(9th Cir. 2000\)](#) (“An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.”).

62. Vindictive Prosecution

The standard of review in a vindictive prosecution case remains unsettled in this circuit. See [United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 \(9th Cir. 2001\)](#); [United States v. Frega, 179 F.3d 793, 801 \(9th Cir. 1999\)](#). The court has variously applied abuse of discretion, clearly erroneous, and de novo standards. See [Hernandez-Herrera, 273 F.3d at 1217](#); [United States v. Montoya, 45 F.3d 1286, 1291 \(9th Cir. 1995\)](#). A de novo standard was advocated in [United States v. Martinez, 785 F.2d 663, 666 \(9th Cir. 1988\)](#). However, some 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 \(9th Cir. 1997\)](#). Most cases simply decline to decide what standard of review applies because the “claim of prosecutorial vindictiveness fails regardless of which standard is applied.” See [Hernandez-Herrera, 273 F.3d at 1217](#); see also [United States v. Frega, 179 F.3d 793, 801 \(9th Cir. 1999\)](#) (declining to decide).

63. Voluntariness of a Confession

See II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 6. Confessions.

64. Waiver of Rights

Issues of waiver generally are reviewed de novo. See [United States v. Pacheco-Navarette, 432 F.3d 967, 970 \(9th Cir. 2005\)](#) (appeal waivers). “Whether [a] waiver was knowing and intelligent is a question of fact that we review for clear error.” [United States v. Rodriguez-Preciado, 399 F.3d 1118, 1127 \(9th Cir. 2005\)](#) (*Miranda* waiver). “Whether the waiver was voluntary is a mixed question of fact and law, which we review de novo.” *Id.*; see also [United States v. Amano, 229 F.3d 801, 803 \(9th Cir. 2000\)](#) (*Miranda* waiver).³⁶

³⁶ See, e.g., [United States v. Younger, 398 F.3d 1179, 1185 \(9th Cir. 2005\)](#) (*Miranda* waiver); [United States v. Percy, 250 F.3d 720, 725 \(9th Cir. 2001\)](#) (right to counsel); [United States v. Ruiz, 241 F.3d 1157, 1163 \(9th Cir. 2001\)](#) (waiver of *Brady* rights), *rev’d on other grounds*, [536 U.S. 622](#) (2002); [United States v. Anglin, 215 F.3d 1064, 1066 \(9th Cir. 2000\)](#) (right to appeal); [United States v. Amlani, 169 F.3d 1189, 1194 \(9th Cir. 1999\)](#)

65. Warrants

The issuance of a search warrant by a magistrate judge is reviewed for clear error. See [United States v. Meek](#), 366 F.3d 705, 712 (9th Cir. 2004).³⁷ The magistrate judge's determination of probable cause is accorded deference by the reviewing court. See [Meek](#), 366 F.3d at 712 (“great deference”); [United States v. Leasure](#), 319 F.3d 1092, 1099 (9th Cir. 2003) (“significant deference”); [United States v. Hay](#), 231 F.3d 630, 634 n.4 (9th Cir. 2000) (“great deference”).

Whether a warrant is sufficiently specific is reviewed de novo. See [United States v. Reeves](#), 210 F.3d 1041, 1046 (9th Cir. 2000).³⁸ The scope of a warrant is a question of law reviewed de novo. See [United States v. Hitchcock](#), 286 F.3d 1064, 1071 (9th Cir.), amended by [298 F.3d 1021](#) (9th Cir. 2002).³⁹ Whether an area is within the protected curtilage of a home is reviewed de novo. See [United States v. Barajas-Avalos](#), 377 F.3d 1040, 1054 (9th Cir. 2004).⁴⁰

(waiver of attorney-client privilege); [United States v. Aguilar-Muniz](#), 156 F.3d 974, 976 (9th Cir. 1998) (right to appeal); [United States v. Duane-Higareda](#), 113 F.3d 1000, 1002 (9th Cir. 1997) (waiver of jury trial); [United States v. Anderson](#), 79 F.3d 1522, 1525 (9th Cir. 1996) (privilege against self-incrimination); [United States v. Reyes](#), 8 F.3d 1379, 1383 (9th Cir. 1993) (waiver of jury trial by jury over government objection); *but see* [United States v. Lumitap](#), 111 F.3d 81, 83 (9th Cir. 1997) (district court's denial of a defendant's motion to waive presence at trial reviewed for abuse of discretion).

³⁷ See also [United States v. Wong](#), 334 F.3d 831, 835-36 (9th Cir. 2003); [United States v. Celestine](#), 324 F.3d 1095, 1000 (9th Cir. 2003); [United States v. Bowman](#), 215 F.3d 951, 963 n.6 (9th Cir. 2000); [United States v. Hernandez](#), 937 F.2d 1490, 1494 (9th Cir. 1991) (the standard of review is “less probing than de novo review and shows deference to the issuing magistrate's determination.”).

³⁸ See also [United States v. Barajas-Avalos](#), 377 F.3d 1040, 1058 (9th Cir. 2004) (legal sufficiency of a redacted affidavit); [United States v. Noushfar](#), 78 F.3d 1442, 1447 (9th Cir. 1996).

³⁹ [United States v. Cannon](#), 264 F.3d 875, 878 (9th Cir. 2001); [United States v. Gorman](#), 104 F.3d 272, 274 (9th Cir. 1996)

⁴⁰ [United States v. Johnson](#), 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see* [United](#)

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); see also [United States v. Fowlie](#), 24 F.3d 1059, 1066 (9th Cir. 1994) (good faith reliance on a warrant not supported by probable cause).

66. Wiretaps

A district court's authorization of a wiretap is reviewed for an abuse of discretion. See [United States v. Canales Gomez](#), 358 F.3d 1221, 1225 (9th Cir. 2004).⁴¹ However, the 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 [Canales Gomez](#), 358 F.3d at 1224; [United States v. Shryock](#), 342 F.3d 948, 975 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004).⁴² Whether other investigative procedures have been exhausted or why they reasonably appear not likely to succeed is also reviewed de novo. See [United States v. Lynch](#), 367 F.3d 1148, 1159 (9th Cir. 2004) (but noting that ultimate conclusion that a wiretap is necessary is reviewed for an abuse of discretion).

The court's decision to deny a motion to suppress wiretap evidence is reviewed de novo. See [Lynch](#), 367 F.3d at 1159 (reviewing denial of suppression motion); [United States v. Reyna](#), 218 F.3d 1108, 1110 (9th Cir. 2000) (same). 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. See [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*

[States v. Romero-Bustamante](#), 337 F.3d 1104, 1107-08 n.2 (9th Cir. 2003) (questioning *Johnson*'s precedential value on the standard of review).

Wiretaps

⁴¹ [United States v. McGuire](#), 307 F.3d 1192, 1197 (9th Cir. 2002); [United States v. Blackmon](#), 273 F.3d 1204, 1207 (9th Cir. 2001); [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).

⁴² [McGuire](#), 307 F.3d at 1197; [Blackmon](#), 273 F.3d at 1207; [United States v. Khan](#), 993 F.2d 1368, 1375 (9th Cir. 1993); [Carneiro](#), 861 F.2d at 1176.

hearing challenging the veracity of an affidavit supporting a wiretap application. See [Shryock, 342 F.3d at 975](#); [United States v. Meling, 47 F.3d 1546, 1553 \(9th Cir. 1995\)](#). The district court's underlying factual determinations are reviewed for clear error. See [Shryock, 342 F.3d at 975](#); [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. See [United States v. Rrapi, 175 F.3d 742, 746 \(9th Cir. 1999\)](#); [United States v. Fuentes-Montijo, 68 F.3d 352, 354 \(9th Cir. 1995\)](#).

C. Trial Decisions in Criminal Cases

1. Acquittals

A trial court's ruling on a motion for acquittal is reviewed de novo. See [United States v. Johnson, 357 F.3d 980, 983 \(9th Cir. 2004\)](#).⁴³ This court reviews 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.⁴⁴ See also [United States v. Yoshida, 303 F.3d 1145, 1149 \(9th Cir. 2002\)](#) (noting standard and explaining deference owed to jury); [United States v. Magallon-Jimenez, 219 F.3d 1109, 1112 \(9th Cir. 2000\)](#) (noting standard applies also to bench trials).

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. See [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 move for acquittal during trial, review is

⁴³ [United States v. Somsamouth, 352 F.3d 1271, 1274 \(9th Cir. 2003\)](#), cert. denied, 541 U.S. 1000 (2004); [United States v. Bridges, 344 F.3d 1010, 1014 \(9th Cir. 2003\)](#); [United States v. Gonzalez-Torres, 309 F.3d 594, 598 \(9th Cir. 2002\)](#), cert. denied, 538 U.S. 969 (2003); [United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 \(9th Cir. 2001\)](#).

⁴⁴ See [Somsamouth, 352 F.3d at 1274-75](#); [Gonzalez-Torres, 309 F.3d at 598](#); [Hernandez-Herrera, 273 F.3d at 1218](#).

limited to plain error. See [United States v. Ross](#), 338 F.3d 1054, 1057 (9th Cir. 2003), cert. denied, 540 U.S. 1168 (2004). Similarly, when a defendant fails to renew a motion for judgment of acquittal at the close of all evidence in a jury trial, this court reviews only for plain error to prevent a miscarriage of justice. See [United States v. Alvarez-Valenzuela](#), 231 F.3d 1198, 1200 (9th Cir. 2000); [United States v. Yossunthorn](#), 167 F.3d 1267, 1270 n.4 (9th Cir. 1999) (explaining how defendant may preserve de novo review); [United States v. Carpenter](#), 95 F.3d 773, 775 (9th Cir. 1996). No such motion is required, however, in a bench trial to preserve for appeal a challenge to the sufficiency of the evidence. See [United States v. Atkinson](#), 990 F.2d 501, 503 (9th Cir. 1993) (en banc). When a claim of sufficiency of the evidence is preserved by a motion for acquittal at the close of the evidence, the appellate court reviews the district court's denial of the motion de novo. See [United States v. Carranza](#), 289 F.3d 634, 641 (9th Cir. 2002).

2. Admission of Evidence

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. See [United States v. Plancarte-Alvarez](#), 366 F.3d 1058, 1062 (9th Cir. 2004) (Rule 404(b)).⁴⁵ Such rulings will be reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. See [United States v. Edwards](#), 235 F.3d 1173, 1178 (9th Cir. 2000); [United States v. Ramirez](#), 176 F.3d 1179, 1182 (9th Cir. 1999); [United States v. Morales](#), 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is also reviewed for an abuse of discretion. See [United States v. Patterson](#), 292 F.3d 615, 626 (9th Cir. 2002).

The district court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. See [United States v. Sioux](#), 362 F.3d 1241, 1244 n.5 (9th Cir. 2004).⁴⁶ Whether

⁴⁵ See [United States v. Pang](#), 362 F.3d 1187, 1194 (9th Cir. 2004); [United States v. Lillard](#), 354 F.3d 850, 853 (9th Cir. 2003) (general); [United States v. Allen](#), 341 F.3d 870, 886 (9th Cir. 2003) (Rule 403), cert. denied, 124 S. Ct. 1876 (2004); [United States v. Geston](#), 299 F.3d 1130, 1137 (9th Cir. 2002) (Rules 404 and 608(b)).

⁴⁶ [United States v. Angwin](#), 271 F.3d 786, 798 (9th Cir. 2001); [United States v. Mateo-Mendez](#), 215 F.3d 1039, 1042 (9th Cir. 2000).

particular evidence falls within the scope of a rule of evidence is also reviewed de novo. See [United States v. Lillard](#), 354 F.3d 850, 853 (9th Cir. 2003); [United States v. Smith](#), 282 F.3d 758, 768 (9th Cir. 2002).

Questions of the admissibility of evidence that involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. See [United States v. Mateo-Mendez](#), 215 F.3d 1039, 1042 (9th Cir. 2000).⁴⁷ When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an “essentially factual” inquiry is present, or if the exercise of the district court’s discretion is determinative, then deference is given to the decision of the district court; otherwise, review is de novo. See [Mateo-Mendez](#), 215 F.3d at 1042; [United States v. Marbella](#), 73 F.3d 1508, 1515 (9th Cir. 1996).⁴⁸

3. *Allen* Charges

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions, i. *Allen* Charges.

4. Authenticity

A trial court’s decision regarding the authenticity of evidence is reviewed for an abuse of discretion. See [United States v. Workinger](#), 90 F.3d 1409, 1415 (9th Cir. 1996); [United States v. Childs](#), 5 F.3d 1328, 1335 (9th Cir. 1993). Authentication of evidence is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” [Fed. R. Evid. 901\(a\)](#).⁴⁹ The trial court’s conclusion that evidence is supported by a proper foundation is also reviewed for an abuse of

⁴⁷ [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).

⁴⁸ See also [United States v. James](#), 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc) (noting 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).

⁴⁹ See also [United States v. Panaro](#), 266 F.3d 939, 951 (9th Cir. 2001) (reciting standard); [Workinger](#), 90 F.3d at 1409 (same).

discretion. See [United States v. Pang](#), 362 F.3d 1187, 1191 (9th Cir. 2004); [United States v. Tank](#), 200 F.3d 627, 630 (9th Cir. 2000).

5. *Batson* Claims

Whether a district court is obligated to apply the *Batson* analysis to a defendant's claim of purposeful discrimination is a question of law reviewed de novo. See [United States v. Alanis](#), 335 F.3d 965, 967 & n.1 (9th Cir. 2003). Whether a particular jury satisfies the "representative jury" required by *Batson* is reviewed de novo. See [United States v. Bishop](#), 959 F.2d 820, 827 (9th Cir. 1992).⁵⁰ Whether a prosecutor's proclaimed reason for exercising a peremptory challenge is an adequate race-neutral explanation is an issue of law reviewed de novo. See [United States v. Steele](#), 298 F.3d 906, 910 (9th Cir. 2002).⁵¹ When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. See [United States v. Contreras-Contreras](#), 83 F.3d 1103, 1105 (9th Cir. 1996).

The district court's findings of fact as to the racially discriminatory use of peremptory challenges are reviewed for clear error. See [United States v. Annigoni](#), 96 F.3d 1132, 1136 n.3 (9th Cir. 1996) (en banc).⁵²

The trial court's remedy for a *Batson* violation is reviewed for an abuse of discretion. See [United States v. Ramirez-Martinez](#), 273 F.3d 903, 910 (9th Cir. 2001).

⁵⁰ See also [Cooperwood v. Cambra](#), 245 F.3d 1042, 1047 (9th Cir. 2001) (habeas) (reviewing de novo the state court's ruling on the *Batson* prima facie issue).

⁵¹ See also [Williams v. Rhoades](#), 354 F.3d 1101, 1107 (9th Cir. 2004) (habeas) (reviewing de novo the facial validity of prosecutor's proffered reasons).

⁵² See also [United States v. Steele](#), 298 F.3d 906, 910 (9th Cir. 2002) (noting whether defendant has made a prima facie showing of racial discrimination is reviewed for clear error); [United States v. Hernandez-Herrera](#), 273 F.3d 1213, 1218 (9th Cir. 2001) (same); [United States v. Gillam](#), 167 F.3d 1273, 1278 (9th Cir. 1999) ("The district court's determination on intent to discriminate is reviewed under a deferential standard.").

6. Best Evidence Rule

The best evidence rule provides that the original of a “writing, recording, or photograph” is required to prove the contents thereof. [Fed. R. Evid. 1002](#). A district court’s ruling on the best evidence rule is reviewed for an abuse of discretion. See [United States v. Bennett](#), 363 F.3d 947, 952 (9th Cir. 2004).

7. Bruton Violations

An alleged *Bruton* violation is reviewed de novo. See [United States v. Angwin](#), 271 F.3d 786, 795 (9th Cir. 2001). When there is no objection at trial, review is limited to plain error. See [United States v. Arias-Villanueva](#), 998 F.2d 1491, 1507 (9th Cir. 1993).

8. Burden of Proof

Whether a district court properly applied the correct burden of proof is a question of law reviewed de novo. See [United States v. Banuelos](#), 322 F.3d 700, 704 (9th Cir. 2003) (sentencing); [United States v. Gill](#), 280 F.3d 923, 930 (9th Cir. 2002) (same). Whether the court improperly shifted the burden of proof is reviewed de novo. See [United States v. Coutchavlis](#), 260 F.3d 1149, 1156 (9th Cir. 2001). The trial court’s determination that a defendant has the burden of proving a defense is reviewed de novo. See [United States v. Beasley](#), 346 F.3d 930, 933 (9th Cir. 2003), *cert. denied*, 542 U.S. 921 (2004).⁵³ 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).

9. 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).

⁵³ [United States v. Hernandez-Franco](#), 189 F.3d 1151, 1157 (9th Cir. 1999); [United States v. McKittrick](#), 142 F.3d 1170, 1177 (9th Cir. 1998).

10. Character Evidence

The trial court's decision to admit character evidence is reviewed for an abuse of discretion. See [United States v. Geston](#), 299 F.3d 1130, 1137-38 (9th Cir. 2002).⁵⁴ If no objection was raised, the court's decision to admit the evidence is reviewed for plain error. [United States v. Bracy](#), 67 F.3d 1421, 1432 (9th Cir. 1995). Whether particular evidence falls within the scope of Rule 404 is reviewed de novo. See [United States v. Lillard](#), 354 F.3d 850, 853 (9th Cir. 2003); [United States v. Smith](#), 282 F.3d 758, 768 (9th Cir. 2002).

11. Closing Arguments

The district court's decision to allow a jury to consider comments made in closing argument is reviewed for an abuse of discretion. See [United States v. Tam](#), 240 F.3d 797, 802 (9th Cir. 2001).⁵⁵ Any improper comments are subject to harmless error review. See [United States v. Brown](#), 327 F.3d 867, 871 (9th Cir. 2003).⁵⁶ The plain error standard applies when there is no objection. See [Brown](#), 327 F.3d at 871; [Tam](#), 240 F.3d at 802.⁵⁷

Note that prosecutors are forbidden from commenting on a defendant's silence. See [Griffin v. California](#), 380 U.S. 609, 615 (1985); [United States v. Atcheson](#), 94 F.3d 1237, 1246 (9th Cir. 1996). Claimed violations are reviewed de novo. See [United States v. Smith](#), 282 F.3d 758, 769 (9th Cir. 2002); [United States v. Bushyhead](#), 270 F.3d 905, 911 (9th Cir. 2001) (applying harmless error standard). When there is no objection, review is limited to plain error. See [United States v. Amlani](#), 111 F.3d 705,

⁵⁴ [United States v. Smith](#), 282 F.3d 758, 768 (9th Cir. 2002); [United States v. Cervantes](#), 219 F.3d 882, 884 (9th Cir. 2000); [United States v. Castillo](#), 181 F.3d 1129, 1132 (9th Cir. 1999); [United States v. Bracy](#), 67 F.3d 1421, 1432 (9th Cir. 1995).

⁵⁵ [United States v. Cooper](#), 173 F.3d 1192, 1203 (9th Cir. 1999); [United States v. Etsitty](#), 130 F.3d 420, 424 (9th Cir. 1997), amended by 140 F.3d 1274 (9th Cir. 1998).

⁵⁶ [United States v. Marcucci](#), 299 F.3d 1156, 1158 (9th Cir. 2002); [United States v. Hermanek](#), 289 F.3d 1076, 1098 (9th Cir. 2002) (vouching).

⁵⁷ [United States v. Leon-Reyes](#), 177 F.3d 816, 821 (9th Cir. 1999); [Cooper](#), 173 F.3d at 1203; [United States v. Senchenko](#), 133 F.3d 1153, 1156 (9th Cir. 1998).

[714 \(9th Cir. 1997\)](#).

12. Coconspirator Statements

A trial court's decision to admit coconspirator statements is reviewed for an abuse of discretion, while its underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy are reviewed for clear error. See [United States v. Shryock](#), 342 F.3d 948, 981 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004).⁵⁸ In [United States v. Pena-Espinoza](#), 47 F.3d 356, 360-61 (9th Cir. 1995), however, this court stated that “[w]e review de novo the legal question of whether the government established a prima facie showing of conspiracy but apply a clearly erroneous standard in reviewing whether a challenged statement was made in the course and furtherance of the conspiracy.” The court noted that “[t]he standard for reviewing the prima facie showing is . . . unsettled in this circuit.” [Id.](#) at 361 n.3.

Prior to [Bourjaily v. United States](#), 483 U.S. 171 (1987), this circuit reviewed de novo the district court's legal conclusion that a conspiracy existed. See [United States v. Gordon](#), 844 F.2d 1397, 1402 (9th Cir. 1988) (reviewing development of standard of review). In [Bourjaily](#), the Supreme Court noted that the district court's factfinding regarding the existence of a conspiracy and the defendant's involvement in it was not clearly erroneous. [Bourjaily](#), 483 U.S. at 181. After [Bourjaily](#), this court has generally stated that it reviews for clear error the district court's findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy. See [United States v. Torres](#), 908 F.2d 1417, 1425 (9th Cir. 1990). Notwithstanding, some cases 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

⁵⁸ [United States v. Bowman](#), 215 F.3d 951, 960 (9th Cir. 2000); [United States v. Gil](#), 58 F.3d 1414, 1419 (9th Cir. 1995).

discretion standard applied to the trial court's decision to admit the statements but the trial court's underlying findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy are reviewed for clear error. The correct standard is probably that this court reviews for abuse of discretion the district court's decision to admit coconspirator statements and for clear error the underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy. *See also* [Shryock, 342 F.3d at 981](#) (stating standard); [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 \(9th Cir. 1989\)](#).

13. Comments on the Evidence

A trial court has discretion to comment on the evidence, as long as it makes clear that the jury must ultimately decide all questions of fact. *See* [United States v. Sager, 227 F.3d 1138, 1145 \(9th Cir. 2000\)](#); [People of Guam v. McGravey, 14 F.3d 1344, 1348 \(9th Cir. 1994\)](#). Whether a judge's comment on a defendant's decision not to testify violates the right against self-incrimination is reviewed de novo. *See* [United States v. Coutchavlis, 260 F.3d 1149, 1156 \(9th Cir. 2001\)](#)

A prosecutor's improper comments at closing argument are reviewed for harmless error. *See* [United States v. Brown, 327 F.3d 867, 871 \(9th Cir. 2003\)](#); [United States v. Marcucci, 299 F.3d 1156, 1158 \(9th Cir. 2002\)](#); [United States v. Hermanek, 289 F.3d 1076, 1098 \(9th Cir. 2002\)](#) (vouching). The plain error standard applies when there is no objection. *See* [Brown, 327 F.3d at 871](#); [Marcucci, 299 F.3d at 1158](#).

14. Confrontation Clause

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See* [Lilly v. Virginia, 527 U.S. 116, 136-37 \(1999\)](#).⁵⁹

⁵⁹ [United States v. Nielsen, 371 F.3d 574, 581 \(9th Cir. 2004\)](#); [United States v. Murillo, 288 F.3d 1126, 1137 \(9th Cir. 2002\)](#); [United States v. Boone, 229 F.3d 1231, 1233 \(9th Cir. 2000\)](#); [United States v. Amlani, 111](#)

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. Shryock](#), 342 F.3d 948, 979 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004).⁶⁰

Note, however, that decisions on the scope of cross-examination are reviewed for an abuse of discretion. See [Munoz](#), 233 F.3d at 1134; [Ortega](#), 203 F.3d at 682; [United States v. Bensimon](#), 172 F.3d 1121, 1128 (9th Cir. 1999). This may have led to some disagreement in the caselaw. See [United States v. Rodriguez-Rodriguez](#), 364 F.3d 1142, 1147 (9th Cir. 2004) (noting but not resolving conflict); [United States v. Lo](#), 231 F.3d 471, 482 (9th Cir. 2000) (applying abuse of discretion standard).

Confrontation Clause violations are subject to harmless error analysis. See [United States v. Nielsen](#), 371 F.3d 574, 581 (9th Cir. 2004); [Shryock](#), 342 F.3d at 979.⁶¹

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 55. Sixth Amendment Rights.

15. Constitutionality of Regulations

Whether a regulation is unconstitutional is a question of law reviewed de novo. See [United States v. Elias](#), 269 F.3d 1003, 1014 (9th Cir. 2001) (vagueness).⁶² Note that the district court's interpretation of a regulation is

[F.3d 705, 716 \(9th Cir. 1997\)](#); 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).

⁶⁰ [United States v. Munoz](#), 233 F.3d 1117, 1134 (9th Cir. 2000); [United States v. Ortega](#), 203 F.3d 675, 682 (9th Cir. 2000).

⁶¹ [United States v. Orellana-Blanco](#), 294 F.3d 1143, 1148 (9th Cir. 2002); [Ortega](#), 203 F.3d at 682; see also [Hernandez v. Small](#), 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); [Whelchel v. Washington](#), 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

⁶² See, e.g., [United States v. Erickson](#), 75 F.3d 470, 475 (9th Cir. 1996) (vagueness, overbreadth and "prior restraint"); [United States v. Woodley](#), 9 F.3d 774, 778 (9th Cir. 1993) (vagueness); [United States v. Coutchavlis](#), 260 F.3d 1149, 1155 (9th Cir. 2001) (vagueness); [United States v. Albers](#), 226 F.3d 989, 992 (9th Cir. 2000) (same).

reviewed de novo. See [United States v. Willfong](#), 274 F.3d 1297, 1300 (9th Cir. 2001).⁶³ An agency’s interpretation of regulations, however, is entitled to deference. See [United States v. McKittrick](#), 142 F.3d 1170, 1173 (9th Cir. 1998).

16. Constitutionality of Statutes

The constitutionality of a statute is a question of law reviewed de novo. See [United States v. Naghani](#), 361 F.3d 1255, 1259 (9th Cir. 2004).⁶⁴ The construction or interpretation of a statute is reviewed de novo. See [United States v. Cabaccang](#), 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc).⁶⁵ The applicability of a statute to a particular case is a question of law reviewed de novo. See [United States v. Villa-Gonzalez](#), 208 F.3d 1160, 1165 (9th Cir. 2000) (AEDPA).

17. 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. See [United States v. Rrapi](#), 175 F.3d 742, 753 (9th Cir. 1999); [United States v. Engstrom](#), 16 F.3d 1006, 1009 (9th Cir. 1994); *but see* [United States v. Glass](#), 361 F.3d 580, 587 (9th Cir. 2004) (noting court “must independently evaluate the need for summary procedures”). The court’s refusal to grant a mistrial after holding a defendant in criminal contempt is reviewed for an abuse of discretion. See [United States v. McCormac](#), 309 F.3d 623, 626 (9th Cir. 2002).

⁶³ [United States v. Albers](#), 226 F.3d 989, 994 (9th Cir. 2000); [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).

⁶⁴ [United States v. Rodriguez](#), 360 F.3d 949, 953 (9th Cir. 2004) (void for vagueness); [United States v. Adams](#), 343 F.3d 1024, 1027 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004); [United States v. McCoy](#), 323 F.3d 1114, 1117 (9th Cir. 2003) (commerce clause); [United States v. Carranza](#), 289 F.3d 634, 643 (9th Cir. 2002) (sentencing).

⁶⁵ [United States v. Carranza](#), 289 F.3d 634, 642 (9th Cir. 2002); [United States v. Davidson](#), 246 F.3d 1240, 1246 (9th Cir. 2001); [United States v. Kakatin](#), 214 F.3d 1049, 1051 (9th Cir. 2000) (sentencing statutes); [United States v. Kaluna](#), 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc).

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

The legality of a sentence imposed for criminal contempt is reviewed de novo. See [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. See [Bingman v. Ward](#), 100 F.3d 653, 656 (9th Cir. 1996).

Civil contempt orders are reviewed for an abuse of discretion. See [SEC v. Hickey](#), 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003); [United States v. Ayres](#), 166 F.3d 991, 995 (9th Cir. 1999).

18. Continuances

A trial court's ruling on a request for a continuance of trial is reviewed for an abuse of discretion. See [United States v. Prime](#), 363 F.3d 1028, 1035 (9th Cir. 2004).⁶⁶ 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. See [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. See [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. See [United States v. Wills](#), 88 F.3d 704, 711 (9th Cir. 1996).

⁶⁶ [United States v. Nguyen](#), 262 F.3d 998, 1002 (9th Cir. 2001); [United States v. Zamora-Hernandez](#), 222 F.3d 1046, 1049 (9th Cir. 2000); [United States v. Garrett](#), 179 F.3d 1143, 1144-45 (9th Cir. 1999) (en banc).

19. Credibility Determinations

A trial court's ruling on the credibility of a witness is entitled to deference and is reviewed for clear error. See [United States v. Jordan](#), 291 F.3d 1091, 1100 (9th Cir. 2002).⁶⁷ Harmless error review applies when defendant objects at trial to alleged improper vouching. See [United States v. Hermanek](#), 289 F.3d 1076, 1098 (9th Cir. 2002). Plain error review applies when defendant makes no objection to alleged improper vouching. See [United States v. Parker](#), 241 F.3d 1114, 1119 (9th Cir. 2001).⁶⁸ A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. See [United States v. Geston](#), 299 F.3d 1130, 1138 (9th Cir. 2002).

20. Cross-Examination

A trial court's decisions regarding the scope of cross-examination is reviewed for abuse of discretion. See [United States v. Shryock](#), 342 F.3d 948, 980 (9th Cir. 2003) (limiting cross-examination), *cert. denied*, 541 U.S. 965 (2004); [United States v. Senchenko](#), 133 F.3d 1153, 1158-59 (9th Cir. 1998) (permitting cross-examination).⁶⁹ "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." [United States v. Manning](#), 56 F.3d 1188, 1197 (9th Cir. 1995) (internal quotation omitted). The failure to object to questions posed during cross-examination limits review to plain error. See [United States v. Shwayder](#), 312 F.3d 1109, 1120 (9th Cir. 2002), *amended by* 320 F.3d 889 (9th Cir.), *cert. denied*, 539 U.S. 944 (2003); [United States v. Geston](#), 299 F.3d 1130, 1135 (9th Cir. 2002).

This court has reviewed whether limitations on cross-examination are so severe as to violate the Confrontation Clause under both de novo and

⁶⁷ [United States v. Reid](#), 226 F.3d 1020, 1029 (9th Cir. 2000); [United States v. Cervantes](#), 219 F.3d 882, 891 (9th Cir. 2000); [United States v. Hanley](#), 190 F.3d 1017, 1031 (9th Cir. 1999)

⁶⁸ [United States v. Daas](#), 198 F.3d 1167, 1174 (9th Cir. 1999); [United States v. Leon-Reyes](#), 177 F.3d 816, 821 (9th Cir. 1999); [United States v. Garcia-Guizar](#), 160 F.3d 511, 521 (9th Cir. 1998); [United States v. Rudberg](#), 122 F.3d 1199, 1206 (9th Cir. 1997).

⁶⁹ [United States v. Geston](#), 299 F.3d 1130, 1137 (9th Cir. 2002); [United States v. Bensimon](#), 172 F.3d 1121, 1128 (9th Cir. 1999).

abuse of discretion standards of review. See [United States v. Larson, --- F.3d ---, 2006 WL 2466872](#) at *12 n.3 (9th Cir. Aug. 28, 2006) (noting but not resolving conflict); [United States v. Rodriguez-Rodriguez, 393 F.3d 849, 856 \(9th Cir. 2005\)](#) (same).⁷⁰ Note that Confrontation Clause violations are subject to harmless error analysis. [Shryock, 342 F.3d at 979](#).

Whether a court's limitation on recross-examination constitutes a violation of the Confrontation Clause is also reviewed de novo. See [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).

21. Documentary Evidence

A district court's ruling on the admission of documentary evidence is reviewed for abuse of discretion. See [United States v. Blitz, 151 F.3d 1002, 1007 \(9th Cir. 1998\)](#) (bank records).⁷¹ The decision to seal documents is reviewed for an abuse of discretion. See [Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 n.3 \(9th Cir. 2006\)](#) ("We review for abuse of discretion ...the decision to unseal the judicial record."); [United States v. Shryock, 342 F.3d 948, 983 \(9th Cir. 2003\), cert. denied, 541 U.S. 965 \(2004\)](#).

⁷⁰ [United States v. Adamson, 291 F.3d 606, 612 \(9th Cir. 2002\)](#) (de novo); [United States v. Ortega, 203 F.3d 675, 682 \(9th Cir. 2000\)](#) (de novo); [United States v. Lo, 231 F.3d 471, 482 \(9th Cir. 2000\)](#) (applying abuse of discretion standard); [United States v. Bensimon, 172 F.3d 1121, 1128 \(9th Cir. 1999\)](#) ("The district court, however, has considerable discretion in restricting cross-examination, and this court will find error only when that discretion has been abused.").

⁷¹ See also [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).

22. Double Jeopardy

Double jeopardy claims are reviewed de novo. See [*United States v. Patterson*, 292 F.3d 615, 622 \(9th Cir. 2002\)](#); [*United States v. Male Juvenile \(Pierre Y.\)*, 280 F.3d 1008, 1019 \(9th Cir. 2002\)](#) (noting review applies to both statutory and constitutional claims).⁷²

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. See [*United States v. Hickey*, 367 F.3d 888, 891 n.3 \(9th Cir. 2004\)](#); [*United States v. Ziskin*, 360 F.3d 934, 942-43 \(9th Cir. 2003\)](#) (clarifying law).⁷³ Note, however, that the district court's determination that the initial dismissal was required by "manifest necessity" is reviewed for an abuse of discretion. See [*United States v. Bonas*, 344 F.3d 945, 948 \(9th Cir. 2003\)](#) (explaining in n.3 that review is for an abuse of discretion even though "manifest necessity" is referred to as a finding). Also, a denial of a motion for a hearing on the issue of double jeopardy is reviewed for an abuse of discretion. See [*United States v. Hernandez*, 80 F.3d 1253, 1261 \(9th Cir. 1996\)](#).

It is unclear whether a double jeopardy claim that was not raised in the district court is subject to plain error review or is deemed to have been waived. See [*United States v. Hernandez-Guardado*, 228 F.3d 1017, 1028 \(9th Cir. 2000\)](#) (noting that "the case law in this circuit reflects some uncertainty as to whether a double jeopardy claim not raised in the district court is subject to plain error review [or waived]," and applying plain error review without deciding the issue).

23. Entrapment

⁷² [*United States v. Radmall*, 340 F.3d 798, 800 n. 4 \(9th Cir. 2003\)](#) (resentencing); [*United States v. McClain*, 133 F.3d 1191, 1193 \(9th Cir. 1998\)](#) (habeas); [*United States v. Stoddard*, 111 F.3d 1450, 1454 \(9th Cir. 1997\)](#) (conspiracy); [*United States v. Salemo*, 81 F.3d 1453, 1462 \(9th Cir. 1996\)](#) (sentencing); [*United States v. Seley*, 957 F.2d 717, 720 \(9th Cir. 1992\)](#) (relationship of collateral estoppel to double jeopardy reviewed de novo); [*United States v. Stauffer*, 922 F.2d 508, 513 \(9th Cir. 1990\)](#) (whether trial court's correction of verdict form violates double jeopardy reviewed de novo).

⁷³ [*United States v. Price*, 314 F.3d 417, 420 \(9th Cir. 2002\)](#).

A defendant's entrapment argument is reviewed de novo. See [United States v. Si](#), 343 F.3d 1116, 1125 (9th Cir. 2003).⁷⁴ A trial court's decision to exclude evidence of an entrapment defense is also reviewed de novo. See [United States v. Batterjee](#), 361 F.3d 1210, 1216 (9th Cir. 2004).⁷⁵ Whether a jury instruction properly states the law of entrapment is a question of law subject to de novo review. See [United States v. LaRizza](#), 72 F.3d 775, 778 (9th Cir. 1995).⁷⁶ Findings underlying a district court's decision not to depart based on sentencing entrapment is reviewed for clear error. See [United States v. Ross](#), 372 F.3d 1097, 1113-14 (9th Cir. 2004).

24. Evidentiary Rulings

A district court's evidentiary rulings during trial are generally reviewed for an abuse of discretion. See [United States v. Alvarez](#), 358 F.3d 1194, 1205 (9th Cir. 2004) (noting "wide discretion").⁷⁷ Evidentiary rulings will be reversed for abuse of discretion only if such error more likely than not affected the verdict. See [United States v. Pang](#), 362 F.3d 1187, 1192 (9th Cir. 2004); [Alvarez](#), 358 F.3d at 1205; [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).⁷⁸

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. Lynch](#), 367 F.3d 1148, 1159 (9th Cir. 2004) (reviewing evidentiary ruling that precluded

⁷⁴ [United States v. Mendoza-Prado](#), 314 F.3d 1099, 1102 (9th Cir. 2002); [United States v. Tucker](#), 133 F.3d 1208, 1214 (9th Cir. 1998).

⁷⁵ [United States v. Hancock](#), 231 F.3d 557, 560 (9th Cir. 2000); [United States v. Ramirez-Valencia](#), 202 F.3d 1106, 1109 (9th Cir. 2000).

⁷⁶ [United States v. Reese](#), 60 F.3d 660, 661 (9th Cir. 1995); [United States v. Lorenzo](#), 43 F.3d 1303, 1306 (9th Cir. 1995).

⁷⁷ [United States v. Pang](#), 362 F.3d 1187, 1191 (9th Cir. 2004) (foundation); [United States v. Lynch](#), 367 F.3d 1148, 1159 (9th Cir. 2004); [United States v. Bensimon](#), 172 F.3d 1121, 1130 (9th Cir. 1999).

⁷⁸ See also [United States v. Flores](#), 172 F.3d 695, 698 (9th Cir. 1999); [United States v. Serang](#), 156 F.3d 910, 915 (9th Cir. 1998).

defendant's proffered defense).⁷⁹ For example, the district court's interpretations of the Federal Rules of Evidence are reviewed de novo. [United States v. Sioux](#), 362 F.3d 1241, 1244 n.5 (9th Cir. 2004).⁸⁰

A district court has broad discretion whether to admit extrinsic evidence in a criminal case. See [United States v. Higa](#), 55 F.3d 448, 452 (9th Cir. 1995); [Hicks](#), 103 F.3d at 844 (ruling on the admissibility and relevance of DNA evidence reviewed for an abuse of discretion). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. [United States v. Saya](#), 247 F.3d 929, 937 (9th Cir. 2001). The district court's decision to admit or reject impeachment evidence is reviewed for an abuse of discretion. See [United States v. Geston](#), 299 F.3d 1130, 1137 (9th Cir. 2002) (prior bad acts).⁸¹

25. Expert Testimony

A district court's decision to admit expert opinion testimony is reviewed for abuse of discretion. See [United States v. Gonzales](#), 307 F.3d 906, 909 (9th Cir. 2002) (noting such decisions will not be reversed unless "manifestly erroneous").⁸² The trial court's decision to exclude expert

⁷⁹ See [United States v. Hardy](#), 289 F.3d 608, 612 (9th Cir. 2002) (relevance); [United States v. Angwin](#), 271 F.3d 786, 798 (9th Cir. 2001) (noting "rulings which raise predominantly legal questions" are reviewed de novo); [United States v. James](#), 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc); [United States v. Castillo](#), 181 F.3d 1129, 1134 (9th Cir. 1999).

⁸⁰ [United States v. Bennett](#), 363 F.3d 947, 952 (9th Cir. 2004) (best evidence rule); [United States v. Angwin](#), 271 F.3d 786, 798 (9th Cir. 2001) (habit evidence under FRE 406); [United States v. Bensimon](#), 172 F.3d 1121, 1125 (9th Cir. 1999).

⁸¹ See, e.g., [United States v. Beckman](#), 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); [United States v. Bensimon](#), 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); [United States v. Beltran](#), 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements); [United States v. Rowe](#), 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

⁸² [United States v. Hanna](#), 293 F.3d 1080, 1085 (9th Cir. 2002); [United States v. Abonce-Barrera](#), 257 F.3d 959, 964 (9th Cir. 2001) (whether an expert witness has sufficient qualifications to testify); [United States v. Alatorre](#), 222 F.3d 1098, 1100 (9th Cir. 2000); [United States v. Marsh](#), 26

testimony is also reviewed for an abuse of discretion. See [United States v. Prime](#), 363 F.3d 1028, 1033 (9th Cir. 2004).⁸³ Despite attempts to settle on a single formulation, cases continue to refer to both “abuse of discretion” and “manifest error” in discussing the standard of review for decisions on expert testimony.⁸⁴

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. See [United States v. Sherwood](#), 98 F.3d 402, 408 (9th Cir. 1996); see also [United States v. Varela-Rivera](#), 279 F.3d 1174, 1177-78 (9th Cir. 2002) (noting circumstances that preserve defendant’s right of review under abuse of discretion standard rather than plain error); [United States v. Seschillie](#), 310 F.3d 1208, 1212 (9th Cir. 2002) (applying harmless error review).

“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)

[F.3d 1496, 1502 \(9th Cir. 1994\)](#) (refusal to allow an expert to testify regarding a witness’s psychiatric condition); [United States v. Hicks](#), 103 F.3d 837, 842 (9th Cir. 1996) (admissibility of expert testimony on the reliability of eyewitness identifications).

⁸³ [United States v. Seschillie](#), 310 F.3d 1208, 1211-12 (9th Cir. 2002), cert. denied, 123 S. Ct. 1644 (2003); [United States v. Johnson](#), 297 F.3d 845, 862 (9th Cir. 2002); [United States v. Benavidez-Benavidez](#), 217 F.3d 720, 723 (9th Cir. 2000).

⁸⁴ In 1997, the Ninth Circuit sitting en banc noted that “although there appears to be no practical difference” between abuse of discretion and manifest error review, earlier cases had used the two standards inconsistently. The court explicitly adopted abuse of discretion as the proper standard, “to the extent [the two standards were] ... different.” [United States v. Morales](#), 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc). Later that same year, the Supreme Court conflated the two terms by stating that abuse of discretion is the proper standard in reviewing decisions on expert testimony, and describing that standard as requiring reversal only where the decision was “manifestly erroneous.” [General Electric Co. v. Joiner](#), 522 U.S. 136, 142 (1997). Subsequent cases have again used the terms in parallel. See [United States v. Gonzales](#), 307 F.3d 906, 909 (9th Cir. 2002).

(citations omitted); accord [United States v. Sinigaglio](#), 942 F.2d 581, 584 (9th Cir. 1991) (“district court has wide latitude to exclude expert testimony”).

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

26. Extrinsic Evidence

A district court has broad discretion to decide whether to admit extrinsic evidence in a criminal case. See [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. See [United States v. Blackstone](#), 56 F.3d 1143, 1145 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment’s Confrontation Clause, review is de novo. See [United States v. Saya](#), 247 F.3d 929, 937 (9th Cir. 2001). Review is also de novo of the denial of a motion for mistrial based on a contention that the jury improperly reviewed extrinsic evidence. See [United States v. Prime](#), 363 F.3d 1028, 1037 (9th Cir. 2004) (noting “independent review”).

27. Federal Rules

The district court’s interpretation of the federal rules is reviewed de novo. See [United States v. Navarro Viayra](#), 365 F.3d 790, 793 (9th Cir. 2004) (criminal procedure); [United States v. Sioux](#), 362 F.3d 1241, 1244 n.5 (9th Cir. 2004) (evidence).

28. Fifth Amendment Rights

Whether there has been a violation of a defendant’s Fifth Amendment right is reviewed de novo. See [United States v. Gregory](#), 322 F.3d 1157, 1161 (9th Cir. 2003) (due process).⁸⁵ A witness’s claim of Fifth

⁸⁵ [United States v. Beckman](#), 298 F.3d 788, 795 (9th Cir. 2002)

Amendment privilege is reviewed de novo. *United States v. Rubio-Topete*, 999 F.2d 1334 1338 (9th Cir. 1993). Note that Fifth Amendment violations are subject to harmless error review. See *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc).

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. See *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. See *id.*

The district court's refusal to hold a *Kastigar* hearing is reviewed for an abuse of discretion. See *United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995). If a hearing is held, the district court's findings of fact are reviewed for clear error. *Anderson*, 79 F.2d at 1525 n.4. Whether a defendant's testimony is immunized is a question of law reviewed de novo. See *id.* at 1525.

29. *Griffin* Violations

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1985). *Griffin* violations are reviewed de novo. See *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002). When there is no objection to the prosecutor's comments, review is for plain error. See *United States v. Tam*, 240 F.3d 797, 801 (9th Cir. 2001); *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). When the defendant does object, harmless error applies. See *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc).

(references to defendant's silence); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001) (references to defendant's silence); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (evidence of defendant's physical or emotional reaction); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's reference to defendant's decision not to testify).

30. Hearsay

Whether the district court correctly construed the hearsay rule is a question of law reviewable de novo. See [United States v. Alvarez, 358 F.3d 1194, 1214 \(9th Cir. 2004\)](#).⁸⁶ However, a district court's decision to admit evidence under an exception to the hearsay rule is reviewed for an abuse of discretion. See [Alvarez, 358 F.3d at 1214](#) (noting error may be harmless); [United States v. Johnson, 297 F.3d 845, 862-63 \(9th Cir. 2002\)](#).⁸⁷ The court's decision to exclude evidence under the hearsay rule is reviewed for an abuse of discretion. See [United States v. Shryock, 342 F.3d 948, 981 \(9th Cir. 2003\), cert. denied, 541 U.S. 965 \(2004\)](#).⁸⁸ The court's decision to consider hearsay at sentencing is also reviewed for an abuse of discretion. See [United States v. Berry, 258 F.3d 971, 976 \(9th Cir. 2001\)](#); [United States v. Chee, 110 F.3d 1489, 1492 \(9th Cir. 1997\)](#).

Note that a ruling that a witness is unavailable is reviewed for an abuse of discretion. See [United States v. McGuire, 307 F.3d 1192, 1205 \(9th Cir. 2002\)](#); [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 reviewed for an abuse of discretion. See [Magana-Olvera, 917 F.2d at 407](#). The denial of a continuance based upon the absence of a witness is reviewed for an abuse of discretion. See [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 \(9th Cir. 1994\)](#).

However, the refusal to dismiss based on the prosecutor's failure to retain a witness is reviewed de novo. See [United States v. Carreno, 363 F.3d 883, 887 \(9th Cir. 2004\)](#); [Arizona v. Johnson, 351 F.3d 988, 993 \(9th](#)

⁸⁶ [United States v. Orellana-Blanco, 294 F.3d 1143, 1148 \(9th Cir. 2002\)](#); [United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 \(9th Cir. 2001\)](#); [United States v. Pena-Gutierrez, 222 F.3d 1080, 1086 \(9th Cir. 2000\)](#); [United States v. Olafson, 213 F.3d 435, 441 \(9th Cir. 2000\)](#); [United States v. Ortega, 203 F.3d 675, 682 \(9th Cir. 2000\)](#).

⁸⁷ [Hernandez-Herrera, 273 F.3d at 1217](#); [Olafson, 213 F.3d at 441](#); [United States v. Scholl, 166 F.3d 964, 978 \(9th Cir. 1999\)](#); [United States v. Ramos-Oseguera, 120 F.3d 1028, 1034 \(9th Cir. 1997\)](#).

⁸⁸ [United States v. Alarcon-Simi, 300 F.3d 1172, 1175 \(9th Cir. 2002\)](#); [United States v. Adamson, 291 F.3d 606, 612 \(9th Cir. 2002\)](#); [United States v. Bishop, 291 F.3d 1100, 1108 \(9th Cir. 2002\)](#).

[Cir. 2003](#)) (direct appeal from trial conducted pursuant to 28 U.S.C. § 1442(a)(1)).

In collateral proceedings, “[a] state trial court’s decision that a witness is constitutionally ‘unavailable’ is an evidentiary question we review de novo, rather than for an 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).

31. 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. See [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. See *id.* at 1468; but see [United States v. Young](#), 86 F.3d 944, 947 (9th Cir. 1996) (district court’s denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court’s finding that the government’s evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. See [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. See [United States v. Cooper](#), 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. See [United States v. Alvarez](#), 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. See *id.*

32. Impeachment Evidence

The district court’s decision to admit impeachment evidence is reviewed for an abuse of discretion. See [United States v. Geston](#), 299 F.3d

1130, 1137 (9th Cir. 2002) (prior bad acts).⁸⁹ The trial court's refusal to allow impeachment evidence is also reviewed for an abuse of discretion. See [United States v. Rowe](#), 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

33. 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.*

34. 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 process is reviewed for an abuse of discretion. See [United States v. Burdeau](#), 168 F.3d 352, 358 (9th Cir. 1999).⁹⁰ The admission of in-court identification testimony is reviewed for an abuse of discretion. See [United States v. Dixon](#), 201 F.3d 1223, 1229 (9th Cir. 2000); [United States v. Gregory](#), 891 F.2d 732, 734 (9th Cir. 1989). The denial of a request for an in-court lineup is also reviewed for an abuse of discretion. See [Dixon](#), 201 F.3d at 1229; [Lumitap](#), 111 F.3d at 83.

35. Ineffective Assistance of Counsel

Whether a defendant received ineffective assistance of counsel is reviewed de novo. See [Allen v. Woodford](#), 366 F.3d 823, 836 (9th Cir. 2004) (§ 2254); [United States v. Rodrigues](#), 347 F.3d 818, 823 (9th Cir. 2003) 2255); [United States v. Mack](#), 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal).⁹¹

⁸⁹ [United States v. Beckman](#), 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); [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).

⁹⁰ [United States v. Carbajal](#), 956 F.2d 924, 929 (9th Cir. 1992); [United States v. Walitwarangkul](#), 808 F.2d 1352, 1353 (9th Cir. 1987)

⁹¹ See also [United States v. Alaimalo](#), 313 F.3d 1188, 1191 (9th Cir.

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. See [United States v. Lillard](#), 354 F.3d 850, 853 (9th Cir. 2003) (explaining rationale); [United States v. McKenna](#), 327 F.3d 830, 845 (9th Cir.) (noting exceptions), cert. denied, 540 U.S. 941 (2003);⁹² see also [United States v. Leasure](#), 319 F.3d 1092, 1099 (9th Cir. 2003) (electing to review claim on direct appeal); [United States v. Mack](#), 164 F.3d 467, 471 (9th Cir. 1999) (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. Fry](#), 322 F.3d 1198, 1200 (9th Cir. 2003); [Mancuso v. Olivarez](#), 292 F.3d 939, 953-54 (9th Cir. 2002) (explaining standards). The district court's findings of fact are reviewed for clear error. See [Fry](#), 322 F.3d at 1200; [Anderson](#), 232 F.3d at 1084; [United States v. Alvarez-Tautimez](#), 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. See [Stankewitz v. Woodford](#), 365 F.3d 706, 714 (9th Cir. 2004).⁹³

36. Jewell Instruction

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases,

[2002](#) (§ 2255), cert. denied, 540 U.S. 895 (2003); [Mancuso v. Olivarez](#), 292 F.3d 939, 949 (9th Cir. 2002) (§ 2254); [Dubria v. Smith](#), 224 F.3d 995, 1000 (9th Cir. 2000) (en banc) (noting claim presents a mixed question of law and fact reviewed de novo); [LaGrand v. Stewart](#), 133 F.3d 1253, 1269-70 (9th Cir. 1998) (noting claim presents a mixed question of law and fact reviewed de novo).

⁹² [United States v. Rogers](#), 321 F.3d 1226, 1230 (9th Cir. 2003) (explaining rationale); [United States v. Sager](#), 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review); [United States v. Ross](#), 206 F.3d 896, 899 (9th Cir. 2000) (noting when direct review is permissible).

⁹³ [United States v. Leonti](#), 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); [United States v. Chacon-Palomares](#), 208 F.3d 1157, 1158-59 (9th Cir. 2000) (habeas).

41. Jury Instructions, b. Adequacy of Instructions, j. *Jewell* Instructions.

37. Judge 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.” [United States v. Laurins, 857 F.2d 529, 537 \(9th Cir. 1988\)](#) (citations omitted).⁹⁴ Allegations of judicial misconduct are reviewed for plain error when a defendant fails to object at trial. See [United States v. Morgan, 376 F.3d 1002, 1007 \(9th Cir. 2004\)](#); [United States v. Springer, 51 F.3d 861, 864 n.1 \(9th Cir. 1995\)](#).

A district court’s decision whether to grant a motion for recusal is reviewed for an abuse of discretion. See [United States v. Martin, 278 F.3d 988, 1005 \(9th Cir. 2002\)](#).⁹⁵ 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 \(9th Cir. 1991\)](#).

38. Juror Misconduct

The standard of review of a trial court’s decisions regarding jury incidents is abuse of discretion. See [United States v. Martinez-Martinez, 369 F.3d 1076, 1081-82 \(9th Cir. 2004\)](#) (noting “extremely deferential standard”).⁹⁶ The district court has considerable discretion in determining

⁹⁴ [United States v. Shryock, 342 F.3d 948, 974 \(9th Cir. 2003\)](#) (whether to impose security measures during trial), *cert. denied*, [541 U.S. 965](#) (2004); [United States v. Morgan, 376 F.3d 1002, 1007 \(9th Cir. 2004\)](#) (questioning of witness).

⁹⁵ [United States v. Silver, 245 F.3d 1075, 1078 \(9th Cir. 2001\)](#); [United States v. Wilkerson, 208 F.3d 794, 797 \(9th Cir. 2000\)](#); [United States v. Eshkol, 108 F.3d 1025, 1030 \(9th Cir. 1997\)](#); see also [United States v. Rogers, 119 F.3d 1377, 1380 \(9th Cir. 1997\)](#) (motion to disqualify); [United States v. \\$292,888.04 in U.S. Currency, 54 F.3d 564, 566 \(9th Cir. 1995\)](#) (civil forfeiture action).

⁹⁶ [United States v. Shryock, 342 F.3d 948, 973 \(9th Cir. 2003\)](#), *cert. denied*, [541 U.S. 965](#) (2004); [United States v. Long, 301 F.3d 1095, 1101 \(9th Cir. 2002\)](#), *cert. denied*, [123 S. Ct. 1314](#) (2003); [United States v. Beard, 161 F.3d 1190, 1194 \(9th Cir. 1998\)](#); [United States v. Olano, 62 F.3d 1180, 1192 \(9th Cir. 1995\)](#).

whether to hold an investigative hearing on allegations of jury misconduct or bias and in defining its nature and extent. See [United States v. Olano](#), 62 F.3d 1180, 1192 (9th Cir. 1995). “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. See [United States v. Long](#), 301 F.3d 1095, 1101 (9th Cir. 2002), cert. denied, 537 U.S. 1216 (2003); [Dyer v. Calderon](#), 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc).

A district court’s decision to replace a juror with an alternate is reviewed for an abuse of discretion. See [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. See [United States v. Symington](#), 195 F.3d 1080, 1085 (9th Cir. 1999).⁹⁷ 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);⁹⁸ but see [Symington](#), 195 F.3d at 1085 (noting district court’s discretion is not unbounded).

A district court’s decision to excuse a juror for just cause is reviewed for an abuse of discretion. See [United States v. Gonzalez](#), 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo).⁹⁹ The court’s decision not to excuse a juror is also reviewed for an abuse of discretion. [Long](#), 301 F.3d at 1101;¹⁰⁰ see also [United States v. Martinez-Salazar](#), 528 U.S. 304, 307 (2000) (reversing

⁹⁷ [United States v. Mullins](#), 992 F.2d 1472, 1477 (9th Cir. 1993); [United States v. Egbuniwe](#), 969 F.2d 757, 760 (9th Cir. 1992).

⁹⁸ [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”).

⁹⁹ [United States v. Padilla-Mendoza](#), 157 F.3d 730, 733 (9th Cir. 1998); [United States v. Annigoni](#), 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc).

¹⁰⁰ [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).

Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

A district court's order granting a new trial based on juror misconduct is reviewed for an abuse of discretion. See [United States v. Edmond](#), 43 F.3d 472, 473 (9th Cir. 1994); but see [United States v. Keating](#), 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review). The court's denial of a motion for a new trial based on allegations of juror misconduct is also reviewed for an abuse of discretion. See [United States v. Mills](#), 280 F.3d 915, 921 (9th Cir. 2002).¹⁰¹ The district court's findings of fact relating to the issue of juror misconduct are reviewed for clear error. See [Long](#), 301 F.3d at 1101.¹⁰²

In habeas, whether an instance of juror misconduct was prejudicial to the defendant presents a mixed question of law and fact reviewed de novo. See [Rodriguez v. Marshall](#), 125 F.3d 739, 744 (9th Cir. 1997); see also [Caliendo v. Warden](#), 365 F.3d 691, 694 (9th Cir. 2004) (noting issues of juror misconduct are reviewed de novo).

39. Jury Examination of Evidence

The trial court's decision to allow a jury to have transcripts during deliberations is reviewed for an abuse of discretion. See [United States v. Montgomery](#), 150 F.3d 983, 999 (9th Cir. 1998).¹⁰³ The court's decision to

¹⁰¹ [United States v. Saya](#), 247 F.3d 929, 935 (9th Cir. 2001); [United States v. Hanley](#), 190 F.3d 1017, 1031 (9th Cir. 1999); but see [United States v. Keating](#), 147 F.3d 895, 899 (9th Cir. 1998) (acknowledging abuse of discretion review, but noting that "where jurors are exposed to extrinsic evidence, however, our review 'is an independent one'" when considering a new trial motion).

¹⁰² [United States v. Elias](#), 269 F.3d 1003, 1020 (9th Cir. 2001); [United States v. Matta-Ballesteros](#), 71 F.3d 754, 766 (9th Cir. 1995); but see [Martinez-Martinez](#), 369 F.3d at 1082 (reviewing findings for manifest error or abuse of discretion).

¹⁰³ [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).

replay tape-recorded conversation evidence to the jury is reviewed for an abuse of discretion. See [United States v. Rrapi](#), 175 F.3d 742, 746 (9th Cir. 1999). 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. See [Montgomery](#), 150 F.3d at 999.¹⁰⁴

A trial court’s finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. See [United States v. Carrillo](#), 902 F.2d 1405, 1410 (9th Cir. 1990). A court’s decision to allow a jury to have English translations is reviewed for an abuse of discretion. See [United States v. Abonce-Barrera](#), 257 F.3d 959, 963 (9th Cir. 2001).¹⁰⁵

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. See [Eslaminia v. White](#), 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas).¹⁰⁶

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

The denial of a motion for mistrial based on a contention that the jury was improperly exposed to extrinsic evidence is reviewed de novo. See [United States v. Prime](#), 363 F.3d 1028, 1037 (9th Cir. 2004) (noting “independent review”).

¹⁰⁴ See also [United States v. Hernandez](#), 27 F.3d 1403, 1408 (9th Cir. 1994) (replaying testimony); [United States v. Guess](#), 745 F.2d 1286, 1288 (9th Cir. 1984) (“[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.”).

¹⁰⁵ [Rrapi](#), 175 F.3d at 746; [United States v. Fuentes-Montijo](#), 68 F.3d 352, 353 (9th Cir. 1995).

¹⁰⁶ 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).

40. Jury Inquiries

a. District Court's Response

A district court's response to a jury's inquiry is reviewed for an abuse of discretion. [*United States v. Verduzco*, 373 F.3d 1022](#), 1030 n.3 (9th Cir. 2004); [*United States v. Romero-Avila*, 210 F.3d 1017](#), 1024 (9th Cir. 2000) (explaining abuse of discretion standard).¹⁰⁷

b. Supplemental Instructions

The court's decision whether to give supplemental instructions is also reviewed for an abuse of discretion. [*United States v. McIver*, 186 F.3d 1119](#), 1130 (9th Cir. 1999); [*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.”).¹⁰⁸ When defendant does not challenge the supplemental instruction or fails to state distinctly the grounds for the objection, review is limited to plain error. [*McIver*, 186 F.3d at 1130](#).¹⁰⁹ Whether supplemental jury instructions correctly state the elements of an offense is a question of law reviewed de novo. [*Verduzco*, 373 F.3d at 1030 n.3](#); [*United States v. Si*, 343 F.3d 1116](#), 1126 (9th Cir. 2003).

41. Jury Instructions

a. Formulation of Instructions

A district court's formulation of jury instructions is reviewed for an abuse of discretion. See [*United States v. Shipsey*, 363 F.3d 962](#), 966 n.3 (9th Cir. 2004); [*United States v. Garcia-Rivera*, 353 F.3d 788](#), 791-92 (9th Cir. 2003) (“In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation.”); [*United States v. Franklin*, 321 F.3d 1231](#), 1240-41 (9th Cir. 2003) (considering “the instructions as a whole, and in context”); [*United*](#)

¹⁰⁷ [*Arizona v. Johnson*, 351 F.3d 988](#), 993 (9th Cir. 2003) (direct appeal from trial conducted pursuant to 28 U.S.C. § 1442(a)(1)); [*United States v. Amlani*, 111 F.3d 705](#), 716 (9th Cir. 1997).

¹⁰⁸ [*United States v. Dorri*, 15 F.3d 888](#), 892 (9th Cir. 1994).

¹⁰⁹ [*United States v. Stapleton*, 293 F.3d 1111](#), 1118 n.3 (9th Cir. 2002); [*Dorri*, 15 F.3d at 891](#) (explaining plain error rule).

States v. Hicks, 217 F.3d 1038, 1045 (9th Cir. 2000) (“The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented.”).¹¹⁰

b. Adequacy of Instructions

Whether jury instructions omit or misstate elements of a statutory crime,¹¹¹ or adequately cover a defendant’s proffered defense,¹¹² are questions of law reviewed de novo.

c. Denial of Requested Instruction

¹¹⁰ *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003) (supplemental instructions); *United States v. Stapleton*, 293 F.3d 1111, 1114 (9th Cir. 2002); *United States v. Beltran-Garcia*, 179 F.3d 1200, 1205 (9th Cir. 1999); *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997).

¹¹¹ *Stapleton*, 293 F.3d at 1114; *United States v. Henderson*, 243 F.3d 1168, 1170 (9th Cir. 2001) (If the instructions misstate the offense, “we reverse a defendant’s conviction unless the misstatement was harmless beyond a reasonable doubt.”); *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001) (“Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo.”); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997); see also *United States v. Vallegjo*, 237 F.3d 1008, 1024 (9th Cir. 2001) (If “the instructions ‘fairly and adequately covered the elements of the offense,’ we review the instruction’s precise formulation for abuse of discretion.”); *United States v. Frega*, 179 F.3d 793, 807 n.16 (9th Cir. 1999) (“The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.”) (citation omitted); *United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999) (supplemental jury instruction).

¹¹² *United States v. Martinez-Martinez*, 369 F.3d 1076, 1083 (9th Cir. 2004); *Shipsey*, 363 F.3d at 966 n.3; *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1038 (9th Cir. 2002); *United States v. Leyva*, 282 F.3d 623, 625 (9th Cir. 2002) (reviewing rejected instruction); see also *United States v. Iverson*, 162 F.3d 1015, 1022 & n.5 (9th Cir. 1998) (discussing preservation of issue); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997) (distinguishing allegation that instructions were potentially misleading).

The appropriate standard for reviewing a district court's denial of a defendant's requested jury instruction depends on the issue being reviewed. See [United States v. Hairston](#), 64 F.3d 491, 493-94 (9th Cir. 1995) (citing [United States v. Duran](#), 59 F.3d 938, 941 (9th Cir.1995)); see also [United States v. Somsamouth](#), 352 F.3d 1271, 1274 (9th Cir. 2003).

The denial of a defendant's jury instruction due to an inadequate factual basis is reviewed for an abuse of discretion. See [United States v. Wills](#), 88 F.3d 704, 715 (9th Cir. 1996) (noting clarification of standard). Denial of a jury instruction based on a question of law is reviewed de novo. [United States v. Wiseman](#), 274 F.3d 1235, 1240 (9th Cir. 2001); [United States v. Eshkol](#), 108 F.3d 1025, 1028 (9th Cir. 1997).

A district court's refusal to give a lesser-included offense instruction is reviewed de novo. See [United States v. Pierre](#), 254 F.3d 872, 875 (9th Cir. 2001).¹¹³ If the defendant did not request the lesser included offense instruction or does not object to its omission, review is only for plain error. See [United States v. Anderson](#), 201 F.3d 1145, 1148 (9th Cir. 2000).

d. Special Verdict Forms

The district court's decision to use a special verdict form over a defendant's objection is reviewed for an abuse of discretion. See [United States v. 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). When a defendant does not object, review is for plain error. See [United States v. Vasquez-Velasco](#), 15 F.3d 833, 847 (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. See [United States v. Garcia](#), 37 F.3d 1359, 1370 (9th Cir. 1994).

¹¹³ [United States v. Naghani](#), 361 F.3d 1255, 1262 (9th Cir. 2004) (“A lesser included offense instruction is proper where (1) the offense on which the instruction is sought is a lesser included offense in the offense charged and (2) the jury could rationally conclude that the defendant was guilty of the lesser but not of the greater offense. We review the first step de novo, and the second for abuse of discretion.”).

e. Due Process Challenges

Whether a jury instruction violated due process is reviewed de novo. See [United States v. Amparo](#), 68 F.3d 1222, 1224 (9th Cir. 1995). For example, whether an instruction violates due process by creating an unconstitutional presumption or inference is reviewed de novo. See [Tapia v. Roe](#), 189 F.3d 1052, 1056 (9th Cir. 1999) (habeas); [United States v. Warren](#), 25 F.3d 890, 897 (9th Cir. 1994). Whether a constitutionally deficient jury instruction is harmless error is reviewed de novo. See [Tapia](#), 189 F.3d at 1055-56.

f. Procedure for Reviewing Instructions

In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. See [United States v. Garcia-Rivera](#), 353 F.3d 788, 792 (9th Cir. 2003); [United States v. Dixon](#), 201 F.3d 1223, 1230 (9th Cir. 2000); [United States v. Frega](#), 179 F.3d 793, 807 n.16 (9th Cir. 1999); [United States v. Knapp](#), 120 F.3d 928, 930 (9th Cir. 1997).

The district court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. See [United States v. Hicks](#), 217 F.3d 1038, 1045 (9th Cir. 2000).¹¹⁴

A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. See *Ho v. Carey* 332 F.3d 587, 593 (9th Cir. 2003) (granting habeas writ based on jury instruction error); [Dixon](#), 201 F.3d at 1230.¹¹⁵

Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the district court's discretion. [Frega](#), 179 F.3d at 807 n.16.

¹¹⁴ [Frega](#), 179 F.3d at 807 n.16; [United States v. Reed](#), 147 F.3d 1178, 1180 (9th Cir. 1998).

¹¹⁵ [Frega](#), 179 F.3d at 807 n.16; [United States v. Harrison](#), 34 F.3d 886, 889 (9th Cir. 1994)

g. Harmless Error and Plain Error

A district court's failure to instruct the jury on an element of a crime may be harmless if the appellate court concludes that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." [*United States v. Gracidas-Ulibarry*, 231 F.3d 1188](#), 1197 (9th Cir. 2000) (en banc).

When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. [*Jones v. United States*, 527 U.S. 373](#), 388 (1999); [*United States v. Recio*, 371 F.3d 1093](#), 1099-1102 (9th Cir. 2004) (explaining when review is for plain error or harmless error); [*United States v. Delgado*, 357 F.3d 1061](#), 1065 (9th Cir. 2004); [*United States v. Franklin*, 321 F.3d 1231](#), 1240 (9th Cir. 2003). Plain error is error that is plain and affects substantial rights. [*Delgado*, 357 F.3d at 1065](#); [*Franklin*, 321 F.3d at 1240](#).¹¹⁶

h. Invited Error

If the district court gives jury instructions requested by the defendant, those instructions are nonreviewable under the invited error doctrine. [*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). In *Perez*, however, this court limited that rule to situations where the defendant has "waived" his rights in contrast to "forfeited." See [*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. See [*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

¹¹⁶ [*United States v. Garcia-Guizar*, 160 F.3d 511](#), 516, 522-23 (9th Cir. 1998) (noting plain error is a highly prejudicial error affecting substantial rights); [*United States v. Klinger*, 128 F.3d 705](#), 712 (9th Cir. 1997) (noting 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"); [*United States v. Lacy*, 119 F.3d 742](#), 749 (9th Cir. 1997) (noting plain error does not require reversal unless the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding).

plain error in same circumstances).

i. Allen Charges

The trial court's decision to instruct the jury with an *Allen* charge is reviewed for an abuse of discretion. See [United States v. Steele, 298 F.3d 906, 909 \(9th Cir. 2002\)](#).¹¹⁷ The 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. [Steele, 298 F.3d at 909-10](#); [United States v. Daas, 198 F.3d 1167, 1178 \(9th Cir. 1999\)](#) (modified charge); [United States v. Nelson, 137 F.3d 1094, 1109 \(9th Cir. 1998\)](#). 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).

j. Jewell Instructions

A district court's decision to give a "deliberate ignorance" or *Jewell* instruction is reviewed de novo. See [United States v. Shannon, 137 F.3d 1112, 1117 \(9th Cir. 1998\)](#).¹¹⁸

42. Jury Selection

a. Challenges for Cause

i. Voir Dire/Peremptory Challenges

A district court's voir dire procedures are reviewed for an abuse of discretion, and its findings regarding juror impartiality is for manifest error. See [United States v. Padilla-Mendoza, 157 F.3d 730, 733 \(9th Cir. 1998\)](#); [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.")¹¹⁹ Although this court reviews the

¹¹⁷ [United States v. Daas, 198 F.3d 1167, 1178 \(9th Cir. 1999\)](#) (modified charge); [United States v. Nelson, 137 F.3d 1094, 1109 \(9th Cir. 1998\)](#).

¹¹⁸ [United States v. Fulbright, 105 F.3d 443, 446 47 \(9th Cir. 1997\)](#); [United States v. de Cruz, 82 F.3d 856, 865 \(9th Cir. 1996\)](#).

¹¹⁹ [United States v. Steele, 298 F.3d 906, 910 \(9th Cir. 2002\)](#); [United States v. Howell, 231 F.3d 615, 627 \(9th Cir. 2000\)](#); [United States v.](#)

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. See [United States v. Milner](#), 962 F.2d 908, 911 (9th Cir. 1992).

The district court has considerable control over the administration of peremptory challenges and the scope of questioning permitted during voir dire. See [United States v. Annigoni](#), 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc). The sufficiency of voir dire questions asked by the district court is also reviewed for an abuse of discretion, see [United States v. Payne](#), 944 F.2d 1458, 1474 (9th Cir. 1991), as is the court's refusal to ask defendant's requested voir dire questions, see [United States v. Sarkisian](#), 197 F.3d 966, 978 (9th Cir. 1999).

“Although a trial court has considerable discretionary authority in administering peremptory strikes, a trial court commits reversible error if its procedures effect an impairment or an outright denial of a party's right of peremptory challenge.” [United States v. Annigoni](#), 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc).¹²⁰ The court may also abuse its discretion by failing to ask questions reasonably sufficient to test jurors for bias or partiality. See [United States v. Payne](#), 944 F.2d 1458, 1474 (9th Cir. 1991).

Where there is not objection to voir dire, review is limited to plain error. See [United States v. Mendoza-Reyes](#), 331 F.3d 1119, 1121 (9th Cir.), cert. denied, 540 U.S. 925 (2003); [United States v. Steele](#), 298 F.3d 906, 910 (9th Cir. 2002). The district court's failure to sua sponte conduct supplemental voir dire is reviewed for plain error. See [United States v. Gay](#),

[Sarkisian](#), 197 F.3d 966, 978 (9th Cir. 1999) (reviewing for an abuse of discretion the court's refusal to ask requested voir dire questions); [United States v. Annigoni](#), 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc); see also [United States v. Sherwood](#), 98 F.3d 402, 407 (9th Cir. 1996) (defendant has a right to be present at voir dire sidebars, but waives the right if not expressed).

¹²⁰ [United States v. Martinez-Salazar](#), 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

[967 F.2d 322](#), 325 (9th Cir. 1992).

The number of peremptory challenges permitted by the Federal Rules of Criminal Procedure presents a question of law reviewed de novo. See [United States v. Machado](#), 195 F.3d 454, 456 (9th Cir. 1999).

ii. Jury Misconduct

The district court's decisions regarding incidents of jury misconduct are reviewed for an abuse of discretion. See [United States v. Shryock](#), 342 F.3d 948, 973 (9th Cir. 2003). Thus, the district court's decision to excuse¹²¹ or to not excuse¹²² a juror for just cause is reviewed for an abuse of discretion. "When the defendant has made a timely objection to an error, the harmless error standard generally applies, and the government bears the burden of proving that the error was not prejudicial." [United States v. Beard](#), 161 F.3d 1190, 1193 (9th Cir. 1998).

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. See [United States v. Alexander](#), 48 F.3d 1477, 1485 (9th Cir. 1995); [Beard](#), 161 F.3d at 1194-95 (discussing application of harmless error review); [United States v. Gay](#), 967 F.2d 322, 325 (9th Cir. 1992).

b. Jury Composition/Batson Claims

A challenge to the composition of a jury is reviewed de novo. See

¹²¹ [United States v. Beard](#), 161 F.3d 1190, 1193 (9th Cir. 1998); [United States v. McFarland](#), 34 F.3d 1508, 1511 (9th Cir. 1994); see also [United States v. Gonzalez](#), 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo).

¹²² [United States v. Long](#), 301 F.3d 1095, 1101 (9th Cir. 2002) (noting presence of biased jury can never be harmless error); [United States v. Miguel](#), 111 F.3d 666, 673 (9th Cir. 1997); [United States v. Alexander](#), 48 F.3d 1477, 1484-85 (9th Cir. 1995); see also [United States v. Martinez-Salazar](#), 528 U.S. 304, 307 (2000) (no constitutional right violated if the defendant uses a peremptory challenge to cure an erroneous refusal by the court to remove the juror for cause).

[*United States v. Bushyhead*, 270 F.3d 905, 909 \(9th Cir. 2001\)](#); [*Thomas v. Borg*, 159 F.3d 1147, 1149 \(9th Cir. 1998\)](#) (habeas).

“The standards of review for rulings on certain aspects of the *Batson* analysis are settled in this circuit.” [*Tolbert v. Page*, 182 F.3d 677, 680 n.5 \(9th Cir. 1999\)](#) (explaining standards of review for *Batson* challenges) (en banc).

“When considering a *Batson* challenge, we review de novo whether a prosecutor’s proclaimed reason for exercising a peremptory challenge was an adequate explanation.” [*United States v. You*, 382 F.3d 958, 967 \(9th Cir. 2004\)](#) (citation omitted); [*United States v. Steele*, 298 F.3d 906, 910 \(9th Cir. 2002\)](#).

“A trial court’s determination on discriminatory intent is a finding of fact entitled to deference and is reviewed for clear error.” [*You*, 382 F.3d at 967-68](#). For example, the determination whether a defendant established a prima facie showing of racial discrimination under *Batson* is reviewed for clear error. See [*Steele*, 298 F.3d at 910](#); [*United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 \(9th Cir. 2001\)](#). Clear error review also applies to the question whether the defendant has satisfied the ultimate burden of proving purposeful discrimination. See [*Tolbert*, 182 F.3d at 680 n.5](#).¹²³

“[W]hether the challenged juror is a member of a protected class for *Batson* purposes is a question of law reviewed de novo.” [*Tolbert*, 182 F.3d at 680 n.5](#).

“Whether the district court was obliged to proceed to step three of the *Batson* process is a legal question we review de novo.” [*United States v. Alanis*, 335 F.3d 965, 967 n.1 \(9th Cir. 2003\)](#).

Whether a particular jury satisfies the “representative jury” standard

¹²³ [*Hernandez v. New York*, 500 U.S. 352, 364-65 \(1991\)](#); [*United States v. Murillo*, 288 F.3d 1126, 1135 \(9th Cir. 2002\)](#) (“The trial court’s findings regarding purposeful discrimination in jury selection are entitled to ‘great deference’ and will not be set aside unless clearly erroneous.”) (internal quotation marks omitted).

under *Batson* 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. See [United States v. Contreras Contreras](#), 83 F.3d 1103, 1105 (9th Cir. 1996).

The district court's "remedy" for a *Batson* violation is reviewed for an abuse of discretion. See [United States v. Ramirez-Martinez](#), 273 F.3d 903, 910 (9th Cir. 2001).

See also II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 5. *Batson* Claims.

c. Anonymous Jury

The district court's decision to empanel an anonymous jury is reviewed for an abuse of discretion. See [United States v. Shryock](#), 342 F.3d 948, 970 (9th Cir. 2003) (deciding first impression question), *cert. denied*, 541 U.S. 965 (2004).

43. Materiality of a False Statement

In prosecutions under [18 U.S.C. § 1001](#) (false statements),¹²⁴ [26 U.S.C. § 1706](#) (filing false tax returns),¹²⁵ and [18 U.S.C. § 1623](#) (perjury),¹²⁶ and other statutes having the element of materiality, the question of materiality is a mixed question of law and fact to be submitted to the jury. See [United States v. Uchimura](#), 125 F.3d 1282, 1284 (9th Cir. 1997) (discussing the leading Supreme Court case on the topic of materiality, [United States v. Gaudin](#), stating that "the Supreme Court's reasoning applies with equal potency to every crime of which materiality is an element").¹²⁷

¹²⁴ [United States v. Gaudin](#), 28 F.3d 943, 951 (9th Cir. 1994) (en banc), *aff'd*, 515 U.S. 506 (1995).

¹²⁵ [United States v. Scholl](#), 166 F.3d 964, 980 (9th Cir. 1999).

¹²⁶ [Johnson v. United States](#), 520 U.S. 461, 465 (1997) (materiality is an element of perjury).

¹²⁷ [United States v. Service Deli, Inc.](#), 151 F.3d 938, 941 (9th Cir. 1998) (discussing various formulations of materiality).

If materiality is not an element of the crime, however, it need not be submitted to the jury. See [Uchimura, 125 F.3d at 1284](#).¹²⁸ Whether materiality if an element of a crime is a question of law reviewed de novo. See [United States v. Watkins, 278 F.3d 961](#), 964 (9th Cir. 2002).

A district court's error in not charging a jury on the element of materiality is subject to harmless error review. See [Neder v. United States, 527 U.S. 1, 8-15 \(1999\)](#) (discussing framework to decide if harmless error review applies); [United States v. Du Bo, 186 F.3d 1177, 1180 n.2 \(9th Cir. 1999\)](#) (limiting *Neder* to petite juries, and not grand juries).

Plain error applies when defendant fails to object to a materiality instruction. See [United States v. Johnson, 297 F.3d 845](#), 866 (9th Cir. 2002).¹²⁹

44. Opening Statements

A district court's decision to order parties to deliver opening statements before voir dire is reviewed for an abuse of discretion. See [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.

45. Opinion Evidence

a. Expert Opinion Evidence

¹²⁸ [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) (false statements to federally insured bank).

¹²⁹ [United States v. Scholl, 166 F.3d 964](#), 980-81 (9th Cir. 1999) ("[W]here the defendant failed to object to the materiality error, '[t]o warrant reversal in a case where a *Gaudin*-type error is made, the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.'" (second alternation in original, internal quotation marks omitted)); [United States v. Knapp, 120 F.3d 928](#), 932 (9th Cir. 1997); [United States v. Nash, 115 F.3d 1431](#), 1437 (9th Cir. 1997).

i. Admission or Exclusion of Evidence

A district court's decision to admit¹³⁰ or exclude¹³¹ evidence is reviewed for an abuse of discretion and will be reversed only if manifestly erroneous. [United States v. Gonzales](#), 307 F.3d 906, 909 (9th Cir. 2002); [United States v. Finley](#), 301 F.3d 1000, 1008 (9th Cir. 2002); see also [United States v. VonWillie](#), 59 F.3d 922, 928 (9th Cir. 1995) (noting court has characterized the standard of review in different ways). Pursuant this standard, the district 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), and decisions regarding experts on eyewitness identification reliability, [United States v. Hicks](#), 103 F.3d 837, 842 (9th Cir. 1996); [United States v. Rincon](#), 28 F.3d 921, 923 (9th Cir. 1994), are both reviewed for an abuse of discretion.

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. See [United States v. Sherwood](#), 98 F.3d 402, 408 (9th Cir. 1996); see also [United States v. Varela-Rivera](#), 279 F.3d 1174, 1177-78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error).

¹³⁰ [United States v. Hanna](#), 293 F.3d 1080, 1085 (9th Cir. 2002) (officers as experts); [United States v. Alatorre](#), 222 F.3d 1098, 1100 (9th Cir. 2000) (customs officer as expert, discussing *Daubert*, *Joiner*, and *Kumho Tire*); [United States v. Burdeau](#), 168 F.3d 352, 357 (9th Cir. 1999) (fingerprint); [United States v. Cordoba](#), 104 F.3d 225, 229 (9th Cir. 1997) (drug trafficker modus operandi); [United States v. Gillespie](#), 852 F.2d 475, 480 (9th Cir. 1988) (reversing district court's admission of criminal profiler testimony).

¹³¹ [United States v. Seschillie](#), 310 F.3d 1208, 1211-12 (9th Cir. 2002) (shooting expert); [United States v. Johnson](#), 297 F.3d 845, 862 (9th Cir. 2002) (sentencing guideline expert); [United States v. Campos](#), 217 F.3d 707, 710 (9th Cir. 2000) (polygraph); [United States v. Benavidez-Benavidez](#), 217 F.3d 720, 723 (9th Cir. 2000) (polygraph); [United States v. Scholl](#), 166 F.3d 964, 971-72 (9th Cir. 1999) (accounting expert); [United States v. Morales](#), 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc) (reversing court's exclusion of bookkeeping expert, noting review is for an abuse of discretion, not "manifest error").

ii. Reliability

The district court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results, and will be upheld unless manifestly erroneous. [United States v. Finley](#), 301 F.3d 1000, 1008 (9th Cir. 2002); [United States v. Gillespie](#), 852 F.2d 475, 480 (9th Cir. 1988).

iii. Qualifications

The determination whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. [United States v. Abonce-Barrera](#), 257 F.3d 959, 964 (9th Cir. 2001); [United States v. Benavidez-Benavidez](#), 217 F.3d 720, 723 (9th Cir. 2000); [United States v. Garcia](#), 7 F.3d 885, 889 (9th Cir. 1993).

iv. Funds/Expert Appointment Request

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. See [United States v. Rodriguez-Lara](#), 421 F.3d 932, 939-40 (9th Cir. 2005).¹³²

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

b. Lay Opinion Testimony

This court reviews for abuse of discretion a district court's admission of lay opinion testimony. See [United States v. Beck](#), 418 F.3d 1008, 1013-15 & n.3 (9th Cir. 2005) (holding that "a lay witness's testimony is rationally based within the meaning of Rule 701 where it is 'based upon personal observation and recollection of concrete facts.'").¹³³

¹³² [United States v. Nelson](#), 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); [United States v. Labansat](#), 94 F.3d 527, 530 (9th Cir. 1996).

¹³³ [United States v. Matsumaru](#), 244 F.3d 1092, 1101 (9th Cir. 2001) (allowing lay testimony); [United States v. Holmes](#), 229 F.3d 782, 788 (9th

46. Photographs

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

Permitting lay witness testimony regarding the identity of an individual depicted in a photograph is also reviewed for an abuse of discretion. See [United States v. Henderson](#), 241 F.3d 638, 650-51 (9th Cir. 2000).

47. Presence of Defendant

A district court's denial of a defendant's motion to waive his or her presence at trial is reviewed for abuse of discretion. See [United States v. Lumitap](#), 111 F.3d 81, 83 (9th Cir. 1997).

A district court's factual finding that a defendant has knowingly and voluntarily failed to appear for trial is reviewed for clear error. See [United States v. Houtchens](#), 926 F.2d 824, 826 (9th Cir. 1991).

A defendant's absence from a "critical stage" of the trial is subject to harmless error review. See [United States v. Rosales-Rodriguez](#), 289 F.3d 1106, 1109 (9th Cir. 2002). Plain error applies when there is no objection. See [United States v. Romero](#), 282 F.3d 683, 689 (9th Cir. 2002).

47. Prior Crimes, Wrongs or Acts

"We review for abuse of discretion the district court's decision to admit evidence of prior bad acts." [United States v. Mendoza-Prado](#), 314 F.3d 1099, 1103 (9th Cir. 2002).

a. [Fed. R. Evid. 404\(b\)](#)

The district court's decision to admit evidence of prior crimes or bad

[Cir. 2000](#)) (same); [United States v. VonWillie](#), 59 F.3d 922, 929 (9th Cir. 1995) (noting this court has characterized the standard of review in different ways).

acts pursuant to Federal Rule of Evidence 404(b) is reviewed for an abuse of discretion under a four-part test. See [United States v. Plancarte-Alvarez](#), 366 F.3d 1058, 1062 (9th Cir. 2004).¹³⁴

Whether evidence falls within the scope of Rule 404(b) is a question of law reviewed de novo. [United States v. Williams](#), 291 F.3d 1180, 1189 (9th Cir. 2002); [United States v. Smith](#), 282 F.3d 758, 768 (9th Cir. 2002). For example, de novo review applies to whether such evidence is directly relevant to the crime charged or relevant only to “other crimes.” [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. Jackson](#), 84 F.3d 1154, 1158-59 (9th Cir. 1996). De novo review also applies to whether certain conduct constitutes “other crimes.” [United States v. Serang](#), 156 F.3d 910, 915 (9th Cir. 1998); [United States v. Andaverde](#), 64 F.3d 1305, 1314 (9th Cir. 1995); [United States v. Kearns](#), 61 F.3d 1422, 1427 (9th Cir. 1995); [United States v. Warren](#), 25 F.3d 890, 895 (9th Cir. 1994).

In allowing Rule 404(b) evidence, a district court is not required to recite the corresponding Rule 403 balancing analysis; it is enough if the reviewing court can conclude, based on a review of the record, that the district court considered Rule 403’s requirements. See [United States v. Rrapi](#), 175 F.3d 742, 749 (9th Cir. 1999).

b. [Fed. R. Evid. 608](#)

“Evidentiary rulings admitting evidence of prior criminal activity under Rule 608 are reviewed for an abuse of discretion.” [United States v. Castillo](#), 181 F.3d 1129, 1132 (9th Cir. 1999).

c. [Fed. R. Evid. 609](#)

Admission of prior criminal activity pursuant to Federal Rule of

¹³⁴ [United States v. Williams](#), 291 F.3d 1180, 1189 (9th Cir. 2002); [United States v. Smith](#), 282 F.3d 758, 768 (9th Cir. 2002); [United States v. Romero](#), 282 F.3d 683, 688 (9th Cir. 2002); [United States v. Carrasco](#), 257 F.3d 1045, 1048 (9th Cir. 2001); [United States v. Chea](#), 231 F.3d 531, 534 (9th Cir. 2000); [United States v. Howell](#), 231 F.3d 615, 628 (9th Cir. 2000); [United States v. Hicks](#), 217 F.3d 1038, 1046 (9th Cir. 2000).

Evidence 609 (impeachment) is reviewed for an abuse of discretion under five-factor test. See [United States v. Martinez-Martinez](#), 369 F.3d 1076, 1088 (9th Cir. 2004). This court reviews the district court's interpretation of Rule 609 de novo. See [United States v. Foster](#), 227 F.3d 1096, 1099 (9th Cir. 2000).

De novo review applies to whether the use of prior crimes for purposes of sentencing enhancement, see [United v. Gallaher](#), 275 F.3d 784, 790 (9th Cir. 2001),¹³⁵ and to whether a defendant is a career offender, see [United States v. Kovac](#), 367 F.3d 1116, 1118 (9th Cir. 2004).

48. Privileges

a. Attorney-Client, Doctor-Patient, Marital

De novo review applies to the district court's attorney-client privilege determinations, see [United States v. Alexander](#), 287 F.3d 811, 816 (9th Cir. 2002),¹³⁶ including rulings on the scope of the privilege, see [United States v. Mett](#), 178 F.3d 1058, 1061-62 (9th Cir. 1999),¹³⁷ and whether the privilege exists, see [In re Subpoena to Testify Before Grand Jury](#), 39 F.3d 973, 976 (9th Cir. 1994).

An abuse of discretion standard applies to findings regarding the applicability of the marital privilege. See [United States v. Murphy](#), 65 F.3d 758, 761 (9th Cir. 1995).

De novo review also exists for the scope of the doctor-patient privilege. See [United States v. Romo](#), 413 F.3d 1044, 1046 (9th Cir. 2005) (psychotherapist-patient privilege); [United States v. Chase](#), 340 F.3d 978,

¹³⁵ [United States v. Phillips](#), 149 F.3d 1026, 1031 (9th Cir. 1998) (Armed Career Criminal Act); [United States v. Young](#), 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

¹³⁶ [United v. Martin](#), 278 F.3d 988, 999-1000 (9th Cir. 2002) (explaining elements of privilege); [United States v. Wiseman](#), 274 F.3d 1235, 1244 (9th Cir. 2001); [United States v. Munoz](#), 233 F.3d 1117, 1128 (9th Cir. 2000). [Ralls v. United States](#), 52 F.3d 223, 225 (9th Cir. 1995)

¹³⁷ [United States v. Bauer](#), 132 F.3d 504, 507 (9th Cir. 1997); [United States v. Blackman](#), 72 F.3d 1418, 1423 (9th Cir. 1995) (describing scope of privilege as a mixed question of fact and law).

981 ([9th Cir. 2003](#)) (en banc) (patient-doctor privilege).

An otherwise applicable privilege may be waived through voluntary disclosure; whether such waiver occurred is a mixed question of fact and law. See [Feldman v. Allstate Ins. Co.](#), 322 F.3d 660, 665, 667-68 ([9th Cir. 2003](#)) (marital privilege); [United States v. Amlani](#), 169 F.3d 1189, 1194 ([9th Cir. 1999](#)) (attorney-client).¹³⁸

Courts have discretion to fashion appropriate remedies whenever prosecutors subvert the attorney client relationship. See [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](#)). 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 – it is either de novo or an abuse of discretion. See [United States v. Bauer](#), 132 F.3d 504, 509 n.3 ([9th Cir. 1997](#)); [In re Grand Jury Proceedings](#), 87 F.3d 377, 380 ([9th Cir. 1996](#)).

b. Fifth Amendment/Defendant’s Silence

De novo review applies to the district court’s determinations regarding the scope of the Fifth Amendment privilege, 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, see [United States v. Anderson](#), 79 F.3d 1522, 1525 ([9th Cir. 1996](#)), whether suppression of a defendant’s testimony violates the constitutional right to testify, see [United States v. Moreno](#), 102 F.3d 994, 998 ([9th Cir. 1996](#)), and whether there has been a violation of a defendant’s Fifth Amendment right via references to the defendant’s silence, see [United States v. Beckman](#), 298 F.3d 788, 795 ([9th Cir. 2002](#)).¹³⁹

¹³⁸ [United States v. Ortlund](#), 109 F.3d 539, 543 ([9th Cir. 1997](#)); [United States v. Plache](#), 913 F.2d 1375, 1379 ([9th Cir. 1990](#)).

¹³⁹ [United States v. Bushyhead](#), 270 F.3d 905, 911 ([9th Cir. 2001](#)); [United States v. Velarde-Gomez](#), 269 F.3d 1023, 1028 ([9th Cir. 2001](#)) (en banc) (defendant’s lack of a physical or emotional reaction); [United States v.](#)

Prosecutors are forbidden from commenting on a defendant's decision not to testify. [Griffin v. California](#), 380 U.S. 609, 615 (1985).¹⁴⁰ *Griffin* claims are reviewed de novo. See [United States v. Smith](#), 282 F.3d 758, 769 (9th Cir. 2002); [United States v. Mende](#), 43 F.3d 1298, 1301 (9th Cir. 1995).

When a defendant fails to object to the admission of testimony or comments that may violate his Fifth Amendment privilege (or that may violate *Griffin*), review is limited to plain error. See [United States v. Thompson](#), 82 F.3d 849, 854-55 (9th Cir. 1996).

When the defendant does object, harmless error applies. See [United States v. Velarde-Gomez](#), 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc)

49. [Fed. R. Evid. 403](#) – Probative Value vs. Prejudicial Harm

The district court's balancing under Rule 403 of the probative value of evidence against its prejudicial effect is reviewed for an abuse of discretion. See [United States v. Gonzalez-Flores](#), 418 F.3d 1093, 1098 (9th Cir. 2005) (reversing); [United States v. Plancarte-Alvarez](#), 366 F.3d 1058, 1062 (9th Cir. 2004) (affirming).¹⁴¹ The district court need not, however, recite the Rule 403 test when deciding whether to admit evidence. [United States v. Hicks](#), 103 F.3d 837, 844 n.6 (9th Cir. 1996).

[Coutchavlis](#), 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's comment); [United States v. Pino-Noriega](#), 189 F.3d 1089, 1098 (9th Cir. 1999); [United States v. Ross](#), 123 F.3d 1181, 1187 (9th Cir. 1997).

¹⁴⁰ [United States v. Garcia-Guizar](#), 160 F.3d 511, 522 (9th Cir. 1998); [United States v. Atcheson](#), 94 F.3d 1237, 1246 (9th Cir. 1996).

¹⁴¹ [United States v. Allen](#), 341 F.3d 870, 886 (9th Cir. 2003); [United States v. LeMay](#), 260 F.3d 1018, 1024 (9th Cir. 2001) (discussing constitutional import of Rule 403); [United States v. Leon-Reyes](#), 177 F.3d 816, 821 (9th Cir. 1999); [United States v. Neill](#), 166 F.3d 943, 946 (9th Cir. 1999) (holding error to be harmless); [United States v. Hicks](#), 103 F.3d 837, 844 (9th Cir. 1996); see also [Old Chief v. United States](#), 519 U.S. 172, 183 n.7 (1997) (“On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely on.”).

50. Prosecutorial Misconduct

a. Generally

The district court's rulings on alleged prosecutorial misconduct are reviewed for an abuse of discretion, *see* [United States v. Steele](#), 298 F.3d 906, 910 (9th Cir. 2002),¹⁴² including the denial of a motion for new trial based on prosecutorial misconduct, *see* [United States v. Murillo](#), 288 F.3d 1126, 1140 (9th Cir. 2002).¹⁴³

Harmless error applies when defendant objects to prosecutorial misconduct, *see* [United States v. Blueford](#), 312 F.3d 962, 973-74 (9th Cir. 2002), and plain error review applies when defendant fails to object, *see* [United States v. Geston](#), 299 F.3d 1130, 1134 (9th Cir. 2002).

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

b. Bolstering/Vouching

Whether a prosecutor's comments constitute improper "bolstering" is a mixed question of law and fact reviewed de novo. *See* [United States v. Santiago](#), 46 F.3d 885, 891 (9th Cir. 1995).

The Ninth Circuit has not been clear on the standard of review when the defendant timely objection to improper vouching. The approach has been to determine de novo whether the prosecutor's conduct constituted improper vouching, and if so, whether the vouching was harmless error. *See*

¹⁴² [United States v. Murillo](#), 288 F.3d 1126, 1140 (9th Cir. 2002).

¹⁴³ [United States v. Sarkisian](#), 197 F.3d 966, 988 (9th Cir. 1999) (misconduct to be viewed in entirety of the trial); [United States v. Scholl](#), 166 F.3d 964, 974 (9th Cir. 1999); [United States v. Peterson](#), 140 F.3d 819, 821 (9th Cir. 1998); [United States v. Nelson](#), 137 F.3d 1094, 1106 (9th Cir. 1998) (reciting defendant's burden as "showing that it is 'more probable than not that the misconduct materially affected the verdict'"); [United States v. Sayetsitty](#), 107 F.3d 1405, 1408 (9th Cir. 1997).

[*United States v. Sarkisian*, 197 F.3d 966, 989-990 \(9th Cir. 1999\)](#).¹⁴⁴

If there is no timely objection, vouching claims are reviewed for plain error. See [*United States v. Parker*, 241 F.3d 1114, 1119 \(9th Cir. 2001\)](#).¹⁴⁵ A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. See [*United States v. Geston*, 299 F.3d 1130, 1138 \(9th Cir. 2002\)](#).

c. Dismissal

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. See [*United States v. Gurolla*, 333 F.3d 944, 950 \(9th Cir. 2003\)](#).¹⁴⁶ The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. [*Gurolla*, 333 F.3d at 950](#); [*United States v. Cuellar*, 96 F.3d 1179, 1182 \(9th Cir. 1996\)](#).

d. Grand Jury Misconduct

Allegations of prosecutorial misconduct before a grand jury are reviewed de novo. [*United States v. Pang*, 362 F.3d 1187, 1194 \(9th Cir. 2004\)](#); [*United States v. Fuchs*, 218 F.3d 957, 964 \(9th Cir. 2000\)](#).¹⁴⁷

e. Disqualification of Prosecutor

¹⁴⁴ [*United States v. Shaw*, 829 F.2d 714, 716-718 \(9th Cir. 1987\)](#); see also [*United States v. Hinton*, 31 F.3d 817, 824 \(9th Cir. 1994\)](#) (harmless error standard).

¹⁴⁵ [*United States v. Leon-Reyes*, 177 F.3d 816, 821 \(9th Cir. 1999\)](#); [*United States v. Garcia-Guizar*, 160 F.3d 511, 516, 521 \(9th Cir. 1998\)](#); [*United States v. Rudberg*, 122 F.3d 1199, 1206 \(9th Cir. 1997\)](#).

¹⁴⁶ [*United States v. Bridges*, 344 F.3d 1010, 1014 \(9th Cir. 2003\)](#); [*United States v. Haynes*, 216 F.3d 789, 796 \(9th Cir. 2000\)](#); [*United States v. Lazarevich*, 147 F.3d 1061, 1065 \(9th Cir. 1998\)](#); [*United States v. Edmonds*, 103 F.3d 822, 825 \(9th Cir. 1996\)](#); [*United States v. Wills*, 88 F.3d 704, 711 \(9th Cir. 1996\)](#); [*United States v. Dudden*, 65 F.3d 1461, 1466 \(9th Cir. 1995\)](#).

¹⁴⁷ [*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 \(9th Cir. 1983\)](#).

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

f. Suppression of Exculpatory Evidence

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); *see also* [United States v. Estrada](#), 453 F.3d 1208, 1212 (9th Cir. 2006). The district court's underlying factual findings are reviewed for clear error. *See* [Hernandez](#), 109 F.3d at 1454. The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed for an abuse of discretion. *See* [United States v. Belden](#), 957 F.2d 671, 674 (9th Cir. 1992).

51. Rebuttal and Surrebuttal Evidence

Abuse of discretion review applies to a district court's decision regarding admission of rebuttal evidence,¹⁴⁸ order of proof,¹⁴⁹ proper scope of rebuttal,¹⁵⁰ and admission or exclusion of surrebuttal evidence.¹⁵¹ *See* [United States v. Beck](#), 418 F.3d 1008, 1016 n.6 (9th Cir. 2005) (admission of rebuttal evidence); [United States v. Goland](#), 959 F.2d 1449, 1454 (9th Cir. 1992) (scope); [United States v. Blackstone](#), 56 F.3d 1143, 1146 (9th Cir. 1995) (surrebuttal).

52. Recess

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

¹⁴⁸ [United States v. Antonakeas](#), 255 F.3d 714, 724 (9th Cir. 2001); [Jackson v. Calderon](#), 211 F.3d 1148, 1165 n.9 (9th Cir. 2000) (habeas).

¹⁴⁹ 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).

¹⁵⁰ [Rent-A-Center v. Canyon Television & Appliance](#), 944 F.2d 597, 601 (9th Cir. 1991).

¹⁵¹ [United States v. Butcher](#), 926 F.2d 811, 817 (9th Cir. 1991).

arguments is an abuse of discretion).

53. Recusal and Disqualification of Judge

A district court's decision whether to grant a motion for recusal, or to disqualify herself,¹⁵² is reviewed for an abuse of discretion. See [United States v. Martin](#), 278 F.3d 988, 1005 (9th Cir. 2002).¹⁵³

When recusal is not raised below, or the defendant fails to object at trial, the allegation of judicial bias is reviewed for plain error. [United States v. Morgan](#), 376 F.3d 1002, 1007 (9th Cir. 2004).¹⁵⁴

54. Relevancy of Evidence

The district court's decisions regarding the relevancy of evidence are reviewed for abuse of discretion. See [United States v. Alvarez](#), 358 F.3d 1194, 1216 (9th Cir. 2004).¹⁵⁵ Note, however, that legal issues regarding whether evidence is relevant to other acts or to the crime charged is reviewed de novo. See [United States v. Castillo](#), 181 F.3d 1129, 1134 (9th Cir. 1999).¹⁵⁶

¹⁵² [United States v. Rogers](#), 119 F.3d 1377, 1380 (9th Cir. 1997).

¹⁵³ [United States v. Silver](#), 245 F.3d 1075, 1078 (9th Cir. 2001); [United States v. Wilkerson](#), 208 F.3d 794, 797 (9th Cir. 2000); [United States v. Scholl](#), 166 F.3d 964, 977 (9th Cir. 1999); [United States v. Hernandez](#), 109 F.3d 1450, 1453 (9th Cir. 1997); [United States v. Eshkol](#), 108 F.3d 1025, 1030 (9th Cir. 1997); [United States v. Chischilly](#), 30 F.3d 1144, 1149 50 (9th Cir. 1994); see also [United States v. \\$292,888.04 in U.S. Currency](#), 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action).

¹⁵⁴ [United States v. Springer](#), 51 F.3d 861, 864 n.1 (9th Cir. 1995); [United States v. Bosch](#), 951 F.2d 1546, 1548 (9th Cir. 1991).

¹⁵⁵ [United States v. Finley](#), 301 F.3d 1000, 1007 (9th Cir. 2002) (expert testimony); [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. Kallin](#), 50 F.3d 689, 693 (9th Cir. 1995) (Rule 402); [United States v. Vaandering](#), 50 F.3d 696, 704 (9th Cir. 1995).

¹⁵⁶ [United States v. Hardy](#), 289 F.3d 608, 612 (9th Cir. 2002); [United States v. Rrapi](#), 175 F.3d 742, 748 (9th Cir. 1999) (Rule 404(b)); [United States v. Keiser](#), 57 F.3d 847, 852 n.6 (9th Cir. 1995).

55. Reopening

Abuse of discretion standard applies to the district court's decision whether to reopen a case¹⁵⁷ or a suppression hearing.¹⁵⁸ See [United States v. Pino-Noriega](#), 189 F.3d 1089, 1094 (9th Cir. 1999).

56. Rule of Completeness

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

57. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion, see [United States v. Fernandez](#), 231 F.3d 1240, 1245 (9th Cir. 2000),¹⁵⁹ including the decision to exclude evidence as a sanction for destroying or failing to preserve evidence, see [United States v. Rivera-Relle](#), 333 F.3d 914, 922 (9th Cir. 2003).

The applicability of Federal Rules and local rules,¹⁶⁰ however, is reviewed de novo,¹⁶¹ but once sanctions are imposed, their propriety is

¹⁵⁷ See, e.g., [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.”).

¹⁵⁸ [United States v. Jordan](#), 291 F.3d 1091, 1100 (9th Cir. 2002) (no abuse of discretion); [United States v. Hobbs](#), 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

¹⁵⁹ [United States v. Scholl](#), 166 F.3d 964, 972 (9th Cir. 1999).

¹⁶⁰ [United States v. Wunsch](#), 84 F.3d 1110 (9th Cir. 1996) (noting apparent unresolved question of what standard of review applies to sanctions for violation of local rules); [United States v. Lopez](#), 4 F.3d 1455, 1458 (9th Cir. 1993) (“We review de novo the district court's conclusion that specific conduct violated court rules.”).

¹⁶¹ [United States v. Cedano-Arellano](#), 332 F.3d 568, 571 (9th Cir. 2003) (de novo review of interpretation of discovery rule); [United States v.](#)

reviewed for an abuse of discretion. See [United States v. Finley](#), 301 F.3d 1000, 1007 (9th Cir. 2002).¹⁶²

The district court's findings of fact in support of its imposition of sanctions are reviewed for clear error. See [United States v. Lopez](#), 4 F.3d 1455, 1458 (9th Cir. 1993).

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. See [United States v. Shryock](#), 342 F.3d 948, 983 (9th Cir. 2003).¹⁶³

The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. See [United States v. McKoy](#), 78 F.3d 446, 449 (9th Cir. 1996).

58. Shackling

The district court's decision to shackle a defendant, or to impose other security measures,¹⁶⁴ is reviewed for an abuse of discretion. See [United States v. Collins](#), 109 F.3d 1413, 1417 (9th Cir. 1997).¹⁶⁵ The underlying factual findings are reviewed for clear error. See [Spain v. Rushen](#), 883 F.2d 712, 717 (9th Cir. 1989).

59. Side-Bar Conferences

[Fernandez](#), 231 F.3d 1240, 1245 (9th Cir. 2000).

¹⁶² [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.”); [United States v. Mandel](#), 914 F.2d 1215, 1218 (9th Cir. 1990); [United States v. Iglesias](#), 881 F.2d 1519, 1523 (9th Cir. 1989).

¹⁶³ [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).

¹⁶⁴ [United States v. Shryock](#), 342 F.3d 948, 974 (9th Cir. 2003) (limiting audience seating).

¹⁶⁵ [Morgan v. Bunnell](#), 24 F.3d 49, 51 (9th Cir. 1994); [Jones v. Meyer](#), 899 F.2d 883, 884 (9th Cir. 1990).

The judge's decision whether to conduct a side-bar conference is reviewed for an abuse of discretion. See [United States v. Bennett, 363 F.3d 947, 952 \(9th Cir. 2004\)](#).¹⁶⁶

60. Witnesses

a. District Court Decisions

The trial court's decisions regarding witnesses are generally reviewed for an abuse of discretion. For example:

- Issues regarding the court's control over the questioning of witnesses at trial. See [United States v. Geston, 299 F.3d 1130, 1137 \(9th Cir. 2002\)](#) (limiting cross-examination).¹⁶⁷
- Decision to exclude witnesses from the courtroom. See [United States v. Seschillie, 310 F.3d 1208, 1213 \(9th Cir. 2002\)](#).
- Imposition of a sanction for a violation of a witness sequestration order. See [United States v. English, 92 F.3d 909, 913 \(9th Cir. 1996\)](#). Note that if there is no contemporaneous objection, however, plain error review applies. See [United States v. Hobbs, 31 F.3d 918, 921 \(9th Cir. 1994\)](#).
- Whether a witness is "unavailable" to testify. See [United States v. McGuire, 307 F.3d 1192, 1205 \(9th Cir. 2002\)](#).
- Refusal to allow witness testimony on remand. See [United States v. Ross, 372 F.3d 1097, 1112 \(9th Cir. 2004\)](#).
- Grant of an exception to the witness disclosure requirements of Federal Rule of Criminal Procedure 12.1(e). See [United States v. Wills, 88 F.3d 704, 708 \(9th Cir. 1996\)](#).
- Refusal to grant a writ of habeas corpus ad testificandum to

¹⁶⁶ [United States v. Laurins, 857 F.2d 529, 538 \(9th Cir. 1988\)](#); [United States v. Wellington, 754 F.2d 1457, 1469 \(9th Cir. 1985\)](#).

¹⁶⁷ See, e.g., [United States v. Geston, 299 F.3d 1130, 1137 \(9th Cir. 2002\)](#) (limiting cross-examination); [United States v. Pearson, 274 F.3d 1225, 1233 \(9th Cir. 2001\)](#) (disallowing leading questions); [United States v. Munoz, 233 F.3d 1117, 1134 \(9th Cir. 2001\)](#) (limiting cross-examination); [United States v. Archdale, 229 F.3d 861, 865 \(9th Cir. 2000\)](#) (permitting leading questions); [United States v. 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).

allow an individual to testify. See [United States v. Smith, 924 F.2d 889, 896 \(9th Cir. 1991\)](#).

- Denial of a motion to produce witness statements. See [United States v. Nash, 115 F.3d 1431, 1440 \(9th Cir. 1997\)](#).

A defendant's failure to object limits review to plain error. See [United States v. Shwayder, 312 F.3d 1109, 1120 \(9th Cir. 2002\)](#) (prosecutor's use of guilt-assuming hypotheticals during cross-examination), amended by [320 F.3d 889 \(9th Cir.\)](#), cert. denied, [539 U.S. 944 \(2003\)](#). Note that 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. See [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.”).

Other witness determinations are reviewed de novo, such as the denial of a motion to dismiss an indictment for the government's failure to retain witnesses. See [United States v. Gastelum-Almeida, 298 F.3d 1167, 1174 \(9th Cir. 2002\)](#). Note that the district court's underlying factual determinations are reviewed for clear error. See *id.* The district court's interpretation of the witness tampering provisions of [18 U.S.C. § 1512\(b\)](#) is also reviewed de novo. See [United States v. Khatami, 280 F.3d 907, 910 \(9th Cir. 2002\)](#).

b. Witness Immunity

The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch. See [United States v. Mendia, 731 F.2d 1412, 1414 \(9th Cir. 1984\)](#).

Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. See [United States v. Dudden, 65 F.3d 1461, 1467 \(9th Cir. 1995\)](#).

Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law

reviewed de novo. See [United States v. Cooper](#), 173 F.3d 1192, 1203 (9th Cir. 1999).

Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. See [United States v. Alvarez](#), 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. See *id.*

D. Post-Trial Decisions in Criminal Cases

1. Allocution

The court's failure to allow a defendant his or her right of allocution is reviewed to determine if the error is harmless. See [United States v. Mack](#), 200 F.3d 653, 657 (9th Cir. 2000).¹⁶⁸ The denial of allocution is not harmless when the district court has the discretion to sentence the defendant to a shorter sentence than given. See [Mack](#), 200 F.3d at 657.¹⁶⁹

2. Appeals

De novo review applies to whether a defendant has waived the statutory right to appeal by entering into a plea agreement, see [United States v. Bynum](#), 362 F.3d 574, 583 (9th Cir. 2004),¹⁷⁰ and to whether the waiver is

¹⁶⁸ [United States v. Leasure](#), 122 F.3d 837, 840 (9th Cir. 1997); [United States v. Carper](#), 24 F.3d 1157, 1162 (9th Cir. 1994) (finding error not harmless).

¹⁶⁹ [United States v. Sarno](#), 73 F.3d 1470, 1503-04 (9th Cir. 1995) (reversing sentence).

¹⁷⁰ [United States v. Joyce](#), 357 F.3d 921, 922 (9th Cir. 2004); [United States v. Shimoda](#), 334 F.3d 846, 848 (9th Cir. 2003); [United States v. Nguyen](#), 235 F.3d 1179, 1182 (9th Cir. 2000) (“The sole test of a waiver’s validity is whether it was made knowingly and voluntarily.”); [United States v. Nunez](#), 223 F.3d 956, 958 (9th Cir. 2000) (“Generally, courts will enforce a defendant’s waiver of his right to appeal if (1) the language of the waiver encompasses the defendant’s right to appeal on the grounds claimed on appeal, and (2) the waiver is knowingly and voluntarily made.”); [United States v. Phillips](#), 174 F.3d 1074, 1075 (9th Cir. 1999) (holding that no waiver existed due to ambiguous plea agreement); [United States v.](#)

valid, see [United States v. Littlejohn](#), 224 F.3d 960, 964 (9th Cir. 2000).¹⁷¹

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. See [United States v. Green](#), 89 F.3d 657, 660 (9th Cir. 1996); [United States v. Smith](#), 60 F.3d 595, 596-97 (9th Cir. 1995).

A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. See [United States v. Garcia](#), 997 F.2d 1273, 1276 n.1 (9th Cir. 1993).

3. *Apprendi* Violations

De novo review applies to a claim that a defendant's sentence violates [Apprendi v. New Jersey](#), 530 U.S. 466 (2000), see [United States v. Pina-Jaime](#), 332 F.3d 609, 611 (9th Cir. 2003),¹⁷² whether the district court correctly applied *Apprendi* at sentencing, [United States v. Banelos](#), 322 F.3d 700, 704 (9th Cir. 2003),¹⁷³ and the district court's interpretation of the constitutional rule in *Apprendi*. See [United States v. Maria-Gonzalez](#), 268 F.3d 664, 667 (9th Cir. 2001).

Apprendi violations are subject to harmless error review. See [Banelos](#), 322 F.3d at 705; [United States v. Jordan](#), 291 F.3d 1091, 1095 (9th Cir. 2002) (vacating sentence).

[Buchanan](#), 59 F.3d 914, 918 (9th Cir. 1995), (plea agreement waiver not controlling in light of court's oral assurances of appeal).

¹⁷¹ [United States v. Garza-Sanchez](#), 217 F.3d 806, 808 (9th Cir. 2000) (deportation order); [United States v. Portillo-Cano](#), 192 F.3d 1246, 1249 (9th Cir. 1999) (finding no waiver, vacating conviction); [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) (finding no waiver).

¹⁷² [United States v. Smith](#), 282 F.3d 758, 771 (9th Cir. 2002) (applying harmless error); [United States v. Martin](#), 278 F.3d 988, 1005 (9th Cir. 2002) (*Apprendi* does not apply to criminal history).

¹⁷³ [United States v. Gill](#), 280 F.3d 923, 928 (9th Cir. 2002).

A defendant's failure, however, to raise an *Apprendi* claim before the district court limits appellate review to plain error. See [United States v. Sua](#), 307 F.3d 1150, 1154 (9th Cir. 2002).¹⁷⁴

Note that *Apprendi* is not structural, nor is it to be applied retroactively. See [United States v. Sanchez-Cervantes](#), 282 F.3d 664, 670-71 (9th Cir. 2002).

4. Arrest of Judgment

The district court's denial of a motion for arrest of judgment is reviewed for an abuse of discretion. See [United States v. Rodriguez](#), 360 F.3d 949, 955 (9th Cir. 2004); [United States v. Baker](#), 63 F.3d 1478, 1499 (9th Cir. 1995).

5. Attorneys' Fees

The award¹⁷⁵ or denial¹⁷⁶ of attorneys' fees pursuant to [18 U.S.C. § 3006A](#) (Hyde Amendment) are reviewed for an abuse of discretion. See [United States v. Danielson](#), 325 F.3d 1054, 1076 (9th Cir. 2003).

6. Bail Pending Sentence and Appeal

Post trial release is governed by the standards set forth in [18 U.S.C. § 3143](#), [Federal Rule of Criminal Procedure 46](#), and [Federal Rule of Appellate Procedure 9](#). This circuit has not established a standard of review of a

¹⁷⁴ [United States v. Buckland](#), 289 F.3d 558, 563 (9th Cir. 2002) (en banc) (finding any error harmless); [United States v. Rodriguez](#), 285 F.3d 759, 763 (9th Cir. 2002) (vacating sentence); [United States v. Johansson](#), 249 F.3d 848, 861 (9th Cir. 2001) (no error if fact used to increase sentence within statutory maximum).

¹⁷⁵ [United States v. Braunstein](#), 281 F.3d 982, 992 (9th Cir. 2002).

¹⁷⁶ [United States v. Danielson](#), 325 F.3d 1054, 1076 (9th Cir. 2003); [United States v. Campbell](#), 291 F.3d 1169, 1170 (9th Cir. 2002); [United States v. Tucor Int'l, Inc.](#), 238 F.3d 1171, 1175 (9th Cir. 2001) ("The district court abuses its discretion when it makes an error of law, or bases its conclusion on a clearly erroneous finding of fact.") (citation omitted); [United States v. Lindberg](#), 220 F.3d 1120, 1124 (9th Cir. 2000) (comparing EAJA standard).

district court's denial of release. However, the court has laid out the requirements for bail pending appeal. See [United States v. Handy](#), 761 F.2d 1279, 1283-84 (9th Cir. 1985); [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 [United States v. Handy](#), 761 F.2d 1279, 1283 (9th Cir. 1985); [United States v. Reynolds](#), 956 F.2d 192, 192 (9th Cir. 1992). Other circuits are split.¹⁷⁷

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. See [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. See *id.*

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

7. Correcting/Amending/Reducing Sentences

[Federal Rule of Criminal Procedure 35\(c\)](#) permits corrections of sentences that are clearly erroneous under the Sentencing Guidelines. See [United States v. Aguirre](#), 214 F.3d 1122, 1126 (9th Cir. 2000).

De novo review applies to issues of law raised in a Rule 35(c) motion,¹⁷⁸ and whether a court has jurisdiction under Rule 35(c) to

¹⁷⁷ [United States v. Barnes](#), 324 F.3d 135, 140 (3d Cir. 2003) (“plenary”); [United States v. Chilingirian](#), 280 F.3d 704, 709 (6th Cir. 2001) (abuse of discretion); [United States v. Mercedes](#), 254 F.3d 433, 435 (2d Cir. 2001) (clear error); [United States v. Eaken](#), 995 F.2d 740, 741 (7th Cir. 1993) (de novo); [United States v. Bayko](#), 774 F.2d 516, 519 (1st Cir. 1985) (“independent”).

¹⁷⁸ [United States v. Zakhor](#), 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act).

resentence.¹⁷⁹ See [United States v. Penna](#), 319 F.3d 509, 511 (9th Cir. 2003). Note that a district court’s decision under Rule 35 involving pre-November 1, 1987 conduct is “reviewed for illegality or gross abuse of discretion.” [United States v. Hovsepien](#), 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc); [United States v. Hayes](#), 231 F.3d 1132, 1135 (9th Cir. 2000).

Abuse of discretion review applies to a trial court’s decision whether to reduce a Guideline sentence pursuant to [18 U.S.C. § 3582\(c\)\(2\)](#) (change in Guideline range), see [United States v. Hurt](#), 345 F.3d 1033, 1035 (9th Cir. 2003),¹⁸⁰ and the denial a motion to amend a guideline sentence, see [United States v. Hurt](#), 345 F.3d 1033, 1035 (9th Cir. 2003).

8. Disciplinary Orders

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

9. Expungement

This court reviews de novo whether a district court has the authority to order expungement of a record of conviction. See [United States v. Crowell](#), 374 F.3d 790, 792 (9th Cir. 2004); [United States v. Sumner](#), 226 F.3d 1005, 1009 (9th Cir. 2000).

10. Fines

The district court’s determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. See [United States v. Rearden](#), 349 F.3d 608, 617 (9th Cir. 2003).¹⁸¹

¹⁷⁹ [United States v. Holler](#), 411 F.3d 1061, 1064 (9th Cir. 2005); [Aguirre](#), 214 F.3d at 1124 (vacating resentence); [United States v. Barragan-Mendoza](#), 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating resentence).

¹⁸⁰ See also [United States v. Sprague](#), 135 F.3d 1301, 1304 (9th Cir. 1998); [United States v. Townsend](#), 98 F.3d 510, 512 (9th Cir. 1996).

¹⁸¹ [United States v. Brickey](#), 289 F.3d 1144, 1152 (9th Cir. 2002) (noting limited review when defendant fails to object); [United States v. Sager](#), 227 F.3d 1138, 1147 (9th Cir. 2000); [United States v. Scrivener](#), 189 F.3d 944,

De novo review applies to the legality, see [United States v. Turner](#), 312 F.3d 1137, 1142 (9th Cir. 2002), and constitutionality of a fine, see [United States v. Bajakajian](#), 524 U.S. 321, 336 & n.10 (1998). The court also reviews de novo whether a district court has the authority to modify a fine. See [United States v. Miller](#), 205 F.3d 1098, 1100 (9th Cir. 2000).

11. Forfeiture

De novo review applies to the following:

- District court's interpretation of the federal forfeiture laws. See [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 \(9th Cir. 1999\)](#).¹⁸²
- Whether there is standing to contest a forfeiture action. See [United States v. \\$191,910.00 in U.S. Currency](#), 16 F.3d 1051, 1057 n.10 (9th Cir. 1994), *superseded by statute on other grounds as stated in United States v. \$80,180.00 in U.S. Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002).
- Whether a delay in the initiation of civil forfeiture proceedings is unconstitutional. See [United States v. \\$292,888.04 in U.S. Currency](#), 54 F.3d 564, 566 (9th Cir. 1995) (no probable cause); [United States v. \\$874,938.00 U.S. Currency](#), 999 F.2d 1323, 1325 (9th Cir. 1993).
- Determinations of probable cause in civil forfeiture proceedings. See [United States v. Real Property Located at 22 Santa Barbara Drive](#), 264 F.3d 860, 868 (9th Cir. 2001).¹⁸³

953 (9th Cir. 1999).

¹⁸² [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) (reversing).

¹⁸³ See, e.g., [United States v. \\$129,727.00 U.S. Currency](#), 129 F.3d 486, 489 (9th Cir. 1997); [United States v. \\$405,089.23 U.S. Currency](#), 122 F.3d 1285, 1289 (9th Cir. 1997) (reversing probable cause); [United States v. One 1986 Ford Pickup](#), 56 F.3d 1181, 1186 (9th Cir. 1995) (reviewing certificate of reasonable cause); [United States v. U.S. Currency, \\$30,060](#), 39 F.3d 1039, 1041 (9th Cir. 1994).

- Whether a civil forfeiture is “grossly disproportional” to the gravity of the defendant’s crime. See *United States v. \$100,348 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004).

“However, [the appellate court] must accept the district court’s findings of fact in conducting the excessiveness inquiry unless they are clearly erroneous.” *United States v. \$100,348 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004).

12. Mistrial

The district court’s denial of a motion for mistrial is reviewed for an abuse of discretion. See *United States v. Hagege*, 437 F.3d 943, 959-60 (9th Cir. 2006).¹⁸⁴ Note, however, that the district court’s denial of a mistrial based on *Brady* violations is reviewed do novo. See *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000).

13. New Trial

The denial of a defendant’s motion for a new trial is reviewed for an abuse of discretion. See *United States v. Mack*, 362 F.3d 597, 600 (9th Cir. 2004) (reversing for a new trial).¹⁸⁵ This includes the following:

¹⁸⁴ See, e.g., *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003) (prejudicial testimony); *United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002) (contempt); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (prosecutorial misconduct); *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002) (juror misconduct); *United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999) (extraneous information to jury); *United States v. Ramirez*, 176 F.3d 1179, 1183 (9th Cir. 1999) (misstatements at closing); *United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998) (cautionary instruction); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (improper questions); *United States v. English*, 92 F.3d 909, 912 (9th Cir. 1996) (emotional testimony); *United States v. Wills*, 88 F.3d 704, 712 (9th Cir. 1996) (statement about polygraph); *United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996) (prejudicial testimony); *United States v. George*, 56 F.3d 1078, 1082 (9th Cir. 1995) (inadmissible hearsay).

¹⁸⁵ See, e.g., *United States v. Hursh*, 217 F.3d 761, 769 (9th Cir. 2000); *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000) (28 U.S.C. §

- Motions based on newly discovered evidence. See [United States v. Jernigan](#), 451 F.3d 1027, 1033 (9th Cir. 2006) (Rule 33 motion).¹⁸⁶
- Motions based on alleged prosecutorial misconduct. See [United States v. Murillo](#), 288 F.3d 1126, 1140 (9th Cir. 2002) (finding error harmless beyond reasonable doubt).¹⁸⁷
- Motions based on alleged juror misconduct. See [United States v. Bussell](#), 414 F.3d 1048, 1054 (9th Cir. 2005).¹⁸⁸
- District court’s decision not to hold an evidentiary hearing. See [United States v. Bussell](#), 414 F.3d 1048, 1054 (9th Cir. 2005); [United States v. Del Muro](#), 87 F.3d 1078, 1080 n.3 (9th Cir. 1996).

The decision to grant a new trial based on a claim that jurors were improperly exposed to extrinsic evidence is subject, however, to “independent” review. See [United States v. Prime](#), 431 F.3d 1147, 1157 (9th Cir. 2005); [United States v. Keating](#), 147 F.3d 895, 899 (9th Cir. 1998). Note that the presence of a biased juror cannot be harmless and requires a new trial without a showing of prejudice. See [United States v. Long](#), 301 F.3d 1095, 1101 (9th Cir. 2002).

This court has also stated that de novo review applies to the denial of motions for a new trial based on a *Brady* violation, see [United States v. Jernigan](#), 451 F.3d 1027, 1030 (9th Cir. 2006),¹⁸⁹ and or one based on a

[2255](#) “motion”); [United States v. Endicott](#), 869 F.2d 452, 454 (9th Cir. 1989) (“[T]he defendant carries a ‘significant burden’ to show that the district court abused its discretion in denying a new trial.”).

¹⁸⁶ [United States v. Waggoner](#), 339 F.3d 915, 919 (9th Cir. 2003); [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).

¹⁸⁷ [United States v. Peterson](#), 140 F.3d 819, 821 (9th Cir. 1998) (prosecutorial misconduct, reversing for new trial); [United States v. Sayetsitty](#), 107 F.3d 1405, 1408 (9th Cir. 1997).

¹⁸⁸ [United States v. Mills](#), 280 F.3d 915, 921 (9th Cir. 2002); [United States v. Saya](#), 247 F.3d 929, 935 (9th Cir. 2001); [United States v. George](#), 56 F.3d 1078, 1083 (9th Cir. 1995).

¹⁸⁹ [United States v. Antonakeas](#), 255 F.3d 714, 725 (9th Cir. 2001); [United States v. Zuno Arce](#), 44 F.3d 1420, 1425 (9th Cir. 1995).

theory of entrapment, see [United States v. Thickstun](#), 110 F.3d 1394, 1398 (9th Cir. 1997).

14. Parole

The legality of a sentence and its impact on parole are issues reviewed de novo. See [United States v. Carpenter](#), 91 F.3d 1282, 1283 (9th Cir. 1996); [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. See [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. See [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).¹⁹⁰

15. 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); [United States v. Lorenzini](#), 71 F.3d 1489, 1496 (9th Cir. 1995).

Abuse of discretion review applies to the following:

- Decision to revoke probation. See [United States v. Shampang](#), 987 F.2d 1439, 1441 (9th Cir. 1993).¹⁹¹

¹⁹⁰ [Benny v. United States Parole Comm’n](#), 295 F.3d 977, 981 (9th Cir. 2002) (noting review is limited to “whether the Commission exceeded its authority or acted so arbitrarily as to violate due process”).

¹⁹¹ [United States v. Laughlin](#), 933 F.2d 786, 788 (9th Cir. 1991); [United](#)

- The choice of conditions of probation.¹⁹² See [United States v. Juvenile Male #1](#), 38 F.3d 470, 473 (9th Cir. 1994).
- The decision not to conduct an in camera inspection of probation files pursuant to defendant’s discovery request. See [United States v. Alvarez](#), 358 F.3d 1194, 1208 (9th Cir. 2004).

De novo review applies to the following:

- Challenges to the district court’s authority to impose specific probation conditions. See [United States v. Parrott](#), 992 F.2d 914, 920 (9th Cir. 1993).
- Whether a district court can properly delegate authority to a magistrate judge to conduct a probation revocation hearing. See [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. See [United States v. Mejia-Sanchez](#), 172 F.3d 1172, 1174 (9th Cir. 1999).
- Whether a district court may reinstate an original term of supervised release. See [United States v. Trenter](#), 201 F.3d 1262, 1263 (9th Cir. 2000).
- The district court’s interpretation and application of the supervised release statute. See [United States v. Turner](#), 312 F.3d 1137, 1142 (9th Cir. 2002); [United States v. Cade](#), 236 F.3d 463, 465 (9th Cir. 2000).

16. Resentencing

De novo review applies to whether a court has jurisdiction to resentence a defendant,¹⁹³ whether double jeopardy bars resentencing,¹⁹⁴ and

[States v. Tham](#), 884 F.2d 1262, 1263 (9th Cir. 1989).

¹⁹² [United States v. Parrott](#), 992 F.2d 914, 920 (9th Cir. 1993) (noting review is de novo if defendant challenges the court’s authority to impose condition); [United States v. Terrigno](#), 838 F.2d 371, 374 (9th Cir. 1988) (noting district court has “broad discretion in setting probation conditions”).

¹⁹³ [United States v. Penna](#), 319 F.3d 509, 511 (9th Cir. 2003); [United States v. Aguirre](#), 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating sentence); [United States v. Ruiz-Alvarez](#), 211 F.3d 1181, 1184 (9th Cir. 2000); [United](#)

whether resentencing violates a defendant's due process rights.¹⁹⁵ See [United States v. Holler](#), 411 F.3d 1061, 1064 (9th Cir. 2005) (jurisdiction); [United States v. Dowd](#), 417 F.3d 1080, 1086 (9th Cir. 2005) (due process rights); [United States v. Radmall](#), 340 F.3d 798, 800 n. 4 (9th Cir. 2003) (double jeopardy). Note that generally a district court's discretion on remand to resentence a defendant is not limited to the prior record. See [United States v. Matthews](#), 278 F.3d 880, 885 (9th Cir. 2002) (en banc).¹⁹⁶

17. Restitution

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. See [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004).¹⁹⁷ When the restitution order is not challenged before the district court, review is limited to plain error. See [United States v. Bright](#), 353 F.3d 1114, 1120 (9th Cir. 2004).¹⁹⁸

A court has broad discretion in ordering restitution,¹⁹⁹ and the amount of restitution ordered is reviewed for an abuse of discretion. See [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004).²⁰⁰ The court's

[States v. Barragan-Mendoza](#), 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating sentence).

¹⁹⁴ [United States v. Ruiz-Alvarez](#), 211 F.3d 1181, 1185 (9th Cir. 2000); [United States v. McClain](#), 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas).

¹⁹⁵ [United States v. Garcia-Guizar](#), 234 F.3d 483, 489 n.2 (9th Cir. 2000).

¹⁹⁶ [United States v. Culps](#), 300 F.3d 1069, 1082 (9th Cir. 2002)

(discussing certain cases where we may limit the discretion of the district court to consider new evidence).

¹⁹⁷ [United States v. De La Fuente](#), 353 F.3d 766, 772 (9th Cir. 2003); [United States v. Riley](#), 335 F.3d 919, 931 (9th Cir. 2003); [United States v. Forman](#), 329 F.3d 1037, 1039 (9th Cir. 2003); [United States v. Grice](#), 319 F.3d 1174, 1176 (9th Cir. 2003); [United States v. Pizzichiello](#), 272 F.3d 1232, 1240 (9th Cir. 2001).

¹⁹⁸ [United States v. De La Fuente](#), 353 F.3d 766, 769 (9th Cir. 2003); [United States v. Zink](#), 107 F.3d 716, 718 (9th Cir. 1997).

¹⁹⁹ [United States v. Laney](#), 189 F.3d 965, 966 (9th Cir. 1999); [United States v. Miguel](#), 49 F.3d 505, 511 (9th Cir. 1995).

²⁰⁰ [United States v. Najjar](#), 255 F.3d 979, 984 (9th Cir. 2001) (remand for recalculation of restitution); [United States v. Matsumaru](#), 244 F.3d 1092, 1108 (9th Cir. 2001) (same); [United States v. Laney](#), 189 F.3d 965, 966 (9th

“valuation methodology” is reviewed, however, de novo. See [United States v. Lomow](#), 266 F.3d 1013, 1020 (9th Cir. 2001).

Factual findings supporting a restitution order are reviewed for clear error. See [United States v. De La Fuente](#), 353 F.3d 766, 772 (9th Cir. 2003).²⁰¹

The legality of a restitution order, however, is reviewed de novo. See [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004).²⁰²

18. [Fed. R. Crim. P. 32](#)

The sentencing court’s compliance with [Federal Rule of Criminal Procedure 32](#) is reviewed de novo. See [United States v. Thomas](#), 355 F.3d 1191, 1194 (9th Cir. 2004); [United States v. Ruiz](#), 257 F.3d 1030, 1031 & 1033 (9th Cir. 2001) (en banc) (clarifying that “fair and just” standard applies to Rule 32(e) rather than “manifest injustice” test).²⁰³

The court’s decision whether to hold an evidentiary hearing on a Rule

[Cir. 1999](#)); [United States v. Johnson](#), 132 F.3d 1279, 1286 (9th Cir. 1997); [United States v. Sablan](#), 92 F.3d 865, 870 (9th Cir. 1996) (reversing for recalculation of restitution).

²⁰¹ [United States v. Forman](#), 329 F.3d 1037, 1039 (9th Cir. 2003); [United States v. Pizzichiello](#), 272 F.3d 1232, 1240 (9th Cir. 2001); [United States v. Allen](#), 153 F.3d 1037, 1044-45 (9th Cir. 1998).

²⁰² [United States v. Cliatt](#), 338 F.3d 1089, 1090 (9th Cir. 2003); [United States v. Forman](#), 329 F.3d 1037, 1039 (9th Cir. 2003); [United States v. Grice](#), 319 F.3d 1174, 1176 (9th Cir. 2003); [United States v. Pizzichiello](#), 272 F.3d 1232, 1240 (9th Cir. 2001); [United States v. Follet](#), 269 F.3d 996, 998 (9th Cir. 2001) (reversing); [United States v. King](#), 257 F.3d 1013, 1028 (9th Cir. 2001); [United States v. Laney](#), 189 F.3d 954, 964-65 (9th Cir. 1999).

²⁰³ [United States v. Herrera-Rojas](#), 243 F.3d 1139, 1142 (9th Cir. 2001) (vacating sentence); [United States v. Houston](#), 217 F.3d 1204, 1206 (9th Cir. 2000); [United States v. Standard](#), 207 F.3d 1136, 1140 (9th Cir. 2000) (vacating sentence); [United States v. Havier](#), 155 F.3d 1090, 1092 (9th Cir. 1998) (examining requirements of Rule 32.1 and vacating sentence); [United States v. Stein](#), 127 F.3d 777, 780 (9th Cir. 1997); [United States v. Karterman](#), 60 F.3d 576, 583 (9th Cir. 1995).

32 motion is reviewed for an abuse of discretion. See [United States v. Pearson](#), 274 F.3d 1225, 1234 (9th Cir. 2001).²⁰⁴ If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. See [United States v. Berry](#), 258 F.3d 971, 976 (9th Cir. 2001).

19. Sentencing

a. Applicability of the Sentencing Guidelines and pre-Guidelines Standards of Review

The Sentencing Guidelines apply to defendants who committed offenses on or after November 1, 1987. Whether the Sentencing Guidelines apply to a given offense is a question of law reviewed de novo. See [United States v. Alcaez-Camacho](#), 340 F.3d 794, 796 (9th Cir. 2003); [United States v. Merino](#), 44 F.3d 749, 753 (9th Cir. 1994); [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), *overruled on other grounds by* [United States v. Nordby](#), 225 F.3d 1053 (9th Cir. 2000). The legality of a pre-Guidelines sentence is reviewed de novo. See [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). Pre-Guidelines sentences that fall within statutory limits are left to the sound discretion of the district court and are reviewed only for abuse of discretion. See [Pomazi](#), 851 F.2d at 247. If the sentence raises constitutional issues, however, review is more searching. See *id.*; see also [United States v. Tucker](#), 404 U.S. 443, 447 (1972) (sentence within statutory limits generally not reviewable absent constitutional concerns). The district court’s decision to impose pre-Guidelines and Guidelines sentences consecutively is reviewed for an abuse of discretion. See [United States v. Scarano](#), 76 F.3d 1471, 1474 (9th Cir. 1996).

b. Application of the Guidelines to Specific Facts

²⁰⁴ [United States v. Houston](#), 217 F.3d 1204, 1206-07 (9th Cir. 2000); [United States v. Stein](#), 127 F.3d 777, 780 (9th Cir. 1997).

The Ninth Circuit has recognized that there is a conflict in its statement of the standard of review, both before and after [United States v. Booker, 543 U.S. 220](#) (2005), for a district court’s “application” of the Guidelines. See [United States v. Staten, 450 F.3d 384](#), 388 n.3 (9th Cir.) (recognizing the conflict but concluding that it was not necessary to resolve it in the case at bar), amended by [--- F.3d ---, 2006 WL 2506386](#) (9th Cir. Aug 31, 2006). At the time of this document’s current revision, the Ninth Circuit is undertaking en banc review of questions raised by *Booker*, though this conflict is not explicitly raised in the issues to be examined. See [United States v. Carty, ---F.3d ---, 2006 WL 249311](#) (9th Cir. Aug. 25, 2006) (inviting supplemental briefs in the cases of *United States v. Carty* and *United States v. Zavala* on six issues related to *Booker*).

Under one approach to “application” developed prior to *Booker*, the district court’s application of the Guidelines to the facts of a particular case is reviewed for an abuse of discretion.²⁰⁵ Post-*Booker* cases have also applied this standard. See, e.g., [United States v. Smith, 424 F.3d 992, 1015](#) (9th Cir. 2005), cert. denied, 126 S. Ct. 1477 (2006). Under this standard, the 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).²⁰⁶ “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 § 5K2.0, p.s.); [United States v. Redman, 35 F.3d 437, 439](#) (9th Cir. 1994) (Guidelines did not alter appellate courts’ traditional deference to district court’s

²⁰⁵ See [United States v. Miguel, 368 F.3d 1150](#), 1155 (9th Cir. 2004); [United States v. Naghani, 361 F.3d 1255](#), 1263 (9th Cir. 2004); [United States v. Allen, 341 F.3d 870](#), 892 (9th Cir. 2003); [United States v. Technic Servs., Inc., 314 F.3d 1031](#), 1038 (9th Cir. 2002); [United States v. Alexander, 287 F.3d 811](#), 818 (9th Cir. 2002); see also [United States v. Robinson, 94 F.3d 1325](#), 1327 n.1 (9th Cir. 1996) (explaining standard).

²⁰⁶ See also [United States v. Defterios, 343 F.3d 1020](#), 1023 (9th Cir. 2003) (noting “substantial deference”); [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).

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). Note, however, that [18 U.S.C. § 3553\(c\)](#) mandates the judge state in open court the reasons for imposition of a particular sentence; the court’s compliance with this requirement is reviewed de novo. See [United States v. Delgado](#), 357 F.3d 1061, 1071 (9th Cir. 2004); [United States v. Wilson](#), 7 F.3d 828, 839 (9th Cir. 1993).

The conflicting approach to the standard of review for “application” of the Guidelines is closely related to the standard of review for “interpretation” discussed below. See II. Criminal Proceedings, D. Post-Trial Decisions in Criminal Cases, 19. Sentencing, j. Interpretation and Application of Sentencing Guidelines.

c. Constitutionality

The constitutionality of the Sentencing Guidelines is a question of law reviewed de novo.²⁰⁷ The constitutionality of a sentence imposed under the Guidelines is reviewed de novo.²⁰⁸ A claim that a defendant’s sentence violates [Apprendi v. New Jersey](#), 530 U.S. 466 (2000), is also reviewed de novo. See [United States v. Dare](#), 425 F.3d 634, 638 (2005), *cert. denied*, 126 S. Ct. 2959 (2006); [United States v. Smith](#), 282 F.3d 758, 771 (9th Cir. 2002); *but see* [United States v. Sanchez-Cervantes](#), 282 F.3d 664, 671 (9th Cir. 2002) (holding that “Apprendi does not apply retroactively to cases on initial collateral review”); *see also* [Cooper-Smith v. Palmateer](#), 397 F.3d 1236, 1245-46 (9th Cir.) (concluding that Sanchez-Cervantes is still valid in light of subsequent Supreme Court precedent), *cert. denied*, 126 S. Ct. 442 (2005).

²⁰⁷ See [United States v. Leasure](#), 319 F.3d 1092, 1096 (9th Cir. 2003); [United States v. Mezas de Jesus](#), 217 F.3d 638, 642 (9th Cir. 2000); [United States v. Johnson](#), 130 F.3d 1352, 1354 (9th Cir. 1997); *see also* [United States v. Booker](#), 543 U.S. 220 (2005) (holding portions of the Guidelines unconstitutional).

²⁰⁸ See [United States v. Leon H.](#), 365 F.3d 750, 752 (9th Cir. 2004); [United States v. Barajas-Avalos](#), 377 F.3d 1040, 1060 (9th Cir. 2004); [United States v. Patterson](#), 292 F.3d 615, 631 (9th Cir. 2002); [United States v. Mezas de Jesus](#), 217 F.3d 638, 642 (9th Cir. 2000); [United States v. Estrada-Plata](#), 57 F.3d 757, 762 (9th Cir. 1995).

d. Continuances

A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. See [Williams v. Stewart](#), 441 F.3d 1030, 1056 (9th Cir. 2006); [United States v. Lopez-Patino](#), 391 F.3d 1034, 1036 (9th Cir. 2004); [United States v. Lewis](#), 991 F.2d 524, 528 (9th Cir. 1993); [United States v. Monaco](#), 852 F.2d 1143, 1150 (9th Cir. 1988).

e. Correcting/Amending/Reducing Sentences and Rule 35

Rule 35(a) permits corrections of sentences which are clearly erroneous under the Guidelines. See [United States v. Aguirre](#), 214 F.3d 1122, 1126 (9th Cir. 2000) (discussing former Rule 35(c), now located in Rule 35(a)). Issues of law raised in a Rule 35(a) motion are reviewed de novo. See [United States v. Zakhor](#), 58 F.3d 464, 465 (9th Cir. 1995) (challenge to application and constitutionality of Sentencing Reform Act in former Rule 35(c) motion). Whether a court has jurisdiction under Rule 35(a) to resentence presents a question of law reviewed de novo.²⁰⁹

Note that [Federal Rule of Criminal Procedure 35](#) was modified to conform with the Sentencing Guidelines.²¹⁰ 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. See [United States v. Stump](#), 914 F.2d 170, 172 (9th Cir. 1990). The district court's ruling on a Rule 35 motion is reviewed for "illegality or gross abuse of discretion." See [United States v. Hayes](#), 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct). The trial court's decision not to hold an evidentiary hearing on a Rule 35 motion is reviewed for an abuse of discretion. See [Hayes](#), 231 F.3d at 1135; [United States v. Gonzales](#), 765 F.2d 1393, 1396 (9th Cir. 1985).

²⁰⁹ See [United States v. Penna](#), 319 F.3d 509, 511 (9th Cir. 2003); [Aguirre](#), 214 F.3d at 1124; [United States v. Barragan-Mendoza](#), 174 F.3d 1024, 1027 (9th Cir. 1999).

²¹⁰ 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).

A trial court's decision whether to reduce a Guideline sentence pursuant to [18 U.S.C. § 3582\(c\)\(2\)](#) (change in Guideline range) is reviewed for an abuse of discretion. See [United States v. Sprague](#), 135 F.3d 1301, 1304 (9th Cir. 1998); [United States v. Townsend](#), 98 F.3d 510, 512 (9th Cir. 1996). The court's denial of a motion to amend a Guideline sentence is also reviewed for an abuse of discretion. See [United States v. Hurt](#), 345 F.3d 1033, 1035 (9th Cir. 2003).

f. Departures

Prior to [United States v. Booker](#), 543 U.S. 220 (2005), district court decisions to depart from the Guidelines were reviewed de novo in accordance with [18 U.S.C. § 3742\(e\)](#).²¹¹ *Booker* excised this and other provisions as unconstitutional and stated that the modified statute sets forth an implicit reasonableness standard for appellate review. [Booker](#), 543 U.S. at 260-65. *Booker* applies to all cases pending on direct review at the time it was decided. *Id.* at 268. At the time of this document's current revision, the Ninth Circuit is undertaking en banc review of questions raised by *Booker*.

²¹¹ The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT) (April 30, 2003) amended 18 U.S.C. § 3742(e) and provided for de novo review of the district court's decision to depart from the applicable sentencing guideline. See [United States v. Barragan-Espinoza](#), 350 F.3d 978, 981 (9th Cir. 2003). PROTECT thus overruled in part the holding of [Koon v. United States](#), 518 U.S. 81, 99 (1996) (holding district court's decision to depart is reviewed for an abuse of discretion), and applied to all pending cases. See [United States v. Philips](#), 367 F.3d 846, 860 (9th Cir. 2004) (holding PROTECT "applies to cases pending on appeal at the time of its enactment"); [United States v. Daychild](#), 357 F.3d 1082, 1105-06 (9th Cir. 2004); see also [United States v. Leon](#), 341 F.3d 928, 931 (9th Cir. 2003) (noting change in standard of review but declining to decide whether PROTECT applied to cases pending on appeal). Prior to PROTECT, a district court's decision to depart was reviewed under an abuse of discretion standard. See, e.g., [Barragan-Espinoza](#), 350 F.3d at 981; [Leon](#), 341 F.3d at 931; [United States v. Thompson](#), 315 F.3d 1071, 1074 (9th Cir. 2002). PROTECT applied only to review of departures and not to a district court's refusal to depart downward. [United States v. Linn](#), 362 F.3d 1261, 1262 (9th Cir. 2004) (holding appellate court lacks jurisdiction to review district court's discretionary refusal to depart downward).

See [United States v. Carty, ---F.3d ---, 2006 WL 249311 \(9th Cir. Aug. 25, 2006\)](#) (inviting supplemental briefs in the cases of *United States v. Carty* and *United States v. Zavala* on six issues related to *Booker*).

Prior to *Booker*, the extent of a district court’s downward departure was reviewed for abuse of discretion.²¹² This standard has been applied since *Booker*, though it could be affected by the pending en banc review described above. See [United States v. Menyweather, 447 F.3d 625, 630 \(9th Cir. 2006\)](#) (“[T]he appropriate standard for reviewing the district court's determination of its departure authority is abuse of discretion.”).

Note that a district court’s discretionary refusal to depart from pre-*Booker* mandatory Guidelines is not reviewable on appeal. See [United States v. Linn, 362 F.3d 1261, 1262 \(9th Cir. 2004\)](#).²¹³ If the trial court indicated, however, that it did not have the discretion under the guidelines to depart, that determination is reviewed de novo. See [United States v. Clough, 360 F.3d 967, 969 \(9th Cir. 2004\)](#).²¹⁴ At the time of this revision, the Ninth Circuit is considering en banc the question of whether it has jurisdiction, post-*Booker*, to review appeals of within-Guidelines range sentences. See [United States v. Carty, --- F.3d ---, 2006 WL 249311 \(9th Cir. Aug. 25, 2006\)](#) (inviting supplemental briefs on questions including: “Do we have jurisdiction to review appeals of within-Guidelines range sentences?”).

Pre-*Booker*, the adequacy of the district court’s notice to defendant of its intent to depart upward was reviewed de novo. Where the defendant fails to object to lack of notice, however, review for plain error applies, both pre-

²¹² See [Barragan-Espinoza, 350 F.3d at 981](#) (explaining that PROTECT did not alter this standard of review); [United States v. Working, 287 F.3d 801, 806 \(9th Cir. 2002\)](#) (noting extent of departure must be “reasonable”); [United States v. Rodriguez-Cruz, 255 F.3d 1054, 1060 \(9th Cir. 2001\)](#) (noting extent of departure cannot be “grossly disproportionate to objective criteria”).

²¹³ See [United States v. Rodriguez, 360 F.3d 949, 959 \(9th Cir. 2004\)](#); [United States v. Smith, 330 F.3d 1209, 1212 \(9th Cir. 2003\)](#); [United States v. Romero, 293 F.3d 1120, 1126 \(9th Cir. 2002\)](#); [United States v. Ruiz, 241 F.3d 1157, 1161-62 \(9th Cir. 2001\)](#) (noting exceptions), *rev’d on other grounds*, 536 U.S. 622 (2002).

²¹⁴ See [Smith, 330 F.3d at 1212](#); [Romero, 293 F.3d at 1126](#); [United States v. Davoudi, 172 F.3d 1130, 1133 \(9th Cir. 1999\)](#).

and post-*Booker*. See [United States v. Evans-Martinez](#), 448 F.3d 1163, 1166 (applying plain error standard and apparently leaving open question of whether, post-*Booker*, de novo review would still apply where objection is timely raised); [United States v. Garcia](#), 323 F.3d 1161, 1165 (9th Cir. 2003) (articulating pre-*Booker* standard). The requirement, imposed by Rule 32(h), that a district court provide notice of its intent to depart from the Guidelines, survives *Booker*. See [Evans-Martinez](#), 448 F.3d at 1167. Pre-*Booker*, the district court’s consideration of Chapter 7’s non-binding policy statements was reviewed for an abuse of discretion. See [Garcia](#), 323 F.3d at 1164.

g. Disparate Sentences

Before [United States v. Booker](#), 543 U.S. 220 (2005), a claim of disparate sentencing was reviewed under the abuse of discretion standard. See [United States v. Bischel](#), 61 F.3d 1429, 1437 (9th Cir. 1996) (“Generally, the imposition of disparate sentences alone is not an abuse of discretion, and a judge isn’t required to give reasons for a disparate sentence in the absence of any evidence that a defendant is being punished for exercising his right to stand trial.”). This standard has not been rearticulated since *Booker*.

Both before and after *Booker*, the Ninth Circuit “has applied the rational basis standard of review to equal protection challenges to the Sentencing Guidelines based on a comparison of allegedly disparate sentences.” [United States v. Ellsworth](#), 456 F.3d 1146, 1149 (9th Cir. 2006).

h. Factual Findings

Before [United States v. Booker](#), 543 U.S. 220 (2005), the district court’s factual findings in the sentencing phase were reviewed for clear error.²¹⁵ At the time of this revision, the Ninth Circuit is considering this question en banc. See [United States v. Carty](#), --- F.3d ---, 2006 WL 249311 (9th Cir. Aug. 25, 2006) (inviting supplemental briefs on questions

²¹⁵ See [United States v. Nielsen](#), 371 F.3d 574, 582 (9th Cir. 2004) (acceptance of responsibility); [United States v. Martinez-Martinez](#), 369 F.3d 1076, 1088-89 (9th Cir. 2004) (acceptance of responsibility); [United States v. Cordova Barajas](#), 360 F.3d 1037, 1042 (9th Cir. 2004) (minor participant); [United States v. Smith](#), 282 F.3d 758, 772 (9th Cir. 2002) (minor or minimal role).

including: “Are factual findings decided by the district court reviewed for clear error, abuse of discretion, or on some other standard of review?”).²¹⁶

The Ninth Circuit has clarified the plain error standard to be applied when a *Booker* Sixth Amendment sentencing claim was not raised in pre-*Booker* proceedings at the district court. See [United States v. Ameline](#), 409 F.3d 1073, 1078-85 (9th Cir. 2005) (en banc). When faced with an unpreserved *Booker* error, the court applies the “limited remand” procedure described in *Ameline*. See *id.*

i. Fines

The legality of a fine imposed is a question of law reviewed de novo. See [United States v. Turner](#), 312 F.3d 1137, 1142 (9th Cir. 2002); [United States v. Portin](#), 20 F.3d 1028, 1029-30 (9th Cir. 1994). Whether a fine is constitutionally excessive is reviewed de novo. See [United States v. Bajakajian](#), 524 U.S. 321, 336 & n.10 (1998). Whether a district court has the authority to modify a fine is a question of law reviewed de novo. See [United States v. Miller](#), 205 F.3d 1098, 1100 (9th Cir. 2000). The district court’s determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error.²¹⁷

j. Interpretation and Application of Sentencing Guidelines

Before [United States v. Booker](#), 543 U.S. 220 (2005), the district court’s interpretation of the Sentencing Guidelines was reviewed de novo. See [United States v. Nielsen](#), 371 F.3d 574, 582 (9th Cir. 2004) (“interpretation” reviewed de novo); [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004) (“interpretation” reviewed de novo); [United States v.](#)

²¹⁶ Opinions since *Booker* have continued to apply the clear error standard. See, e.g., [United States v. Williamson](#), 439 F.3d 1125, 1137 n.12 (9th Cir. 2006).

²¹⁷ See [United States v. Rearden](#), 349 F.3d 608, 617 (9th Cir. 2003); [United States v. Brickey](#), 289 F.3d 1144, 1152 (9th Cir. 2002) (noting limited review when defendant fails to object); [United States v. Sager](#), 227 F.3d 1138, 1147 (9th Cir. 2000); [United States v. Scrivener](#), 189 F.3d 944, 953 (9th Cir. 1999); [United States v. Ladum](#), 141 F.3d 1328, 1344 (9th Cir. 1998).

[Mitchell](#), 354 F.3d 1013, 1014 (9th Cir. 2004) (“application” reviewed de novo); [United States v. Garcia](#), 323 F.3d 1161, 1164 (9th Cir. 2003) (“application” reviewed de novo); [United States v. Lopez-Garcia](#), 316 F.3d 967, 970 (9th Cir. 2003) (“interpretation and application” reviewed de novo). Opinions since *Booker* have continued to apply this standard. See [United States v. Williamson](#), 439 F.3d 1125, 1137 n.12 (9th Cir. 2006) (“interpretation and application” reviewed de novo); [United States v. Speelman](#), 431 F.3d 1226, 1231 (9th Cir. 2005) (“application” reviewed de novo); [United States v. Stephens](#), 424 F.3d 876, 879 (9th Cir. 2005) (“application” reviewed de novo). At the time of this revision, the Ninth Circuit is considering en banc the question of how to review sentences for reasonableness under *Booker*. See [United States v. Carty](#), --- F.3d ---, 2006 WL 249311 (9th Cir. Aug. 25, 2006) (inviting supplemental briefs on six questions related to *Booker*).

The same line of cases that applies de novo review to “interpretation” also applies de novo review to “application” of the guidelines, using these terms in a somewhat interchangeable fashion. See [Nielsen](#), 371 F.3d at 582; (“interpretation” reviewed de novo); [Mitchell](#), 354 F.3d at 1014 (“application” reviewed de novo); [Lopez-Garcia](#), 316 F.3d at 970 (9th Cir. 2003) (“interpretation and application” reviewed de novo). The Ninth Circuit has recognized that both before and after [United States v. Booker](#), 543 U.S. 220 (2005), there is an ongoing conflict in its statement of the standard of review for a district court’s “application” of the Guidelines. See [United States v. Staten](#), 450 F.3d 384, 388 n.3 (9th Cir.) (recognizing the conflict but concluding that it was not necessary to resolve it in the case at bar), amended by --- F.3d ----, 2006 WL 2506386; see also II. Criminal Proceedings, D. Post-Trial Decisions in Criminal Cases, 19. Sentencing, b. Application of the Guidelines to Specific Facts. At the time of this document’s current revision, the Ninth Circuit is undertaking en banc review of questions raised by *Booker*, though this conflict is not explicitly raised in the issues to be examined. See [United States v. Carty](#), --- F.3d ---, 2006 WL 249311 (9th Cir. Aug. 25, 2006) (inviting supplemental briefs in the cases of *United States v. Carty* and *United States v. Zavala* on six issues related to *Booker*).

The following subsections address specific issues related to interpretation and application of the guidelines. These appear unrelated to the current en banc review of *United States v. Carty* and *United States v. Zavala*, though the issues raised in those cases could have broad

implications that would affect these standards. See [United States v. Carty, --F.3d ---, 2006 WL 249311 \(9th Cir. Aug. 25, 2006\)](#) (inviting supplemental briefs on six questions related to *Booker*).

i. Abuse of Trust Enhancement

The district court's application of the abuse of trust enhancement is a mixed question of law and fact reviewed de novo. See [United States v. Brickey, 289 F.3d 1144, 1153 \(9th Cir. 2002\)](#); [United States v. Hoskins, 282 F.3d 772, 776 \(9th Cir. 2002\)](#).

ii. Prior Conviction

The court's conclusion that a prior conviction may be used for purposes of sentencing enhancement is also reviewed de novo. See [United States v. Rodriguez-Rodriguez, 364 F.3d 1142, 1147 \(9th Cir. 2004\)](#) (§ 2L1.2).²¹⁸ Whether a defendant is a career offender is reviewed de novo. See [United States v. Kovac, 367 F.3d 1116, 1118 \(9th Cir. 2004\)](#); [United States v. Shumate, 319 F.3d 1026, 1028 \(9th Cir. 2003\)](#).

iii. Prison Credit Time

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

iv. Aggravated Felonies

Whether the aggravated felony provisions of the guidelines apply to a conviction is reviewed de novo. See [United States v. Rios-Beltran, 361 F.3d 1204, 1206 \(9th Cir. 2004\)](#).²¹⁹

²¹⁸ See also [United States v. Hernandez-Valdovinos, 352 F.3d 1243, 1246 \(9th Cir. 2003\)](#) (§ 2L1.2); [United States v. Ramirez, 347 F.3d 792, 797 \(9th Cir. 2003\)](#) (§ 4A1.1(c)); [United States v. Gallaher, 275 F.3d 784, 790 \(9th Cir. 2001\)](#) (Armed Career Criminal Act).

²¹⁹ See [United States v. Campos-Fuerte, 357 F.3d 956, 958 \(9th Cir.\)](#), amended by [366 F.3d 691 \(9th Cir. 2004\)](#); [United States v. Sanchez-Sanchez, 333 F.3d 1065, 1067 \(9th Cir. 2003\)](#); [United States v. Carrillo-Lopez, 313](#)

v. Approximation of Drug Quantities

Whether a district court's method of approximating the relevant drug quantity conforms to the guidelines is reviewed de novo. [United States v. Rosacker](#), 314 F.3d 422, 425 (9th Cir. 2002); [United States v. Culps](#), 300 F.3d 1069, 1076 (9th Cir. 2002).

vi. Grouping of Offenses

The trial court's "grouping of offenses" for purposes of applying the Sentencing Guidelines is also reviewed de novo. See [United States v. Melchor-Zaragoza](#), 351 F.3d 925, 927 (9th Cir. 2003).²²⁰ Note, however, that whether prior convictions are "related" for purposes of sentencing enhancement is a factual inquiry reviewed for clear error. See [United States v. Woodard](#), 172 F.3d 717, 719 (9th Cir. 1999); see also [Buford v. United States](#), 532 U.S. 59, 60 (2001) (clarifying that standard is a deferential search for clear error).

vii. Reductions for Change in Guideline Range (§ 3582(c)(2))

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

k. Legality

The legality of a Guidelines sentence is reviewed de novo. See [United States v. Williams](#), 291 F.3d 1180, 1191 (9th Cir. 2002).²²¹

[F.3d 1185](#), 1186 (9th Cir. 2002); [United States v. Hernandez-Castellanos](#), 287 F.3d 876, 878 (9th Cir. 2002).

²²⁰ See [United States v. Gastelum-Almeida](#), 298 F.3d 1167, 1174 (9th Cir. 2002); [United States v. Seesing](#), 234 F.3d 456, 458 (9th Cir. 2001); [United States v. Boos](#), 127 F.3d 1207, 1209 (9th Cir. 1997).

²²¹ See [United States v. Tighe](#), 266 F.3d 1187, 1190 (9th Cir. 2001); [United States v. Reyes-Pacheco](#), 248 F.3d 942, 945 (9th Cir. 2001); [United States v. Tam](#), 240 F.3d 797, 803 (9th Cir. 2001); [United States v. Carter](#),

I. Restitution

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework.²²² When the restitution order is not challenged before the district court, review is limited to plain error. See [United States v. Bright](#), 353 F.3d 1114, 1120 (9th Cir. 2004); [United States v. De La Fuente](#), 353 F.3d 766, 769 (9th Cir. 2003).

Factual findings supporting a restitution order are reviewed for clear error. [Gordon](#), 393 F.3d at 1051.²²³

The legality of a restitution order, however, is reviewed de novo. See [United States v. Bussell](#), 414 F.3d 1048, 1060-61 (9th Cir. 2005) (“In contrast to its application of the Sentencing Guidelines, the district court’s orders of restitution and costs are unaffected by the changes worked by *Booker*. . . . We review the legality of the orders de novo.”)²²⁴

A court has broad discretion in ordering restitution. See [United States v. Laney](#), 189 F.3d 954, 966 (9th Cir. 1999); [United States v. Miguel](#), 49 F.3d 505, 511 (9th Cir. 1995). The amount of restitution ordered is reviewed for an abuse of discretion. See [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004).²²⁵ The court’s “valuation methodology” is reviewed,

[219 F.3d 863, 866 \(9th Cir. 2000\)](#); [United States v. Hankey](#), 203 F.3d 1160, 1166 (9th Cir. 2000).

²²² See [United States v. Gordon](#), 393 F.3d 1044, 1051 (9th Cir. 2004); [United States v. Phillips](#), 367 F.3d 846, 854 (9th Cir. 2004); [United States v. De La Fuente](#), 353 F.3d 766, 772 (9th Cir. 2003); [United States v. Riley](#), 335 F.3d 919, 931 (9th Cir. 2003); [United States v. Forman](#), 329 F.3d 1037, 1039 (9th Cir. 2003); [United States v. Grice](#), 319 F.3d 1174, 1176 (9th Cir. 2003); [United States v. Pizzichiello](#), 272 F.3d 1232, 1240 (9th Cir. 2001).

²²³ See also [De La Fuente](#), 353 F.3d at 772; [Forman](#), 329 F.3d at 1039; [Pizzichiello](#), 272 F.3d at 1240; [United States v. Allen](#), 153 F.3d 1037, 1044-45 (9th Cir. 1998).

²²⁴ See also [United States v. Gordon](#), 393 F.3d 1044, 1051 (9th Cir. 2004); [Phillips](#), 367 F.3d at 854; [United States v. Cliatt](#), 338 F.3d 1089, 1090 (9th Cir. 2003); [Forman](#), 329 F.3d at 1039; [Grace](#), 319 F.3d at 1176; [Pizzichiello](#), 272 F.3d at 1240; [United States v. Follet](#), 269 F.3d 996, 999 (9th Cir. 2001); [United States v. King](#), 257 F.3d 1013, 1028 (9th Cir. 2001); [United States v. Laney](#), 189 F.3d 954, 964-65 (9th Cir. 1999).

²²⁵ [Laney](#), 189 F.3d at 966; [United States v. Johnson](#), 132 F.3d 1279,

however, de novo. See [United States v. Doe](#), 374 F.3d 851, 854 (9th Cir. 2004); [United States v. Lomow](#), 266 F.3d 1013, 1020 (9th Cir. 2001).

m. Rule 32

The sentencing court's compliance with [Federal Rule of Criminal Procedure 32](#) is reviewed de novo. See [United States v. Thomas](#), 355 F.3d 1191, 1194 (9th Cir. 2004).²²⁶ The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion.²²⁷ See [United States v. Pearson](#), 274 F.3d 1225, 1234 (9th Cir. 2001). If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. See [United States v. Berry](#), 258 F.3d 971, 976 (9th Cir. 2001).

20. Sufficiency of the Evidence

Claims of insufficient evidence are reviewed de novo. See [United States v. Shipsey](#), 363 F.3d 962, 971 n.8 (9th Cir. 2004),²²⁸

There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See [Jackson v. Virginia](#), 443 U.S. 307, 319 (1979).²²⁹ In habeas review, the state court's application of [Jackson v. Virginia](#), 443 U.S.

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).

²²⁶ [United States v. Herrera-Rojas](#), 243 F.3d 1139, 1142 (9th Cir. 2001); [United States v. Houston](#), 217 F.3d 1204, 1206 (9th Cir. 2000); [United States v. Standard](#), 207 F.3d 1136, 1140 (9th Cir. 2000); [United States v. Havier](#), 155 F.3d 1090, 1092 (9th Cir. 1998); [United States v. Stein](#), 127 F.3d 777, 780 (9th Cir. 1997); see also [United States v. Ruiz](#), 257 F.3d 1030, 1031 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test).

²²⁷ [Houston](#), 217 F.3d at 1206-07; [Stein](#), 127 F.3d at 780.

²²⁸ [United States v. Naghani](#), 361 F.3d 1255, 1261 (9th Cir. 2004); [United States v. Odom](#), 329 F.3d 1032, 1034 (9th Cir. 2003); [United States v. Weber](#), 320 F.3d 1047, 1050 (9th Cir. 2003); see also [Chein v. Shumsky](#), 373 F.3d 978, 982 (9th Cir. 2004) (en banc) (habeas).

²²⁹ See [Shipsey](#), 363 F.3d at 971 n.8; [Naghani](#), 361 F.3d at 1261; [Odom](#), 329 F.3d at 1034; [Weber](#), 320 F.3d at 1050.

[307](#) (1979) must be “objectively unreasonable,” the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) notwithstanding. See [Juan H. v. Allen](#), 408 F.3d 1262, 1275 n.13 (9th Cir. 2005) (“We note that this Circuit has not yet decided what standard applies to sufficiency of the evidence challenges under AEDPA. We conclude that the Supreme Court’s analysis of AEDPA in Williams compels the conclusion that the state court’s application of the Jackson standard must be ‘objectively unreasonable.’”) (citations omitted), *cert denied*, [Allen v. Juan H.](#), 126 S. Ct. 1142, *cert. denied*, [Juan H. v. Allen](#), 126 S Ct. 1145 (2006); [Chein v. Shumsky](#), 373 F.3d 978, 983 (9th Cir. 2004) (declining to address this issue where it did not affect outcome and had not been briefed). The same test applies to both jury and bench trials. See [United States v. Magallon-Jimenez](#), 219 F.3d 1109, 1112 (9th Cir. 2000).²³⁰

When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this court reviews the district court’s denial of the motion de novo. See [United States v. Stewart](#), 420 F.3d 1007, 1014 (2005).²³¹

The defendant’s failure to move for acquittal limits appellate review to plain error or manifest injustice. See [United States v. Delgado](#), 357 F.3d 1061, 1068 (9th Cir. 2004).²³²

21. Supervised Release

²³⁰ See [United States v. Doe](#), 136 F.3d 631, 636 (9th Cir. 1998); [United States v. Mayberry](#), 913 F.2d 719, 721 (9th Cir. 1990).

²³¹ See [Carranza](#), 289 F.3d 634, 641 (9th Cir. 2002); [United States v. Munoz](#), 233 F.3d 1117, 1129 (9th Cir. 2000); [United States v. Tucker](#), 133 F.3d 1208, 1214 (9th Cir. 1998); [United States v. Hernandez](#), 105 F.3d 1330, 1332 (9th Cir. 1997); [United States v. Bahena-Cardenas](#), 70 F.3d 1071, 1072 (9th Cir. 1995).

²³² [United States v. Ross](#), 338 F.3d 1054, 1057 (9th Cir. 2003). [United States v. Franklin](#), 321 F.3d 1231, 1239 (9th Cir. 2003); [United States v. Weber](#), 320 F.3d 1047, 1050-51 (9th Cir. 2003); [United States v. Alarcon-Simi](#), 300 F.3d 1172, 1176 (9th Cir. 2002); see also [United States v. Vizcarra-Martinez](#), 66 F.3d 1006, 1010 (9th Cir. 1995) (noting reluctance to affirm conviction when there is insufficient evidence to sustain the conviction regardless of standard of review to be applied).

District courts have wide discretion in fashioning a defendant's obligations during terms of supervised release.²³³ A district court's decision to impose a condition of supervised release is typically reviewed for an abuse of discretion.²³⁴ Review is de novo, however, when this court reviews the district court's application of the supervised release statute.²³⁵ Jurisdictional issues are also reviewed de novo.²³⁶ Similarly, whether a district court has the authority to reinstate an original term of supervised release is a question of law reviewed de novo. See [United States v. Trenter](#), 201 F.3d 1262, 1263 (9th Cir. 2000). Whether a district court has the authority to modify a fine when it is an express condition of supervised release is also a question of law reviewed de novo. See [United States v. Lopez-Soto](#), 205 F.3d 1098, 1100 (9th Cir. 2000).

It is plain error to sentence a defendant to a term of supervised release that exceeds the statutory maximum. See [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.²³⁷ Whether a defendant has received

²³³ See [United States v. Weber](#), 451 F.3d 552, 557 (9th Cir. 2006); [United States v. Williams](#), 356 F.3d 1045, 1052 (9th Cir. 2004) (“wide latitude”); [United States v. Rearden](#), 349 F.3d 608, 618 (9th Cir. 2003); [United States v. Lopez](#), 258 F.3d 1053, 1056 (9th Cir. 2001); [United States v. Bee](#), 162 F.3d 1232, 1234 (9th Cir. 1998).

²³⁴ See [Weber](#), 451 F.3d at 557 (9th Cir. 2006); [Williams](#), 356 F.3d at 1052; [United States v. Britt](#), 332 F.3d 1229, 1231 (9th Cir. 2003); [United States v. T.M.](#), 330 F.3d 1235, 1239-40 (9th Cir. 2003) (noting discretion is not unfettered); [United States v. Gallaher](#), 275 F.3d 784, 793 (9th Cir. 2001); [United States v. Lakatos](#), 241 F.3d 690, 692 (9th Cir. 2001).

²³⁵ See [United States v. Tinoso](#), 327 F.3d 864, 865 (9th Cir. 2003); [United States v. Cade](#), 236 F.3d 463, 465 (9th Cir. 2000); [United States v. Lomayoama](#), 86 F.3d 142, 146 (9th Cir. 1996).

²³⁶ See [United States v. Vargas-Amaya](#), 389 F.3d 901, 903 (9th Cir. 2004) (reviewing de novo jurisdiction to revoke supervised release under 18 U.S.C. § 3583(i)); [United States v. Morales-Alejo](#), 193 F.3d 1102, 1104 (9th Cir. 1999); [United States v. Malandrini](#), 177 F.3d 771, 772 (9th Cir. 1999); [United States v. Vallejo](#), 69 F.3d 992, 994 (9th Cir. 1995).

²³⁷ See [United States v. Ortuno-Higareda](#), 450 F.3d 406, 409 (9th Cir. 2006); [United States v. Verduzco](#), 330 F.3d 1182, 1184 (9th Cir. 2003);

sufficient due process at a revocation proceeding is a mixed question of law and fact that is reviewed de novo. See [United States v. Ortuno-Higareda](#), 450 F.3d 406, 409 (9th Cir. 2006); [United States v. Javier](#), 155 F.3d 1090, 1092 (9th Cir. 1998). Any such due process violation is subject to harmless error analysis. See [United States v. Verduzco](#), 330 F.3d 1182, 1184 (9th Cir. 2003); [United States v. Daniel](#), 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000); [Javier](#), 155 F.3d at 1090. A court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. See [United States v. Musa](#), 220 F.3d 1096, 1102 (9th Cir. 2000). The district court's refusal to grant vacatur of a revocation judgment is reviewed for an abuse of discretion. See [United States v. Tapia-Marquez](#), 361 F.3d 535, 537 (9th Cir. 2004).

22. Transcripts

A criminal defendant has a right to a record on appeal that includes a complete transcript of the proceedings at trial. See [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. See [Carrillo](#), 902 F.2d at 1410. A court's decision to allow a jury to have English translations of Spanish wiretap tape recordings is reviewed for an abuse of discretion. See [United States v. Fuentes-Montijo](#), 68 F.3d 352, 353 (9th Cir. 1995).²³⁸

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. See [United States v. Devlin](#), 13 F.3d 1361, 1363 (9th Cir. 1994).

The district court's decision to use transcripts as an aid in listening to tape recordings is reviewed for an abuse of discretion. See [United States v. Delgado](#), 357 F.3d 1061, 1068 (9th Cir. 2004).²³⁹ Where there is no dispute

[United States v. Turner](#), 312 F.3d 1137, 1142 (9th Cir. 2002); [United States v. Musa](#), 220 F.3d 1096, 1100 (9th Cir. 2000); [United States v. Daniel](#), 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000).

²³⁸ See also [United States v. Rrapi](#), 175 F.3d 742, 746 (9th Cir. 1999) (English translation of Albanian wiretap tape recordings).

²³⁹ See [United States v. Abonce-Barrera](#), 257 F.3d 959, 963 (9th Cir.

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. See [United States v. Rrapi](#), 175 F.3d 742, 746 (9th Cir. 1999).²⁴⁰ 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. See [United States v. Tisor](#), 96 F.3d 370, 377 (9th Cir. 1996).

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. See [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. See [United States v. Nash](#), 115 F.3d 1431, 1440 (9th Cir. 1997); [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).

23. Writ Ad Testificandum

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

2001); [Rrapi](#), 175 F.3d at 746; [United States v. Tisor](#), 96 F.3d 370, 377 (9th Cir. 1996); [United States v. Armijo](#), 5 F.3d 1229, 1234 (9th Cir. 1993).

²⁴⁰ See [United States v. Montgomery](#), 150 F.3d 983, 999 (9th Cir. 1998); [Tisor](#), 96 F.3d at 377; [United States v. Fuentes-Montijo](#), 68 F.3d 352, 354 (9th Cir. 1995); [United States v. Pena-Espinoza](#), 47 F.3d 356, 359 (9th Cir. 1995); [United States v. Hernandez](#), 27 F.3d 1403, 1408 (9th Cir. 1994) (“We review a decision to allow the jury to reread transcripts in the jury room for an abuse of discretion.”).

24. Writ of Audita Querela

This court reviews de novo the question whether a federal prisoner challenging a conviction and sentence may properly file a petition for a writ of audita querela. See [United States v. Valdez-Pacheco](#), 237 F.3d 1077, 1079 (9th Cir. 2000); [United States v. Fonseca-Martinez](#), 36 F.3d 62, 63 (9th Cir. 1994). The effectiveness of such a writ for purposes of immigration is also a pure legal issue reviewed de novo. See [Beltran-Leon v. INS](#), 134 F.3d 1379, 1380 (9th Cir. 1998). The district court's decision to grant a writ of audita querela is reviewed de novo. See [United States v. Hovsepien](#), 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc).

25. Writ of Coram Nobis

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

E. Habeas Corpus Petitions

1. § 2241

The district court's decision to grant or deny a petition for writ of habeas corpus filed pursuant to [28 U.S.C. § 2241](#) is reviewed de novo. See [Singh v. Ashcroft](#), 351 F.3d 435, 438 (9th Cir. 2003).²⁴¹ The court's dismissal of a § 2241 petition is also reviewed de novo. See [Zegarra-Gomez v. INS](#), 314 F.3d 1124, 1126 (9th Cir. 2003).²⁴² Whether a district court has jurisdiction over a § 2241 petition is reviewed de novo. See [Johnson v. Reilly](#), 349 F.3d 1149, 1153 (9th Cir. 2003).²⁴³ A district court's decision whether to stay habeas proceedings is reviewed for an abuse of discretion.

Habeas Corpus Petitions

²⁴¹ [Hunter v. Ayers](#), 336 F.3d 1007, 1011 (9th Cir. 2003); [Benny v. United States Parole Comm.](#), 295 F.3d 977, 981 (9th Cir. 2002); [Angulo-Dominguez v. Ashcroft](#), 290 F.3d 1147, 1149 (9th Cir. 2002); [Taylor v. Sawyer](#), 284 F.3d 1143, 1147 (9th Cir. 2002).

²⁴² [Miranda v. Reno](#), 238 F.3d 1156, 1158 (9th Cir. 2001); [Nakaranurack v. United States](#), 231 F.3d 568, 570 (9th Cir. 2000).

²⁴³ [Dearinger ex rel. Volkova v. Reno](#), 232 F.3d 1042, 1044 (9th Cir. 2000); [Barapind v. Reno](#), 225 F.3d 1100, 1109-10 (9th Cir. 2000).

See [Rohan ex rel. Gates v. Woodford](#), 334 F.3d 803, 817 (9th Cir. 2003) (noting discretion “must be exercised within constitutional and statutory limits”).²⁴⁴

For information regarding how the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) [Pub. L. No. 104-208](#), [110 Stat. 3009](#), and the subsequent passage of the REAL ID Act of 2005, [Pub. L. No. 109-13](#), [119 Stat. 231 \(2005\)](#), affected habeas review of final orders of exclusion, removal, or deportation see III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

2. § 2255

The district court’s decision to grant or deny a federal prisoner’s [28 U.S.C. § 2255](#) motion is reviewed de novo. See [Mendoza v. Carey](#), 449 F.3d 1065, 1068 (9th Cir. 2006) (denial).²⁴⁵ Whether a district court has jurisdiction over a § 2255 motion is reviewed de novo. See [United States v. Monreal](#), 301 F.3d 1127, 1130 (9th Cir. 2002) (construing action as a § 2255 motion).²⁴⁶ The dismissal of a § 2255 motion based on statute of limitations is reviewed de novo. See [United States v. Battles](#), 362 F.3d 1195, 1196 (9th Cir. 2004); [United States v. Valdez](#), 195 F.3d 544, 546 (9th Cir. 1999).

Findings underlying the court’s decision on a § 2255 motion are reviewed for clear error.²⁴⁷ The district court’s decision whether to conduct

²⁴⁴ [Yong v. INS](#), 208 F.3d 1116, 1119 (9th Cir. 2000) (noting review is “somewhat less deferential” than usual abuse of discretion).

²⁴⁵ See, e.g., [United States v. Sandoval-Lopez](#), 409 F.3d 1193, 1195 & n.4 (9th Cir. 2005) (denial); [United States v. Rodrigues](#), 347 F.3d 818, 823 (9th Cir. 2003) (denial); [United States v. Skurdal](#), 341 F.3d 921, 925 (9th Cir. 2003) (denial); [United States v. Fry](#), 322 F.3d 1198, 1200 (9th Cir. 2003) (denial); [United States v. Day](#), 285 F.3d 1167, 1169 (9th Cir. 2002) (denial).

²⁴⁶ See [United States v. Martin](#), 226 F.3d 1042, 1045 (9th Cir. 2000) (reconsideration); see also [United States v. Thiele](#), 314 F.3d 399, 401-02 (9th Cir. 2002) (noting limitations of § 2255).

²⁴⁷ [United States v. Battles](#), 362 F.3d 1195, 1196 (9th Cir. 2004); [United States v. Alaimalo](#), 313 F.3d 1188, 1191 (9th Cir. 2002); [United States v. Christakis](#), 238 F.3d 1164, 1168 (9th Cir. 2001); [United States v. Guess](#), 203 F.3d 1143, 1145 (9th Cir. 2000); [Sanchez v. United States](#), 50 F.3d 1448,

an evidentiary hearing is reviewed for an abuse of discretion. See [Mendoza v. Carey](#), 449 F.3d 1065, 1068 (9th Cir. 2006).²⁴⁸

Note that for purposes of § 2255, constitutional errors may be deemed harmless unless petitioner demonstrates that the error had a “substantial and injurious effect or influence” on the jury’s verdict. See [United States v. Montalvo](#), 331 F.3d 1052, 1057 (9th Cir. 2003) (applying *Brecht* standard).

3. § 2254

The district court’s decision to grant or deny a 28 U.S.C. § 2254 habeas petition is reviewed de novo. See [Benitez v. Garcia](#), 449 F.3d 971, 974 (9th Cir. 2006) (denying); [Arnold v. Runnels](#), 421 F.3d 859, 862 (9th Cir. 2005) (denying); [Leavitt v. Arave](#), 371 F.3d 663, 668 (9th Cir. 2004) (granting); [Ramirez v. Castro](#), 365 F.3d 755, 762 (9th Cir. 2004) (granting).²⁴⁹ Note that this court may affirm on any ground supported by the record even if it differs from the rationale of the district court. See [Buckley v. Terhune](#), 441 F.3d 688, 694 (9th Cir. 2006); [Washington v. Lampert](#), 422 F.3d 864, 869 (9th Cir. 2005), cert. denied, 126 S. Ct. 1778 (2006); [Ramirez](#), 365 F.3d at 762.

A dismissal of a habeas petition for mootness is reviewed de novo. See [Zegarra-Gomez v. INS](#), 314 F.3d 1124, 1126 (9th Cir. 2003). Dismissals based on jurisdiction are also reviewed de novo. See [Lucky v. Calderon](#), 86 F.3d 923, 925 (9th Cir. 1996); [Cook v. Maleng](#), 847 F.2d 616, 617 (9th Cir. 1988). The rejection of a sufficiency of the evidence challenge in a habeas petition is also reviewed de novo. See [Juan H. v. Allen](#), 408 F.3d 1262, 1270 (9th Cir. 2005); [Chein v. Shumsky](#), 373 F.3d 978, 982 (9th Cir. 2004) (en banc); see also [Juan H.](#), 408 F.3d at 1275 n.13 (“We note that this Circuit

1452 (9th Cir. 1995).

²⁴⁸ [Sandoval-Lopez](#), 409 F.3d at 1195 & n.4 (9th Cir. 2005); [Rodrigues](#), 347 F.3d at 823; [United States v. Leonti](#), 326 F.3d 1111, 1116 (9th Cir. 2003); [Christakis](#), 238 F.3d at 1168; [Chancon-Palomares](#), 208 F.3d at 1158-59.

²⁴⁹ See e.g., [Beardslee v. Woodford](#), 358 F.3d 560, 568 (9th Cir. 2004) (denying); [Nunes v. Mueller](#), 350 F.3d 1045, 1051 (9th Cir. 2003) (granting); [Gill v. Ayers](#), 342 F.3d 911, 917 (9th Cir. 2003) (denying); [Alcala v. Woodford](#), 334 F.3d 862, 868 (9th Cir. 2003) (granting); [Clark v. Murphy](#), 331 F.3d 1062, 1067 (9th Cir. 2003) (denying);

has not yet decided what standard applies to sufficiency of the evidence challenges under AEDPA. We conclude that the Supreme Court’s analysis of AEDPA in *Williams* compels the conclusion that the state court’s application of the Jackson standard must be ‘objectively unreasonable.’”).

Dismissals based on state procedural default are reviewed de novo. See [Griffin v. Johnson](#), 350 F.3d 956, 960 (9th Cir. 2003); [Cockett v. Ray](#), 333 F.3d 938, 941 (9th Cir. 2003).²⁵⁰

Dismissals based on a prisoner’s failure to exhaust remedies are reviewed de novo. See [Fields v. Waddington](#), 401 F.3d 1018, 1020 (9th Cir.), cert. denied, 126 S. Ct. 738 (2005); [Peterson v. Lampert](#), 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc); [Greene v. Lampert](#), 288 F.3d 1081, 1086 (9th Cir. 2002). Whether a state prisoner must exhaust state remedies before pursuing a federal constitutional claim is a question of law to be reviewed de novo. See [Blueford v. Prunty](#), 108 F.3d 251, 255 (9th Cir. 1997).

Dismissals of “mixed petitions” are reviewed de novo. [Cassett v. Stewart](#), 406 F.3d 614, 620-21 (9th Cir. 2005), cert. denied, 126 S. Ct. 1336 (2006); [Olivera v. Giurbino](#), 371 F.3d 569, 572 (9th Cir. 2004) (noting district court’s decision whether to grant petitioner’s request for “withdrawal and abeyance” is reviewed for abuse of discretion).

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

Findings of fact made by the district court are reviewed for clear error. See [Buckley v. Terhune](#), 441 F.3d 688, 694 (9th Cir. 2006); [Washington v. Lampert](#), 422 F.3d 864, 869 (9th Cir. 2005), cert. denied, 126 S. Ct. 1778 (2006); [Riley v. Payne](#), 352 F.3d 1313, 1317 (9th Cir. 2003);²⁵¹ cf. [Juan H. v.](#)

²⁵⁰ [Vang v. Nevada](#), 329 F.3d 1069, 1072 (9th Cir. 2003); [Zichko v. Idaho](#), 247 F.3d 1015, 1019 (9th Cir. 2001); [La Cross v. Kernan](#), 244 F.3d 702, 704 (9th Cir. 2000); [Hoffman v. Arave](#), 236 F.3d 523, 529 (9th Cir. 2001).

²⁵¹ [Alcala v. Woodford](#), 334 F.3d 862, 868 (9th Cir. 2003); [McClure v. Thompson](#), 323 F.3d 1233, 1240 (9th Cir. 2003) (noting standard is “significantly deferential”).

Allen, 408 F.3d 1262, 1269 (9th Cir. 2005) (“Although we normally review for clear error any factual findings of the district court, . . . in this case the district court made no independent factual findings, and so we review the state court findings under the deferential standards of AEDPA . . .”), *cert denied*, Allen v. Juan H., 126 S. Ct. 1142, *cert. denied*, Juan H. v. Allen, 126 S. Ct. 1145 (2006).

Note that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) altered habeas review of state convictions brought under § 2254. See Bell v. Cone, 535 U.S. 685, 693 (2002); Bartlett v. Alameida, 366 F.3d 1020, 1023 (9th Cir. 2004) (noting AEDPA limits appellate review); Riley v. Payne, 352 F.3d 1313, 1317 (9th Cir. 2003) (noting “constrained standards of review”).

The AEDPA does not apply, however, to the merits of petitions filed before the effective date of the Act. See, e.g., Brown v. Sanders, 126 S. Ct. 884, 889 (2006) (citing Lindh v. Murphy, 521 U.S. 320, 327 (1997)); Raley v. Ylst, 444 F.3d 1085, 1090 (9th Cir. 2006); Caswell v. Calderon, 363 F.3d 832, 836 n.3 (9th Cir. 2004).²⁵²

Although this court applies pre-AEDPA law to petitions filed before the Act’s effective date, post-AEDPA law governs the right of the petitioner to appeal. See Slack v. McDaniel, 529 U.S. 473, 482 (2000) (holding that AEDPA’s requirements regarding certificates of appealability apply to petition filed prior to effective date of act); Beardslee v. Woodford, 358 F.3d 560, 568 (9th Cir. 2004) (applying Slack); Nevius v. McDaniel, 218 F.3d 940, 942 (9th Cir. 2000) (noting § 2253(c) provides that petitioner cannot appeal unless a circuit justice or judge issues a certificate of appealability).

Under the AEDPA, a petitioner must demonstrate that the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or that the decision was based on an unreasonable

²⁵² Allen v. Roe, 305 F.3d 1046, 1049 (9th Cir. 2002); Ghent v. Woodford, 279 F.3d 1121, 1125 n.1 (9th Cir. 2002); Mayfield v. Woodford, 270 F.3d 915, 922 (9th Cir. 2001) (en banc) (noting pre-AEDPA standards of review apply when petition was filed prior to effective date); see also Smith v. Robbins, 528 U.S. 259, 268 n.3 (2000) (noting AEDPA does not apply to petitions filed before the effective date of April 24, 1996).

determination of the facts. See [Lockyer v. Andrade](#), 538 U.S. 63, 70-73 (2003) (explaining standard).²⁵³

Under the AEDPA, state court findings of fact are to be presumed correct unless petitioner rebuts the presumption with clear and convincing evidence. See [28 U.S.C. § 2254\(e\)\(1\)](#); [Benitez v. Garcia](#), 449 F.3d 971, 976 (9th Cir. 2006); [Arnold v. Runnels](#), 421 F.3d 859, 862 (9th Cir. 2006).²⁵⁴ This presumption applies even if the finding was made by a state court of appeals rather than by the state trial court. See [Bragg v. Galza](#), 242 F.3d 1082, 1087 (9th Cir.) amended by 253 F.3d 1150 (9th Cir. 2001). Where the state court fails to articulate its reasoning, however, the reviewing court grants less deference to the state court’s decision. See [Brown v. Palmatier](#), 379 F.3d 1089, 1092-93 (9th Cir. 2004) (“Because the [state] courts have provided no *ratio decidendi* to review, or to which we can give deference, we employ the ‘objectively reasonable’ test. In this situation, federal habeas courts accord the state court decisions less deference than in standard habeas cases.”) (citing [Delgado v. Lewis](#), 223 F.3d 976, 982 (9th Cir. 2000)).²⁵⁵

In § 2254 cases, an error may be harmless unless it “‘had substantial and injurious effect or influence in determining the jury’s verdict.’” See [Brecht v. Abrahamson](#), 507 U.S. 619, 637 (1993) (quoting [Kotteakos v. United States](#), 328 U.S. 750, 776 (1946)).²⁵⁶

²⁵³ See also [Arnold v. Runnels](#), 421 F.3d 859, 862 (9th Cir. 2005); [Ramirez v. Castro](#), 365 F.3d 755, 762 (9th Cir. 2004) (reciting and applying standard); [Chia v. Cambra](#), 360 F.3d 997, 1002 (9th Cir. 2004) (explaining “unreasonable application” prong); [Vlasak v. Superior Court](#), 329 F.3d 683, 687 (9th Cir. 2003) (explaining “contrary to” prong); [Lewis v. Lewis](#), 321 F.3d 824, 829 (9th Cir. 2003) (noting “highly deferential standard”); [Killian v. Poole](#), 282 F.3d 1204, 1207-08 (9th Cir. 2002) (applying standard).

²⁵⁴ [Davis v. Woodford](#), 333 F.3d 982, 991 (9th Cir. 2003); [McClure v. Thompson](#), 323 F.3d 1233, 1241 (9th Cir. 2003); [Sandgathe v. Maass](#), 314 F.3d 371, 376 (9th Cir. 2002).

²⁵⁵ See also [Weaver v. Thompson](#), 197 F.3d 359, 363 (9th Cir. 1999) (noting trial judge made no factual determinations entitled to deference under [28 U.S.C. § 2254\(e\)\(1\)](#) and that other factual findings were reviewed for clear error).

²⁵⁶ See also [Calderon v. Coleman](#), 525 U.S. 141, 147 (1998) (noting 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

The AEDPA limits a district court's decision to conduct evidentiary hearings in § 2254 proceedings. See [28 U.S.C. § 2254\(e\)\(2\)](#); See also [Ortiz-Sandoval v. Clarke](#), 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing limitations).²⁵⁷ 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 interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. See [Earp v. Ornoski](#), 431 F.3d 1158, 1166 (9th Cir. 2005); [Baja v. Ducharme](#), 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. See [Davis v. Woodford](#), 333 F.3d 982, 991 (9th Cir. 2003), amended by 384 F.3d 628 (9th Cir. 2004).

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

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); [Inthavong v. Lamarque](#), 420 F.3d 1055, 1059 (9th Cir. 2005) (holding that the *Brecht* standard survived the AEDPA and [Mitchell v. Esparza](#), 540 U.S. 12 (2003), despite contrary views in other circuits); [Kennedy v. Lockyer](#), 379 F.3d 1041 (9th Cir. 2004) (noting that *Brecht* standard applies to both post-AEDPA and pre-AEDPA cases); [Martinez v. Garcia](#), 371 F.3d 600, 604 (9th Cir. 2004) (explaining when error is structural); [Gill v. Ayers](#), 342 F.3d 911, 921 (9th Cir. 2003) (reciting and explaining *Brecht* standard); [Evanchyk v. Stewart](#), 340 F.3d 933, 941 n. 3 (9th Cir. 2003) (noting circuit has "not used always used the same language in describing the harmless error standard in habeas cases").

²⁵⁷ [Bragg v. Galza](#), 242 F.3d 1082, 1089-90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), amended by 253 F.3d 1150 (9th Cir. 2001); [Downs v. Hoyt](#), 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); [Baja v. Ducharme](#), 187 F.3d 1075, 1077 (9th Cir. 1999) (noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

court. See [Stankewitz v. Woodford](#), 365 F.3d 706, 714 (9th Cir. 2004); [Williams v. Woodford](#), 306 F.3d 665, 684 (9th Cir. 2002).²⁵⁸ The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. See [Stankewitz v. Woodford](#), 365 F.3d 706, 714 (9th Cir. 2004); [Beardslee v. Woodford](#), 358 F.3d 560, 573 (9th Cir. 2004); [Douglas v. Woodford](#), 316 F.3d 1079, 1085 (9th Cir. 2003).

The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. [Lawson v. Borg](#), 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. See [Wade v. Calderon](#), 29 F.3d 1312, 1325-26 (9th Cir. 1994). The scope of an evidentiary hearing is reviewed for an abuse of discretion. See [Williams](#), 306 F.3d at 684; [LaGrand v. Stewart](#), 133 F.3d 1253, 1270 (9th Cir. 1998).

4. Certificates of Appealability

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the scope of review in a habeas case to those issues specified in the certificate of appealability (COA). See [Olivera v. Guirbino](#), 371 F.3d 569, 572 (9th Cir. 2004); [Nardi v. Stewart](#), 354 F.3d 1134, 1137 (9th Cir. 2004), *overruled in part on other grounds by* [Day v. McDonough](#), 126 S. Ct. 1675 (2006); [Hiivala v. Wood](#), 195 F.3d 1098, 1102-03 (9th Cir. 1999); *see also* [Williams v. Rhoades](#), 354 F.3d 1101, 1106 (9th Cir. 2004) (reviewing related issue not excluded by the COA). A request to broaden the scope of the COA may be granted if petitioner makes a substantial showing of the denial of a constitutional right. See [Pham v. Terhune](#), 400 F.3d 740, 742 (9th Cir. 2005); [Nardi](#), 354 F.3d at 1138 (noting standard is the same as that applied by the district court when initially determining whether to grant the COA); *see also* [Silva v. Woodford](#), 279 F.3d 825, 832 (9th Cir. 2002) (distinguishing standard of review for purposes of granting COA and for granting writ of habeas corpus).

5. Discovery

The court's decision to permit discovery in habeas proceedings is

²⁵⁸ [Beaty v. Stewart](#), 303 F.3d 975, 993 (9th Cir. 2002); [Karis v. Calderon](#), 283 F.3d 1117, 1126-27 & n.1 (9th Cir. 2002); [Laboa v. Calderon](#), 224 F.3d 972, 981 n.7 (9th Cir. 2000).

reviewed for an abuse of discretion. See [Bittaker v. Woodford](#), 331 F.3d 715, 728 (9th Cir. 2002) (en banc) (noting habeas discovery is limited to court's discretion); [Rich v. Calderon](#), 187 F.3d 1064, 1068 (9th Cir. 1999) (noting discovery is available only in the discretion of the court).

6. Evidentiary Hearings

The district court's decision whether to conduct an evidentiary hearing for a § 2255 motion is reviewed for an abuse of discretion. See [United States v. Rodrigues](#), 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); [United States v. Leonti](#), 326 F.3d 1111, 1116 (9th Cir. 2003); [United States v. Christakis](#), 238 F.3d 1164, 1168 (9th Cir. 2001); [United States v. Chacon-Palomares](#), 208 F.3d 1157, 1158-59 (9th Cir. 2000).

In pre-AEDPA § 2254 proceedings, 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 [Stankewitz v. Woodford](#), 365 F.3d 706, 714 (9th Cir. 2004); [Williams v. Woodford](#), 306 F.3d 665, 684 (9th Cir. 2002); [Beaty v. Stewart](#), 303 F.3d 975, 993 (9th Cir. 2002); [Laboa v. Calderon](#), 224 F.3d 972, 981 n.7 (9th Cir. 2000).

The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. See [Beardslee v. Woodford](#), 358 F.3d 560, 573 (9th Cir. 2004); [Douglas v. Woodford](#), 316 F.3d 1079, 1085 (9th Cir. 2003); [Karis v. Calderon](#), 283 F.3d 1117, 1126 (9th Cir. 2002). The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. See [Lawson v. Borg](#), 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. See [Wade v. Calderon](#), 29 F.3d 1312, 1325-26 (9th Cir. 1994). The scope of an evidentiary hearing is reviewed for an abuse of discretion. See [Williams](#), 306 F.3d at 684; [LaGrand v. Stewart](#), 133 F.3d 1253, 1270 (9th Cir. 1998).

Note that the AEDPA limits the district court's authority to conduct evidentiary hearings in § 2254 proceedings. See [28 U.S.C. § 2254\(e\)\(2\)](#); see also [Ortiz-Sandoval v. Clarke](#), 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing limitations).²⁵⁹ If the petitioner failed in state court to develop

²⁵⁹ [Bragg v. Galza](#), 242 F.3d 1082, 1089-90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), amended by [253 F.3d 1150](#)

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 interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See* [Earp v. Ornoski](#), 431 F.3d 1158, 1166 (9th Cir. 2005); [Baja v. Ducharme](#), 187 F.3d 1075, 1077 (9th Cir. 1999). The court’s decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See* [Davis v. Woodford](#), 333 F.3d 982, 991 (9th Cir. 2003), *amended by* 384 F.3d 628 (9th Cir. 2004).

7. Interstate Agreement on Detainers Act

A petition for habeas relief based on an alleged violation of the Interstate Agreement on Detainers Act (“IAD”) is reviewed de novo. *See* [King v. Brown](#), 8 F.3d 1403, 1409 (9th Cir. 1993); [Snyder v. Sumner](#), 960 F.2d 1448, 1452 (9th Cir. 1992). Note that a court’s refusal to dismiss an indictment based on its interpretation of the IAD is reviewed de novo. *See* [United States v. Laulemaga](#), 280 F.3d 1260, 1263 (9th Cir. 2002).

8. Juror Misconduct

Allegations of juror misconduct in habeas cases are reviewed de novo. *See* [Caliendo v. Warden](#), 365 F.3d 691, 694 (9th Cir. 2004); [Mancuso v. Olivarez](#), 292 F.3d 939, 949 (9th Cir. 2002); [Sassounian v. Roe](#), 230 F.3d 1097, 1108 (9th Cir. 2000). The court’s decision not to hold a hearing on alleged juror misconduct is reviewed for an abuse of discretion. *See* [Davis v. Woodford](#), 333 F.3d 982, 1006 (9th Cir. 2003), *amended by* 384 F.3d 628 (9th Cir. 2004).

9. Reconsideration

The district court’s denial of a motion to reconsider is reviewed for an

(9th Cir. 2001); [Downs v. Hoyt](#), 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court’s discretion); [Baja v. Ducharme](#), 187 F.3d 1075, 1077 (9th Cir. 1999) (noting AEDPA “substantially restricts the district court’s discretion to grant an evidentiary hearing”).

abuse of discretion. See [Herbst v. Cook](#), 260 F.3d 1039, 1044 (9th Cir. 2001); [McDowell v. Calderon](#), 197 F.3d 1253, 1256 (9th Cir. 1999) (en banc).

10. Statutes of Limitations

Dismissals based on statutes of limitations are reviewed de novo. See [Shannon v. Newland](#), 410 F.3d 1083, 1087 n.3 (9th Cir. 2005), cert. denied, 126 S. Ct. 1333 (2006); [Delhomme v. Ramirez](#), 340 F.3d 817, 819 (9th Cir. 2003) (§ 2254).²⁶⁰ Legal determinations regarding equitable tolling are also reviewed de novo. See [Shannon v. Newland](#), 410 F.3d 1083, 1087 n.3 (9th Cir. 2005); [Malcom v. Payne](#), 281 F.3d 951, 956 (9th Cir. 2002) (§ 2254); [Corjasso v. Ayers](#), 278 F.3d 874, 877 (9th Cir. 2002). Note that the district court has the discretion to stay habeas proceedings pending state action to avoid the limitations period in § 2244(d). See [Valerio v. Crawford](#), 306 F.3d 742, 771 (9th Cir. 2002) (en banc).

11. Successive Petitions

The AEDPA made significant changes to [28 U.S.C. § 2244](#), setting requirements for filing a second or successive habeas petition. See [Cooper v. Woodford](#), 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (noting limitations); [Rohan v. Woodford](#), 334 F.3d 803, 812 (9th Cir.) (noting “strict limits on successive petitions”); [Barapind v. Reno](#), 225 F.3d 1100, 1111 (9th Cir. 2000) (noting provision does not apply to § 2241 petitions); [Calderon v. United States Dist. Court for the Cent. Dist. of Cal.](#), 163 F.3d 530, 538 (9th Cir. 1998) (en banc) (discussing AEDPA). A district court’s determination that petitioner failed to establish eligibility under § 2244 to file a successive petition is reviewed de novo. See [United States v. Villa-Gonzalez](#), 208 F.3d 1160, 1165 (9th Cir. 2000); [Thompson v. Calderon](#), 151 F.3d 918, 921 (9th Cir. 1998) (en banc). A district court’s dismissal of a petition under abuse of the writ doctrine is reviewed for an abuse of discretion.²⁶¹

²⁶⁰ See, e.g., [Jenkins v. Johnson](#), 330 F.3d 1146, 1149 (9th Cir. 2003) (§ 2254); [Guillory v. Roe](#), 329 F.3d 1015, 1017 (9th Cir.) (§ 2254); [Ferguson v. Palmateer](#), 321 F.3d 820, 822 (9th Cir.) (§ 2254); [Lott v. Mueller](#), 304 F.3d 918, 922 (9th Cir. 2002) (§ 2254); [Hasan v. Galaza](#), 254 F.3d 1150, 1153 (9th Cir. 2001) (§ 2254); [United States v. Valdez](#), 195 F.3d 544, 546 (9th Cir. 1999) (§ 2255).

²⁶¹ See [Barapind v. Reno](#), 225 F.3d 1100, 1110 (9th Cir. 2000); [Turner v.](#)

12. Writ of Ad Testificandum

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. See [Walker v. Sumner](#), 14 F.3d 1415, 1422 (9th Cir. 1994) *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); [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).

13. Writ of Coram Nobis

The denial of a writ of error coram nobis is reviewed de novo. See [United States v. Kwan](#), 407 F.3d 1005, 1011 (9th Cir. 2005); [Matus-Leva v. United States](#), 287 F.3d 758, 760 (9th Cir. 2002); [United States v. Walgren](#), 885 F.2d 1417, 1420 (9th Cir. 1989).

III. CIVIL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

Findings of fact are reviewed for clear error. See [Husain v. Olympic Airways](#), 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004). This standard also applies to the district court's application of law to facts where it requires an "essentially factual" review. *Id.* The court reviews adopted findings with close scrutiny, even though review remains to be for clear error. See [Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.](#), 104 F.3d 1137, 1140 (9th Cir. 1997).

Conclusions of law are reviewed de novo. See [Husain](#), 316 F.3d at 835. Mixed questions of law and fact are also reviewed de novo. See [Lim v. City of Long Beach](#), 217 F.3d 1050, 1054 (9th Cir. 2000). A mixed question of law and fact exists when there is no dispute as to the facts or the rule of

[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).

law and the only question is whether the facts satisfy the legal rule. *See id.* A district court's interpretation of the Federal Rules of Civil Procedure is reviewed de novo. *See [United States v. 2,164 Watches](#), 366 F.3d 767, 770 (9th Cir. 2004).*

2. Affirming on Alternative Grounds

The district court's decision may be affirmed on any ground supported by the record, even if not relied upon by the district court. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003).²⁶² Accordingly, the decision may be affirmed, "even if the district court relied on the wrong grounds or wrong reasoning." *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998) (citation omitted).

B. Pretrial Decisions in Civil Cases

1. Absolute Immunity

Whether a public official is entitled to absolute immunity is a question of law reviewed de novo. *Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003) (county social worker), *cert. denied*, 542 U.S. 904 (2004).²⁶³ A dismissal based on absolute immunity is reviewed de novo. *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (state board member).

2. Abstention

This court reviews de novo whether *Younger* abstention is required. *See [Green v. City of Tucson](#), 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc)* (overruling prior cases applying abuse of discretion standard to district court's decision whether to abstain), *overruled in part on other grounds by [Gilbertson v. Albright](#), 381 F.3d 965, 976-78 (9th Cir. 2004).*

²⁶² *See also [Atel Fin. Corp. v. Quaker Coal Co.](#), 321 F.3d 924, 926 (9th Cir. 2003)* (affirming on different ground than that relied upon by district court).

²⁶³ *See also [Miller v. Gammie](#), 335 F.3d 889, 892 (9th Cir. 2003)* (en banc) (reviewing appeal of district court's order deferring a ruling on defendant's motion for absolute immunity pending limited discovery as a writ of mandamus).

Note that *Green* may not apply to other abstention doctrines.²⁶⁴ See [id. at 1093 n.10](#). For example, the court of appeals reviews *Pullman* abstention decisions under a “modified abuse of discretion standard.” [Smelt v. County of Orange, 447 F.3d 673, 678 \(9th Cir. 2006\)](#). This means the court reviews de novo whether the requirements have been met, but the district court’s ultimate decision to abstain under *Pullman* for abuse of discretion. See [id.](#)

3. Affirmative Defenses

“[A] district court’s decisions with regard to the treatment of affirmative defenses [are] reviewed for an abuse of discretion.” 389 [Orange St. Part. v. Arnold, 179 F.3d 656, 664 \(9th Cir. 1999\)](#). Whether an affirmative defense is waived, however, is a question of law reviewed de novo. See [Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 \(9th Cir. 2001\)](#).²⁶⁵

The district court’s decision to strike certain affirmative defenses pursuant to Rule 12(f) is reviewed for an abuse of discretion. [Federal Sav. & Loan Ins. Corp. v. Gemini Mgmt., 921 F.2d 241, 243 \(9th Cir. 1990\)](#). Likewise, the decision whether to instruct the jury on affirmative defenses is reviewed for an abuse of discretion. See [Costa v. Desert Palace, Inc., 299 F.3d 838, 858-59 \(9th Cir. 2002\) \(en banc\) \(instructing\), aff’d, 539 U.S. 90 \(2003\)](#); [McClaran v. Plastic Indus., Inc., 97 F.3d 347, 355-56 \(9th Cir. 1996\)](#) (refusing to instruct).

4. Amended Complaints

The trial court’s denial of a motion to amend a complaint is reviewed for an abuse of discretion. See [Caswell v. Calderon, 363 F.3d 832, 836 \(9th Cir. 2004\)](#) (habeas); [Brother Records, Inc. v. Jardine, 318 F.3d 900, 911 \(9th](#)

²⁶⁴ See e.g. [United States v. Morros, 268 F.3d 695, 703 \(9th Cir. 2001\)](#) (applying de novo review to whether *Pullman*, *Burford* or *Colorado River* abstention is permissible and abuse of discretion standard to district court’s decision to abstain on those grounds).

²⁶⁵ See also [Sheet Metal Workers’ Int’l Ass’n, Local Union 150 v. Air Sys. Eng’g, Inc., 831 F.2d 1509, 1510 \(9th Cir. 1987\)](#) (reviewing de novo whether a defense to an arbitration award is waived by the failure to timely file an action to vacate).

Cir.), *cert. denied*, 540 U.S. 824 (2003) (finding no abuse of discretion); Chappel v. Laboratory Corp., 232 F.3d 719, 725 (9th Cir. 2000) (finding abuse of discretion). “A district court acts within its discretion to deny leave to amend when amendment would be futile, when it would cause undue prejudice to the defendant, or when it is sought in bad faith.” Id. at 725-26. The discretion is particularly broad where a plaintiff has previously been permitted leave to amend. See Chodos v. West Publishing Co., 292 F.3d 992, 1003 (9th Cir. 2002); Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000).

The trial court’s decision to permit amendment is also reviewed for an abuse of discretion. See National Audubon Soc’y, Inc. v. Davis, 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002); United States v. McGee, 993 F.2d 184, 187 (9th Cir. 1993).

Dismissal of a complaint without leave to amend is improper unless it is clear, upon de novo review that the complaint could not be saved by any amendment. See Thinket Ink Information Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004).²⁶⁶

A district court’s order denying a Rule 15(b) motion to conform the pleadings to the evidence is reviewed for an abuse of discretion. See Madeja v. Olympic Packers, 310 F.3d 628, 635 (9th Cir. 2002). The court’s decision to grant a Rule 15(b) motion is also reviewed for an abuse of discretion. See Galindo v. Stoddy Co., 793 F.2d 1502, 1512-13 (9th Cir. 1986).

The district court’s dismissal of the complaint with prejudice for failure to comply with the court’s order to amend the complaint is reviewed for an abuse of discretion. See Ordonez v. Johnson, 254 F.3d 814, 815-16 (9th Cir. 2001); McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996). Dismissal of a complaint for failure to serve a timely summons and complaint is also reviewed for abuse of discretion. See In re Sheehan, 253

²⁶⁶ See also Eminence Capital v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (finding abuse of discretion where district court dismissed complaint with prejudice); McKesson HBOC v. New York State Common Retirement Fund, Inc., 339 F.3d 1087, 1090 (9th Cir. 2003) (no abuse because complaint could not be cured by amendment); Lee v. City of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001) (finding district court abused discretion in dismissing claim without leave to amend).

[F.3d 507, 511 \(9th Cir. 2001\)](#); [West Coast Theater Corp. v. City of Portland](#), 897 F.2d 1519, 1528 (9th Cir. 1990).

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).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 55. Leave to Amend.

5. Answers

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

The court's refusal to permit a defendant to amend pleadings to assert additional counterclaims in an answer is also reviewed for an abuse of discretion. *See* [California Dep't of Toxic Substances Control v. Neville Chem. Co.](#), 358 F.3d 661, 673 (9th Cir. 2004).

The court's decision to strike an answer and enter default judgment as a discovery sanction is reviewed for an abuse of discretion. *See* [Fair Housing of Marin v. Combs](#), 285 F.3d 899, 905 (9th Cir. 2002).

6. 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). 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).

7. Appointment of Guardian Ad Litem

A district court's appointment of a guardian ad litem is reviewed for an abuse of discretion. See [United States v. 30.64 Acres of Land](#), 795 F.2d 796, 798 (9th Cir. 1986); see also [Feng 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. See [Johns v. County of San Diego](#), 114 F.3d 874, 876 (9th Cir. 1997).

8. Arbitration

“The district court's decision to grant²⁶⁷ or deny²⁶⁸ a motion compel arbitration is reviewed de novo.” [Bushley v. Credit Suisse First Boston](#), 360 F.3d 1149, 1152 (9th Cir. 2004). Whether a party defaulted in arbitration is a question of fact reviewed for clear error. See [Sink v. Aden Enter., Inc.](#), 352 F.3d 1197, 1199 (9th Cir. 2003). Whether a party should be compelled back to arbitration after default is reviewed de novo. See [id.](#) at 1200.

The decision of the district court concerning whether a dispute should be referred to arbitration is a question of law reviewed de novo. See [Dean Witter Reynolds, Inc. v. Byrd](#), 470 U.S. 213, 218 (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). 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).²⁶⁹ Note that

²⁶⁷ See [Circuit City Stores, Inc. v. Adams](#), 279 F.3d 889, 892 n.2 (9th Cir. 2002) (reviewing grant of motion to compel arbitration); [Bradley v. Harris Research, Inc.](#), 275 F.3d 884, 888 (9th Cir. 2001); [Quackenbush v. Allstate Ins. Co.](#), 121 F.3d 1372, 1380 (9th Cir. 1997).

²⁶⁸ See [Ingle v. Circuit City Stores, Inc.](#), 328 F.3d 1165, 1169 (9th Cir.), cert. denied, 124 S. Ct. 1169 (2003) (reviewing denial of motion to compel arbitration); [Ticknor v. Choice Hotels Int'l, Inc.](#), 265 F.3d 931, 937 (9th Cir. 2001).

²⁶⁹ See also [Ticknor v. Choice Hotels Int'l, Inc.](#), 265 F.3d 931, 936 (9th Cir. 2001) (quoting *Moses H. Cone Mem'l Hosp.*); [Wagner v. Stratton Oakmont, Inc.](#), 83 F.3d 1046, 1049 (9th Cir. 1996) (resolving any ambiguities as to the scope of arbitration in favor of arbitration).

underlying factual findings are reviewed for clear error. See [Ticknor v. Choice Hotels Int'l, Inc.](#), 265 F.3d 931, 937 (9th Cir. 2001).

The validity and scope of an arbitration clause is reviewed de novo. See [Moore v. Local 569 of Int'l Bhd. of Elec. Workers](#), 53 F.3d 1054, 1055 (9th Cir. 1995). 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). 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).

Confirmation²⁷⁰ or vacation²⁷¹ of an arbitration award is reviewed de novo. See [First Options, Inc. v. Kaplan](#), 514 U.S. 938, 948 (1995); see also [Poweragent v. Electronic Data Systems Corp.](#), 358 F.3d 1187, 1193 (9th Cir. 2004) (noting review of the award is “both limited and highly deferential”).²⁷²

The Supreme Court has stated that “ordinary, not special standards” should be applied in reviewing the trial court’s decision upholding arbitration awards. [First Options](#), 514 U.S. at 948. Nonetheless, a labor arbitrator’s award is entitled to “nearly unparalleled degree of deference.” See [Teamsters Local Union 58 v. BOC Gases](#), 249 F.3d 1089, 1093 (9th Cir. 2001) (internal quotation omitted); [Grammar v. Artists Agency](#), 287 F.3d 886, 890 (9th Cir. 2002). Courts must defer “as long as the arbitrator even arguably construed or applied the contract.” See [Teamsters Local Union 58](#), 249 F.3d at 1093 (quoting [United Paperworkers Int'l Union v. Misco, Inc.](#), 484 U.S. 29, 38 (1987)).²⁷³

²⁷⁰ See [Southern California Gas Co. v. Utility Workers Union](#), 265 F.3d 787, 792 (9th Cir. 2001) (confirming); [Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.](#), 241 F.3d 1177, 1180 (9th Cir. 2001) (confirming).

²⁷¹ See [Teamsters Local Union 58 v. BOC Gases, Inc.](#), 249 F.3d 1089, 1093 (9th Cir. 2001) (vacating).

²⁷² See also [Kyocera Corp. v. Prudential-Bache](#), 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding that review of arbitral decisions is limited to enumerated statutory grounds), *cert. dismissed*, 540 U.S. 1098 (2004).

²⁷³ See also [Hawaii Teamsters, Local 996](#), 241 F.3d at 1180-81 (noting review is “extremely deferential”); [Association of Western Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc.](#), 221 F.3d 1085, 1093 (9th Cir.

An arbitrator's factual findings are presumed correct, rebuttable only by a clear preponderance of the evidence. See [*Grammer v. Artists Agency*, 287 F.3d 886, 891 \(9th Cir. 2002\)](#). Factual findings underlying the district court's decision are reviewed for clear error. See [*Sink v. Aden Enter., Inc.*, 352 F.3d 1197, 1199 \(9th Cir. 2003\)](#); [*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. See *id.*

Review of a foreign arbitration award is circumscribed. See [*China Nat. Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 379 F.3d 796, 799 \(9th Cir. 2004\)](#) (court reviews whether the party established a defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, not the merits of the underlying arbitration); [*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.”).

9. Bifurcation

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. See [*Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1021 \(9th Cir. 2004\)](#); [*Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 \(9th Cir. 2001\)](#) (bifurcating laches from liability at start of trial); [*Hilao v. Estate of Marcos*, 103 F.3d 767, 782 \(9th Cir. 1996\)](#) (trifurcation). The court has broad discretion to order separate trials under [*Federal Rule of Civil Procedure 42\(b\)*](#). See [*M2 Software, Inc. v. Madacy Entm't, Corp.*, 421 F.3d 1073, 1088 \(9th Cir. 2005\)](#); [*Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 \(9th Cir. 2002\)](#). The court will set aside a severance order only for an abuse of discretion. See [*Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 \(9th Cir. 2000\)](#).

10. Burden of Proof

The district's court's allocation of the burden of proof is a conclusion of law reviewed de novo. See [*Andrews v. King*, 398 F.3d 1113, 1123 \(9th Cir. 2005\)](#); [*Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d](#)

[*2000*](#)) (noting “broad deference”); [*Garvey v. Roberts*, 203 F.3d 580, 588 \(9th Cir. 2000\)](#) (noting “extremely limited” review).

[550, 555 \(9th Cir. 1991\)](#).²⁷⁴ Note that a trial court’s error in allocating the burden of proof is subject to harmless error analysis. See [Kennedy v. Southern California Edison Co.](#), 268 F.3d 763, 770 (9th Cir. 2001).

11. Case Management

The trial court’s decisions regarding management of litigation are reviewed only for an abuse of discretion. See [FTC v. Enforma Natural Products](#), 362 F.3d 1204, 1212 (9th Cir. 2004); [Jorgensen v. Cassidy](#), 320 F.3d 906, 913 (9th Cir. 2003) (noting “broad discretion”). 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); [Southern California Edison](#), 307 F.3d 794, 807 (9th Cir. 2002) (noting due process limitations). A trial court’s decision regarding time limits on a trial is also reviewed for an abuse of discretion. See [Navellier v. Sletten](#), 262 F.3d 923, 941-42 (9th Cir. 2001).²⁷⁵ A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. See [Pagtalunan v. Gulaza](#), 291 F.3d 639, 640 (9th Cir. 2002) (habeas).

12. Certification to State Court

Certification of a legal issue to a state court lies within the discretion of the federal court. See [Micomonaco v. Washington](#), 45 F.3d 316, 322 (9th Cir. 1995).²⁷⁶ Review of the district court’s decision whether to certify is for an abuse of discretion. [Louie v. United States](#), 776 F.2d 819, 824 (9th Cir. 1985). Note that the court of appeals has discretion to certify questions to state courts. See [Commonwealth Utils. Corp. v. Goltens Trading & Eng’g](#),

²⁷⁴ See also [Estate of Mitchell v. Commissioner](#), 250 F.3d 696, 701 (9th Cir. 2001) (reviewing de novo tax court’s decision to shift burden of proof).

Case Management

²⁷⁵ See also [Amarel v. Connell](#), 102 F.3d 1494, 1513 (9th Cir. 1996); [Zivkovic v. S. California Edison Co.](#), 302 F.3d 1080, 1088 (9th Cir. 2002) (noting trial court’s “broad authority to impose reasonable time limits”).

Certification to State Court

²⁷⁶ See also [Lehman Bros. v. Schein](#), 416 U.S. 386, 390-91 (1974); [Coughlin v. Tailhook Ass’n](#), 112 F.3d 1052, 1063 (9th Cir. 1997).

[313 F.3d 541, 548-49 \(9th Cir. 2002\)](#) (declining to certify); [Ashumus v. Woodford, 202 F.3d 1160, 1164 n.6 \(9th Cir. 2000\)](#) (same).

13. Claim Preclusion

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 72. Res Judicata.

14. Class Actions

A district court's decision regarding class certification is reviewed for an abuse of discretion.²⁷⁷ See [Molski v. Gleich, 318 F.3d 937, 946 \(9th Cir. 2003\)](#); [Armstrong v. Davis, 275 F.3d 849, 867 \(9th Cir. 2001\)](#) (decision is subject to a "very limited" review). A court abuses its discretion if it applies an impermissible legal criterion. See *id.*; [Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1237 \(9th Cir. 2001\)](#). The district court's decision must be supported by sufficient findings to be entitled to the traditional deference given to such a determination. See [Molski, 318 F.3d at 946](#); [Local Joint Executive Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 \(9th Cir. 2001\)](#).

Whether an ERISA claim may be brought as a class action is a question of law reviewed de novo. See [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. See [Molski v. Gleich, 318 F.3d 937, 951 \(9th Cir. 2003\)](#); [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. See [Molski, 318 F.3d at 951](#); [Torrison v. Tucson Elec. Power Co., 8 F.3d 1370, 1374 \(9th Cir. 1993\)](#).

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²⁷⁷ See also [Smith v. University of Washington Law School, 233 F.3d 1188, 1193 \(9th Cir. 2000\)](#) (reviewing denial of certification); [Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233-34 \(9th Cir. 1996\)](#) (reviewing grant of certification); see e.g. [Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022 n.5 \(9th Cir. 2003\)](#) (class certification vacated); [Staton v. Boeing Co., 327 F.3d 938, 953 \(9th Cir. 2003\)](#) (finding no abuse of discretion).

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.](#)

The district court's decision to approve or reject a proposed settlement in a class action is reviewed for an abuse of discretion, and such review is extremely limited. See [Molski v. Gleich, 318 F.3d 937, 953 \(9th Cir. 2003\)](#); [In re Mego Financial Corp. Sec. Lit. \(Dunleavy v. Nadler\), 213 F.3d 454, 458 \(9th Cir. 2000\)](#).²⁷⁸

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

An award of attorneys' fees in a class action and the choice of method for determining fees are reviewed for an abuse of discretion. See [Powers v. Eichen, 229 F.3d 1249, 1256 \(9th Cir. 2000\)](#) (explaining the district court has broad authority over awards of attorneys' fees in class actions).

See also III. Civil Proceedings, C. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, f. Class Action.

15. Collateral Estoppel

Issues regarding collateral estoppel (issue preclusion) are reviewed de novo. See [Littlejohn v. United States, 321 F.3d 915, 919 \(9th Cir.\) \(noting mixed questions of law and fact\), cert. denied, 540 U.S. 985 \(2003\)](#).²⁷⁹ The

²⁷⁸ See also [Linney v. Cellular Alaska Part., 151 F.3d 1234, 1238 \(9th Cir. 1998\)](#) (explaining the court will reverse "only upon a strong showing that the district court's decision was a clear abuse of discretion." (internal quotation marks and citation omitted)).

²⁷⁹ See also [McQuillion v. Schwarzenegger, 369 F.3d 1091, 1096 \(9th Cir. 2004\)](#); [San Remo Hotel v. San Francisco City, 364 F.3d 1088, 1094 \(9th](#)

preclusive effect of a prior judgment is a question of law reviewed de novo. See [Far Out Prod., Inc. v. Oskar](#), 247 F.3d 986, 993 (9th Cir. 2001).²⁸⁰

16. Complaints

The trial court's decision to permit²⁸¹ or deny²⁸² amendment to a complaint is reviewed for an abuse of discretion. The discretion is particularly broad where a plaintiff has previously been permitted leave to amend. See [Simon v. Value Behavioral Health, Inc.](#), 208 F.3d 1073, 1084 (9th Cir. 2000).²⁸³ Dismissal of a complaint without leave to amend is improper unless it is clear upon de novo review that the complaint could not be saved by any amendment. See [Thinket Ink Information Res., Inc. v. Sun Microsystems, Inc.](#), 368 F.3d 1053, 1061 (9th Cir. 2004).²⁸⁴

[Cir. 2004](#)); [Hydranautics v. Filmtec Corp.](#), 204 F.3d 880, 885 (9th Cir. 2000); [Zamarripa v. City of Mesa](#), 125 F.3d 792, 793 (9th Cir. 1997); [Trevino v. Gates](#), 99 F.3d 911, 923 (9th Cir. 1996).

²⁸⁰ See also [United States v. Smith-Baltiher](#), 424 F.3d 913, 919 (9th Cir. 2005); [Jacobs v. CBS Broadcasting, Inc.](#), 291 F.3d 1173, 1176 (9th Cir. 2002); [Santamaria v. Horsley](#), 133 F.3d 1242, 1244 (9th Cir. 1998) (en banc) (state jury verdict) (citing [Schiro v. Farley](#), 510 U.S. 222, 232 (1994)), amended by [138 F.3d 1280](#) (9th Cir. 1998).

²⁸¹ See [National Audubon Soc'y, Inc. v. Davis](#), 307 F.3d 835, 853 (9th Cir.), amended by [312 F.3d 416](#) (9th Cir. 2002) (reviewing district court's decision to permit amendment and finding no abuse of discretion).

²⁸² See [Caswell v. Calderon](#), 363 F.3d 832, 836 (9th Cir. 2004) (habeas) (reviewing denial of leave to amend); [Johnson v. Buckley](#), 356 F.3d 1067, 1077 (9th Cir. 2004) (finding no abuse of discretion in denying motion to amend and discussing factors district court should consider); [Adam v. Hawaii](#), 235 F.3d 1160, 1164 (9th Cir. 2000) (finding abuse of discretion) overruled on other grounds by [Green v. Tucson](#), 255 F.3d 1086 (9th Cir. 2001).

²⁸³ See also [Griggs v. Pace Amer. Group, Inc.](#), 170 F.3d 877, 879 (9th Cir. 1999).

²⁸⁴ See also [McKesson HBOC v. New York State Common Retirement Fund, Inc.](#), 339 F.3d 1087, 1090 (9th Cir. 2003); [Lee v. City of Los Angeles](#), 250 F.3d 668, 692 (9th Cir. 2001) (remanding to allow plaintiffs to amend claim); [Lopez v. Smith](#), 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (reviewing dismissal of complaint without leave to amend for an abuse of discretion).

A district court's order denying or granting a Rule 15(b) motion to conform the pleadings in a complaint to the evidence presented at trial is reviewed for an abuse of discretion. See [*Madeja v. Olympic Packers*, 310 F.3d 628, 635 \(9th Cir. 2002\)](#) (reviewing denial of Rule 15(b) motion); [*Galindo v. Stody Co.*, 793 F.2d 1502, 1512-13 \(9th Cir. 1986\)](#) (reviewing whether district court properly amended pleadings).

Dismissals of a complaint reviewed de novo include:

- Dismissal for lack of subject matter under Rule 12(b)(1). [*Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 \(9th Cir. 2004\)](#); [*Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 \(9th Cir. 2003\)](#).
- Dismissal for failure to state claim under Rule 12(b)(6). [*Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 619 \(9th Cir. 2004\)](#); [*Thompson v. Davis*, 295 F.3d 890, 895 \(9th Cir. 2002\)](#).
- Dismissals under [*28 U.S.C. § 1915\(a\)*](#). [*Ramirez v. Galaza*, 334 F.3d 850, 853-54 \(9th Cir. 2003\)](#), *cert. denied*, 541 U.S. 1063 (2004).

Dismissals of a complaint reviewed for abuse of discretion include:

- Dismissal with prejudice for failure to comply with the court's order to amend the complaint. See [*Ordonez v. Johnson*, 254 F.3d 814, 815 \(9th Cir. 2001\)](#) (per curiam); [*McHenry v. Renne*, 84 F.3d 1172, 1177 \(9th Cir. 1996\)](#).
- Dismissal for failure to serve a timely summons and complaint. See [*Walker v. Sumner*, 14 F.3d 1415, 1422 \(9th Cir. 1994\)](#) *abrogated on other grounds by* [*Sandin v. Conner*, 515 U.S. 472 \(1995\)](#).
- Dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. See [*Pagtalunan v. Gulaza*, 291 F.3d 639, 640 \(9th Cir. 2002\)](#) (habeas).
- A district court's decision to grant or deny a party's request to supplement a complaint pursuant to Rule 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 \(9th Cir. 1988\)](#).

17. Consolidation

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

A district court’s discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is “very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence.” [*Michenfelder v. Sumner*, 860 F.2d 328, 337 \(9th Cir. 1988\)](#) (internal quotation omitted). Ordinarily, when the district court does so, its findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. *See* [*Gentala v. City of Tucson*, 244 F.3d 1065, 1071 \(9th Cir.\) \(en banc\), vacated on other grounds, 534 U.S. 946 \(2001\)](#). When the facts are undisputed, however, review is de novo. *Id.*

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

On habeas review of a state conviction, “the propriety of a consolidation rests within the sound discretion of the state trial judge.” [*Fields v. Woodford*, 309 F.3d 1095, 1110 \(9th Cir.\)](#), *amended by* [315 F.3d 1062 \(9th Cir. 2002\)](#); [*Featherstone v. Estelle*, 948 F.2d 1497, 1503 \(9th Cir. 1991\)](#).

18. Constitutionality of Regulations

The constitutionality of a regulation is a question of law reviewed de novo. *See* [*Doe v. Rumsfeld*, 435 F.3d 980, 984 \(9th Cir. 2006\)](#); [*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 \(9th Cir. 1991\)](#).

19. Constitutionality of Statutes

A challenge to the constitutionality of a federal statute is reviewed de novo. See [Doe v. Rumsfeld](#), 435 F.3d 980, 984 (9th Cir. 2006).²⁸⁵ When the district court upholds a restriction on speech, this court conducts an independent, de novo examination of the facts. See [Gentala v. City of Tucson](#), 244 F.3d 1065, 1071 (9th Cir.) (en banc), *vacated on other grounds*, 534 U.S. 946 (2001).²⁸⁶

A district court's ruling on the constitutionality of a state statute is reviewed de novo. See [American Academy of Pain Mgmt. v. Joseph](#), 353 F.3d 1099, 1103 (9th Cir. 2004) (reviewing California statute).²⁸⁷ The severability of an unconstitutional provision of a state statute presents a question of law reviewed de novo. See [Arizona Libertarian Party, Inc. v. Bayless](#), 351 F.3d 1277, 1283 (9th Cir. 2003). Whether a state law is subject to a facial constitutional challenge is an issue of law reviewed de novo. [Southern Oregon Barter Fair v. Jackson County, Oregon](#), 372 F.3d 1128, 1134 (9th Cir. 2004).

20. Contempt

A court's civil contempt order is reviewed for an abuse of discretion. [Irwin v. Mascott](#), 370 F.3d 924, 931 (9th Cir. 2004).²⁸⁸ Underlying findings

²⁸⁵ See also [Artichoke Joe's California Grand Casino v. Norton](#), 353 F.3d 712, 720 (9th Cir. 2003); [Mayweathers v. Newland](#), 314 F.3d 1062, 1066 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003); [Eunique v. Powell](#), 302 F.3d 971, 973 (9th Cir. 2002); [Taylor v. Delatoore](#), 281 F.3d 844, 847 (9th Cir. 2002) (PLRA).

²⁸⁶ See [Tucker v. California Dep't of Educ.](#), 97 F.3d 1204, 1209 n.9 (9th Cir. 1996); 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.”).

²⁸⁷ See e.g. [Montana Right to Life Ass'n v. Eddleman](#), 343 F.3d 1085, 1090 (9th Cir. 2003) (Montana statute); [Glauner v. Miller](#), 184 F.3d 1053, 1054 (9th Cir. 1999) (Nevada statute); [Tri-State Dev., Ltd. v. Johnston](#), 160 F.3d 528, 529 (9th Cir. 1998) (Washington statute); see also [Rui One Corp. v. City of Berkeley](#), 371 F.3d 1137, 1141 (9th Cir. 2004) (reviewing constitutionality of city ordinance).

²⁸⁸ See also [SEC v. Hickey](#), 322 F.3d 1123, 1128 (9th Cir.) (“District

made in connection with the order of civil contempt are reviewed for clear error. *Id.* The trial court’s decision to impose sanctions or punishment for contempt is also reviewed for abuse of discretion. [*Hook v. Arizona Dep’t of Corrections*, 107 F.3d 1397, 1403 \(9th Cir. 1997\)](#). An award of attorney’s fees for civil contempt is within the discretion of the district court. [*Harcourt Brace Jovanovich Legal & Professional Publications, Inc. v. Multistate Legal Studies, Inc.*, 26 F.3d 948, 953 \(9th Cir. 1994\)](#). Whether the district court provided the alleged contemnor due process, however, is a legal question subject to de novo review. [*Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1458 \(9th Cir. 1996\)](#).

The district court’s “finding” of contempt under [28 U.S.C. § 1826](#) is reviewed for an abuse of discretion. [*In re Grand Jury Proceedings*, 40 F.3d 959, 961 \(9th Cir. 1994\)](#).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions.

21. Continuances

The decision to grant or deny a continuance is reviewed for an abuse of discretion. *See* [*Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 \(9th Cir. 2001\)](#). 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 \(9th Cir. 1996\)](#).

The denial of a motion for a continuance of summary judgment pending further discovery is also reviewed for an abuse of discretion. *See* [*Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 \(9th Cir. 2006\)](#); [*United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 \(9th Cir. 2002\)](#).²⁸⁹ A district court abuses its discretion only if the movant diligently

courts have broad equitable power to order appropriate relief in civil contempt proceedings.”), *amended by* [335 F.3d 834](#) (9th Cir. 2003); [*Hook v. Arizona Dep’t of Corrections*, 107 F.3d 1397, 1403 \(9th Cir. 1997\)](#) (“The district court has wide latitude in determining whether there has been contemptuous defiance of its order.” (internal quotation and citation marks omitted)); [*In re Dyer*, 322 F.3d 1178, 1191 \(9th Cir. 2003\)](#) (bankruptcy court).

²⁸⁹ *See also* [*Weinberg v. Whatcom County*, 241 F.3d 746, 750-51 \(9th](#)

pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment. See [Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 \(9th Cir. 2001\)](#).²⁹⁰ Note that when a trial judge fails to address a Rule 56(f) motion before granting summary judgment, the omission is reviewed de novo. See [Margolis v. Ryan, 140 F.3d 850, 853 \(9th Cir. 1998\)](#).

A district court's decision to stay a civil trial is reviewed for an abuse of discretion. See [Clinton v. Jones, 520 U.S. 681, 706 \(1997\)](#).²⁹¹

22. Counterclaims

Summary judgment on a counterclaim is reviewed de novo. See [Cigna Property & Casualty Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 418 \(9th Cir. 1998\)](#). The dismissal of a counter claim is reviewed de novo. See [City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171 \(9th Cir. 2001\)](#) (ripeness). The court's refusal to strike counterclaims is reviewed de novo. See [United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 \(9th Cir. 1999\)](#).

The court's decision to dismiss a counterclaim after voluntary dismissal of plaintiff's claims is reviewed for an abuse to discretion. See [Smith v. Lenches, 263 F.3d 972, 977 \(9th Cir. 2001\)](#). The district court's denial of leave to amend a counterclaim is reviewed for an abuse of discretion. See [California Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 673 \(9th Cir. 2004\)](#); [Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 371 \(9th Cir. 1992\)](#) (reviewing district court's order granting leave to amend). Likewise, the court's refusal to allow a party to add a counterclaim is reviewed for abuse of discretion. See [Brother Records, Inc. v. Jardine, 318 F.3d 900, 910-11 \(9th Cir.\), cert. denied, 540 U.S. 824 \(2003\)](#).

[Cir. 2001](#)); [Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921 \(9th Cir. 1996\)](#));

²⁹⁰ See also [Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1005 \(9th Cir. 2002\)](#) (noting the failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion).

²⁹¹ See also [Rohan v. Woodford, 334 F.3d 803, 817 \(9th Cir.\) \(habeas\), cert. denied, 540 U.S. 1069 \(2003\)](#); [Yong v. INS, 208 F.3d 1116, 1119 \(9th Cir. 2000\)](#)).

23. Declaratory Relief

The trial court's decision whether to exercise jurisdiction over a declaratory judgment action is reviewed for an abuse of discretion. See [*Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 \(1995\)](#); [*Huth v. Hartford Ins. Co.*, 298 F.3d 800, 802-03 \(9th Cir. 2002\)](#).²⁹² A trial court may abuse its discretion by failing to provide a party an adequate opportunity to be heard when the court contemplates granting an unrequested declaratory judgment ruling. See [*Fordyce v. City of Seattle*, 55 F.3d 436, 442 \(9th Cir. 1995\)](#).

Review of the court's decision granting or denying declaratory relief is de novo. See [*Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1040 \(9th Cir. 2004\)](#); [*Ablang v. Reno*, 52 F.3d 801, 803 \(9th Cir. 1995\)](#).

24. Discovery

The court of appeals reviews the district court's rulings concerning discovery for an abuse of discretion. See [*Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 \(9th Cir. 2004\)](#). "A district court is vested with broad discretion to permit or deny discovery, and a decision to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant." [*Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1084, 1093 \(9th Cir. 2003\)](#) (internal quotation marks and citation omitted).²⁹³

²⁹² See also [*American Casualty Co. v. Krieger*, 181 F.3d 1113, 1117-18 \(9th Cir. 1999\)](#) (finding district court did not abuse its discretion in retaining jurisdiction over the declaratory judgment action); [*Snodgrass v. Provident Life and Accident Ins. Co.*, 147 F.3d 1163, 1164 \(9th Cir. 1998\)](#) (per curiam) (finding district court abused its discretion in declining to exercise jurisdiction); [*United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 918-19 \(9th Cir. 1998\)](#) (explaining discretionary jurisdiction).

²⁹³ See also [*Kulas v. Flores*, 255 F.3d 780, 783 \(9th Cir. 2001\)](#) (the district court's rulings concerning discovery will only be reversed if the ruling more likely than not affected the verdict); [*Blackburn v. United States*, 100 F.3d 1426, 1436 \(9th Cir. 1996\)](#) (the district court has wide discretion in controlling discovery and the ruling will not be overturned absent a showing of clear abuse of discretion).

Following are specific examples of decision related to discovery that are reviewed for abuse of discretion:

- Denial of discovery. See [Wagh v. Metris Direct, Inc.](#), 363 F.3d 821, 825 (9th Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004); [Hall v. Norton](#), 266 F.3d 969, 977 (9th Cir. 2001).
- Ruling limiting the scope of discovery. See [Blackburn v. United States](#), 100 F.3d 1426, 1436 (9th Cir. 1996).
- Decision to stay discovery. See [Alaska Cargo Transp., Inc. v. Alaska R.R.](#), 5 F.3d 378, 383 (9th Cir. 1993).
- Decision to cut off discovery. See [Villegas-Valenzuela v. INS](#), 103 F.3d 805, 813 (9th Cir. 1996).
- Permission of a party to withdraw a prior admission is reviewed for an abuse of discretion. See [Sonoda v. Cabrera](#), 255 F.3d 1035, 1039 (9th Cir. 2001) (citing Fed. R. Civ. Pro. 36(b)).
- Order compelling a party to comply with discovery requests is reviewed for an abuse of discretion. [Epstein v. MCA, Inc.](#), 54 F.3d 1422, 1423 (9th Cir. 1995) (*per curiam*).

The district court's decision not to permit additional discovery pursuant to [Federal Rule of Civil Procedure 56\(f\)](#) is also reviewed for an abuse of discretion. See [Burlington Northern Santa Fe RR Co. v. Assiniboine and Sioux Tribes](#), 323 F.3d 767, 773-74 (9th Cir. 2003).²⁹⁴ “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.” [Qualls v. Blue Cross, Inc.](#), 22 F.3d 839, 844 (9th Cir. 1994).²⁹⁵ If a trial judge fails to address a Rule 56(f) motion before granting summary judgment, the omission is reviewed de novo. See [Margolis v. Ryan](#), 140 F.3d 850, 853 (9th Cir. 1998).²⁹⁶

²⁹⁴ See e.g. [Panatronic USA v. AT&T Corp.](#), 287 F.3d 840, 846 (9th Cir. 2002) (denying request to reopen discovery); [Nidds v. Schindler Elevator Corp.](#), 113 F.3d 912, 920 (9th Cir. 1996); [Qualls v. Blue Cross, Inc.](#), 22 F.3d 839, 844 (9th Cir. 1994).

²⁹⁵ See also [Panatronic USA](#), 287 F.3d at 846 (reciting standard); [U.S. Cellular Inv.](#), 281 F.3d 929, 934 (9th Cir. 2002) (same).

²⁹⁶ See also [Kennedy v. Applause, Inc.](#), 90 F.3d 1477, 1482 (9th Cir. 1996).

Whether information sought by discovery is relevant may 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.](#)

Issues regarding limitations imposed on discovery by application of the attorney-client privilege are governed by federal common law. See [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. See [id.](#) at 130.

A district court interpretation of [28 U.S.C. § 1782](#), permitting domestic discovery of use in foreign proceedings, is reviewed de novo but its application of that statute to the facts of the case is reviewed for an abuse of discretion. See [Advanced Micro Devices, Inc. v. Intel Corp.](#), 292 F.3d 664, 666 (9th Cir. 2002), *aff’d*, 542 U.S. 241 (2004).

a. Discovery Sanctions

The imposition of or refusal to impose discovery sanctions is reviewed for an abuse of discretion. See [Childress v. Darby Lumber, Inc.](#), 357 F.3d 1000, 1010 (9th Cir. 2004); [Paladin Assocs., Inc. v. Montana Power Co.](#), 328 F.3d 1145, 1164-65 (9th Cir. 2003).²⁹⁷ Findings of fact underlying discovery sanctions are reviewed for clear error. [Payne v. Exxon Corp.](#), 121 F.3d 503, 507 (9th Cir. 1997). If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo. [Adriana Int’l Corp. v. Thoeren](#), 913 F.2d 1406, 1408 (9th Cir. 1990).

Note that when the imposition of discovery sanctions turn on the resolution of a legal issue, review is de novo. See [Palmer v. Pioneer Inn Assoc., Ltd.](#), 338 F.3d 981, 985 (9th Cir. 2003). The court’s refusal to hold an evidentiary hearing prior to imposing discovery sanctions is also reviewed for an abuse of discretion. See [Paladin](#), 328 F.3d at 1164.

²⁹⁷ [Rio Prop., Inc. v. Rio Int’l Interlink](#), 284 F.3d 1007, 1022 (9th Cir. 2002) (entering default); [Coleman v. Quaker Oats Co.](#), 232 F.3d 1271, 1297 (9th Cir. 2000) (refusal to sanction); [Read-Rite Corp. v. Burlington Air Express, Ltd.](#), 186 F.3d 1190, 1200 (9th Cir. 1999) (denial of sanctions motion); [Payne v. Exxon Corp.](#), 121 F.3d 503, 507 (9th Cir. 1997).

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 \(9th Cir. 1993\)](#).

b. Protective Orders

This court reviews the grant or denial of a protective order for an abuse of discretion. See [*Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069 \(9th Cir. 2002\)](#), *cert. denied*, 538 U.S. 944 (2003).²⁹⁸ The decision whether to lift or modify a protective order is also reviewed for an abuse of discretion. [*Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210 \(9th Cir. 2002\)](#); [*Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 \(9th Cir. 2003\)](#) (refusal to modify). Whether the lower court used the correct legal standard in granting a protective order is reviewed de novo. See *id.*²⁹⁹ When the order itself is not directly appealed, but is challenged only by the denial of a motion for reconsideration, review is for an abuse of discretion. [*McDowell v. Calderon*, 197 F.3d 1253, 1255-56 \(9th Cir. 1999\) \(en banc\)](#).

When reviewing a district court's decision whether to overturn a magistrate judge's protective order, this court reviews under a "clearly erroneous or contrary to law" standard. [*Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 \(9th Cir. 2004\)](#).

25. Dismissals

A dismissal with leave to amend is also reviewed de novo. See [*Kennedy v. Southern California Edison, Co.*, 268 F.3d 763, 767 \(9th Cir. 2001\)](#); [*Sameena Inc. v. United States Air Force*, 147 F.3d 1148, 1151 \(9th Cir. 1998\)](#). Note there may be a question whether a dismissal with leave to amend is a final, appealable order. See [*Disabled Rights Action Committee v.*](#)

²⁹⁸ [*Portland General Electric v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1089 \(9th Cir. 2000\)](#) (grant of a protective order); [*Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 \(9th Cir. 2004\)](#) (denial of protective order); see also [*Wharton v. Calderon*, 127 F.3d 1201, 1205 \(9th Cir. 1997\)](#) (protective order entered pursuant to trial court's inherent authority).

²⁹⁹ See also [*McDowell v. Calderon*, 197 F.3d 1253, 1255 & n.4 \(9th Cir. 1999\)](#) (en banc) (habeas).

Las Vegas Events, Inc., 375 F.3d 861, 870 (9th Cir. 2004); *Does I Thur XXIII v. Advances Textile Corp.*, 214 F.3d 1058, 1066-67 (9th Cir. 2000).

Note that the district court's decision to grant leave to amend is reviewed for an abuse of discretion. See *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 853 (9th Cir.), amended by 312 F.3d 416 (9th Cir. 2002); see also *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 825 (9th Cir. 2003), cert. denied, 541 U.S. 1043 (2004).

A dismissal without leave to amend is reviewed de novo. See *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) (noting underlying legal determinations require de novo review); *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 772 (9th Cir. 2002).

Dismissal without leave to amend is improper unless it is clear, upon de novo review that the complaint could not be saved by any amendment. See *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).³⁰⁰ 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); see also *Flowers*, 295 F.3d at 976 (noting that court is cautious in approving a district court's decision to deny pro se litigant leave to amend).

The court reviews de novo dismissals based on the following:

- Failure to state a claim pursuant to Rule 12(b)(6). See *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).³⁰¹ For more

³⁰⁰ See also *Eminence Capital v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (abuse of discretion where district court dismissed complaint with prejudice); *McKesson HBOC v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003) (no abuse because complaint could not be cured by amendment); *Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9th Cir. 2001) (abused discretion in dismissing claim without leave to amend).

³⁰¹ *Seinfeld v. Barz*, 322 F.3d 693, 696 (9th Cir.), cert. denied, 540 U.S. 939 (2003); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001); *In re Hemmeter*, 242 F.3d 1186, 1189 (9th Cir. 2001) (bankruptcy court).

information, *see* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 32. Failure to State a Claim.

- Venue. *See* [Meyers v. Bennett Law Offices](#), 238 F.3d 1068, 1071 (9th Cir. 2001).
- Immunity. *See* [Harvey v. Waldron](#), 210 F.3d 1008, 1011 (9th Cir. 2000) (judicial immunity)³⁰²; [Blaxland v. Commonwealth Dir. of Public Prosecutions](#), 323 F.3d 1198, 1203 (9th Cir. 2003) (foreign sovereign immunity); [Steel v. United States](#), 813 F.2d 1545, 1548 (9th Cir. 1987) (sovereign immunity); [Manistee Town Ctr. v. City of Glendale](#), 227 F.3d 1090, 1092 n.3 (9th Cir. 2000) (*Noerr-Pennington* immunity). For more information, *see* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 36. Immunities.
- Ripeness. *See* [Manufactured Home Communities Inc. v. City of San Jose](#), 420 F.3d 1022, 1025 (9th Cir. 2005); [Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura](#), 371 F.3d 1046, 1050 (9th Cir. 2004).³⁰³
- *Feres* doctrine. *See* [Bowen v. Oistead](#), 125 F.3d 800, 803 (9th Cir. 1997).
- Subject matter jurisdiction. *See* [Nuclear Info. & Res. Service v. United States Dept. of Transp.](#), 457 F.3d 956, 958 (9th Cir. 2006); [Luong v. Circuit City Stores, Inc.](#), 368 F.3d 1109, 1111 n.2 (9th Cir. 2004).³⁰⁴ Note that the court's factual findings relevant to its determination of subject matter jurisdiction are reviewed for clear error. [United States v. Peninsula Communications, Inc.](#), 287 F.3d 832, 836 (9th Cir. 2002). *See also* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 84. Subject Matter Jurisdiction.

³⁰² *See also* [Olsen v. Idaho State Bd. of Medicine](#), 363 F.3d 916, 922 (9th Cir. 2004) (absolute immunity); [In re Castillo](#), 297 F.3d 940, 946 (9th Cir. 2002) (trustee immunity).

³⁰³ *See also* [City of Auburn v. Qwest Corp.](#), 260 F.3d 1160, 1171 (9th Cir. 2001) (dismissing counterclaim).

³⁰⁴ *See also* [United States v. Peninsula Communications, Inc.](#), 287 F.3d 832, 836 (9th Cir. 2002) (refusal to dismiss for lack of subject matter jurisdiction); [Snell v. Cleveland, Inc.](#), 316 F.3d 822, 825 (9th Cir. 2002) (noting *de novo* review of subject matter jurisdiction but applying abuse of discretion standard to district court's decision whether to sua sponte dismiss complaint)

- *Rooker-Feldman*. See [Manufactured Home Communities Inc. v. City of San Jose](#), 420 F.3d 1022, 1025 (9th Cir. 2005); [Maldonado v. Harris](#), 370 F.3d 945, 949 (9th Cir. 2004).
- Lack of personal jurisdiction is reviewed de novo. See [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800 (9th Cir. 2004); [Action Embroidery Corp. v. Atlantic Embroidery, Inc.](#), 368 F.3d 1174, 1177 (9th Cir. 2004)
- Res judicata. See [Maldonado v. Harris](#), 370 F.3d 945, 949 (9th Cir. 2004); [Stewart v. U.S. Bancorp](#), 297 F.3d 953, 956 (9th Cir. 2002).
- Dismissal on the pleadings pursuant to Rule 12(c). A dismissal on the pleadings pursuant to Rule 12(c) is reviewed de novo. See [Dunlap v. Credit Protection Ass’n LP](#), 419 F.3d 1011, 1012 n.1 (9th Cir. 2005).
- Statute of limitations. The district court’s dismissal based on a statute of limitation is reviewed de novo. See [Ventura Mobilehome Cmty. Owners Ass’n v. City of San Buenaventura](#), 371 F.3d 1046, 1050 (9th Cir. 2004); [Erlin v. United States](#), 364 F.3d 1127, 1130 (9th Cir. 2004).
- Dismissal of a prisoner’s complaint pursuant to [28 U.S.C. § 1915A](#). See [Ramirez v. Galaza](#), 334 F.3d 850, 853-54 (9th Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004); [Resnick v. Hayes](#), 213 F.3d 443, 447 (9th Cir. 2000).³⁰⁵

Dismissals based on the following are reviewed for abuse of discretion:

- Dismissal as a sanction. See [Valley Eng’rs, Inc. v. Electric Eng’g Co.](#), 158 F.3d 1051, 1052 (9th Cir. 1998) (discovery). Note that “[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.” [Oliva v. Sullivan](#), 958 F.2d 272, 274 (9th Cir. 1992) (internal quotation omitted).

³⁰⁵ See also [Thompson v. Davis](#), 295 F.3d 890, 895 (9th Cir. 2002) (construing prisoner’s pro se pleadings liberally on defendant’s motion to dismiss).

- Dismissal or refusal to dismiss on grounds of international comity. See [Sarei v. Rio Tinto, PLC.](#), 456 F.3d 1069, 1087 n.18 (9th Cir. 2006).
- Lack of prosecution. [Southwest Marine, Inc. v. Danzig](#), 217 F.3d 1128, 1137 n.10 (9th Cir. 2000); [Dahl v. City of Huntington Beach](#), 84 F.3d 363, 366 (9th Cir. 1996).³⁰⁶
- Failure to comply with a court’s order to amend the complaint. [Ordonez v. Johnson](#), 254 F.3d 814, 815 (9th Cir. 2001); [McHenry v. Renne](#), 84 F.3d 1172, 1177 (9th Cir. 1996).
- Failure to comply with an order requiring submission of pleadings within a designated time. See [Pagtalunan v. Gulaza](#), 291 F.3d 639, 640 (9th Cir. 2002) (habeas).
- Failure to serve a timely summons and complaint. See [In re Sheehan](#), 253 F.3d 507, 511 (9th Cir. 2001) (bankruptcy court); [Walker v. Sumner](#), 14 F.3d 1415, 1422 (9th Cir. 1994) *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).
- Dismissal for “judge-shopping” made pursuant to the inherent powers of the district court. [Hernandez v. City of El Monte](#), 138 F.3d 393, 398 (9th Cir. 1998).
- Dismissal for failure to comply with a vexatious litigant order. See [In re Fillbach](#), 223 F.3d 1089, 1190 (9th Cir. 2000).
- Involuntary dismissals pursuant to Rule 41(b) are reviewed for abuse of discretion. See [Edwards v. Marin Park, Inc.](#), 356 F.3d 1058, 1065 (9th Cir. 2004).³⁰⁷ See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 43. Involuntary Dismissals .
- Voluntary dismissal. See [Smith v. Lenches](#), 263 F.3d 972, 975 (9th Cir. 2001); [Hyde & Drath v. Baker](#), 24 F.3d 1162, 1169 (9th Cir. 1994); [Bell v. Kellogg](#), 922 F.2d 1418, 1421-22 (9th Cir. 1991).

³⁰⁶ See also [Oliva v. Sullivan](#), 958 F.2d 272, 274 (9th Cir. 1992) (sua sponte dismissal for failure to prosecute).

³⁰⁷ See, e.g., [Bautista v. Los Angeles County](#), 216 F.3d 837, 841 (9th Cir. 2000) (deficient pleadings); [Bishop v. Lewis](#), 155 F.3d 1094, 1096-97 (9th Cir. 1998) (failure to comply with court order); [McHenry v. Renne](#), 84 F.3d 1172, 1177 (9th Cir. 1996) (deficient pleadings); [Al-Torki v. Kaempfen](#), 78 F.3d 1381, 1384 (9th Cir. 1996) (failure to prosecute); see also [In re Dominguez](#), 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings reviewing de novo, because question before court concerned a legal conclusion).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 94. Voluntary Dismissals .

- Failure to serve a timely summons and complaint. See *In re Sheehan*, 253 F.3d 507, 511 (9th Cir. 2001); *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). *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Note that § 1915(d) was recodified as 28 U.S.C. § 1915(e) by the Prison Litigation Reform Act of 1996 (PLRA). See *Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc). Dismissals pursuant to that section are reviewed de novo. See *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003) (reviewing exhaustion of remedies under the PLRA).³⁰⁸ The court’s decision not to permit an amendment to the complaint is reviewed, however, for an abuse of discretion. See *Lopez*, 203 F.3d at 1130.

26. Disqualifying Counsel

The trial court’s decision ordering counsel to withdraw from a case is reviewed for an abuse of discretion. See *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1464 (9th Cir. 1995). 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.*

The denial of a motion to withdraw is also reviewed for an abuse of discretion. *LaGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998) (habeas). 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).

³⁰⁸ *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998); but see *Bishop v. Lewis*, 155 F.3d 1094, 1096-97 (9th Cir. 1998) (applying abuse of discretion standard to district court’s decision to dismiss civil rights complaint on ground that plaintiff failed to exhaust administrative remedies pursuant to the PLRA).

27. Disqualifying the Judge (Recusal)

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 69. Recusal .

28. Diversity Jurisdiction

A district court's determination that diversity jurisdiction exists is reviewed de novo. See [Kroske v. U.S. Bank Corp.](#), 432 F.3d 976, 979 (9th Cir. 2005).³⁰⁹ Any factual determinations necessary to establish the existence of diversity jurisdiction are reviewed for clear error. *Id.*³¹⁰

The court's decision whether state or federal law should be applied in a diversity action is reviewed de novo. See [Feldman v. Allstate Ins. Co.](#), 322 F.3d 660, 665 (9th Cir.), cert. denied, 540 U.S. 875 (2003); [Torre v. Brickey](#), 278 F.3d 917, 919 (9th Cir. 2002). Additionally, the district court's application of state substantive law in diversity actions is reviewed de novo. [Prieto v. Paul Revere Life Ins. Co.](#), 354 F.3d 1005, 1010 (9th Cir. 2004).

Note that rules regarding the appropriate standard of review, or even the availability of review at all, to be applied by a court sitting in diversity, are questions of federal law. [Freund v. Nycomed Amersham](#), 347 F.3d 752, 762 (9th Cir. 2003).

29. Equitable Estoppel and Equitable Tolling

A district court's decision whether to apply equitable estoppel or equitable tolling is reviewed for an abuse of discretion. [Leong v. Potter](#), 347 F.3d 1117, 1121 (9th Cir. 2003); [Johnson v. Henderson](#), 314 F.3d 409, 413 (9th Cir. 2002) (noting prior inconsistency).

Whether a statute of limitations has been equitably tolled is generally reviewed for an abuse of discretion, unless facts are undisputed, in which

³⁰⁹ See also [Bretiman v. May Co. California](#), 37 F.3d 562, 563 (9th Cir. 1994); [Co-Efficient Energy Sys. v. CSL Indus., Inc.](#), 812 F.2d 556, 557 (9th Cir. 1987).

³¹⁰ See also [Prudential Real Estate Affiliates v. PPR Realty](#), 204 F.3d 867, 872-73 (9th Cir. 2000); [Co-Efficient Energy Sys.](#), 812 F.2d at 557.

case review is de novo. See [United States v. Battles](#), 362 F.3d 1195, 1196 (9th Cir. 2004) (habeas).³¹¹

30. Evidentiary Hearings

A district court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. See [Murphy v. Schneider Nat'l, Inc.](#), 362 F.3d 1133, 1139 (9th Cir. 2004) (Rule 12(b)(3) motion).³¹²

31. Exhaustion

Whether a plaintiff has exhausted required administrative remedies is a question of law reviewed de novo. See [Great Basin Mine Watch v. Hankins](#), 456 F.3d 955, 961 (9th Cir. 2006); [Bankston v. White](#), 345 F.3d 768, 770 (9th Cir. 2003). The question of whether administrative remedies must be exhausted is a matter of law reviewed de novo. See [Chang v. United States](#), 327 F.3d 911, 919 (9th Cir. 2003).³¹³ Where exhaustion of

³¹¹ See also [Lucchesi v. Bar-O Boys Ranch](#), 353 F.3d 691, 694 (9th Cir. 2003) (noting whether § 1983 plaintiff is entitled to equitable tolling is a legal question reviewed de novo); [Azer v. Connell](#), 306 F.3d 930, 936 (9th Cir. 2002); [Santa Maria v. Pacific Bell](#), 202 F.3d 1170, 1175 (9th Cir. 2000); [Truitt v. County of Wayne](#), 148 F.3d 644, 648 (9th Cir. 1998) (discussing factors to consider when determining whether equitable tolling is appropriate).

³¹² See, e.g., [Beardslee v. Woodford](#), 358 F.3d 560, 573 (9th Cir. 2004) (habeas); [Paladin Assocs, Inc. v. Montana Power Co.](#), 328 F.3d 1145, 1164-65 (9th Cir. 2003) (discovery sanctions); [Jaros v. E.I. Dupont](#), 292 F.3d 1124, 1138 (9th Cir. 2002) (*Daubert* motion); [McLachlan v. Bell](#), 261 F.3d 908, 910 (9th Cir. 2001) (motion to dismiss); [Callie v. Near](#), 829 F.2d 888, 890 (9th Cir. 1987) (motion to enforce a settlement).

³¹³ [Leong v. Potter](#), 347 F.3d 1117, 1121 (9th Cir. 2003) (reviewing de novo district court's determination that it lacked subject matter jurisdiction for failure to exhaust); see, e.g., [Rumbles v. Hill](#), 182 F.3d 1064, 1067 (9th Cir. 1999) (PLRA); [Kildare v. Saenz](#), 325 F.3d 1078, 1082 (9th Cir. 2003) (social security); [Porter v. Board of Trustess of Manhattan Beach Unified Sch. Dist.](#), 307 F.3d 1064, 1068-69 (9th Cir. 2002) (IDEA), *cert. denied*, 537 U.S. 1194 (2003); [Sodhu v. Flecto Co.](#), 279 F.3d 896, 898 (9th Cir. 2002) (collective bargaining agreement); [Diaz v. United Agric. Employee Welfare Benefit Plan & Trust](#), 50 F.3d 1478, 1483 (9th Cir. 1995) (ERISA); [Cooney](#)

administrative remedies is not required by statute, the decision of the district court to require exhaustion of administrative remedies is reviewed for an abuse of discretion. See [Sarei v. Rio Tinto, PLC.](#), 456 F.3d 1069, 1090 (9th Cir. 2006).³¹⁴ Additionally, the court's decision to require a party to exhaust intra-union remedies prior to filing an action under the LMRDA is reviewed for an abuse of discretion. See [Kofoed v. International Bro. of Elec., Local 48](#), 237 F.3d 1001, 1004 (9th Cir. 2001).

Whether a prisoner asserting a habeas claim has exhausted state remedies is a question of law reviewed de novo. See [Greene v. Lampert](#), 288 F.3d 1081, 1086 (9th Cir. 2002). The court's decision to dismiss a habeas petition for failure to exhaust is also reviewed de novo. See [Vang v. Nevada](#), 329 F.3d 1069, 1072 (9th Cir. 2003).

32. Failure to State a Claim

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. See [Knieval v. ESPN](#), 393 F.3d 1068, 1072 (9th Cir. 2005).³¹⁵ All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. See *id.*³¹⁶ Conclusory allegations and unwarranted inferences, however, are insufficient to defeat a motion to dismiss. See [Cholla Ready Mix, Inc. v. Civish](#), 382 F.3d 969, 973 (9th Cir. 2004); [Warren v. Fox Family Worldwide, Inc.](#), 328 F.3d 1136, 1139 (9th Cir. 2003).³¹⁷ A complaint should not be dismissed unless it

[v. Edwards](#), 971 F.2d 345, 346 (9th Cir. 1992) (*Bivens*).

³¹⁴ [Chang v. United States](#), 327 F.3d 911, 925 (9th Cir. 2003); [Pension Benefit Guar. Corp. v. Carter & Tillery Enters.](#), 133 F.3d 1183, 1187 (9th Cir. 1998) (reviewing for abuse of discretion where the exhaustion requirement is created by agency regulations); [Leorna v. United States Dep't of State](#), 105 F.3d 548, 550 (9th Cir. 1997).

³¹⁵ [Seinfeld v. Barz](#), 322 F.3d 693, 696 (9th Cir.), *cert. denied*, 540 U.S. 939 (2003); [Zimmerman v. City of Oakland](#), 255 F.3d 734, 737 (9th Cir. 2001); [In re Hemmeter](#), 242 F.3d 1186, 1189 (9th Cir. 2001) (bankruptcy court).

³¹⁶ [Warren v. Fox Family Worldwide, Inc.](#), 328 F.3d 1136, 1139 (9th Cir. 2003); [Seinfeld](#), 322 F.3d at 696.

³¹⁷ [Associated Gen. Contractors v. Metropolitan Water Dist. of S. California](#), 159 F.3d 1178, 1181 (9th Cir. 1998); [In re Syntex Corp. Sec. Litig.](#), 95 F.3d 922, 926 (9th Cir. 1996).

appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. See [Homedics, Inc. v. Valley Forge Ins. Co.](#), 315 F.3d 1135, 1138 (9th Cir. 2003); [Van Buskirk v. Cable News Network, Inc.](#), 284 F.3d 977, 980 (9th Cir. 2002).

Note that if support exists in the record, a dismissal may be affirmed on any proper ground. See [Adams v. Johnson](#), 355 F.3d 1179, 1183 (9th Cir. 2004); [Papa v. United States](#), 281 F.3d 1004, 1009 (9th Cir. 2002).

Review is generally limited to the contents of the complaint. See [Marder v. Lopez](#), 450 F.3d 445 (9th Cir. 2006) (“A court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”).³¹⁸ If matters outside the pleadings are considered, the motion to dismiss under Rule 12(b)(6) is treated as one for summary judgment. See [Olsen v. Idaho State Bd. of Medicine](#), 363 F.3d 916, 921-922 (9th Cir. 2004).³¹⁹

33. Forum Non Conveniens

A forum non conveniens determination is committed to the sound discretion of the district court. See [Harris Rutsky & Co. v. Insurance Servs., Inc.](#), 328 F.3d 1122, 1136 (9th Cir. 2003) (remanding for exercise of that discretion).³²⁰ The district court’s decision “may be reversed only when

³¹⁸ [Warren](#), 328 F.3d at 1141 (noting exception that court may consider documents on which the complaint “necessarily relies and whose authenticity” is not contested). [Van Buskirk v. Cable News Network, Inc.](#), 284 F.3d 977, 980 (9th Cir. 2002) (explaining that “[u]nder the ‘incorporation by reference’ rule of this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.”); [Lee v. City of Los Angeles](#), 250 F.3d 668, 688 (9th Cir. 2001) (noting two exceptions).

³¹⁹ [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).

³²⁰ [Altmann v. Republic of Austria](#), 317 F.3d 954, 972 (9th Cir. 2002), amended by 327 F.3d 1246 (9th Cir. 2003), *aff’d*, 541 U.S. 677 (2004); [Leetsch v. Freedman](#), 260 F.3d 1100, 1102-03 (9th Cir. 2001); [Ravelo](#)

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., Ltd. v. Aztech Sys. Pte, Ltd.*, 61 F.3d 696, 699 \(9th Cir. 1995\)](#).³²¹

A district court’s decision whether 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. See [Jones v. GNC Franchising, Inc.](#), 211 F.3d 495, 498 (9th Cir. 2000); [Lou v. Belzberg](#), 834 F.2d 730, 734 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1998). A district court has discretion to decline jurisdiction when litigation in a foreign forum would be more convenient for the parties. See [Lueck v. Sundstrand Corp.](#), 216 F.3d 1133, 1143 (9th Cir. 2000).

34. Forum Selection Clauses

A district court’s decision to enforce or refusal to enforce a forum selection clause is reviewed for an abuse of discretion. See [Murphy v. Schneider Nat’l, Inc.](#), 362 F.3d 1133, 1137 (9th Cir. 2004) (enforcing forum selection clause); [Fireman’s Fund Ins. v. M.V. DSR Atl.](#), 131 F.3d 1336, 1338 (9th Cir. 1997) (refusal to enforce forum selection clause). However, note that whether the parties agreed to a forum selection clause is a question of law reviewed de novo. See [Chateau Des Charmes Wines, Ltd. v. Sebate USA Inc.](#), 328 F.3d 528, 530 (9th Cir.), *cert. denied*, 540 U.S. 1049 (2003). Additionally, the trial court’s interpretation of a forum selection clause is 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); see also [Richards v. Lloyd’s of London](#), 135 F.3d 1289, 1292 (9th Cir. 1998) (*en banc*) (reviewing whether federal securities laws void a choice-of-laws clause de novo).

35. Frivolousness

[Monegro v. Rosa](#), 211 F.3d 509, 511 (9th Cir. 2000).

³²¹ 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 prisoner's lawsuit may be dismissed as frivolous pursuant to the Prison Litigation Reform Act of 1996 (PLRA), [28 U.S.C. § 1915\(e\)](#). See [Lopez v. Smith](#), [203 F.3d 1122, 1126 \(9th Cir. 2000\)](#) (en banc). Dismissals under the PLRA are reviewed de novo. See [Wyatt v. Terhune](#), [315 F.3d 1108, 1117 \(9th Cir. 2003\)](#) (reviewing exhaustion of remedies under the PLRA).³²² See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 25. Dismissals.

Dismissal of a prisoner's complaint pursuant to [28 U.S.C. § 1915A](#) is reviewed de novo. See [Ramirez v. Galaza](#), [334 F.3d 850, 853-54 \(9th Cir. 2003\)](#), cert. denied, [541 U.S. 1063 \(2004\)](#); [Resnick v. Hayes](#), [213 F.3d 443, 447 \(9th Cir. 2000\)](#).³²³

Rule 11 sanctions based on frivolousness are reviewed for an abuse or discretion. See [G.C. & K.B. Inv., Inc. v. Wilson](#), [326 F.3d 1096, 1109-10 \(9th Cir. 2003\)](#); [Christian v. Mattel, Inc.](#), [286 F.3d 1118, 1121 \(9th Cir. 2002\)](#). The court's decision whether to award attorneys' fees based on the pursuit of a frivolous case is also reviewed for an abuse of discretion. See [United States v. Manchester Farming P'ship](#), [315 F.3d 1176, 1183 \(9th Cir.\)](#), amended by [326 F.3d 1028 \(9th Cir. 2003\)](#). Note also that the appellate court has discretion to impose attorneys' fees and costs as a sanction for bringing a frivolous appeal. See [In re George](#), [322 F.3d 586, 591 \(9th Cir. 2003\)](#) (Rule 38); [Orr v. Bank of America](#), [285 F.3d 764, 784 n.34 \(9th Cir. 2002\)](#) (same).

36. Immunities

Immunity under the Eleventh Amendment presents questions of law reviewed de novo. See [Cholla Ready Mix, Inc. v. Civish](#), [382 F.3d 969, 973 \(9th Cir. 2004\)](#); [Lovell v. Chandler](#), [303 F.3d 1039, 1050 \(9th Cir. 2002\)](#), cert. denied, [537 U.S. 1105 \(2003\)](#).³²⁴ Whether a party is immune under the

³²² [Barren v. Harrington](#), [152 F.3d 1193, 1194 \(9th Cir. 1998\)](#); but see [Bishop v. Lewis](#), [155 F.3d 1094, 1096-97 \(9th Cir. 1998\)](#) (applying abuse of discretion).

³²³ See also [Thompson v. Davis](#), [295 F.3d 890, 895 \(9th Cir. 2002\)](#) (construing prisoner's pro se pleadings liberally on defendant's motion to dismiss).

³²⁴ See also [Bethel Native Corp. v. Department of the Interior](#), [208 F.3d 1171, 1173 \(9th Cir. 2000\)](#); [Yakama Indian Nation v. Washington Dep't of](#)

Eleventh Amendment is also reviewed de novo. See [Holz v. Nenana City Pub. Sch. Dist.](#), 347 F.3d 1176, 1179 (9th Cir. 2003).³²⁵

Whether a judge is protected from suit by judicial immunity is a question of law reviewed de novo. See [Harvey v. Waldron](#), 210 F.3d 1008, 1011 (9th Cir. 2000); [Crooks v. Maynard](#), 913 F.2d 699, 700 (9th Cir. 1990). The district court's conclusion that an individual is entitled to judicial immunity is also reviewed de novo. See [Bennett v. Williams](#), 892 F.2d 822, 823 (9th Cir. 1989) (individual acting within judicially-conferred authority). A dismissal based on judicial immunity is reviewed de novo. See [Harvey](#), 210 F.3d at 1011.³²⁶

Whether a public official is entitled to absolute immunity is a question of law reviewed de novo. See [Doe v. Lebbos](#), 348 F.3d 820, 825 (9th Cir. 2003) (county social worker), cert. denied, 542 U.S. 904 (2004).³²⁷ A dismissal based on absolute immunity is reviewed de novo. See [Olsen v. Idaho State Bd. of Medicine](#), 363 F.3d 916, 922 (9th Cir. 2004) (state board members).

Whether an individual is entitled to legislative immunity is a question of law reviewed de novo. See [Kaahumanu v. County of Maui](#), 315 F.3d 1215, 1219 (9th Cir. 2003); [San Pedro Hotel Co. v. City of Los Angeles](#), 159 F.3d 470, 476 (9th Cir. 1998); see also [Chappell v. Robbins](#), 73 F.3d 918, 920 (9th Cir. 1996) (reviewing de novo dismissal based on absolute legislative immunity).

[Revenue](#), 176 F.3d 1241, 1245 (9th Cir. 1999).

³²⁵ [Cardenas v. Anzai](#), 311 F.3d 929, 934 (9th Cir. 2002); [Eason v. Clark County Sch. Dist.](#), 303 F.3d 1137, 1140 (9th Cir. 2002), cert. denied, [537 U.S. 1190](#) (2003).

³²⁶ See also [In re Castillo](#), 297 F.3d 940, 946 (9th Cir. 2002) (trustee immunity).

³²⁷ See, e.g., [Milstein v. Cooley](#), 257 F.3d 1004, 1007 (9th Cir. 2001) (prosecutor); [Buckles v. King County](#), 191 F.3d 1127, 1132 (9th Cir. 1999) (county administrative board); see also [Miller v. Gammie](#), 335 F.3d 889, 892 (9th Cir. 2003) (en banc) (reviewing appeal of district court's order deferring a ruling on defendant's motion for absolute immunity pending limited discovery as a writ of mandamus).

Consular immunity is reviewed de novo. See [Park v. Shin](#), 313 F.3d 1138, 1141 (9th Cir. 2002); [Joseph v. Office of Consulate General of Nigeria](#), 830 F.2d 1018, 1027 (9th Cir. 1987).

A district court's decision on qualified immunity is reviewed de novo. See [Elder v. Holloway](#), 510 U.S. 510, 516 (1994).³²⁸ The type of immunity to which a public official is entitled is a question of law reviewed de novo. See [Mabe v. San Bernardino County](#), 237 F.3d 1101, 1106 (9th Cir. 2001); [Greater Los Angeles Council on Deafness, Inc. v. Zolin](#), 812 F.2d 1103, 1107 n.7 (9th Cir. 1987). The court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. See [Motley v. Parks](#), 383 F.3d 1059, 1062 (9th Cir. 2004); [Bingham v. City of Manhattan Beach](#), 341 F.3d 939, 945 (9th Cir. 2003).³²⁹ The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. See [Lee v. Gregory](#), 363 F.3d 931, 932 (9th Cir. 2004); [Bingham](#), 341 F.3d at 945-46 (describing two-step inquiry); [Huskey v. City of San Jose](#), 204 F.3d 893, 899 (9th Cir. 2000). 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 [Boyd v. Benton County](#), 374 F.3d 773, 778 (9th Cir. 2004).³³⁰

The existence of sovereign immunity is a question of law reviewed de novo. See [Orff v. United States](#), 358 F.3d 1137, 1142 (9th Cir. 2004).³³¹

³²⁸ [Beier v. City of Lewiston](#), 354 F.3d 1058, 1064 (9th Cir. 2004); [Grant v. City of Long Beach](#), 315 F.3d 1081, 1088-89 (9th Cir. 2002), amended by 334 F.3d 795 (9th Cir. 2003); [Sorrels v. McKee](#), 290 F.3d 965, 969 (9th Cir. 2002); [Nelson v. Heiss](#), 271 F.3d 891, 893 (9th Cir. 2001); [DiRuzza v. County of Tehama](#), 206 F.3d 1304, 1313 (9th Cir. 2000).

³²⁹ [Case v. Kitsap County Sheriff's Dep't](#), 249 F.3d 921, 925 (9th Cir. 2001); [LSO, Ltd. v. Stroh](#), 205 F.3d 1146, 1157 (9th Cir. 2000).

³³⁰ [Martinez v. Stanford](#), 323 F.3d 1178, 1183 (9th Cir. 2003); [Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.](#), 237 F.3d 1101, 1107 (9th Cir. 2002).

³³¹ [United States ex. rel. Ali v. Daniel, Mann, Johnson & Mendenhall](#), 355 F.3d 1140, 1144 (9th Cir. 2004); [Porter v. Jones](#), 319 F.3d 483, 489 (9th Cir. 2003); [In re Bliemeister](#), 296 F.3d 858, 861 (9th Cir. 2002) (bankruptcy proceedings); see also [Sierra Club v. Whitman](#), 268 F.3d 898, 901 (9th Cir. 2001) (whether immunity has been waived is a question of law reviewed de novo).

Dismissals based on sovereign immunity are reviewed de novo. See [Blaxland v. Commonwealth Dir. of Public Prosecutions](#), 323 F.3d 1198, 1203 (9th Cir. 2003) (foreign sovereign immunity); [Steel v. United States](#), 813 F.2d 1545, 1548 (9th Cir. 1987).

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. See [Marceau v. Blackfeet Housing Authority](#), 455 F.3d 974 (9th Cir. 2006); [Linneen v. Gila River Indian Community](#), 276 F.3d 489, 492 (9th Cir. 2002). Whether Congress has abrogated an Indian tribe's sovereign immunity is a question of statutory interpretation also reviewed de novo. See [Krystal Energy Co. v. Navajo Nation](#), 357 F.3d 1055, 1056 (9th Cir. 2004); [DeMontiney v. United States](#), 255 F.3d 801, 805 (9th Cir. 2001).

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

37. 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).

38. In Forma Pauperis Status

The district court's denial of leave to proceed in forma pauperis is reviewed for an abuse of discretion. [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 reviewed for an abuse of discretion. See [Taylor v. Delatoore](#), 281 F.3d 844, 847 (9th Cir. 2002); [Olivares v. Marshall](#), 59 F.3d 109, 111 (9th Cir. 1995); [Alexander v. Carson Adult High Sch.](#), 9 F.3d 1448, 1449 (9th Cir. 1993) (noting 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).

39. Inherent Powers

A district court's exercise of its inherent powers is reviewed for an abuse of discretion. See [Southern California Edison Co. v. Lynch](#), 307 F.3d 794, 807 (9th Cir. 2002) (case management).³³²

40. Injunctions

A district court's decision regarding preliminary injunctive relief is subject to limited review. See [Harris v. Board of Supervisors, L.A. County](#), 366 F.3d 754, 760 (9th Cir. 2004) (“limited and deferential”); [Southwest Voter Registration Educ. Pro. v. Shelley](#), 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (same); [Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.](#), 204 F.3d 867, 874 (9th Cir. 2000). The court should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See [FTC v. Enforma Natural Products](#), 362 F.3d 1204, 1211-12 (9th Cir. 2004); [Harris](#), 366 F.3d at 760.³³³

A preliminary injunction must be supported by findings of fact, reviewed for clear error. See [Earth Island Inst. v. U.S. Forest Service](#), 442 F.3d 1147, 1156 (9th Cir. 2006); [Hawkins v. Comparet-Cassani](#), 251 F.3d

³³² See, e.g., [Medical Lab. Mgmt. Consultants v. American Broadcasting Cos.](#), 306 F.3d 806, 824 (9th Cir. 2002) (evidentiary rulings); [Gomez v. Vernon](#), 255 F.3d 1118, 1134 (9th Cir. 2001) (sanctions); [Atchison, Topeka & Santa Fe Ry Co. v. Hercules, Inc.](#), 146 F.3d 1071, 1074 (9th Cir. 1998) (docket control); [Hernandez v. City of El Monte](#), 138 F.3d 393, 398 (9th Cir. 1998) (dismissal for “judge-shopping”); [Wharton v. Calderon](#), 127 F.3d 1201, 1205 (9th Cir. 1997) (protective order); [Rachel v. Banana Rep. Inc.](#), 831 F.2d 1503, 1505 n.1 (9th Cir. 1987) (supersedeas bond).

³³³ [Satava v. Lowry](#), 323 F.3d 805, 810 (9th Cir.) (reversing district court decision), cert. denied, 540 U.S. 983 (2003); [Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills](#), 321 F.3d 878, 881 (9th Cir. 2003) (affirming district court decision); [In re Dunbar](#), 245 F.3d 1058, 1061 (9th Cir. 2001) (bankruptcy court); [Textile Unlimited, Inc. v. A..BMH Co.](#), 240 F.3d 781, 786 (9th Cir. 2001); see also [Ashcroft v. American Civil Liberties Union](#), 542 U.S. 656, 664 (2004) (noting Supreme Court, “like other appellate courts, has always applied the abuse of discretion standard on the review of a preliminary injunction”).

[1230, 1239 \(9th Cir. 2001\)](#). The district court’s conclusions of law are reviewed de novo. See [Earth Island Inst.](#), 442 F.3d at 1156; [Brown v. California Dep’t of Transp.](#), 321 F.3d 1217, 1221 (9th Cir. 2003).

Note that review is de novo when the district court’s ruling rests solely on a premise of law and the facts are either established or undisputed. See [Harris](#), 366 at 754.³³⁴

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See [United States v. Schiff](#), 379 F.3d 621, 625 (9th Cir. 2004); [Idaho Watersheds Project v. Hahn](#), 307 F.3d 815, 823 (9th Cir. 2002); [Rolex Watch, U.S.A., Inc. v. Michel Co.](#), 179 F.3d 704, 708 (9th Cir. 1999) (finding the scope of injunctive relief granted was inadequate).

The district court’s refusal to modify or dissolve a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See [ACF Indus. Inc. v. California State Bd. of Equalization](#), 42 F.3d 1286, 1289 (9th Cir. 1994) (modify); [Tracer Research Corp. v. National Envntl. Servs. Co.](#), 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve).³³⁵ Whether a district court has jurisdiction to vacate a preliminary injunction during the pendency of an appeal is a question of law reviewed de novo. See [Prudential Real Estate](#), 204 F.3d at 880. The court’s decision not to enforce an injunction is reviewed for an abuse of discretion. See [Paulson v. City of San Diego](#), 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

³³⁴ [FTC v. Enforma Natural Products](#), 362 F.3d 1204, 1212 (9th Cir. 2004); [Sammartano v. First Judicial Dist. Court](#), 303 F.3d 959, 964-65 (9th Cir. 2002); [Gentala v. City of Tucson](#), 244 F.3d 1065, 1071 (9th Cir.) (en banc), *vacated on other grounds*, 534 U.S. 946 (2001); *but see* [Bay Area Addiction Research and Treatment, Inc.](#), 179 F.3d 725, 732 (9th Cir. 1999) (applying unitary abuse of discretion standard).

³³⁵ See also [Oregon Advocacy Ctr. v. Mink](#), 322 F.3d 1101, 1122 n.13 (9th Cir. 2003) (concluding that court did not abuse its discretion by refusing to modify its injunction); [Natural Res. Def. Council v. Southwest Marine, Inc.](#), 242 F.3d 1163, 1168 (9th Cir. 2001) (noting court may within its “sound discretion” modify its injunction); [In re Complaint of Ross Island Sand & Gravel](#), 226 F.3d 1015, 1017 (9th Cir. 2000) (noting court has “broad discretion” to decide whether to dissolve an injunction).

A district court's decision to hold a hearing or to proceed by affidavit is reviewed for an abuse of discretion. See [United States v. Peninsula Communications, Inc.](#), 287 F.3d 832, 839 (9th Cir. 2002). The court's discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is "very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence." [Michenfelder v. Sumner](#), 860 F.2d 328, 337 (9th Cir. 1988) (internal quotation omitted).

The district court's decision to require a bond 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 [Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills](#), 321 F.3d 878, 882 (9th Cir. 2003); [Barahona-Gomez](#), 167 F.3d at 1237.

The district court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See [Fortyune v. American Multi-Cinema, Inc.](#), 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment).³³⁶ The denial of a request for a permanent injunction is also reviewed for an abuse of discretion. See [Cummings v. Connell](#), 316 F.3d 886, 897 (9th Cir.), *cert. denied*, 539 U.S. 927 (2003).

Whether a district court possesses the authority to issue an injunction is a question of law reviewed de novo. See [United States v. Hovsepian](#), 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).³³⁷

³³⁶ [Planned Parenthood Federation of Am., Inc. v. Gonzales](#), 435 F.3d 1163, 1171 (9th Cir. 2006); [Ting v. AT&T](#), 319 F.3d 1126, 1134-35 (9th Cir.) (noting underlying facts are reviewed for clear error and conclusion of law is reviewed de novo), *cert. denied*, 540 U.S. 811 (2003); [Gomez v. Vernon](#), 255 F.3d 1118, 1128 (9th Cir. 2001).

³³⁷ [Krug v. Lutz](#), 329 F.3d 692, 695 (9th Cir. 2003); [Idaho Watersheds Project v. Hahn](#), 307 F.3d 815, 823 (9th Cir. 2002); *see also* [Burlington Northern Santa Fe Ry. Co. v. International Bhd. of Teamsters, Local 174](#), 203 F.3d 703, 707 (9th Cir. 2000) (en banc) (noting existence of "labor dispute" for purposes of applying anti-injunction provisions of the Norris-LaGuardia Act is a question of law reviewed de novo).

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. See [G.C. & K.B. Inv. v. Wilson](#), 326 F.3d 1096, 1106 (9th Cir. 2003).³³⁸ The decision whether to issue an injunction that does not violate the Act, however, is reviewed for an abuse of discretion [California v. Randtron](#), 284 F.3d 969, 974 (9th Cir. 2002); [Quackenbush v. Allstate Ins. Co.](#), 121 F.3d 1372, 1377 (9th Cir. 1997).

41. Interlocutory Appeals

The district court's decision to certify an interlocutory appeal under [Fed. R. Civ. P. 54\(b\)](#) is reviewed for an abuse of discretion. [In re First T.D. & Inv., Inc.](#), 253 F.3d 520, 531 (9th Cir. 2001).³³⁹

A district judge's decision to reconsider an interlocutory order by another judge of the same court is reviewed for an abuse of discretion. See [Delta Savings Bank v. United States](#), 265 F.3d 1017, 1027 (9th Cir. 2001); [Amarel v. Connell](#), 102 F.3d 1494, 1515 (9th Cir. 1997).³⁴⁰

42. Intervention

The district court's decision under [Federal Rule of Civil Procedure 24\(a\)](#) regarding intervention as a matter of right is reviewed de novo. See [Prete v. Bradbury](#), 438 F.3d 949, 953 (9th Cir. 2006); [United States v. Alisal Water Corp.](#), 370 F.3d 915, 918 (9th Cir. 2004).³⁴¹ Whether the legal

³³⁸ [California v. Randtron](#), 284 F.3d 969, 974 (9th Cir. 2002); [Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.](#), 204 F.3d 867, 879 (9th Cir. 2000).

³³⁹ See also [Bingham v. City of Manhattan Beach](#), 341 F.3d 939, 942 n.1 (9th Cir. 2003) (noting deference owed); [Blair v. Shanahan](#), 38 F.3d 1514, 1522 (9th Cir. 1994); 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 “[t]he present trend is toward greater deference to a district court’s decision to certify under Rule 54(b)”).

³⁴⁰ See also [Fairbank v. Wunderman Cato Johnson](#), 212 F.3d 528, 530 (9th Cir. 2000) (noting court has discretion to overrule interlocutory holding of another court).

³⁴¹ [Arakaki v. Cayetano](#), 324 F.3d 1078, 1082 (9th Cir.), cert. denied, 540 U.S. 1017 (2003); [Southwest Ctr. for Biological Diversity v. Berg](#), 268 F.3d 810, 817 (9th Cir. 2001); [Wetlands Action Network v. United States Army](#)

requirements of Rule 24(a) have been met is reviewed de novo. See [Employee Staffing Servs., Inc. v. Aubry](#), 20 F.3d 1038, 1042 (9th Cir. 1994). The district court's determination whether an application to intervene is timely is reviewed for an abuse of discretion. See [Alisal Water Corp.](#), 370 F.3d at 918-19.³⁴² Note that the court's ruling on a motion to intervene is subject to harmless error analysis. See [Alaska v. Suburban Propane Gas Corp.](#), 123 F.3d 1317, 1321 & n.1 (9th Cir. 1997).

A district court's decision concerning permissive intervention pursuant to [Federal Rule of Civil Procedure 24\(b\)\(2\)](#) is reviewed for an abuse of discretion. See [Prete](#), 438 F.3d at 954 n.6; [Kootenai Tribe of Idaho v. Veneman](#), 313 F.3d 1094, 1110 (9th Cir. 2002).³⁴³

43. Involuntary Dismissal

Involuntary dismissals pursuant to Rule 41(b) are reviewed for abuse of discretion. See [Edwards v. Marin Park, Inc.](#), 356 F.3d 1058, 1065 (9th Cir. 2004).³⁴⁴ Abuse of discretion is also applied when reviewing the district

[Corps of Eng'r](#), 222 F.3d 1105, 1113 (9th Cir. 2000).

³⁴² [California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.](#), 309 F.3d 1113, 1119 (9th Cir. 2002) (discussing factors considered to determine if timely), *cert. dismissed*, 539 U.S. 911 (2003); [United States v. Carpenter](#), 298 F.3d 1122, 1124 (9th Cir. 2002) [Southwest Ctr.](#), 268 F.3d at 817; *but see* [League of United Latin Am. Citizens v. Wilson](#), 131 F.3d 1297, 1302 (9th Cir. 1997) (reviewing timeliness issue de novo when trial court made no findings of fact).

³⁴³ [Southern California Edison v. Lynch](#), 307 F.3d 794, 802 (9th Cir. 2002); *but see* [San Jose Mercury News v. United States District Court](#), 187 F.3d 1096, 1100 (9th Cir. 1999) (noting review is de novo when decision turns on an underlying legal determination); [Beckman Indus., Inc. v. International Ins. Co.](#), 966 F.2d 470, 472 (9th Cir. 1992) (whether Rule 24(b) permits intervention for the purpose of seeking a modification of a protective order is reviewed de novo because the questions before the court concerned legal determinations).

³⁴⁴ [Bautista v. Los Angeles County](#), 216 F.3d 837, 841 (9th Cir. 2000) (deficient pleadings); [Bishop v. Lewis](#), 155 F.3d 1094, 1096-97 (9th Cir. 1998) (failure to comply with court order); [McHenry v. Renne](#), 84 F.3d 1172, 1177 (9th Cir. 1996) (deficient pleadings); [Al-Torki v. Kaempfen](#), 78 F.3d 1381, 1384 (9th Cir. 1996) (failure to prosecute); *see also* [In re](#)

court's dismissal as a sanction. See *Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998) (discovery); *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996).

44. Issue Preclusion

Issues regarding issue preclusion (collateral estoppel) are reviewed de novo. See *United States v. Smith-Baltiher*, 424 F.3d 913, 9191 (9th Cir. 2005); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004).³⁴⁵ The preclusive effect of a prior judgment is a question of law reviewed de novo. See *Jacobs v. CBS Broadcasting, Inc.*, 291 F.3d 1173, 1176 (9th Cir. 2002).³⁴⁶

45. Joinder/Indispensable Party

A district court's decision concerning joinder is generally reviewed for an abuse of discretion. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004).³⁴⁷ Legal conclusions underlying the court's decision are reviewed de novo. See *id.*³⁴⁸

The trial court's decision to dismiss an action for failure to join an indispensable party is reviewed for an abuse of discretion. See

Dominguez, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings reviewing de novo, because question before court concerned a legal conclusion).

³⁴⁵ *San Remo Hotel v. San Francisco City*, 364 F.3d 1088, 1094 (9th Cir. 2004) (discussing differences between issue preclusion and claim preclusion); *Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir.) (noting mixed questions of law and fact), *cert. denied*, 540 U.S. 985 (2003); *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001) (bankruptcy court); *Hydranautics v. Filmtec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

³⁴⁶ *Far Out Prod., Inc. v. Oskar*, 247 F.3d 986, 993 (9th Cir. 2001); *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 528 (9th Cir. 1998).

³⁴⁷ *Schabel v. Lui*, 302 F.3d 1023, 1028-29 (9th Cir. 2002); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296-97 (9th Cir. 2000) (noting district court has broad discretion to sever or join parties); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999).

³⁴⁸ *Schabel v. Lui*, 302 F.3d at 1029; *Bowen*, 172 F.3d at 688.

Dawavendewa v. Salt River Project, 276 F.3d 1150, 1154 (9th Cir. 2002).³⁴⁹ The court's decision that a party is not indispensable is also reviewed for an abuse of discretion. See *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002); *Abkco Music, Inc. v. Lavere*, 217 F.3d 684, 687 (9th Cir. 2000). To the extent that the determination whether the movant's interest is impaired by failure to join an allegedly indispensable party involves an interpretation of law, review is de novo. See *American Greyhound Racing*, 305 F.3d at 1022; *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002). Whether joinder is mandated as a matter of law is reviewed de novo. See *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996) (noting appellate court may consider joinder even when not raised nor decided in the district court).

46. Judgment on the Pleadings

A dismissal on the pleadings pursuant to Rule 12(c) is reviewed de novo. See *Dunlap v. Credit Protection Ass'n LP*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005).³⁵⁰ "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." *Id.* (internal quotation marks and citation omitted).³⁵¹

47. Judicial Estoppel

The district court's decision whether to invoke judicial estoppel is reviewed for an abuse of discretion. See *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).³⁵² Whether the district court

³⁴⁹ *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999); *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999); *Virginia Sur. Corp. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1248 (9th Cir. 1998).

³⁵⁰ *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004); *Arrington v. Wong*, 237 F.3d 1066, 1069 (9th Cir. 2001).

³⁵¹ *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999); *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998); *Smith v. National Steel & Shipbuilding Co.*, 125 F.3d 751, 753 (9th Cir. 1997).

³⁵² *United States ex rel. Sequoia Orange Co. v. Strathmore Packing House Co.*, 151 F.3d 1139, 1146 (9th Cir. 1998); *Johnson v. Oregon Dep't of Human Res.*, 141 F.3d 1361, 1364 (9th Cir. 1998); see also *In re Allen*, 300 F.3d 1055, 1060 (9th Cir. 2002) (bankruptcy court).

properly applied the judicial estoppel doctrine to the facts presented in the case is also reviewed for an abuse of discretion. See *Wagner v. Prof. Eng'rs in California Government*, 354 F.3d 1036, 1040 (9th Cir. 2004); *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir. 1999). Issues of law are reviewed de novo. See *Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004).

48. Judicial Notice

The district court's decision whether to take judicial notice is reviewed for an abuse of discretion. See *United States v. Woods*, 335 F.3d 993, 1001 (9th Cir. 2003); *Madeja v. Olympic Packers*, 310 F.3d 628, 639 (9th Cir. 2002); *Lee v. City of Los Angeles*, 250 F.3d 688, 689 (9th Cir. 2001); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995).

49. Jurisdiction

The district court's determination regarding personal jurisdiction is reviewed de novo. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Likewise, the district court's decision whether there is subject matter jurisdiction is reviewed de novo. See *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002). The district court's factual findings on jurisdictional issues are reviewed for clear error. See *id.*

The district court's decision whether to exercise equitable jurisdiction is reviewed for an abuse of discretion. See *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 28. Diversity Jurisdiction; 56. Magistrate Judges; 61. Personal Jurisdiction; 79. Standing; 84. Subject Matter Section; 90. Supplemental Jurisdiction.

50. Jury Demand

Entitlement to a jury trial is a question of law reviewed de novo. See *California Scents v. Surco Prods., Inc.*, 406 F.3d 1102, 1005 (9th Cir. 2005). *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001) (denial of jury trial was

harmless error).³⁵³ The district court has discretion, however, to grant or deny an untimely demand for a jury trial. See [Zivkovic v. Southern California Edison Co.](#), 302 F.3d 1080, 1086 (9th Cir. 2002) (noting that discretion was narrow and good faith mistake was an insufficient basis for granting relief from untimely jury demand).³⁵⁴ Whether a juvenile defendant has a statutory or constitutional right to a jury trial is reviewed de novo. [United States v. Male Juvenile \(Pierre Y.\)](#), 280 F.3d 1008, 1021 (9th Cir. 2002) (explaining that no constitutional right to a jury trial exists in juvenile delinquency proceedings).

51. Laches

Whether laches is available as a potential defense is a question of law reviewed de novo. See [In re Beaty](#), 306 F.3d 914, 920 (9th Cir. 2002); [Wyler Summit P'ship v. Turner Broadcasting Sys.](#), 235 F.3d 1184, 1193 (9th Cir. 2000). When laches is available as a matter of law, the district court's decision to apply laches is reviewed for an abuse of discretion. See [Beaty](#), 306 F.3d at 920-21 (resolving prior conflict in circuit law).

52. Lack of Prosecution

A district court's order dismissing an action for lack of prosecution is reviewed for an abuse of discretion. See [Southwest Marine, Inc. v. Danzig](#), 217 F.3d 1128, 1137, n.10 (9th Cir. 2000); [Hernandez v. City of El Monte](#), 138 F.3d 393, 398 (9th Cir. 1998). The court's sua sponte dismissal for failure to prosecute is reviewed for an abuse of discretion. See [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).

³⁵³ [Thomas v. Oregon Fruit Prod. Co.](#), 228 F.3d 991, 995 (9th Cir. 2000) (ERISA); [Frost v. Huffman](#), 152 F.3d 1124, 1128 (9th Cir. 1998) (reversing district court's decision to deny jury trial, finding the error not harmless).

³⁵⁴ See also [United States v. California Mobile Home Park Mgmt. Co.](#), 107 F.3d 1374, 1377 (9th Cir. 1997) (holding answer to intervenor complaint, rather than answer to original complaint, was last pleading, for purposes of determining whether right to demand jury trial was waived)

53. 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 [Southern Oregon Barter Fair v. Jackson County, Oregon](#), 372 F.3d 1128, 1136 (9th Cir. 2004); [Delta Savings Bank v. United States](#), 265 F.3d 1017, 1027 (9th Cir. 2001) (noting limited discretion and listing factors).³⁵⁵

54. Leave to Amend

Leave to amend is reviewed for abuse of discretion. See [United States v. Smithkline Beecham, Inc.](#), 245 F.3d 1048, 1051 (9th Cir. 2001) (noting discretion is not absolute and listing factors for district court to consider).³⁵⁶ The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint. See [Chodos v. West Publishing Co.](#), 292 F.3d 992, 1003 (9th Cir. 2002); [Simon v. Value Behavioral Health, Inc.](#), 208 F.3d 1073, 1084 (9th Cir. 2000).

Note that a party is entitled to amend pleadings once "as a matter of course" at any time before a responsive pleading is served. See [Fed. R. Civ. P. 15\(a\)](#); see also [Lipton v. Pathogenesis Corp.](#), 284 F.3d 1027, 1039 (9th Cir. 2002); [Allwaste, Inc. v. Hecht](#), 65 F.3d 1523, 1530 (9th Cir. 1995) (noting motion to dismiss is not a responsive pleading). The denial of leave to amend after a responsive pleading has been filed is reviewed for an abuse of discretion. See [Flowers v. First Hawaiian Bank](#), 295 F.3d 966, 976 (9th Cir. 2002); [Pierce v. Multnomah County](#), 76 F.3d 1032, 1043 (9th Cir. 1996). Such a denial, however, is "strictly" reviewed in light of the strong policy permitting amendment. See [Plumeau v. School Dist. No. 40](#), 130 F.3d

³⁵⁵ See also [Old Person v. Brown](#), 312 F.3d 1036, 1039 (9th Cir. 2002) (listing relevant factors), *cert. denied*, [540 U.S. 1016](#) (2003); [Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency](#), 216 F.3d 764, 787 n.43 (9th Cir. 2000) (noting "different formulations" of standard guiding appellate court's decision whether to follow law of the case).

³⁵⁶ See, e.g., [Caswell v. Calderon](#), 363 F.3d 832, 836 (9th Cir. 2004) (habeas) (reviewing denial of leave to amend); [Brother Records, Inc. v. Jardine](#), 318 F.3d 900, 911 (9th Cir.), *cert. denied*, [540 U.S. 824](#) (2003) (no abuse of discretion); [Bly-Magee v. California](#), 236 F.3d 1014, 1017 (9th Cir. 2001); [Chappel v. Laboratory Corp. of America](#), 232 F.3d 719, 725-16 (9th Cir. 2000) (finding abuse of discretion).

[432, 439 \(9th Cir. 1997\)](#); [Pierce, 76 F.3d at 1043](#). Denial of leave to amend is not an abuse of discretion, however, where further amendment would be futile. See [Flowers, 295 F.3d at 976](#).

Dismissal without leave to amend is improper unless it is clear, upon de novo review that the complaint could not be saved by any amendment. See [Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 \(9th Cir. 2004\)](#).³⁵⁷ 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 \(9th Cir. 1995\)](#); see also [Flowers, 295 F.3d at 976](#) (noting that court is cautious in approving a district court's decision to deny pro se litigant leave to amend).

A dismissal with leave to amend is also reviewed de novo. See [Kennedy v. Southern California Edison, Co., 268 F.3d 763, 767 \(9th Cir. 2001\)](#); [Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1151 \(9th Cir. 1998\)](#). Note there may be a question whether a dismissal with leave to amend is a final, appealable order. See [Disabled Rights Action Committee v. Las Vegas Events, Inc., 375 F.3d 861, 870 \(9th Cir. 2004\)](#); [Does I Thur XXIII v. Advances Textile Corp., 214 F.3d 1058, 1066-67 \(9th Cir. 2000\)](#).

A denial of a Rule 15(c) relation back amendment is reviewed for an abuse of discretion. See [Eaglesmith v. Ward, 73 F.3d 857, 860 \(9th Cir. 1995\)](#); [Louisiana-Pac. Corp. v. ASARCO, Inc., 5 F.3d 431, 434 \(9th Cir. 1993\)](#).³⁵⁸

³⁵⁷ See also [Eminence Capital v. Aspeon, Inc., 316 F.3d 1048, 1052 \(9th Cir. 2003\)](#) (abuse of discretion where district court dismissed complaint with prejudice); [McKesson HBOC v. New York State Common Retirement Fund, Inc., 339 F.3d 1087, 1090 \(9th Cir. 2003\)](#) (no abuse because complaint could not be cured by amendment); [Lee v. City of Los Angeles, 250 F.3d 668, 692 \(9th Cir. 2001\)](#) (abused discretion in dismissing claim without leave to amend).

³⁵⁸ But see [Rodriguez v. Airborne Express, 265 F.3d 890, 898 n.6 \(9th Cir. 2001\)](#) (“We review de novo the district court’s decision that the amendment did not relate back to the original administrative complaint.”); [In re Dominguez, 51 F.3d 1502, 1509 \(9th Cir. 1995\)](#) (“We review de novo a Rule 15(c)(2) relation-back decision that permits or denies amendment to add a new claim against a defendant named in the original pleading.”).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 4. Amended Complaints.

55. Local Rules

Broad deference is owed to the district court's interpretation of its local rules. *See* [Christian v. Mattel, Inc.](#), 286 F.3d 1118, 1129 (9th Cir. 2002) (“district court has considerable latitude in . . . enforcing local rules”); [DeLange v. Dutra Const. Co.](#), 183 F.3d 916, 919 n.2 (9th Cir. 1999) (“broad discretion in interpreting and applying their local rules”).

The district court's compliance with local rules is reviewed for an abuse of discretion. *See* [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. *See* [Mahon v. Credit Bureau of Placer County, Inc.](#), 171 F.3d 1197, 1200 (9th Cir. 1999) (noting an abuse of discretion may occur when a party may suffer prejudice from the denial of argument).

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. *See* [Mabe v. San Bernardino County](#), 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); [Big Bear Lodging Assoc. v. Snow Summit, Inc.](#), 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); *but see* [United States v. Wunsch](#), 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 74. Sanctions.

56. Magistrate Judges

Whether a magistrate judge has jurisdiction is reviewed de novo. *See* [Irwin v. Mascott](#), 370 F.3d 924, 929 (9th Cir. 2004); [Anderson v. Woodcreek Venture, Ltd.](#), 351 F.3d 911, 915 (9th Cir. 2003) (remanded because fact issues remained as to whether consent to magistrate was voluntary).

Factual findings made by a magistrate judge are reviewed for clear error. See [Marinero v. Gregg](#), 164 F.3d 1199, 1205 (9th Cir. 1999) (extradition proceedings). A magistrate judge's findings adopted by the district court are also reviewed for clear error. See [Wildman v. Johnson](#), 261 F.3d 832, 836 (9th Cir. 2001) (habeas). A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed by this court for an abuse of discretion. See [Brown v. Roe](#), 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "clearly erroneous or contrary to law." See [Rivera v. Nibco, Inc.](#), 364 F.3d 1057, 1063 (9th Cir. 2004); [Osband v. Woodford](#), 290 F.3d 1036, 1041 (9th Cir. 2002).

57. Mandamus

Mandamus is an extraordinary remedy that is granted "only in the exercise of sound discretion." See [Miller v. French](#), 530 U.S. 327, 339 (2000) (internal quotation omitted); see also [Johnson v. Reilly](#), 349 F.3d 1149, 1154 (9th Cir. 2003) (listing factors); [Miller v. Gammie](#), 335 F.3d 889, 895 (9th Cir. 2003) (en banc) (same). Whether the elements of the mandamus test are satisfied is a question of law reviewed de novo. See [Johnson](#), 349 F.3d at 1154. However, the trial court retains discretion in ordering mandamus relief, even if all the elements are satisfied. See [R.T. Vanderbilt Co. v. Babbitt](#), 113 F.3d 1061, 1065 (9th Cir. 1997); [Independence Mining Co. v. Babbitt](#), 105 F.3d 502, 505 (9th Cir. 1997). A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard. See [Independence Mining](#), 105 F.3d at 505.

Dismissal for lack of mandamus jurisdiction is reviewed de novo. See [Kildare v. Saenz](#), 325 F.3d 1078, 1081-82 (9th Cir. 2003); [Tucson Airport Auth. v. General Dynamics Corp.](#), 136 F.3d 641, 648 (9th Cir. 1998).

Note that in applying mandamus appellate jurisdiction, this court reviews the district court's underlying action for clear error. See [In re Morris](#), 363 F.3d 891, 891-92 (9th Cir. 2004); [Special Investments, Inc. v. Aero Air, Inc.](#), 360 F.3d 989, 993 (9th Cir. 2004); [Cordoza v. Pacific States Steel Corp.](#), 320 F.3d 989, 998 (9th Cir. 2003).

58. Mootness

Mootness is a question of law reviewed de novo. See [*Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1133 \(9th Cir. 2004\)](#); [*Foster v. Carson*, 347 F.3d 742, 745 \(9th Cir. 2003\)](#).

59. 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, 1200 \(9th Cir. 1999\)](#) (noting 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 Mgmt. Servs., Inc.*, 926 F.2d 865, 867 \(9th Cir. 1991\)](#) (no abuse of discretion when court decided motion to dismiss without oral argument).

60. Pendent Jurisdiction

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 90. Supplemental Jurisdiction.

61. Personal Jurisdiction

Personal jurisdiction rulings, including decisions to dismiss for lack of personal jurisdiction, are reviewed de novo. See [*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 \(9th Cir. 2004\)](#); [*Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177 \(9th Cir. 2004\)](#); [*Harris Rutsky & Co. v. Insurance Servs., Inc.*, 328 F.3d 1122, 1128 \(9th Cir. 2003\)](#); [*Panavision Int'l L.P. v. Toepfen*, 141 F.3d 1316, 1319-20 \(9th Cir. 1998\)](#). As such, whether a district court exceeded its authority in exercising personal jurisdiction is reviewed de novo. See [*Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 \(9th Cir. 1998\)](#).

Additionally, 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 \(9th Cir. 1997\)](#).

62. Preemption

The district court's decision regarding preemption is reviewed de novo. See [Independent Towers v. Washington](#), 350 F.3d 925, 929 (9th Cir. 2003) (ICA).³⁵⁹

63. Preliminary Injunctions

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 40. Injunctions.

64. Pretrial Conferences

A district court is given “considerable deference” in handling a pretrial conference pursuant to [Federal Rule of Civil Procedure 16](#). See [Sanders v. Union Pacific R.R. Co.](#), 193 F.3d 1080, 1082 (9th Cir. 1999) (en banc). Sanctions imposed for counsel's failure to appear at a pretrial conference or to be prepared for the conference are reviewed for an abuse of discretion. See [Transamerica Corp. v. Transamerica Bancgrowth Corp.](#), 627 F.2d 963, 965-66 (9th Cir. 1980); cf. [Tobert v. Leighton](#), 623 F.2d 585, 586 (9th Cir. 1980) (reversing sua sponte dismissal for failure to attend pretrial conference).

65. Pretrial Orders

³⁵⁹ See, e.g., [Winterrowd v. American Gen. Annuity Ins. Co.](#), 321 F.3d 933, 937 (9th Cir. 2003) (ERISA); [Ting v. AT&T](#), 319 F.3d 1126, 1135 (9th Cir.) (FCA), cert. denied, [540 U.S. 811](#) (2003) (Communications Act); [Transmission Agency of California v. Sierra Pacific Power Co.](#), 295 F.3d 918, 927 (9th Cir. 2002) (FPA); [AGG Enter. v. Washington County](#), 281 F.3d 1324, 1327 (9th Cir. 2002) (FAAAA); [Nathan Kimmel, Inc. v. Dowelanco](#), 275 F.3d 1199, 1203 (9th Cir. 2002) (FIFRA); [Cramer v. Consolidated Freightways, Inc.](#), 255 F.3d 683, 689 (9th Cir. 2001) (en banc) (LMRA); [Radici v. Associated Ins. Co.](#), 217 F.3d 737, 740 (9th Cir. 2000) (COBRA); [Williamson v. General Dynamics Corp.](#), 208 F.3d 1144, 1149 (9th Cir. 2000) (FLSA); [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).

A court's refusal to enter a pretrial order is reviewed for an abuse of discretion. See [In re Roosevelt](#), 220 F.3d 1032, 1035 (9th Cir. 2000) (noting bankruptcy judge has discretion to refuse). A district court's denial of a motion to modify a pretrial order is reviewed for an abuse of discretion. See [Polar Bear Prods., Inc. v. Timex Corp.](#), 384 F.3d 700, 719 (9th Cir. 2004). The court's decision regarding the preclusive effect of a pretrial order on issues of law and fact at trial will not be disturbed unless there is evidence of a clear abuse of discretion. See *id.*; [Jorgensen v. Cassidy](#), 320 F.3d 906, 913 (9th Cir. 2003) (noting broad discretion of district court in supervising pretrial phase of litigation). A district court's refusal to sanction a party for violation of a pretrial order is reviewed for an abuse of discretion. See [Freeman v. Allstate Life Ins. Co.](#), 253 F.3d 533, 537 (9th Cir. 2001). Note that a district court's denial of a motion to reconsider a magistrate judge's pretrial order is reviewed by the appellate court under the statutory standard of "clearly erroneous or contrary to law." See [Rivera v. Nibco, Inc.](#), 364 F.3d 1057, 1063 (9th Cir. 2004); [Osband v. Woodford](#), 290 F.3d 1036, 1041 (9th Cir. 2002).

66. Primary Jurisdiction

The primary jurisdiction doctrine permits the district court to stay proceedings pending referral of the issue to an administrative body. See [Chabner v. United of Omaha Life Ins. Co.](#), 225 F.3d 1042, 1051 (9th Cir. 2000); see also [Service Employees Union v. St. Vincent Med. Ctr.](#), 344 F.3d 977, 983 (9th Cir. 2003) (explaining doctrine), *cert. denied*, 541 U.S. 973 (2004).

A challenge to a district court's decision to invoke the primary jurisdiction doctrine is reviewed de novo. See [Pace v. Honolulu Disposal Serv., Inc.](#), 227 F.3d 1150, 1155 (9th Cir. 2000); [International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co.](#), 50 F.3d 770, 773 (9th Cir. 1995); but see [United States v. Culliton](#), 328 F.3d 1074, 1081 (9th Cir.) (stating "circuit has not yet discussed the standard of review for the application of the primary jurisdiction doctrine"), *cert. denied*, 540 U.S. 1111 (2003); [Syntek Semiconductor Co. v. Microchip Tech.](#), 307 F.3d 775, 781 (9th Cir. 2002) (noting primary jurisdiction "is a matter for the court's discretion").

67. Protective Orders

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 24. Discovery, b. Protective Orders.

68. Qualified Immunity

A district court's decision on qualified immunity is reviewed de novo. See [Elder v. Holloway](#), 510 U.S. 510, 516 (1994).³⁶⁰ The type of immunity to which a public official is entitled is a question of law reviewed de novo. See [Mabe v. San Bernardino County](#), 237 F.3d 1101, 1106 (9th Cir. 2001); [Greater Los Angeles Council on Deafness, Inc. v. Zolin](#), 812 F.2d 1103, 1107 n.7 (9th Cir. 1987). The court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. See [Motley v. Parks](#), 383 F.3d 1059, 1062 (9th Cir. 2004); [Bingham v. City of Manhattan Beach](#), 341 F.3d 939, 945 (9th Cir. 2003).³⁶¹ The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. See [Lee v. Gregory](#), 363 F.3d 931, 932 (9th Cir. 2004); [Bingham](#), 341 F.3d at 945-46 (describing two-step inquiry); [Huskey v. City of San Jose](#), 204 F.3d 893, 899 (9th Cir. 2000). 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 [Boyd v. Benton County](#), 374 F.3d 773, 778 (9th Cir. 2004).³⁶²

69. Recusal

The denial of a recusal motion is reviewed for an abuse of discretion. See [Jorgensen v. Cassidy](#), 320 F.3d 906, 911 (9th Cir. 2003).³⁶³ A district

³⁶⁰ [Beier v. City of Lewiston](#), 354 F.3d 1058, 1064 (9th Cir. 2004); [Grant v. City of Long Beach](#), 315 F.3d 1081, 1088-89 (9th Cir. 2002), amended by 334 F.3d 795 (9th Cir. 2003); [Sorrels v. McKee](#), 290 F.3d 965, 969 (9th Cir. 2002); [Nelson v. Heiss](#), 271 F.3d 891, 893 (9th Cir. 2001); [DiRuzza v. County of Tehama](#), 206 F.3d 1304, 1313 (9th Cir. 2000).

³⁶¹ [Case v. Kitsap County Sheriff's Dep't](#), 249 F.3d 921, 925 (9th Cir. 2001); [LSO, Ltd. v. Stroh](#), 205 F.3d 1146, 1157 (9th Cir. 2000).

³⁶² [Martinez v. Stanford](#), 323 F.3d 1178, 1183 (9th Cir. 2003); [Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.](#), 237 F.3d 1101, 1107 (9th Cir. 2002).

³⁶³ See also [Kulas v. Flores](#), 255 F.3d 780, 783 (9th Cir. 2001) (noting recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be

court's refusal to disqualify the sitting judge under [28 U.S.C. § 144](#) may be reversed only for an abuse of discretion. See [Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 \(9th Cir. 1995\)](#).³⁶⁴

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

70. Removal

Removal is a question of federal subject matter jurisdiction reviewed de novo. See [Providence Health Plan v. McDowell, 385 F.3d 1168, 1171 \(9th Cir. 2004\)](#); [Schnabel v. Lui, 302 F.3d 1023, 1029 \(9th Cir. 2002\)](#). Thus, the denial of a motion to remand a removed case is reviewed de novo. See [D-Beam Ltd v. Roller Derby Skates, Inc., 366 F.3d 972, 974 n.2 \(9th Cir. 2004\)](#).³⁶⁵ Similarly, the trial court’s decision to remand a removed case is reviewed de novo. See [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. See [Schnabel, 302 F.3d at 1029](#); [Campbell v. Aerospace Corp., 123 F.3d 1308, 1311 \(9th Cir. 1997\)](#). Note that a district judge’s decision to reconsider a prior judge’s

questioned).

³⁶⁴ [Thomassen v. United States, 835 F.2d 727, 732 \(9th Cir. 1987\)](#); see also [Stanley v. University of S. California, 178 F.3d 1069, 1079 \(9th Cir. 1999\)](#) (applying abuse of discretion standard to judge’s refusal to recuse another judge).

³⁶⁵ See also [Oregon Bureau of Labor v. U.S. West Communications, Inc., 288 F.3d 414, 417 \(9th Cir. 2002\)](#); [Abraham v. Norcal Waste Sys., Inc. 265 F.3d 811, 819 \(9th Cir. 2001\)](#); [ARCO Env’tl. Remediation v. Department of Health and Env’tl. Quality, 213 F.3d 1108, 1111 \(9th Cir. 2000\)](#) (reversing denial of remand).

removal order is reviewed for an abuse of discretion. See [Abada v. Charles Schwab Co.](#), 300 F.3d 1112, 1117 (9th Cir. 2002).

An award of fees and costs associated with removal is reviewed for an abuse of discretion. See [Ansley v. Ameriquest Mortgage Co.](#), 340 F.3d 858, 861 (9th Cir. 2003); [Dahl v. Rosenfeld](#), 316 F.3d 1074, 1077 (9th Cir. 2003); [Balcorta v. Twentieth Century-Fox Film Corp.](#), 208 F.3d 1102, 1105 (9th Cir. 2000). Note, however, that review of a fee award under § 1447(c) must include a de novo examination of whether the remand order was legally correct. [Dahl](#), 316 F.3d at 1077; [Ansley v. Ameriquest Mortg. Co.](#), 340 F.3d 858, 861 (9th Cir. 2003); [Gibson v. Chrysler Corp.](#), 261 F.3d 927, 932 (9th Cir. 2001).

71. Res Judicata

The trial court's determination that res judicata (claim preclusion) applies is reviewed de novo. See [Manufactured Home Communities Inc. v. City of San Jose](#), 420 F.3d 1022, 1025 (9th Cir. 2005); [Littlejohn v. United States](#), 321 F.3d 915, 919 (9th Cir.) (noting mixed questions of law and fact), *cert. denied*, 540 U.S. 985 (2003).³⁶⁶ The district court's dismissal on that ground is subject to de novo review. See [Maldonado v. Harris](#), 370 F.3d 945, 949 (9th Cir. 2004); [Stewart v. U.S. Bancorp](#), 297 F.3d 953, 956 (9th Cir. 2002). A trial court's grant of summary judgment on res judicata grounds is also reviewed de novo. See [City of Martinez v. Texaco Trading & Transp., Inc.](#), 353 F.3d 758, 761 (9th Cir. 2003); [Akootchook v. United States](#), 271 F.3d 1160, 1164 (9th Cir. 2001). Whether a party has waived its right to invoke the defense is also reviewed de novo. See [Kern Oil & Refining Co. v. Tenneco Oil Co.](#), 840 F.2d 730, 735 (9th Cir. 1988) (res judicata).

72. Ripeness

Ripeness is a question of law reviewed de novo. See [Manufactured Home Communities Inc. v. City of San Jose](#), 420 F.3d 1022, 1025 (9th Cir. 2005); [Laub v. United States Dep't of Interior](#), 342 F.3d 1080, 1084 (9th Cir. 2003).³⁶⁷ The district court's decision to dismiss a complaint for lack of

³⁶⁶ See also [Albano v. Norwest Financial Hawaii, Inc.](#), 244 F.3d 1061, 1063 (9th Cir. 2001); [Frank v. United Airlines](#), 216 F.3d 845, 849-50 (9th Cir. 2000).

³⁶⁷ See also [Chang v. United States](#), 327 F.3d 911, 921 (9th Cir. 2003);

ripeness is reviewed de novo. See [Manufactured Home Communities Inc.](#), 420 F.3d at 1025; [Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura](#), 371 F.3d 1046, 1050 (9th Cir. 2004).³⁶⁸

Note that questions of ripeness may be raised and considered for the first time on appeal. See [Washington Legal Found. v. Legal Found. of Washington](#), 271 F.3d 835, 850 (9th Cir. 2001) (en banc), *aff'd*, 538 U.S. 216 (2003); [In re Cool Fuel, Inc.](#), 210 F.3d 999, 1006 (9th Cir. 2000).

73. Rooker-Feldman

The *Rooker-Feldman* doctrine provides that a federal court does not have subject matter jurisdiction to hear a direct appeal from a final judgment of a state court. [Manufactured Home Communities Inc. v. City of San Jose](#), 420 F.3d 1022, 1025 (9th Cir. 2005); [Maldonado v. Harris](#), 370 F.3d 945, 949 (9th Cir. 2004). Dismissals based on *Rooker-Feldman* are reviewed de novo. [Maldonado](#), 370 F.3d at 949; [Kougasian v. TMSL, Inc.](#), 359 F.3d 1136, 1139 (9th Cir. 2004); [Bianchi v. Rylaarsdam](#), 334 F.3d 895, 898 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004).

74. Sanctions

Rule 11 sanctions are reviewed for an abuse of discretion. See [Cooter & Gell v. Hartmarx Corp.](#), 496 U.S. 384, 405 (1990); see also [Retail Flooring Dealers, Inc. v. Beaulieu of America](#), 339 F.3d 1146, 1150 (9th Cir. 2003).³⁶⁹ 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

National Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 849 (9th Cir.), amended by 312 F.3d 416 (9th Cir. 2002); [Natural Res. Def. Council v. Houston](#), 146 F.3d 1118, 1131 (9th Cir. 1998); [Richardson v. City and County of Honolulu](#), 124 F.3d 1150, 1160 (9th Cir. 1997).

³⁶⁸ See also [City of Auburn v. Qwest Corp.](#), 260 F.3d 1160, 1171 (9th Cir. 2001) (dismissing counterclaim).

³⁶⁹ [G.C. & K.B. Inv., Inc. v. Wilson](#), 326 F.3d 1096, 1109 (9th Cir. 2003); [Circuit City Stores, Inc. v. Najd](#), 294 F.3d 1104, 1109 (9th Cir. 2002) (reversing sanction); [Christian v. Mattel, Inc.](#), 286 F.3d 1118, 1126 (9th Cir. 2002); [Barber v. Miller](#), 146 F.3d 707, 709 (9th Cir. 1998); [Security Farms v. International Bhd. of Teamsters](#), 124 F.3d 999, 1016 (9th Cir. 1997) (no abuse of discretion).

assessment of the evidence. See [Retail Flooring Dealers](#), 339 F.3d at 1150; [Patelco Credit Union v. Sahni](#), 262 F.3d 897, 913 (9th Cir. 2001).³⁷⁰

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).³⁷¹

The district court's choice of sanctions is reviewed for an abuse of discretion. See [United Nat. Ins. Co. v. R&D Latex Corp.](#), 242 F.3d 1102, 1115 (9th Cir. 2001); [United States v. Wunsch](#), 84 F.3d 1110, 1114 (9th Cir. 1996).

a. Local Rules

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. See [Mabe v. San Bernardino County](#), 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); [Big Bear Lodging Assoc. v. Snow Summit, Inc.](#), 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); *but see* [United States v. Wunsch](#), 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

b. Supervision of Attorneys

Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. See [Erickson v. Newmar Corp.](#), 87 F.3d 298, 300 (9th Cir. 1996).

The district court's findings as to whether an attorney acted recklessly or in bad faith are reviewed for clear error. [Pacific Harbor Capital Inc. v. Carnival Air Lines, Inc.](#), 210 F.3d 1112, 1117 (9th Cir. 2000).

³⁷⁰ [Weissman v. Quail Lodge, Inc.](#), 179 F.3d 1194, 1198 (9th Cir. 1999); [Security Farms](#), 124 F.3d at 1016.

³⁷¹ See [Avery Dennison Corp. v. Allendale Mut. Ins. Co.](#), 310 F.3d 1114, 1117 (9th Cir. 2002) (affirming); [Fink v. Gomez](#), 239 F.3d 989, 994 (9th Cir. 2001) (reversing); [Coleman v. Quaker Oats Co.](#), 232 F.3d 1271, 1297 (9th Cir. 2000) (affirming); *see also* [In re Marino](#), 37 F.3d 1354, 1358 (9th Cir. 1994) (bankruptcy court).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 26. Disqualifying Counsel.

c. Inherent Powers

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 \(1991\)](#).³⁷²

d. Contempt

A district court's civil contempt order that includes imposition of sanctions is reviewed for an abuse of discretion. See [Irwin v. Mascott, 370 F.3d 924, 931 \(9th Cir. 2004\)](#).³⁷³

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 20. Contempt.

e. [28 U.S.C. § 1927](#)

Sanctions imposed pursuant to [28 U.S.C. § 1927](#) are reviewed for an abuse of discretion. See [Gomez v. Vernon, 255 F.3d 1118, 1135 \(9th Cir. 2001\)](#); [GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 \(9th Cir. 1994\)](#); see also [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).

³⁷² See also [Doi v. Halekulani Corp., 276 F.3d 1131, 1140 \(9th Cir. 2002\)](#) (sanction imposed for refusal to sign settlement agreement); [Gomez v. Vernon, 255 F.3d 1118, 1134 \(9th Cir. 2001\)](#); [F.J. Hanshaw Enter. v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 \(9th Cir. 2001\)](#); [Hernandez v. City of El Monte, 138 F.3d 393, 398 \(9th Cir. 1998\)](#) (dismissing for “judge-shopping”).

³⁷³ [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 \(9th Cir. 1997\)](#); see also [In re Dyer, 322 F.3d 1178, 1191 \(9th Cir. 2003\)](#) (bankruptcy court).

The denial of sanctions sought under § 1927 is reviewed for an abuse of discretion. See [Barber v. Miller](#), 146 F.3d 707, 709 (9th Cir. 1998).

f. Discovery Sanctions

The imposition of or refusal to impose discovery sanctions is reviewed for an abuse of discretion. See [Paladin Assocs., Inc. v. Montana Power Co.](#), 328 F.3d 1145, 1164-65 (9th Cir. 2003).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 24. Discovery, a. Discovery Sanctions.

75. Service of Process

The district court's decision regarding the sufficiency of service of process is reviewed for an abuse of discretion. See [Rio Prop., Inc. v. Rio Int'l Interlink](#), 284 F.3d 1007, 1014 (9th Cir. 2002). District courts have discretion to extend the service of process period. See [United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.](#), 366 F.3d 767, 772 (9th Cir. 2004); [Mann v. American Airlines](#), 324 F.3d 1088, 1090 (9th Cir. 2003).

76. Severance

The district court's decision on a motion to sever is reviewed for an abuse of discretion. See [Coleman v. Quaker Oats Co.](#), 232 F.3d 1271, 1297 (9th Cir. 2000); [Coughlin v. Rogers](#), 130 F.3d 1348, 1351 (9th Cir. 1997). The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. See [Hangarter v. Provident Life & Acc. Ins. Co.](#), 373 F.3d 998, 1021 (9th Cir. 2004); [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. See [Davis v. Mason County](#), 927 F.2d 1473, 1479 (9th Cir. 1991), *overruled on other grounds*, [Davis v. City and County of San Francisco](#), 976 F.2d 1536 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993).

77. Sovereign Immunity

The existence of sovereign immunity is a question of law reviewed de novo. See [Orff v. United States](#), 358 F.3d 1137, 1142 (9th Cir. 2004).³⁷⁴ Dismissals based on sovereign immunity are reviewed de novo. See [Blaxland v. Commonwealth Dir. of Public Prosecutions](#), 323 F.3d 1198, 1203 (9th Cir. 2003) (foreign sovereign immunity); [Steel v. United States](#), 813 F.2d 1545, 1548 (9th Cir. 1987).

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. See [Marceau v. Blackfeet Housing Authority](#), 455 F.3d 974 (9th Cir. 2006); [Linneen v. Gila River Indian Community](#), 276 F.3d 489, 492 (9th Cir. 2002). Whether Congress has abrogated an Indian tribe's sovereign immunity is a question of statutory interpretation also reviewed de novo. See [Krystal Energy Co. v. Navajo Nation](#), 357 F.3d 1055, 1056 (9th Cir. 2004); [DeMontiney v. United States](#), 255 F.3d 801, 805 (9th Cir. 2001).

Immunity under the Eleventh Amendment presents questions of law reviewed de novo. See [Cholla Ready Mix, Inc. v. Civish](#), 382 F.3d 969, 973 (9th Cir. 2004); [Lovell v. Chandler](#), 303 F.3d 1039, 1050 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).³⁷⁵ Whether a party is immune under the Eleventh Amendment is also reviewed de novo. See [Holz v. Nenana City Pub. Sch. Dist.](#), 347 F.3d 1176, 1179 (9th Cir. 2003).³⁷⁶

78. Special Masters

The district court has discretion to appoint a special master and to decide the extent of duties. See [Jaros v. E.I. Dupont](#), 292 F.3d 1124, 1138 (9th Cir. 2002). The district court's order of reference to a special master is

³⁷⁴ [United States ex. rel. Ali v. Daniel, Mann, Johnson & Mendenhall](#), 355 F.3d 1140, 1144 (9th Cir. 2004); [Porter v. Jones](#), 319 F.3d 483, 489 (9th Cir. 2003); [In re Bliemeister](#), 296 F.3d 858, 861 (9th Cir. 2002) (bankruptcy proceedings); *see also* [Sierra Club v. Whitman](#), 268 F.3d 898, 901 (9th Cir. 2001) (whether immunity has been waived is a question of law reviewed de novo).

³⁷⁵ *See also* [Bethel Native Corp. v. Department of the Interior](#), 208 F.3d 1171, 1173 (9th Cir. 2000); [Yakama Indian Nation v. Washington Dep't of Revenue](#), 176 F.3d 1241, 1245 (9th Cir. 1999).

³⁷⁶ [Cardenas v. Anzai](#), 311 F.3d 929, 934 (9th Cir. 2002); [Eason v. Clark County Sch. Dist.](#), 303 F.3d 1137, 1140 (9th Cir. 2002), *cert. denied*, 537 U.S. 1190 (2003).

reviewed for an abuse of discretion. See [United States v. Washington](#), 157 F.3d 630, 660 (9th Cir. 1998) (concurring opinion); [Burlington N. R.R. v. Washington Dep't of Revenue](#), 934 F.2d 1064, 1071 (9th Cir. 1991); [United States v. Suquamish Indian Tribe](#), 901 F.2d 772, 774 (9th Cir. 1990). The court's refusal to enlist the services of a special master is also reviewed for an abuse of discretion. See [Lobatz v. U.S. West Cellular, Inc.](#), 222 F.3d 1142, 1149 (9th Cir. 2000). The district court has broad discretion to set the special master's compensation. See [Cordoza v. Pacific States Steel Corp.](#), 320 F.3d 989, 1001 (9th Cir. 2003).

A special master has discretion whether to permit discovery or hold evidentiary hearings. See [United States v. Clifford Matley Family Trust](#), 354 F.3d 1154, 1161 (9th Cir. 2004). Legal conclusions are reviewed de novo. See *id.* at 1163 n.10. Factual findings are entitled to deference and reviewed for clear error. See [Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth.](#), 263 F.3d 1041, 1049 (9th Cir. 2001).

79. Standing

The district court's determination whether a party has standing is reviewed de novo. See [Buono v. Norton](#), 371 F.3d 543, 546 (9th Cir. 2004); [Mortensen v. County of Sacramento](#), 368 F.3d 1082, 1086 (9th Cir. 2004); *but see* [In re P.R.T.C., Inc. \(Duckor Spradling & Metzger v. Baum Trust\)](#), 177 F.3d 774, 777 (9th Cir. 1999) (noting whether individual has standing to appeal is a question of fact reviewed for clear error).³⁷⁷

80. Stare Decisis

³⁷⁷ See also [Smith v. Pacific Props. & Dev. Corp.](#), 358 F.3d 1097, 1101 (9th Cir. 2004) (representational standing); [Glen Holly Entm't Inc. v. Tektronix Inc.](#), 352 F.3d 367, 369 (9th Cir. 2003) (antitrust standing); [Carroll v. Nakatani](#), 342 F.3d 934, 940 (9th Cir. 2003) (explaining standing requirements); [PLANS, Inc. v. Sacramento City Unified Sch.](#), 319 F.3d 504, 507 (9th Cir. 2003) (organizational standing); [Bernhardt v. County of Los Angeles](#), 279 F.3d 862, 867 (9th Cir. 2002) (reviewing district court's sua sponte dismissal of complaint on its face in part for lack of standing); [Columbia Basin Apartment Ass'n v. City of Pasco](#), 268 F.3d 791, 797 (9th Cir. 2001) (reviewing standing sua sponte even though not raised by either party).

Whether stare decisis applies is a question of law reviewed de novo. See [In re Watts](#), 298 F.3d 1077, 1079 (9th Cir. 2002) (BAP); [Baker v. Delta Air Lines, Inc.](#), 6 F.3d 632, 637 (9th Cir. 1993).

81. Statutes of Limitation

The district court's dismissal based on a statute of limitation is reviewed de novo. See [Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura](#), 371 F.3d 1046, 1050 (9th Cir. 2004); [Erlin v. United States](#), 364 F.3d 1127, 1130 (9th Cir. 2004).³⁷⁸ Thus, whether a claim is barred by a statute of limitations is reviewed de novo. See [Oja v. U.S. Army Corps of Engineers](#), 440 F.3d 1122, 1127 (9th Cir. 2006); [Immigrant Assistance Project v. INS](#), 306 F.3d 842, 856 (9th Cir. 2002). A ruling on the appropriate statute of limitations is a question of law reviewed de novo. See [Northwest Airlines, Inc. v. Camacho](#), 296 F.3d 787, 789 (9th Cir. 2002).³⁷⁹

When the statute of limitations begins to run is a question of law reviewed de novo. See [Oja](#), 440 F.3d at 1127; [Erlin](#), 364 F.3d at 113. When the question turns on what a reasonable person should know, a mixed question of law and fact is presented that is reviewed for clear error. See [Erlin](#), 364 F.3d at 1130; [Bartleson v. United States](#), 96 F.3d 1270, 1274 (9th Cir. 1996). Whether an action is governed by an analogous limitations period is a legal conclusion reviewed de novo. See [Livingston Sch. Dist. v. Keenan](#), 82 F.3d 912, 915 (9th Cir. 1996); [Telink, Inc. v. United States](#), 24 F.3d 42, 46 (9th Cir. 1994).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 29. Equitable Estoppel and Equitable Tolling.

³⁷⁸ [Olsen v. Idaho State Bd. of Medicine](#), 363 F.3d 916, 922 (9th Cir. 2004) (42 U.S.C. § 1983); [Jenkins v. Johnson](#), 330 F.3d 1146, 1149 (9th Cir. 2003) (habeas); [Daviton v. Columbia/HCA Healthcare Corp.](#), 241 F.3d 1131, 1135 (9th Cir. 2001) (en banc).

³⁷⁹ See also [S.V. v. Sherwood Sch. Dist.](#), 254 F.3d 877, 879 (9th Cir. 2001); [United States ex rel. Lujan v. Hughes Aircraft Co.](#), 162 F.3d 1027, 1034 (9th Cir. 1998); [Burrey v. Pacific Gas and Elec. Co.](#), 159 F.3d 388, 396 (9th Cir. 1998); [Bresson v. Commissioner](#), 213 F.3d 1173, 1174 (9th Cir. 2000) (tax court).

82. Stays

A district court's stay order is reviewed for an abuse of discretion. See [Lockyer v. Mirant Corp.](#), 398 F.3d 1098, 1105 (9th Cir. 2005) (noting “somewhat less deferential” standard); [Yong v. INS](#), 208 F.3d 1116, 1119 (9th Cir. 2000) (same); [Intel Corp. v. Advanced Micro Devices, Inc.](#), 12 F.3d 908, 912 (9th Cir. 1993) (noting abuse of discretion standard here is stricter than the flexible abuse of discretion standard used in other contexts).³⁸⁰

Whether the automatic stay provisions of the Bankruptcy Act have been violated is a question of law reviewed de novo. See [Eskanos & Adler v. Leetien](#), 309 F.3d 1210, 1213 (9th Cir. 2002); [In re Pettit](#), 217 F.3d 1072, 1077 (9th Cir. 2000). Whether a party has willfully violated the automatic stay is a question of fact reviewed for clear error. See [Eskanos & Adler](#), 309 F.3d at 1213. The bankruptcy court's decision to grant or deny relief from an automatic stay is reviewed, however, for an abuse of discretion. See [In re Cybernetic Servs., Inc.](#), 252 F.3d 1039, 1045 (9th Cir. 2001); [In re Gruntz](#), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc). The bankruptcy court's decision to impose sanctions for violating the automatic stay is reviewed for an abuse of discretion. See [In re Dyer](#), 322 F.3d 1178, 1191 (9th Cir. 2003). The amount of the sanction is also reviewed for an abuse of discretion. See [Eskanos & Adler](#), 309 F.3d at 1213.

83. Striking

The district court's ruling on a motion to strike is reviewed for an abuse of discretion. See [Hambleton Bros. Lumber Co. v. Balkin Enterprises Inc.](#), 397 F.3d 1217, 1224 n. 4 (9th Cir. 2005).³⁸¹

³⁸⁰ See, e.g., [Clinton v. Jones](#), 520 U.S. 681, 706-07 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”); [Porter v. Jones](#), 319 F.3d 483, 491 (9th Cir. 2003) (abstention); [Rohan v. Woodford](#), 334 F.3d 803, 817 (9th Cir.) (habeas), cert. denied, 540 U.S. 1069 (2003); [United States v. Peninsula Communications, Inc.](#), 287 F.3d 832, 838 (9th Cir. 2002) (reviewing denial of motion for stay).

³⁸¹ See, e.g., [El Pollo Loco, Inc. v. Hashim](#), 316 F.3d 1032, 1038 (9th Cir. 2003) (untimely defense); [Neighbors of Cuddy Mountain v. Alexander](#), 303 F.3d 1059, 1070 (9th Cir. 2002) (redundant counts); [United States ex rel. Newsham v. Lockheed Missiles, Inc.](#), 190 F.3d 963, 968 (9th Cir. 1999)

84. Subject Matter Jurisdiction

The existence of subject matter jurisdiction is a question of law reviewed de novo. See [Marceau v. Blackfeet Housing Authority](#), 455 F.3d 974, 977 (9th Cir. 2006); [Coyle v. P.T. Garuda Indonesia](#), 363 F.3d 979, 984 n.7 (9th Cir. 2004); [United States v. Peninsula Comm., Inc.](#), 287 F.3d 832, 836 (9th Cir. 2002).³⁸² The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error. See [Coyle](#), 363 F.3d at 984; [Schnabel v. Lui](#), 302 F.3d 1023, 1029 (9th Cir. 2002); [Peninsula Comm.](#), 282 F.3d at 836.

The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. See [Coyle](#), 363 F.3d at 984 n.7.³⁸³

85. Subpoenas

The trial court's denial of a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. [In re Grand Jury Subpoena, Dated April 18, 2003](#), 383 F.3d 905, 909 (9th Cir. 2004); [In re Grand Jury Subpoena](#), 357 F.3d 900, 906 (9th Cir. 2004).

A district court's decision whether to enforce an administrative subpoena is reviewed de novo. See [In re Estate of Covington](#), 450 F.3d 917, 919 n.9 (9th Cir. 2006); [NLRB v. The Bakersfield Californian](#), 128 F.3d

(counterclaims); [Federal Sav. & Loan Ins. Corp. v. Gemini Mgmt.](#), 921 F.2d 241, 243 (9th Cir. 1990) (affirmative defenses).

³⁸² See also [Luong v. Circuit City Stores, Inc.](#), 368 F.3d 1109, 1111 n.2 (9th Cir. 2004); [Chang v. United States](#), 327 F.3d 911, 922 (9th Cir. 2003); [A-Z Int'l v. Phillips](#), 323 F.3d 1141, 1145 (9th Cir. 2003); [Moe v. United States](#), 326 F.3d 1065, 1067 (9th Cir. (refusing to dismiss), cert. denied, 540 U.S. 877 (2003)); [Hexom v. Oregon Dep't of Transp.](#), 177 F.3d 1134, 1135 (9th Cir. 1999) (reversing district court's finding of no jurisdiction).

³⁸³ See also [Blaxland v. Commonwealth Dir. of Public Prosecutions](#), 323 F.3d 1198, 1203 (9th Cir. 2003); [Park v. Shin](#), 313 F.3d 1138, 1141 (9th Cir. 2002); [Corza v. Banco Cent. de Reserva Del Peru](#), 243 F.3d 519, 522 (9th Cir. 2001); [Alder v. Federal Republic of Nigeria](#), 219 F.3d 869, 874 (9th Cir. 2000).

[1339, 1341 \(9th Cir. 1997\)](#); [FDIC v. Garner, 126 F.3d 1138, 1142 \(9th Cir. 1997\)](#).

A court's decision to enforce a summons is reviewed for clear error. See [United States v. Blackman, 72 F.3d 1418, 1422 \(9th Cir. 1995\)](#); [Fortney v. United States, 59 F.3d 117, 119 \(9th Cir. 1995\)](#) (denying motion). The district court's conclusion that it lacks subject matter jurisdiction over a petition to quash IRS summons is reviewed de novo. See [Ip v. United States, 205 F.3d 1168, 1170 \(9th Cir. 2000\)](#). Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. See [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. See [David H. Tedder & Assocs. v. United States, 77 F.3d 1166, 1169 \(9th Cir. 1996\)](#); but see [Crystal v. United States, 172 F.3d 1141, 1145 n.5 \(9th Cir. 1999\)](#) (rejecting clear error standard and applying de novo review when appeal was from grant if summary judgment).

86. Substitution of Parties

A court's decision regarding substitution of parties is reviewed for an abuse of discretion. See [In re Bernal, 207 F.3d 595, 598 \(9th Cir. 2000\)](#) (noting [Fed. R. Civ. P. 25\(c\)](#) leaves the substitution decision to the "court's sound discretion"); [United States v. F. D. Rich Co., 437 F.2d 549, 552 \(9th Cir. 1970\)](#) (noting district court has "ample discretionary power to substitute parties"). Mandatory substitution of the United States as a defendant party is reviewed, however, de novo. See [Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 875 \(9th Cir. 1992\)](#) (FELRTCA).

87. Summary Judgment

a. Generally

A district court's decision to grant³⁸⁴, partially grant³⁸⁵, or deny³⁸⁶ summary judgment or a summary adjudication motion³⁸⁷ is reviewed de

³⁸⁴ See [Quest Comm'ns, Inc. v. Berkeley, 433 F.3d 1253, 1256 \(9th Cir. 2006\)](#); [Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 \(9th Cir. 2002\)](#) (en banc), cert. denied, [123 S. Ct. 1573](#) (2003); [Thrifty Oil Co. v. Bank of America Nat. Trust, 322 F.3d 1039, 1046 \(9th Cir. 2003\)](#) (bankruptcy court);

novo. See, e.g., [Universal Health Servs., Inc. v. Thompson](#), 363 F.3d 1013, 1019 (9th Cir. 2004); but see [Carey v. Nevada Gaming Control Bd.](#), 279 F.3d 873, 877 n.1 (9th Cir. 2002) (declining to review denial of summary judgment). A district court’s decision on cross motions for summary judgment³⁸⁸ is also reviewed de novo. See [Arakaki v. Hawaii](#), 314 F.3d 1091, 1094 (9th Cir. 2002).

Under [Federal Rule of Civil Procedure 56\(c\)](#), the appellate court’s review is governed by the same standard used by the trial court. [Quest Comm’ns, Inc. v. Berkeley](#), 433 F.3d 1253, 1256 (9th Cir. 2006); see also [Suzuki Motor Corp. v. Consumers Union, Inc.](#), 330 F.3d 1110, 1131 (9th Cir.), cert. denied, 540 U.S. 983 (2003).

On review, 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 [Olsen v. Idaho State Bd. of Medicine](#), 363 F.3d 916, 922 (9th Cir. 2004).³⁸⁹ The court must not weigh

[Miller v. Commissioner](#), 310 F.3d 640, 642 (9th Cir. 2002) (tax court).

³⁸⁵ See [United States v. \\$100,348 in U.S. Currency](#), 354 F.3d 1110, 1116 (9th Cir. 2004); [King Jewelry, Inc. v. Federal Express Corp.](#), 316 F.3d 961, 963 (9th Cir. 2003); [Delta Savings Bank v. United States](#), 265 F.3d 1017, 1021 (9th Cir. 2001).

³⁸⁶ See [Moreno v. Baca](#), 431 F.3d 633, 638 (9th Cir. 2005); [Lee v. Gregory](#), 363 F.3d 931, 932 (9th Cir. 2004) (qualified immunity); [California v. Neville Chem. Co.](#), 358 F.3d 661, 665 (9th Cir. 2004) (CERCLA’s statute of limitations); [Padfield v. AIG Life Ins. Co.](#), 290 F.3d 1121, 1124 (9th Cir. 2002) (limitations on reviewing denials of summary judgment); [Brewster v. Shasta County](#), 275 F.3d 803, 806 (9th Cir. 2001) (Section 1983 liability).

³⁸⁷ See [Fontana v. Haskin](#), 262 F.3d 871, 876 (9th Cir. 2001); [Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery](#), 150 F.3d 1042, 1046 (9th Cir. 1998); [California v. Campbell](#), 138 F.3d 772, 776 (9th Cir. 1998).

³⁸⁸ See [Children’s Hosp. Med. Ctr. v. California Nurses Ass’n](#), 283 F.3d 1188, 1190 (9th Cir. 2002); [Chevron USA, Inc. v. Cayetano](#), 224 F.3d 1030, 1037 (9th Cir. 2000) (reversing summary judgment notwithstanding parties’ agreement in cross motions that no genuine issue of material facts remained).

³⁸⁹ See also [Far Out Prods., Inc. v. Oscar](#), 247 F.3d 986, 992 (9th Cir. 2002) (defining “genuine” and “material”).

the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. See [Balint v. Carson City](#), 180 F.3d 1047, 1054 (9th Cir. 1999).

Summary judgment may be appropriate when a mixed question of fact and law involves undisputed underlying facts. See [EEOC v. UPS](#), 424 F.3d 1060, 1068 (9th Cir. 2005); [Colacurcio v. City of Kent](#), 163 F.3d 545, 549 (9th Cir. 1998). However, summary judgment is not proper if material factual issues exist for trial. See [Simo v. Union of Needletrades](#), 322 F.3d 602, 610 (9th Cir.), *cert. denied*, 540 U.S. 873 (2003).

Summary judgment may be affirmed on any ground supported by the record. See [Enlow v. Salem-Keizer Yellow Cab Co.](#), 371 F.3d 645, 649 (9th Cir. 2004).³⁹⁰

b. Related Decisions

The district court's decision whether to permit additional discovery pursuant to [Federal Rule of Civil Procedure 56\(f\)](#) is reviewed for an abuse of discretion. See [Burlington Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes](#), 323 F.3d 767, 773 (9th Cir. 2003).³⁹¹ “We will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment.” [Byrd v. Guess](#), 137 F.3d 1126, 1131 (9th Cir. 1998) (quoting [Qualls v. Blue Cross, Inc.](#), 22 F.3d 839, 844 (9th Cir. 1994)).³⁹²

³⁹⁰ See also [Thrifty Oil Co. v. Bank of America Nat. Trust](#), 322 F.3d 1039, 1046 (9th Cir. 2003) (bankruptcy court).

³⁹¹ See [Panatronic USA v. AT&T Corp.](#), 287 F.3d 840, 846 (9th Cir. 2002) (denying motion to reopen discovery).

³⁹² [Maljack Prods. v. Goodtimes Home Video Corp.](#), 81 F.3d 881, 888 (9th Cir. 1996) (No abuse of discretion where the movant failed to show how allowing additional discovery would have precluded summary judgment); see also [United States v. A.E. Lopez Enter., Ltd.](#), 74 F.3d 972, 975 (9th Cir. 1996). See [Chance v. Pac-Tel Teletrac, Inc.](#), 242 F.3d 1151, 1161 n.6 (9th Cir. 2001) (No abuse of discretion where the district court denies further discovery and the movant has failed diligently to pursue discovery in the past.); see also [Nidds v. Schindler Elevator Corp.](#), 113 F.3d 912, 921 (9th Cir. 1996).

Note that if 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 v. Guess*, 137 F.3d 1126, 1135 \(9th Cir. 1998\)](#); [*Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 \(9th Cir. 1996\)](#).

Evidentiary rulings made in the context of summary judgment are reviewed for an abuse of discretion. See [*Fonseca v. Sysco Food Serv., Inc.*, 374 F.3d 840, 845 \(9th Cir. 2004\)](#).³⁹³

The district court's refusal to reconsider or to vacate summary judgment is reviewed for an abuse of discretion. [*Minnesota Life Ins. Co. v. Ensley*, 174 F.3d 977, 987 \(9th Cir. 1999\)](#).³⁹⁴

c. FOIA Cases

In a FOIA case, instead of determining whether a genuine issue of material fact exists, this circuit employs a special two-step standard to review the grant of summary judgment. See [*Lion Raisins Inc. v. United States Dep't of Agriculture*, 354 F.3d 1072, 1078 \(9th Cir. 2004\)](#). 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 *id.*; see also [*TPS, Inc. v. United States Dep't of Def.*, 330 F.3d 1191, 1194 \(9th Cir. 2003\)](#) (noting some cases have applied different standards to summary judgment in a FOIA case).

When parties do not dispute whether the court had an adequate basis for its decision, the court's conclusion that documents are exempt from disclosure is reviewed de novo. See [*Lissner v. United States Custom Serv.*](#),

³⁹³ See also [*Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 \(9th Cir. 2002\)](#) (permitting defendants to withdraw admissions); [*Domingo v. T.K.*, 289 F.3d 600, 605 \(9th Cir. 2002\)](#) (limited review "even when the rulings determine the outcome of a motion for summary judgment"); [*Orr v. Bank of America*, 285 F.3d 764, 773 \(9th Cir. 2002\)](#) (exclusion of evidence); [*Sea-Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 \(9th Cir. 2002\)](#) (inclusion of evidence).

³⁹⁴ See also [*School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 \(9th Cir. 1993\)](#).

[241 F.3d 1220, 1222 \(9th Cir. 2001\)](#); [Klamath Water Users Prot. Ass'n v. DOI, 189 F.3d 1034, 1037 \(9th Cir. 1999\)](#) (noting “where the adequacy of the factual basis is not disputed, the district court’s legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo.”)

88. Summons

A dismissal for failure to timely serve a summons and complaint is reviewed for an abuse of discretion. [In re Sheehan, 253 F.3d 507, 511 \(9th Cir. 2001\)](#). A court’s decision to quash a 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 a 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 a 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).

89. 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. *See* [Planned Parenthood of S. Ariz. v. Neely, 130 F.3d 400, 402 \(9th Cir. 1997\)](#); [Keith v. Volpe, 858 F.2d 467, 473 \(9th Cir. 1988\)](#).

90. Supplemental Jurisdiction

Whether a district court has supplemental (pendent) jurisdiction is reviewed de novo. *See* [Hoeck v. City of Portland, 57 F.3d 781, 784-85 \(9th Cir. 1995\)](#). A district court’s decision whether to retain jurisdiction over supplemental claims when the original federal claims are dismissed is reviewed for an abuse of discretion. *See* [Tritchler v. County of Lake, 358 F.3d 1150, 1153 \(9th Cir. 2004\)](#); [Bryant v. Adventist Health Sys./West, 289 F.3d 1162, 1165 \(9th Cir. 2002\)](#).³⁹⁵

³⁹⁵ *See also* [Patel v. Penman, 103 F.3d 868, 877 \(9th Cir. 1996\)](#); [Brady v. Brown, 51 F.3d 810, 816 \(9th Cir. 1995\)](#) (district court should weigh factors

Note, however, the district court has no discretion to assert jurisdiction over supplemental claims when it dismisses the federal claims for lack of subject matter jurisdiction. See [Scott v. Pasadena Unified Sch. Dist.](#), 306 F.3d 646, 664 (9th Cir. 2002), cert. denied, 538 U.S. 1031 (2003); [Herman Family Revocable Trust v. Teddy Bear](#), 254 F.3d 802, 806 (9th Cir. 2001).

91. Venue

A district court's venue ruling is reviewed de novo. See [Immigrant Assistance Project v. INS](#), 306 F.3d 842, 868 (9th Cir. 2002).³⁹⁶ The court's dismissal for improper venue is reviewed de novo. See [Myers v. Bennett Law Offices](#), 238 F.3d 1068, 1071 (9th Cir. 2001). Any underlying factual findings are reviewed for clear error. [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).

Note that a district court's decision to transfer or dismiss an action on the ground of improper venue pursuant to [28 U.S.C. § 1404\(a\)](#) is reviewed for an abuse of discretion. See [Jones v. GNC Franchising, Inc.](#), 211 F.3d 495, 498 (9th Cir. 2000); [Bruns v. National Credit Union Admin.](#), 122 F.3d 1251, 1253 (9th Cir. 1997).³⁹⁷

92. Vexatious Litigants

A district court's vexatious litigant order is reviewed for an abuse of discretion. See [De Long v. Hennessey](#), 912 F.2d 1144, 1146 (9th Cir. 1990); see also [Estrada v. Speno & Cohen](#), 244 F.3d 1050, 1056-57 (9th Cir. 2001) (explaining what the district court must consider before order default judgment against a party for vexatious litigation tactics).

such as economy, convenience, fairness, and comity).

³⁹⁶ [Myers v. Bennett Law Offices](#), 238 F.3d 1068, 1071 (9th Cir. 2001); [Columbia Pictures Television v. Krypton Broad., Inc.](#), 106 F.3d 284, 288 (9th Cir. 1997) (“So long as the underlying facts are not in dispute, we review the district court’s venue determination de novo.”), rev'd on other grounds, 523 U.S. 340 (1998).

³⁹⁷ See also [Argueta v. Banco Mexicano, S.A.](#), 87 F.3d 320, 323 (9th Cir. 1996) (based on contractual forum selection clause).

A dismissal for failure to comply with a vexatious litigant order is reviewed for an abuse of discretion. See [In re Fillbach](#), 223 F.3d 1089, 1190 (9th Cir. 2000).

93. Voir Dire

A trial court's conduct during civil voir dire is reviewed for abuse of discretion. See [Scott v. Lawrence](#), 36 F.3d 871, 874 (9th Cir. 1994); [Medrano v. City of Los Angeles](#), 973 F.2d 1499, 1507-08 (9th Cir. 1992). The trial court's decision not to use a party's proposed voir dire questions was held not to be an abuse of discretion. See [Monore v. City of Phoenix](#), 248 F.3d 851, 856 (9th Cir. 2001). Additionally, a court's order to parties to make their opening statements to the entire prospective jury panel before voir dire was also not an abuse of discretion. See [In re Yagman](#), 796 F.2d 1165, 1171 (9th Cir.), *amended by* 803 F.2d 1085 (9th Cir. 1986).

94. Voluntary Dismissals

The trial court's decision to grant voluntary dismissal is reviewed for abuse of discretion. See [Smith v. Lenches](#), 263 F.3d 972, 975 (9th Cir. 2001); [Hyde & Drath v. Baker](#), 24 F.3d 1162, 1169 (9th Cir. 1994); [Bell v. Kellogg](#), 922 F.2d 1418, 1421-22 (9th Cir. 1991). In making the decision, the court must consider whether the defendant will suffer legal prejudice as a result of the dismissal. [Smith](#), 263 F.3d at 975; [Hyde & Drath](#), 24 F.3d at 1169. The court's determination of the terms and conditions of dismissal under Rule 41(a)(2) is reviewed for an abuse of discretion. [Hargis v. Foster](#), 312 F.3d 404, 412 (9th Cir. 2002); [Koch v. Hankins](#), 8 F.3d 650, 652 (9th Cir. 1993).

The court's denial of a motion for voluntary dismissal is also reviewed for an abuse of discretion. [In re Exxon Valdez](#), 102 F.3d 429, 432 (9th Cir. 1996); [Westlands Water Dist. v. United States](#), 100 F.3d 94, 96 (9th Cir. 1996).

Whether a court possesses the authority to deny or vacate a voluntary dismissal is a question of law reviewed de novo. See [American Soccer Co. v. Score First Enter.](#), 187 F.3d 1108, 1110 (9th Cir. 1999). A district court's interpretation of Rule 41(a) is reviewed de novo. See [Swedberg v. Marotzke](#), 339 F.3d 1139, 1141 (9th Cir. 2003).

C. Trial Decisions in Civil Cases

1. Alter Ego

A district court's application of the alter ego doctrine is reviewed for clear error. See [*F.J. Hanshaw Enter. v. Emerald River Dev.*, 244 F.3d 1128, 1135 \(9th Cir. 2001\)](#); [*Commodity Futures Trading Comm. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 \(9th Cir. 2000\)](#); [*McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 358 \(9th Cir. 1996\)](#).

2. Authentication

The district court's ruling on the authenticity of proffered evidence is reviewed for an abuse of discretion. See [*Orr v. Bank of America*, 285 F.3d 764, 775 \(9th Cir. 2002\)](#) (summary judgment); [*Security Farms v. International Bhd. of Teamsters*, 124 F.3d 999, 1011 \(9th Cir. 1997\)](#) (summary judgment). The trial court's determination that there is a sufficient evidentiary basis to establish authenticity is also reviewed for an abuse of discretion. See [*E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1398 \(9th Cir. 1989\)](#); but see [*M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 \(9th Cir. 1983\)](#) ("Whether evidence is properly authenticated is a question of law subject to de novo review.").

3. Bench Trials

The district court's decision to conduct a bench trial is reviewed for an abuse of discretion. See [*Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 419 \(9th Cir. 1998\)](#). Following a bench trial, the judge's findings of fact are reviewed for clear error. See [*Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869, 879 \(9th Cir. 2005\)](#); [*Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 843 \(9th Cir. 2004\)](#).³⁹⁸ The district court's findings of fact must be accepted unless the reviewing court is left with a definite and firm

³⁹⁸ See also [*Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 \(9th Cir. 2003\)](#); [*Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 \(9th Cir. 2002\)](#); [*Northern Queen, Inc. v. Kinnear*, 298 F.3d 1090, 1095 \(9th Cir. 2002\)](#) (noting standard is "significantly deferential").

conviction that a mistake has been made. See [Twentieth Century Fox](#), 429 F.3d at 879; [Lentini](#), 370 F.3d at 843.³⁹⁹

The district court's computation of damages following a bench trial is reviewed for clear error. [Lentini](#), 370 F.3d at 843; [Schnabel v. Lui](#), 302 F.3d 1023, 1029 (9th Cir. 2002); [Ambassador Hotel Co. v. Wei-Chuan Inv.](#), 189 F.3d 1017, 1024 (9th Cir. 1999).⁴⁰⁰ Whether the court applied the correct legal standard, however, is reviewed de novo. See [Ambassador Hotel Co.](#), 189 F.3d at 1024.

The district court's conclusions of law following a bench trial are reviewed de novo. See [Twentieth Century Fox](#), 429 F.3d at 879; [Lentini](#), 370 F.3d at 843.⁴⁰¹

4. Best Evidence Rule

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 11. Evidentiary Rulings.

5. Bifurcation

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. See [Hangarter v. Provident Life and Accident Ins. Co.](#), 373 F.3d 998, 1021 (9th Cir. 2004) (declining to bifurcate); [Danjaq LLC v. Sony Corp.](#), 263 F.3d 942, 961 (9th Cir. 2001) (bifurcating laches from liability at start of trial); [Hilao v. Estate of Marcos](#), 103 F.3d 767, 782 (9th Cir. 1996) (trifurcation). The court has broad discretion to order separate trials under Federal Rule of Civil Procedure 42(b). [Zivkovic v. Southern California Edison Co.](#), 302 F.3d 1080, 1088 (9th Cir. 2002). The court will set aside a severance order only for an abuse of discretion. See [Coleman v. Quaker Oats Co.](#), 232 F.3d 1271, 1297 (9th Cir. 2000).

³⁹⁹ See also [Allen v. Iranon](#), 283 F.3d 1070, 1076 (9th Cir. 2002); [FDIC v. Craft](#), 157 F.3d 697, 701 (9th Cir. 1998) (“The district court’s findings are binding unless clearly erroneous.”).

⁴⁰⁰ See also [Twentieth Century Fox Film Corp. v. Entertainment Distributing](#), 429 F.3d 869, 879 (9th Cir. 2005) (attorneys’ fee award).

⁴⁰¹ See also [Zivkovic](#), 302 at 1088; [Craft](#), 157 F.3d at 701.

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 9. Bifurcation.

6. Choice of Laws

A district court's decision concerning the appropriate choice of law is reviewed de novo. See *Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 939 (9th Cir.), amended by 350 F.3d 917 (9th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).⁴⁰² Underlying factual determinations are reviewed for clear error. See *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1187 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001).

Whether a choice-of-law clause is void by operation of other law is reviewed de novo. See *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997).

The trial court's decision to enforce a forum selection clause is reviewed for an abuse of discretion. See *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004); *Chateau Des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328 F.3d 528, 530 (9th Cir.), cert. denied, 540 U.S. 1049 (2003). The court's refusal to enforce a forum selection clause is reviewed for an abuse of discretion. See *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1338 (9th Cir. 1997) (noting other circuits review de novo). Whether the parties agreed to a forum selection clause is a question of law reviewed de novo. See *Chateau Des Charmes Wines*, 328 F.3d at 530. Whether a forum selection clause is mandatory or permissive is also a question of law reviewed de novo. See *Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1036 (9th Cir. 1995). Any interpretation of state law is reviewed de novo. See *State Farm Mut. Automotive Ins. Co. v. Davis*, 937 F.2d 1415, 1418 (9th Cir. 1991).

The trial court's interpretation of Federal Rule of Civil Procedure 44.1 requiring notice of the intent to raise an issue of foreign law is reviewed de novo. See *DP Aviation v. Smiths Indus. Aerospace and Def. Sys., Ltd.*, 268

⁴⁰² *Jorgensen v. Cassidy*, 320 F.3d 906, 913 (9th Cir. 2003); *Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001); see also *In re Megafoods Stores, Inc.*, 163 F.3d 1063, 1067 (9th Cir. 1998) (bankruptcy court).

[F.3d 829, 846 \(9th Cir. 2001\)](#). The court’s determination whether the notice is “reasonable” is reviewed for an abuse of discretion. See [id.](#)

7. 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 \(9th Cir. 1989\)](#) (trial court has broad discretion in controlling closing arguments). 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 \(9th Cir. 1999\)](#); see also [Galdamez v. Potter, 415 F.3d 1015, 1026-27 \(9th Cir. 2005\)](#) (noting that district court may have abused discretion by changing verdict form after submission to jury, but that the error was harmless). When there is no objection to conduct during closing argument, review is limited to plain error. See [Hemmings v. Tidyman’s, Inc., 285 F.3d 1174, 1193 \(9th Cir. 2002\)](#); [Bird v. Glacier Elec. Coop. Inc., 255 F.3d 1136, 1144-48 \(9th Cir. 2001\)](#).

8. Credibility Findings

Credibility findings are reviewed for clear error and entitled to special deference. See [Anderson v. City of Bessemer, 470 U.S. 564, 573 \(1985\)](#); [Allen v. Iranon, 283 F.3d 1070, 1078 n.8 \(9th Cir. 2002\)](#) (trial court’s finding that a witness is not credible is entitled to special deference).⁴⁰³ Note that trial judges have broad discretion to comment upon the evidence, including the credibility of witnesses. [Navellier v. Sletten, 262 F.3d 923, 942 \(9th Cir. 2001\)](#).

⁴⁰³ [Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1119 \(9th Cir. 2000\)](#); [Hernandez v. City of El Monte, 138 F.3d 393, 398 \(9th Cir. 1998\)](#); see also [McClure v. Thompson, 323 F.3d 1233, 1241 \(9th Cir.\) \(habeas\), cert. denied, 540 U.S. 1051 \(2003\)](#).

9. Cross-Examination

The district court's decision to limit the scope and extent of cross-examination is reviewed for an abuse of discretion. See [Dorn v. Burlington N. Santa Fe R.R.](#), 397 F.3d 1183, 1192 (9th Cir. 2005); [Robertson v. Burlington N. R.R.](#), 32 F.3d 408, 411 (9th Cir. 1994); see also [United States v. Real Property Located at 22 Santa Barbara Dr.](#), 264 F.3d 860, 873 (9th Cir. 2001) (applying harmless error review).

10. Directed Verdict

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 16. Judgment as a Matter of Law.

11. Evidentiary Rulings

a. Generally

Evidentiary rulings are reviewed for an abuse of discretion. See [Tritchler v. County of Lake](#), 358 F.3d 1150, 1155 (9th Cir. 2004); [McEuin v. Crown Equip. Corp.](#), 328 F.3d 1028, 1032 (9th Cir.), cert. denied, 540 U.S. 1160 (2003).⁴⁰⁴ 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 [Tritchler](#), 358 F.3d at 1155; [McEuin](#), 328 F.3d at 1032; [Geurin v. Winston Indus., Inc.](#), 316 F.3d 879, 882 (9th Cir. 2002). Prejudice means that, more probable than not, the lower court's error tainted the verdict. See [McEuin](#), 328 F.3d at 1032; [Geurin](#), 316 F.3d at 882.

In reviewing the district court's exclusion of evidence as a sanction, this court first engages in de novo review of whether the district court had the power to exclude the evidence. If such a power exists, this court reviews the district court's imposition of the sanction for abuse of discretion. See

⁴⁰⁴ See, e.g., [Ostad v. Oregon Health Sciences Univ.](#), 327 F.3d 876, 885 (9th Cir. 2003) (hearsay); [Geurin v. Winston Indus., Inc.](#), 316 F.3d 879, 882 (9th Cir. 2002) (exclusion of evidence); [White v. Ford Motor Co.](#), 312 F.3d 998, 1006 (9th Cir. 2002) (admission of expert testimony), amended by [335 F.3d 833](#) (9th Cir. 2003).

[*S.M. v. J.K.*, 262 F.3d 914, 917 \(9th Cir. 2001\)](#); [*Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1556-57 \(9th Cir. 1996\)](#).⁴⁰⁵

b. Attorney testimony

Whether a party's attorney should be permitted to testify is a decision reviewed for an abuse of discretion. See [*Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1391 \(9th Cir. 1993\)](#).

c. Extra-record evidence

The district court's decision to exclude extra-record evidence is reviewed for an abuse of discretion. See [*San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 \(9th Cir. 2002\)](#) (noting exception that permits district court to review evidence outside the administrative record); [*Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 \(9th Cir. 1996\)](#).

d. [Fed. R. Evid. 702](#)

The admissibility of scientific evidence under [Fed. R. Evid. 702](#) is reviewed for an abuse of discretion. See [*Elsayed Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063 \(9th Cir. 2002\)](#) (explaining Rule 702's requirements), amended by [319 F.3d 1073](#) (9th Cir. 2003).⁴⁰⁶ The district court has discretion to determine whether to hold an evidentiary hearing before ruling on the admissibility of scientific evidence. See [*In re Hanford Nuclear Reservation Lit.*, 292 F.3d 1124, 1138 \(9th Cir. 2002\)](#).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 12. Experts.

⁴⁰⁵ 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 because plaintiff disregarded order is reviewed for an abuse of discretion).

⁴⁰⁶ See also [*Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 939 \(9th Cir. 2001\)](#); [*Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1227 \(9th Cir. 1998\)](#); [*Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1420 \(9th Cir. 1998\)](#).

e. Hearsay

The court's interpretation of the hearsay rule is reviewed de novo. See [Calmat Co. v. U.S. Dep't of Labor](#), 364 F.3d 1117, 1122 (9th Cir. 2004); [Orr v. Bank of America](#), 285 F.3d 764, 778 (9th Cir. 2002). The court's decision to allow or to exclude evidence based on the hearsay rule is reviewed for an abuse of discretion. See [Calmat](#), 364 F.3d at 1122; [Orr](#), 285 F.3d at 778.

f. Best Evidence Rule

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. [Fed. R. Evid. 1002](#). A court's ruling on the best evidence rule is reviewed for an abuse of discretion. See [Pahl v. Commissioner](#), 150 F.3d 1124, 1132 (9th Cir. 1998) (tax court); [Mitchell v. Dupnik](#), 75 F.3d 517, 527 (9th Cir. 1996); see also [United States v. Bennett](#), 363 F.3d 947, 952 (9th Cir. 2004) (criminal appeal).

12. Experts

The trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. See [Kumho Tire Co. v. Carmichael](#), 526 U.S. 137, 152 (1999); [Sullivan v. United States Dep't of Navy](#), 365 F.3d 827, 832 (9th Cir. 2004).⁴⁰⁷ The applicability of [Daubert v. Merrell Dow Pharms., Inc.](#), 509 U.S. 579 (1993), presents a question of law reviewed de novo. See [McKendall v. Crown Control Corp.](#), 122 F.3d 803, 805 (9th Cir. 1997). The district court's determination that *Daubert* evidence is reliable is reviewed, however, for an abuse of discretion. See [White v. Ford Motor Co.](#), 312 F.3d 998, 1007 (9th Cir. 2002), amended by 335 F.3d 833 (9th Cir. 2003); [Elsayed Mukhtar v. California State Univ.](#), 299 F.3d 1053, 1064 (9th Cir. 2002), amended by 319 F.3d 1073 (9th Cir. 2003).⁴⁰⁸ The district court

⁴⁰⁷ See [Childress v. Darby Lumber, Inc.](#), 357 F.3d 1000, 1010 (9th Cir. 2004) (denial of motion to exclude); [Guidroz-Brault v. Missouri Pac. R.R. Co.](#), 254 F.3d 825, 830 (9th Cir. 2001) (excluded evidence).

⁴⁰⁸ See also [S.M. v. J.K.](#), 262 F.3d 914, 921 (9th Cir. 2001) (noting "[u]nder *Daubert*, trial courts have broad discretion to admit expert testimony"); [Desrosiers v. Flight Int'l of Florida Inc.](#), 156 F.3d 952, 961 (9th Cir. 1998) (noting trial court's discretion as "gatekeeper").

has discretion to determine whether to hold a *Daubert* hearing. See [In re Hanford Nuclear Reservation Lit.](#), 292 F.3d 1124, 1138 (9th Cir. 2002).

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 [Rice v. Fox Broad. Co.](#), 330 F.3d 1170, 1179-80 (9th Cir. 2003); [Domingo Ex. rel Domingo v. T.K.](#), 289 F.3d 600, 605 (9th Cir. 2002); [Kennedy v. Collagen Corp.](#), 161 F.3d 1226, 1227 (9th Cir. 1998).

The court's decision to appoint an expert sua sponte under Federal Rule of Evidence 706(a) is reviewed for an abuse of discretion. See [Walker v. American Home Shield Long Term Disability Plan](#), 180 F.3d 1065, 1071 (9th Cir. 1999). Whether a statute permits a district court to award fees and expenses, including expert witness fees, is reviewed de novo. See [Clausen v. M/V New Carissa](#), 339 F.3d 1049, 1061-62 (9th Cir. 2003).

13. Federal Rules of Civil Procedure

A district court's interpretation of the Federal Rules of Civil Procedure is reviewed de novo. See [Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.](#), 397 F.3d 1217, 1224 n.5 (9th Cir. 2005) ([Fed. R. Civ. P. 30\(e\)](#)).⁴⁰⁹

14. Foreign Law

A district court's determination and interpretation of foreign law are questions of law reviewed under the de novo standard. See [Shalit v. Coppe](#), 182 F.3d 1124, 1127 (9th Cir. 1999); [Brady v. Brown](#), 51 F.3d 810, 816 (9th Cir. 1995); [Richmark Corp. v. Timber Falling Consultants](#), 959 F.2d 1468, 1473 (9th Cir. 1992).

The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. See [Coyle](#)

⁴⁰⁹ See, e.g., [United States v. 2,164 Watches](#), 366 F.3d 767,770 (9th Cir. 2004) (admiralty); [United States v. Clifford Matley Family Trust](#), 354 F.3d 1154, 1159, n.4 (9th Cir. 2004) ([Fed. R. Civ. P. 53](#)); [Swedberg v. Marotzke](#), 339 F.3d 1139, 1141 (9th Cir. 2003) ([Fed. R. Civ. P. 41\(a\)\(1\)](#) and [12\(b\)\(6\)](#)); [DP Aviation v. Smiths Indus. Aerospace and Defense Sys. Ltd.](#), 268 F.3d 829, 846 (9th Cir. 2001) ([Fed. R. Civ. P. 44.1](#)).

[v. P.T. Garuda Indonesia](#), 363 F.3d 979, 984 n.7 (9th Cir. 2004).⁴¹⁰ Note that a district court has discretion to decline jurisdiction when litigation in a foreign forum would be more convenient for the parties. See [Lueck v. Sundstrand Corp.](#), 216 F.3d 1133, 1143 (9th Cir. 2000).

The trial court’s interpretation of [Federal Rule of Civil Procedure 44.1](#) requiring notice of the intent to raise an issue of foreign law is reviewed de novo. See [DP Aviation v. Smiths Indus. Aerospace and Def. Sys., Ltd.](#), 268 F.3d 829, 846 (9th Cir. 2001). The court’s determination whether the notice is “reasonable” is reviewed for an abuse of discretion. See [id.](#)

A district court interpretation of [28 U.S.C. § 1782](#), permitting domestic discovery of use in foreign proceedings, is reviewed de novo but its application of that statute to the facts of the case is reviewed for an abuse of discretion. See [Advanced Micro Devices, Inc. v. Intel Corp.](#), 292 F.3d 664, 666 (9th Cir. 2002), *aff’d*, 542 U.S. 241 (2004); [United States v. Sealed I, Letter of Request](#), 235 F.3d 1200, 1203 & 1206 (9th Cir. 2000); see also [Four Pillars Enter. v. Avery Dennison Corp.](#), 308 F.3d 1075, 1078 (9th Cir. 2002) (“We review the district court’s decision under 28 U.S.C. § 1782 for abuse of discretion.”).

15. Hearsay

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 11. Evidentiary Rulings.

16. Judgment as a Matter of Law

A grant of a motion for judgment as a matter of law (formerly directed verdict) is reviewed de novo. See [M2 Software, Inc. v. Madacy Entertainment, Corp.](#), 421 F.3d 1073, 1086 (9th Cir. 2005); [City Solutions, Inc. v. Clear Channel Comm. Inc.](#), 365 F.3d 835, 839 (9th Cir. 2004). In reviewing a judgment as a matter of law, the evidence must be viewed in

⁴¹⁰ See also [Blaxland v. Commonwealth Dir. of Public Prosecutions](#), 323 F.3d 1198, 1203 (9th Cir. 2003); [Park v. Shin](#), 313 F.3d 1138, 1141 (9th Cir. 2002); [Corza v. Banco Cent. de Reserva Del Peru](#), 243 F.3d 519, 522 (9th Cir. 2001); [Alder v. Federal Republic of Nigeria](#), 219 F.3d 869, 874 (9th Cir. 2000).

the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. See [*Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 149-50 \(2000\)](#); [*M2 Software, Inc.*, 337 F.3d at 1086](#); [*City Solutions*, 365 F.3d at 839](#). If conflicting inferences may be drawn from the facts, the case must go to the jury. [*Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1060 \(9th Cir. 2000\)](#); [*LaLonde v. County of Riverside*, 204 F.3d 947, 959 \(9th Cir. 2000\)](#).

A denial of a motion for a judgment as a matter of law is also reviewed de novo. See [*Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1091 \(9th Cir. 2005\)](#); [*Bell v. Clackamas County*, 341 F.3d 858, 865 \(9th Cir. 2003\)](#); [*Sanghvi v. City of Claremont*, 328 F.3d 532, 536 \(9th Cir.\), cert. denied, 540 U.S. 1075 \(2003\)](#).

17. Juror Partiality, Bias and Misconduct

The district court's denial of a new trial based on alleged juror misconduct is reviewed for an abuse of discretion. See [*Sea Hawk Seafoods v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 911 n.19 \(9th Cir. 2000\)](#); [*Couglin v. Tailhook Ass'n*, 112 F.3d 1052, 1055 \(9th Cir. 1997\)](#). The court's credibility determinations and findings of historical fact are reviewed for clear error. See [*Sea Hawk Seafoods*, 206 F.3d at 911 n.19](#).

The trial court has broad discretion in dealing with matters of juror bias. See [*Price v. Kramer*, 200 F.3d 1237, 1254-55 \(9th Cir. 2000\)](#) (concluding that court did not abuse its discretion by rejecting charges of juror bias); [*Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220-21 \(9th Cir. 1997\)](#) (noting "trial judge, who observes the demeanor and credibility of a juror, is best suited to determine a juror's impartiality").

The district court also has broad discretion in conducting voir dire. See [*Monroe v. City of Phoenix*, 248 F.3d 851, 856 \(9th Cir. 2001\)](#); [*Paine v. City of Lompoc*, 160 F.3d 562, 564-65 \(9th Cir. 1998\)](#) (permitting district court to reject questions if voir dire is otherwise sufficient to test the jury for bias or partiality).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 19. Jury Selection.

18. Jury Instructions

A district court's formulation of civil jury instructions is reviewed for an abuse of discretion, and will not be reversed if harmless. See [Altera Corp. v. Clear Logic, Inc.](#), 424 F.3d 1079, 1087 (9th Cir. 2005); [Tritchler v. County of Lake](#), 358 F.3d 1150, 1154 (9th Cir. 2004).⁴¹¹ Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. See [White v. Ford Motor Co.](#), 312 F.3d 998, 1012 (9th Cir. 2002), *amended by* 335 F.3d 833 (9th Cir. 2003); [Duran v. City of Maywood](#), 221 F.3d 1127, 1130 (9th Cir. 2000). When the alleged error is in the formulation of the instructions, the instructions are to be considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate. See [Guebara v. Allstate Ins. Co.](#), 237 F.3d 987, 992 (9th Cir. 2001); [Masson v. New Yorker Magazine, Inc.](#), 85 F.3d 1394, 1397 (9th Cir. 1996).

The court's rejection of a proposed jury instruction is generally reviewed for an abuse of discretion. See [Jones v. Williams](#), 297 F.3d 930, 934-35 (9th Cir. 2002); [Duran](#), 221 F.3d at 1130-31; [Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery](#), 150 F.3d 1042, 1051-52 (9th Cir. 1998). Note, however, that review is de novo whenever the rejection is based on a question of law. See [Dang v. Cross](#), 422 F.3d 800, 804 (9th Cir. 2005); [Fireman's Fund Ins. Cos. v. Alaskan Pride P'ship](#), 106 F.3d 1465 (9th Cir. 1997) (noting rejected instruction "goes to the legal requirements of the . . . claim"); [Hilao v. Estate of Marcos](#), 103 F.3d 789, 793 (9th Cir. 1996) (interpreting rejection as jurisdictional).

When the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. See [Snake River Valley Elec. Ass'n v. Pacificorp](#), 357 F.3d 1042, 1052 n.11 (9th Cir. 2004); [Ostad v. Oregon Health Sciences Univ.](#), 327 F.3d 876, 883 (9th Cir. 2003).⁴¹²

⁴¹¹ See also [Bird v. Lewis & Clark College](#), 303 F.3d 1015, 1022 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003); [Costa v. Desert Palace, Inc.](#), 299 F.3d 838, 858 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003); [Voohries-Larson v. Cessna Aircraft Co.](#), 241 F.3d 707, 713 (9th Cir. 2001) (explaining that standard of review depends on nature of claimed error).

⁴¹² See also [Ostad v. Oregon Health Sciences Univ.](#), 327 F.3d 876, 883 (9th Cir. 2003); [Bird](#), 303 F.3d at 1022; [Costa](#), 299 F.3d at 858; [Voohries-](#)

An error in instructing the jury in a civil case does not require reversal if it is harmless. See [Altera Corp.](#), 424 F.3d at 1087; [Tritchler](#), 358 F.3d at 1154; [Swinton v. Potomac Corp.](#), 270 F.3d 794, 805 (9th Cir. 2001); [Kennedy v. Southern California Edison Co.](#), 268 F.3d 763, 770 (9th Cir. 2001). Note that the harmless error standard applied in civil cases is far “less stringent” than that applied in criminal cases. See [Swinton](#), 270 F.3d at 805; [Kennedy](#), 268 F.3d at 770. Finally, the failure to object to an instruction waives the right of review. See [Bird v. Lewis & Clark College](#), 303 F.3d at 1022-23 (9th Cir. 2002), cert. denied, 538 U.S. 923 (2003) (applying Rule 51); [Voohries-Larson v. Cessna Aircraft Co.](#), 241 F.3d 707, 713 (9th Cir. 2001) (same).

A trial court’s decision to give a supplemental jury instruction is reviewed for an abuse of discretion. See [Jazzabi v. Allstate Ins. Co.](#), 278 F.3d 979, 982 (9th Cir. 2002). The formulation of such an instruction is also reviewed for an abuse of discretion. See [id.](#)

19. Jury Selection

The district court has broad discretion in conducting voir dire. See [Monroe v. City of Phoenix](#), 248 F.3d 851, 856 (9th Cir. 2001); [Paine v. City of Lompoc](#), 160 F.3d 562, 564-65 (9th Cir. 1998) (permitting district court to reject questions if voir dire is otherwise sufficient to test the jury for bias or partiality).⁴¹³

The trial court has broad discretion in ruling on challenges for cause and can be reversed only for an abuse of discretion. See [Hard v. Burlington N. R.R.](#), 870 F.2d 1454, 1460 (9th Cir. 1989).

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. See [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).

[Larson](#), 241 F.3d at 713.

⁴¹³ See also [Scott v. Lawrence](#), 36 F.3d 871, 874 (9th Cir. 1994) (district court abused its discretion); [Medrano v. City of Los Angeles](#), 973 F.2d 1499, 1507-08 (9th Cir. 1992) (district court did not abuse its discretion).

20. Jury Verdicts

A jury's verdict must be upheld if supported by "substantial evidence." See [Watec Co., Ltd. V. Liu](#), 403 F.3d 645, 651 n.5 (9th Cir. 2005).⁴¹⁴ Substantial evidence is evidence adequate to support the jury's conclusion, even if it is possible to draw a contrary conclusion from the same evidence. See [id.](#)⁴¹⁵ Note that the credibility of the witnesses and the weight of the evidence are issues for the jury and are generally not subject to appellate review. See [id.](#)⁴¹⁶

When a party fails to move for judgment as a matter of law pursuant to [Federal Rule of Civil Procedure 50\(a\)](#), a challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See [Janes v. Wal-Mart Stores, Inc.](#), 279 F.3d 883, 888 (9th Cir. 2002); [Image Tech. Servs., Inc. v. Eastman Kodak Co.](#), 125 F.3d 1195, 1212 (9th Cir. 1997). Reversal under the plain error standard is proper only for a "manifest miscarriage of justice," [Janes](#), 279 F.3d at 888, or if "there is an absolute absence of evidence to support the jury's verdict," [Image Tech.](#) 125 F.3d at 1212 (internal quotation omitted). The failure to make a timely Rule 50(b) motion waives any sufficiency of the evidence argument on appeal. See [Saman v. Robbins](#), 173 F.3d 1150, 1154 (9th Cir. 1999). However, where a party does not object to an improperly filed post-verdict motion for judgment as a matter of law, and does not raise the issue of default for failure to abide Rule 50(b) before the trial court, the procedural flaw in the post-verdict motion is waived and the court of appeals will review the denial of such a motion de novo under a sufficiency of the evidence standard. See [Graves v. City of Coeur D'Alene](#), 339 F.3d 828, 838-39 (9th Cir. 2003).

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

⁴¹⁴ See also [Pavao v. Pagay](#), 307 F.3d 915, 918 (9th Cir. 2002); [Johnson v. Paradise Valley Unified Sch. Dist.](#), 251 F.3d 1222, 1227 (9th Cir. 2001); [Three Boys Music Corp. v. Bolton](#), 212 F.3d 477, 482 (9th Cir. 2000).

⁴¹⁵ See also [Pavao](#), 307 F.3d at 818; [Johnson](#), 251 F.3d at 1227.

⁴¹⁶ See also [Three Boys Music](#), 212 F.3d at 482; [Bell v. Clackamas County](#), 341 F.3d 858, 865 (9th Cir. 2003) (noting in reviewing denial of motion for judgment as a matter of law that reviewing court "may not make credibility determinations").

standard. See [*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. See [*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. See [*Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052](#), 1056 (9th Cir. 2003) (explaining when the jury is still available “resubmitting an inconsistent verdict best comports with the fair and efficient administration of justice”); [*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. See [*Affordable Housing Development Corp. v. City of Fresno*](#), 433 F.3d 1182, 1193 (9th Cir. 2006); [*Norris v. Sysco Corp.*, 191 F.3d 1043](#), 1047 (9th Cir. 1999). 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 v. City of San Diego*, 149 F.3d 951](#), 970 (9th Cir. 1998); [*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. See [Schiro v. Farley, 510 U.S. 222, 232 \(1994\)](#); see also [Santamaria v. Horsley, 133 F.3d 1242, 1245 \(9th Cir. 1998\) \(habeas\), amended by 138 F.3d 1280 \(9th Cir. 1998\)](#).

21. 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 \(9th Cir. 1986\)](#).

22. Parol Evidence

A district court's application of the parol evidence rule is reviewed de novo. See [Jinro America Inc. v. Secure Inv., Inc., 266 F.3d 993, 998-99 \(9th Cir.\), amended by 272 F.3d 1289 \(9th Cir. 2001\)](#); [Brinderson-Newberg v. Pacific Erectors, Inc., 971 F.2d 272, 277 \(9th Cir. 1992\)](#); [Miller v. Fairchild Indus., Inc., 885 F.2d 498, 503 \(9th Cir. 1989\)](#). The court's refusal to consider parol evidence is reviewed, however, for an abuse of discretion. See [U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 938 \(9th Cir. 2002\)](#).

23. Proximate Cause

A district court's finding of proximate cause presents a mixed question of law and fact that is reviewed for clear error. See [Oberson v. U.S. Dept. of Agriculture, Forest Service, 441 F.3d 703, 714 \(9th Cir. 2006\)](#); [Husain v. Olympic Airways, 316 F.3d 829, 835 \(9th Cir. 2002\), aff'd, 540 U.S. 644 \(2004\)](#); [Tahoe-Sierra Preservation Council, Inc., 216 F.3d 764, 783 \(9th Cir. 2000\), aff'd, 535 U.S. 302 \(2002\)](#); [Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 \(9th Cir. 1995\)](#).

24. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. See [Zurich Am. Ins. Co. v. Whittier Props. Inc., 356 F.3d 1132, 1134](#)

(9th Cir. 2004).⁴¹⁷ The constitutionality of a regulation is also reviewed de novo. See [Doe v. Rumsfeld](#), 435 F.3d 980, 984 (9th Cir. 2006); [Gonzalez v. Metropolitan Transp. Auth.](#), 174 F.3d 1016, 1018 (9th Cir. 1999). Note that deference is owed to an agency’s interpretation of its own regulations. See [Carpenter v. Mineta](#), 432 F.3d 1029, 1032 (9th Cir. 2005); [Providence Health Systems-Washington v. Thompson](#), 353 F.3d 661, 664-65 (9th Cir. 2003).⁴¹⁸ Note that interpretative regulations are entitled to less deference than legislative regulations. See [Community Hosp. v. Thompson](#), 323 F.3d 782, 791 (9th Cir. 2003); [Lynch v. Dawson](#), 820 F.2d 1014, 1020 (9th Cir. 1987) (noting “various degrees of deference” owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a question of law reviewed de novo. See [Erringer v. Thompson](#), 371 F.3d 625, 629 (9th Cir. 2004); [Hemp Indus. Ass’n v. Drug Enforcement Admin.](#), 333 F.3d 1082, 1086 (9th Cir. 2003); [Chief Probation Officers v. Shalala](#), 118 F.3d 1327, 1330 (9th Cir. 1997).

25. State Law

A district court’s interpretation of state law is reviewed de novo. See [Laws v. Sony Music Entertainment, Inc.](#), 448 F.3d 1134, 1137 (9th Cir. 2006); [Rabkin v. Oregon Health Sciences Univ.](#), 350 F.3d 967, 970 (9th Cir. 2003).⁴¹⁹ This court’s role is to determine what meaning the state’s highest court would give to state law. See [Goldman v. Standard Ins.Co.](#), 341 F.3d 1023, 1027 (9th Cir. 2003); [Paulson v. City of San Diego](#), 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

⁴¹⁷ See also [Johnson v. Buckley](#), 356 F.3d 1067, 1071 (9th Cir. 2004); [Boise Cascade Corp. v. United States](#), 329 F.3d 751, 754 (9th Cir. 2003) (treasury regulations); [League of Wilderness Defenders v. Forsgren](#), 309 F.3d 1181, 1183 (9th Cir. 2002).

⁴¹⁸ See also [United States v. Mead Corp.](#), 533 U.S. 218, 227-31 (2001) (explaining when deference is owed); [Forest Guardians v. United States Forest Serv.](#), 329 F.3d 1089, 1097 (9th Cir. 2003); [Community Hosp. v. Thompson](#), 323 F.3d 782, 791-92 (9th Cir. 2003) (explaining when “less deference” is owed); [Pronsolino v. Nastri](#), 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference).

⁴¹⁹ See also [Goldman v. Standard Ins.Co.](#), 341 F.3d 1023, 1027 (9th Cir. 2003); [Feature Realty, Inc. v. City of Spokane](#), 331 F.3d 1082, 1086 n.3 (9th Cir. 2003); [Paulson v. City of San Diego](#), 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

A district court's ruling on the constitutionality of a state statute is reviewed de novo. See [*Caruso v. Yamhill County ex rel. County Com'r*, 422 F.3d 848, 855 \(9th Cir. 2005\)](#); [*Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 \(9th Cir. 2004\)](#); [*American Academy of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 \(9th Cir. 2004\)](#).⁴²⁰ The severability of an unconstitutional provision of a state statute presents a question of law reviewed de novo. See [*Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 \(9th Cir. 2003\)](#). Whether a state law is subject to a facial constitutional challenge is an issue of law reviewed de novo. See [*Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1134 \(9th Cir. 2004\)](#).

Whether state law is preempted by federal law is also reviewed de novo. See [*Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1137 \(9th Cir. 2006\)](#) (whether federal law preempts state law); [*Botsford v. Blue Cross & Blue Shield of Montana*, 314 F.3d 390, 392-93 \(9th Cir. 2002\), amended by 319 F.3d 1078 \(9th Cir. 2003\)](#); [*Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 \(9th Cir. 2000\)](#).

An award of attorneys' fees made pursuant to state law is reviewed for an abuse of discretion. See [*Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 898 \(9th Cir. 2006\)](#) (finding no abuse of discretion in declining to award attorneys' fees); [*Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1102 \(9th Cir. 2003\)](#); [*Kona Enter. Inc. v. Estate of Bishop*, 229 F.3d 877, 883 \(9th Cir. 2000\)](#). Whether a state statute permits attorneys' fees is reviewed de novo. See [*Kona Enter.*, 229 F.3d at 883](#); [*O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1157 \(9th Cir. 1998\)](#). The denial of fees requested under state law is reviewed for an abuse of discretion. See [*Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 \(9th Cir. 2003\)](#); [*Barrios v. California Interscholastic Fed.*, 277 F.3d 1128, 1133 \(9th Cir. 2002\)](#).

⁴²⁰ See also [*Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1090 \(9th Cir. 2003\)](#); [*Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 \(9th Cir. 2000\)](#) (initiative); [*Tri-State Dev., Ltd. v. Johnston*, 160 F.3d 528, 529 \(9th Cir. 1998\)](#) (facts underlying district court conclusion not in dispute); [*Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 \(9th Cir. 2004\)](#) (reviewing constitutionality of city ordinance).

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, r. State Law.

26. Statutes

The district court's interpretation and construction of a federal statute are questions of law reviewed de novo. See [*Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 938 \(9th Cir. 2006\)](#).⁴²¹

The constitutionality of a federal statute is also reviewed de novo. See [*Doe v. Rumsfeld*, 435 F.3d 980, 984 \(9th Cir. 2006\) \(10 U.S.C. § 12305\)](#); [*The Ecology Center v. Castaneda*, 426 F.3d 1144, 1147 \(9th Cir. 2005\)](#) (Flathead and Kootenai National Forest Rehabilitation Act).⁴²²

⁴²¹ See, e.g., [*SEC v. Gemstar TV Guide Int'l, Inc.*, 367 F.3d 1087, 1091 \(9th Cir. 2004\)](#) (Sarbanes-Oxley Act); [*Zurich Am. Ins. Co. v. Whittier Props. Inc.*, 356 F.3d 1132, 1134 \(9th Cir. 2004\)](#) (Environmental Protection Act); [*SEC v. McCarthy*, 322 F.3d 650, 654 \(9th Cir. 2003\)](#) (Securities Exchange Act); [*Sea-Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 \(9th Cir. 2002\)](#) (COGSA); [*Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 \(9th Cir. 2001\)](#) (en banc) (CERCLA); [*Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 \(9th Cir. 2001\)](#) (Fair Housing Act); [*Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 1117 \(9th Cir. 2001\)](#) (FLSA); [*Wetzel v. Lou Ehlers Cadillac*, 222 F.3d 643, 646 \(9th Cir. 2000\)](#) (en banc) (ERISA); [*Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573 \(9th Cir. 2000\)](#) (San Luis Act); [*Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 \(9th Cir. 1999\)](#) (Americans with Disabilities Act); [*Gilbrook v. City of Westminster*, 177 F.3d 839, 872 \(9th Cir. 1999\)](#) (Civil Rights Act); [*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); [*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); [*Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921 \(9th Cir. 1995\)](#) (Navajo-Hopi Settlement Act).

⁴²² See, e.g., [*Mayweathers v. Newland*, 314 F.3d 1062, 1066 \(9th Cir. 2002\)](#) (Religious Land Use and Institutionalized Persons Act), *cert. denied*,

A district court's decision on whether a federal statute may be applied retrospectively is a question of law reviewed de novo. See [Lyon v. Agusta S.P.A.](#), 252 F.3d 1078, 1081 (9th Cir. 2001); [Scott v. Boos](#), 215 F.3d 940, 942 (9th Cir. 2000). Note that there is a traditional presumption against retroactive application of statutes. See [Chang v. United States](#), 327 F.3d 911, 920 (9th Cir. 2003); [United States v. Bacon](#), 82 F.3d 822, 824 (9th Cir. 1996).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 25. State Law.

27. Substantive Areas of Law

a. Admiralty

The judgment of a trial court, sitting without a jury in admiralty, is reviewed for clear error. See [Madeja v. Olympic Packers, LLC](#), 310 F.3d 628, 634-35 (9th Cir. 2002); [Simeonoff v. Hiner](#), 249 F.3d 883, 888 (9th Cir. 2001). Findings of fact made in admiralty are reviewed under the clearly erroneous standard of review. See [Madeja](#), 310 F.3d at 635; [Evanow v. M/V NEPTUNE](#), 163 F.3d 1108, 1113 (9th Cir. 1998); [Resner v. Arctic Orion Fisheries](#), 83 F.3d 271, 273 (9th Cir. 1996).⁴²³ The court of appeals will “reverse only if [it is] 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 Corp. v. S.S. Keiyoh Maru](#), 845 F.2d 818, 822 (9th Cir. 1988); see also [Newby v. F/V Kristen Gail](#), 937 F.2d 1439, 1441, 1444 (9th Cir. 1991) (overtaking vessel).

[540 U.S. 815](#) (2003); [SeaRiver Maritime Financial Holdings Inc. v. Mineta](#), 309 F.3d 662, 668 (9th Cir. 2002) (Oil Pollution Act); [Eunique v. Powell](#), 302 F.3d 971, 973 (9th Cir. 2002) (42 U.S.C. § 652(k)); [Taylor v. Delatoore](#), 281 F.3d 844, 847 (9th Cir. 2002) (PLRA).

⁴²³ See also [Fireman’s Fund Ins. Cos. v. Big Blue Fisheries, Inc.](#), 143 F.3d 1172, 1177 (9th Cir. 1998) (computation of damages); [Chan v. Society Expeditions, Inc.](#), 123 F.3d 1287, 1290 (9th Cir. 1997) (negligence).

“Special deference is paid to a trial court’s credibility findings.” [*Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 \(9th Cir. 1995\), *aff’d*, 517 U.S. 830 \(1996\).](#)

An admiralty court’s conclusions of law are reviewed de novo. See [*Madeja*, 310 F.3d at 635](#); [*Harper v. U.S. Seafoods*, 278 F.3d 971, 973 \(9th Cir. 2002\)](#) (statutory interpretation).⁴²⁴ For example, the question of whether a court may exercise its admiralty jurisdiction is reviewed de novo. See [*Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 \(9th Cir. 2002\), *cert. denied*, 538 U.S. 1000 \(2003\)](#); [*La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 \(9th Cir. 2001\)](#) (remanding for district court to exercise its admiralty jurisdiction). Also, the court reviews de novo whether a party is liable in admiralty. See [*Chan*, 123 F.3d at 1290](#).

The issue of whether a party’s claims give rise to a maritime lien so that the party may pursue an action in rem against a vessel is also reviewed de novo. See [*Myers v. American Triumph F/V*, 260 F.3d 1067, 1069 \(9th Cir. 2001\)](#). The court also reviews de novo whether the doctrine of maintenance and cure applies to a given set of facts. See [*Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 \(9th Cir. 1999\)](#).

The court’s interpretation of the terms of a bill of lading is reviewed de novo. See [*Sea-Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 \(9th Cir. 2002\)](#).

The question of the existence of a duty is a matter of law subject to de novo review in maritime law. See [*Sutton v. Earles*, 26 F.3d 903, 912 n.8 \(9th Cir. 1994\)](#).

Evidentiary rulings by the admiralty court are reviewed for abuse of discretion. See [*Madeja*, 310 F.3d at 635](#); [*Evanow*, 163 F.3d at 113](#). This court will not reverse absent some prejudice. [*Evanow*, 163 F.3d at 113](#).

Additionally, the district court’s order regarding the apportionment of costs incurred while the vessel was in custodia legis is reviewed for abuse of

⁴²⁴ See also [*Nautilus Marine, Inc. v. Neimela*, 170 F.3d 1195, 1196 \(9th Cir. 1999\)](#) (*Robins Dry Dock* rule); [*Fireman’s Fund*, 143 F.3d at 1175](#); [*Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 529 \(9th Cir. 1994\)](#) (Death on the High Seas Act).

discretion. See *Certain Underwriters at Lloyds v. Kenco Marine Terminal, Inc.*, 81 F.3d 871, 872 (9th Cir. 1996). The court also reviews for abuse of discretion a district court's order confirming a United States Marshal's sale of a vessel. See *Bank of Am. v. PENGWIN*, 175 F.3d 1109, 1118 (9th Cir. 1999).

The court's decision whether to consider an untimely claim under Admiralty Rule C(6) (governing in rem forfeitures) is reviewed for abuse of discretion. See *United States v. \$100,348 in U.S. Currency*, 354 F.3d 1110, 1117 (9th Cir. 2004).

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. An award of attorneys' fees is also reviewed for an abuse of discretion. See *Madeja*, 310 F.3d at 635. See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, a. Admiralty.

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). The court's decision whether to award prejudgment interest is also reviewed for abuse of discretion. *Simeonoff*, 249 F.3d at 894.

b. Americans with Disabilities Act (ADA)

An interpretation of the ADA is reviewed de novo. See *Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002); *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1047 (9th Cir. 2000); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir. 2000) (interpreting Title III of ADA), *aff'd*, 532 U.S. 661 (2001).

The court's decision to grant summary judgment in an ADA action is reviewed de novo. See *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2003); *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128, 1133 (9th Cir. 2001).

Whether a party is immune from an ADA action is a question of law reviewed de novo. See [Lovell, 303 F.3d at 1050](#); [Demshki v. Monteith, 255 F.3d 986, 988 \(9th Cir. 2001\)](#).

Dismissal of an ADA action without leave to amend is also reviewed de novo. See [Lee v. City of Los Angeles, 250 F.3d 668, 691-92 \(9th Cir. 2001\)](#). Dismissal based on the ADA's statute of limitations is also reviewed de novo. See [Mann v. American Airlines, 324 F.3d 1088, 1090 \(9th Cir. 2003\)](#).

Regulations promulgated under the ADA “must be given legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute.” See [Lovell, 303 F.3d at 1058](#); [Does 1-5 v. Chandler, 83 F.3d 1150, 1153 \(9th Cir. 1996\)](#). The preemptive effect of the ADA is a question of law reviewed de novo. See [Saridakis v. United Airlines, 166 F.3d 1272, 1276 \(9th Cir. 1999\)](#). Whether a per se rule exists barring ADA claims after a claimant has applied for and received disability benefits is a question of law reviewed de novo. See [Johnson v. Oregon Dep't of Human Res., 141 F.3d 1361, 1364 \(9th Cir. 1998\)](#) (rejecting application of judicial estoppel).

Whether a plaintiff has waived the right to sue under the ADA by agreeing to arbitrate any employment-related disputes is a question of law reviewed de novo. See [Kummetz v. Tech Mold, 152 F.3d 1153, 1154 \(9th Cir. 1998\)](#).

The reasonable accommodation of a disability is a question of fact reviewed for clear error. See [Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1088 \(9th Cir. 2002\)](#); [Fuller v. Frank, 916 F.2d 558, 562 n.6 \(9th Cir. 1990\)](#); *but see* [Morton v. United Parcel Serv., 272 F.3d 1249, 1253 \(9th Cir. 2001\)](#) (applying de novo review when summary judgment is based on court's reasonable accommodation determination).

The court's decision whether to grant equitable relief under the ADA is reviewed for an abuse of discretion. See [Bird v. Lewis & Clark College, 303 F.3d 1015, 1020 \(9th Cir. 2002\)](#), *cert. denied*, 538 U.S. 923 (2003).

The issuance of a permanent injunction is reviewed for an abuse of discretion and application of the correct legal standards. See [Fortyune v.](#)

American Multi-Cinema, Inc., 364 F.3d 1075, 1079 (9th Cir. 2004)
(reviewing summary judgment).

An award of attorneys' fees in an ADA action is reviewed for an abuse of discretion. See *Armstrong v. Davis*, 318 F.3d 965, 970 (9th Cir. 2003); *Richard S. v. Dep't of Dev. Serv.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003) (reviewing denial of fee request); see also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, b. Americans with Disabilities Act. An award of costs after the dismissal of an ADA action is reviewed for an abuse of discretion. See *Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003).

c. Antitrust

Whether specific conduct is anticompetitive is a question of law reviewed de novo. See *SmileCare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996); *Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). However, whether a party possesses monopoly power is a question of fact. See *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993).

Antitrust standing is a question of law reviewed de novo. See *Glen Holly Entm't Inc. v. Tektronix Inc.*, 352 F.3d 367, 369 (9th Cir. 2003); *American Ad Mgmt. v. General Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999); *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996); *Hillis Motors, Inc. v. Hawaii Automotive Dealers' Ass'n*, 997 F.2d 581, 584 (9th Cir. 1993).

The grant of summary judgment is reviewed de novo. See *County of Tuolumne v. Sonora Comm. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (noting standards for antitrust actions); see also *Int'l Healthcare Management v. Hawaii Coalition for Health*, 332 F.3d 600, 604 (9th Cir. 2003) (noting that antitrust cases are sometimes difficult to resolve on summary judgment).

The denial of judgment as a matter of law is also reviewed de novo. See *Omega Env'tl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997) (noting factors for antitrust cases).

A jury's award of damages is reviewed for substantial evidence. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1221 (9th Cir. 1997) (noting relaxed standard for antitrust cases).

Dismissal of a complaint alleging antitrust violations is reviewed de novo. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000) (noting requirements for antitrust complaint); *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999) (noting dismissal was without leave to amend).

An award of attorneys' fees in an antitrust action is reviewed for an abuse of discretion. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997); *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, c. Antitrust.

d. Bankruptcy

This court reviews de novo the district court's decision on an appeal from a bankruptcy court. *See In re Raintree Healthcare Corp.*, 431 F.3d 685, 687 (9th Cir. 2005); *In re Olshan*, 356 F.3d 1078, 1083 (9th Cir. 2004); *In re Mantz*, 343 F.3d 1207, 1211 (9th Cir. 2003). Thus, this court applies the same standard of review applied by the district court. *See Raintree Healthcare Corp.*, 431 F.3d at 687 (summary judgment); *Olshan*, 356 F.3d at 1083; *In re Smith*, 317 F.3d 918, 923 (9th Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003). No deference is given to the district court's decision. *See In re Salazar*, 430 F.3d 992, 994 (9th Cir. 2005); *Mantz*, 343 F.3d at 1211; *In re Bunyan*, 354 F.3d 1149, 1150 (9th Cir. 2004).

The bankruptcy court's conclusions of law are reviewed de novo and its factual findings for clear error. *See Salazar*, 430 F.3d at 994; *Olshan*, 356 F.3d at 1083; *Mantz*, 343 F.3d at 1211. This court must accept the bankruptcy court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been committed. *See Latman v. Burdette*, 366 F.3d 774, 781 (9th Cir. 2004); *In re Jan Weilert RV, Inc.*, 315 F.3d 1192, 1196 (9th Cir.), *amended by* 326 F.3d 1028 (9th Cir. 2003); *In re Banks*, 263 F.3d 862, 829 (9th Cir. 2001). Note, however, that “[f]indings of fact prepared by counsel and adopted by the trial court are

subject to greater scrutiny than those authored by the trial judge.” [In re Alcock](#), 50 F.3d 1456, 1459 n.2 (9th Cir. 1995).

The bankruptcy court’s decision to grant or deny summary judgment is reviewed de novo. See [Raintree Healthcare Corp.](#), 431 F.3d at 687; [In re Prestige Ltd. P’ship-Concord](#), 234 F.3d 1108, 1112-14 (9th Cir. 2000) (explaining when denial of summary judgment may be reviewed).⁴²⁵

A bankruptcy court’s decision to dismiss an action for failure to state a claim is reviewed de novo. See [In re Zimmer](#), 313 F.3d 1220, 1222 (9th Cir. 2002); [In re Hemmeter](#), 242 F.3d 1186, 1189 (9th Cir. 2001); [In re Rogstad](#), 126 F.3d 1224, 1228 (9th Cir. 1997). A dismissal for failure to serve a summons and complaint is reviewed, however, for an abuse of discretion. See [In re Sheehan](#), 253 F.3d 507, 511 (9th Cir. 2001). A dismissal based on substantial abuse under 11 U.S.C. § 707(b) is also reviewed for an abuse of discretion. See [In re Price](#), 353 F.3d 1135, 1138 (9th Cir. 2004).

Decisions of the Bankruptcy Appellate Panel (BAP) are reviewed de novo. See [Price](#), 353 F.3d at 1138; [In re Summers](#), 332 F.3d 1240, 1243 (9th Cir. 2003); [In re BCE West, L.P.](#), 319 F.3d 1166, 1170 (9th Cir. 2003). Note that BAP’s decision to impose sanctions is reviewed for an abuse of discretion. See [In re Morrissey](#), 349 F.3d 1187, 1190 (9th Cir. 2003) (noting issue of first impression).

This court independently reviews bankruptcy courts’ rulings on appeal from the BAP. See [In re Deville](#), 361 F.3d 539, 547 (9th Cir. 2004); [In re Staffer](#), 306 F.3d 967, 970-71 (9th Cir. 2002).

The bankruptcy court’s interpretation of the bankruptcy code is reviewed de novo. See [Salazar](#), 430 F.3d at 994; [Deville](#), 361 F.3d at 547; [Bunyan](#), 354 F.3d at 1150; [BCE West, L.P.](#), 319 F.3d at 1170. BAP’s interpretation of the code is also reviewed de novo. See [In re Debbie Reynolds Hotel & Casino, Inc.](#), 255 F.3d 1061, 1065 (9th Cir. 2001); [In re Berg](#), 230 F.3d 1165, 1167 (9th Cir. 2000). BAP’s interpretation of a

⁴²⁵ See, e.g., [In re Stanton](#), 303 F.3d 939, 941 (9th Cir. 2002) (affirming BAP’s order reversing bankruptcy court’s grant of summary judgment); [In re Betacom](#), 240 F.3d 823, 828 (9th Cir. 2001) (reversing district court’s order vacating bankruptcy court’s order granting summary judgment).

bankruptcy rule is reviewed de novo. See [In re LPM Corp.](#), 300 F.3d 1134, 1136 (9th Cir. 2002); [In re Los Angeles Int'l Airport Hotel Assocs.](#), 106 F.3d 1479, 1480 (9th Cir. 1997).

Jurisdictional issues in bankruptcy are reviewed de novo. See [Mantz](#), 343 F.3d at 1211 (' 505); [In re McGhan](#), 288 F.3d 1172, 1178 (9th Cir. 2002) (reopening).⁴²⁶ Whether plaintiffs in a bankruptcy proceeding have established a prima facie case for personal jurisdiction is a question of law reviewed de novo. See [In re Pintlar Corp.](#), 133 F.3d 1141, 1144 (9th Cir. 1997). Domicile is a question of fact reviewed for clear error. See [In re Lowenschuss](#), 171 F.3d 673, 684 (9th Cir. 1999). The district court's acceptance of jurisdiction over core proceedings in bankruptcy is reviewed de novo. See [In re Harris Pine Mills](#), 44 F.3d 1431, 1434 (9th Cir. 1995).

Whether a bankruptcy court's decision is an appealable, final order is reviewed de novo. See [In re City of Desert Hot Springs](#), 339 F.3d 782, 787 (9th Cir. 2003), cert. denied, 540 U.S. 1110 (2004); [In re Bonham](#), 229 F.3d 750, 761 (9th Cir. 2000). The timeliness of a notice of appeal from the bankruptcy court to the district court is a question of law reviewed de novo. [In re Delaney](#), 29 F.3d 516, 517-18 (9th Cir. 1994) (per curiam). The court's decision to vacate a confirmation order is reviewed de novo. See [In re Lowenschuss](#), 170 F.3d 923, 932 (9th Cir. 1999).

When a transfer occurs within the meaning of the Bankruptcy Code is a question of law reviewed de novo. See [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. See [In re Arnold & Baker Farms](#), 85 F.3d 1415, 1420 (9th Cir. 1996).

Whether a claim is nondischargeable presents mixed issues of law and fact reviewed de novo. See [Miller v. United States](#), 363 F.3d 999, 1004 (9th Cir. 2004); [In re Hamada](#), 291 F.3d 645, 649 (9th Cir. 2002); [In re Bammer](#), 131 F.3d 788, 790 (9th Cir. 1997) (en banc) (overruling prior cases). Whether a pre-petition installment contract for legal services rendered in

⁴²⁶ See also [In re Bonham](#), 229 F.3d 750, 761 (9th Cir. 2000) (final order); [In Re G.I. Indus., Inc.](#), 204 F.3d 1276, 1279 (9th Cir. 2000) (subject matter jurisdiction); [In re Filtercorp, Inc.](#), 163 F.3d 570, 576 (9th Cir. 1998) (mootness)

contemplation of bankruptcy is discharged presents a question of law reviewed de novo. See [In re Biggar](#), 110 F.3d 685, 687 (9th Cir. 1997).

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. See [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. See [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. See [In re Lawson](#), 122 F.3d 1237, 1240 (9th Cir. 1997). The court's finding of bad faith is reviewed for clear error. See [In re Leavitt](#), 171 F.3d 1219, 1222-23 (9th Cir. 1999). Reconstruction of income through statistical methods is a factual question reviewed for clear error. See [In re Renovizor's, Inc.](#), 282 F.3d 1233, 1237 n.1 (9th Cir. 2002).

Whether a particular transaction is a gift is also a question of fact reviewed for clear error. See [In re Dyer](#), 322 F.3d 1178, 1188 (9th Cir. 2003). Whether a transaction falls outside the ordinary course of business is a question of fact reviewed for clear error. See [In re Jan Weilert RV, Inc.](#), 315 F.3d 1192, 1196 (9th Cir.), amended by [326 F.3d 1028](#) (9th Cir. 2003).

The bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion. See [Latman v. Burdette](#), 366 F.3d 774, 781 (9th Cir. 2004); [In re Renovizor's, Inc.](#), 282 F.3d 1233, 1237 n.1 (9th Cir. 2002); [In re Smith's Home Furnishings, Inc.](#), 265 F.3d 959, 962-63 (9th Cir. 2001).

The bankruptcy court's choice of remedies is reviewed for an abuse of discretion. See [In re Lopez](#), 345 F.3d 701, 705 (9th Cir. 2003), cert. denied, 541 U.S. 987 (2004). The court's decision to approve a compromise as part of a plan is reviewed for an abuse of discretion. See [In re Debbie Reynolds Hotel & Casino, Inc.](#), 255 F.3d at 1065 (noting court abuses its discretion by erroneously interpreting the applicable law); [In re Arden](#), 176 F.3d 1226, 1228 (9th Cir. 1999). The court's decision to appoint a trustee is reviewed for an abuse of discretion. See [Lowenschuss](#), 171 F.3d at 685. Note, however, that the bankruptcy court's legal conclusion that trustees can transfer their avoidance powers is reviewed de novo. See [In re P.R.T.C., Inc.](#), 177 F.3d 774, 780 (9th Cir. 1999).

The denial of a motion for a new trial is reviewed for an abuse of discretion. See [In re Jess](#), 169 F.3d 1204, 1209 (9th Cir. 1999). The bankruptcy judge's denial of a motion for recusal is reviewed for an abuse of discretion. See [In re Smith](#), 317 F.3d 918, 923 (9th Cir. 2002), cert. denied, 538 U.S. 1032 (2003). The district court's decision to withdraw reference to the bankruptcy court is reviewed for an abuse of discretion. See [In re Canter](#), 299 F.3d 1150, 1155 (9th Cir. 2002); [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 is reviewed for an abuse of discretion. See [In re Staffer](#), 306 F.3d 967, 971 (9th Cir. 2002); [In re Castillo](#), 297 F.3d 940, 945 (9th Cir. 2002); [In re McGhan](#), 288 F.3d 1172, 1178 (9th Cir. 2002).

The court's decision whether to permit a party to supplement the record is also reviewed for an abuse of discretion. See [In re Weiner](#), 161 F.3d 1216, 1217 (9th Cir. 1998). The bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. See [In Re Kaypro](#), 218 F.3d 1070, 1073 (9th Cir. 2000). The court's decision to vacate its prior order of dismissal is reviewed for an abuse of discretion. See [In re Sylman](#), 234 F.3d 1081, 1086 (9th Cir. 2000). The court's refusal to apply equitable or judicial estoppel is reviewed for an abuse of discretion. See [In re Allen](#), 300 F.3d 1055, 1060 (9th Cir. 2002).

Whether the automatic stay provisions of [11 U.S.C. § 362\(a\)](#) have been violated is a question of law reviewed de novo. See [Eskanos & Alder v. Leetien](#), 309 F.3d 1210, 1213 (9th Cir. 2002). See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 82. Sanctions.

The bankruptcy court's entry of a nunc pro tunc approval is reviewed for abuse of discretion or erroneous application of law. See [In re Bonham](#), 229 F.3d 750, 763 (9th Cir. 2000); [In re Atkins](#), 69 F.3d 970, 973 (9th Cir. 1995).

The bankruptcy court has broad discretion to determine whether to grant an administrative expense claim. See [In re Kadjevich](#), 220 F.3d 1016, 1019 (9th Cir. 2000); [In re DAK Indus., Inc.](#), 66 F.3d 1091, 1094 (9th Cir. 1995). When its decision to deny an administrative claim is based on its interpretation of law, however, review is de novo. See [In re Allen Care Ctrs., Inc.](#), 96 F.3d 1328, 1330 n.1 (9th Cir. 1996).

A bankruptcy court's award of attorneys' fees should not be reversed absent an abuse of discretion or an erroneous application of the law. See [In re Smith](#), 317 F.3d 918, 923 (9th Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003); [In re Bennett](#), 298 F.3d 1059, 1063 (9th Cir. 2002); [In re Jastrem](#), 253 F.3d 438, 442 (9th Cir. 2001). The amount of the fee award is also reviewed for an abuse of discretion. See [In re Lewis](#), 113 F.3d 1040, 1043 (9th Cir. 1997). The bankruptcy court's decision whether to award fees under [11 U.S.C. § 523\(d\)](#) is also reviewed for an abuse of discretion. See [In re Hunt](#), 238 F.3d 1098, 1101 (9th Cir. 2001). Note that there is no general right to recover attorneys' fees under the Bankruptcy Code. See [Renfrow v. Draper](#), 232 F.3d 688, 693 (9th Cir. 2000).

The bankruptcy court's decision to impose sanctions is reviewed for an abuse of discretion. See [Deville](#), 361 F.3d at 547; [In re Silberkraus](#), 336 F.3d 864, 871 (9th Cir. 2003); [In re Rainbow Magazine, Inc.](#), 77 F.3d 278, 283 (9th Cir. 1996). The court's refusal to impose sanctions is also reviewed for an abuse of discretion. See [In re Marino](#), 37 F.3d 1354, 1358 (9th Cir. 1994). The court's imposition of contempt sanctions for violation of an automatic stay is reviewed for an abuse of discretion. See [In re Dyer](#), 322 F.3d 1178, 1191 (9th Cir. 2003). The amount of such a sanction is reviewed for an abuse of discretion. See [Eskanos & Alder v. Leetien](#), 309 F.3d at 1213. Note that BAP's decision to impose sanctions is also reviewed for an abuse of discretion. See [In re Morrissey](#), 349 F.3d at 1190.

e. ***Bivens* Actions**

Constitutional claims asserted under [Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics](#), 403 U.S. 388 (1971), are reviewed de novo. See [Martinez v. City of Los Angeles](#), 141 F.3d 1373, 1382 (9th Cir. 1998). The district court's dismissal of a *Bivens* action is reviewed de novo. See [Adams v. Johnson](#), 355 F.3d 1179, 1183 (9th Cir. 2004); [Libas Ltd. v. Carillo](#), 329 F.3d 1128, 1130 (9th Cir. 2003); [Morgan v. United States](#), 323 F.3d 776, 780 (9th Cir. 2003). Summary judgments are reviewed de novo. See [Moore v. Glickman](#), 113 F.3d 988, 989 (9th Cir. 1997).

The grant or denial of qualified immunity in a *Bivens* action is reviewed de novo. See [Hell's Angels Motorcycle Corp. v. McKinley](#), 360 F.3d 930, 933 (9th Cir. 2004) (grant); [Lawrence v. United States](#), 340 F.3d 952, 955 (9th Cir. 2003) (grant); [V-1 Oil Co. v. Smith](#), 114 F.3d 854, 857

(9th Cir. 1997) (denial). Whether exhaustion of remedies is required is a question of law reviewed de novo. See [Cooney v. Edwards](#), 971 F.2d 345, 346 (9th Cir. 1992). Whether a district court lacks jurisdiction over a *Bivens* action is reviewed de novo. See [Collins v. Bender](#), 195 F.3d 1076, 1078 (9th Cir. 1999); [Hicks v. Small](#), 69 F.3d 967, 969 (9th Cir. 1995).

f. Civil Rights

A district court statutory interpretation of [42 U.S.C. § 1983](#) is reviewed de novo. See [Abrams v. City of Rancho Palos Verdes](#), 354 F.3d 1094, 1096 (9th Cir. 2004), *rev'd on other grounds by* 544 U.S. 113 (9th Cir. 2005). The court's grant or denial of summary judgment in a § 1983 action is reviewed de novo. See [Pinard v. Clatskani School Dist.](#) 6J, 446 F.3d 964, 971 (9th Cir. 2006) (grant in favor of defendants); [Diruzza v. County of Tehama](#), 323 F.3d 1147, 1152 (9th Cir. 2003) (grant); [Lassonde v. Pleasanton Unified Sch. Dist.](#), 320 F.3d 979, 982 (9th Cir.), *cert. denied*, 540 U.S. 817 (2003) (grant); [Brewster v. Shasta County](#), 275 F.3d 803, 806 (9th Cir. 2001) (§ 1983) (denial).

A court's decision to dismiss a § 1983 action pursuant to Rule 12(b)(6) is reviewed de novo. See [Watson v. Weeks](#), 436 F.3d 1152, 1158 (9th Cir. 2006); [Kirtley v. Rainey](#), 326 F.3d 1088, 1092 (9th Cir. 2003); [Knox v. Davis](#), 260 F.3d 1009, 1012 (9th Cir. 2001); [Zimmerman v. City of Oakland](#), 255 F.3d 734, 737 (9th Cir. 2001). The court's denial of leave to amend the complaint to add additional civil rights claims is reviewed for an abuse of discretion. See [Gerber v. Hickman](#), 291 F.3d 617, 623 (9th Cir. 2002) (*en banc*).

A district court's decision on qualified immunity in a § 1983 action is reviewed de novo. See [Kennedy v. City of Ridgefield](#), 439 F.3d 1055, 1059 (9th Cir. 2006).⁴²⁷ The court's decision to grant or deny summary judgment on the ground of qualified immunity is reviewed de novo. See *id.* (deny); [Menotti v. City of Seattle](#), 409 F.3d 1113, 1119 (9th Cir. 2005) (grant); [Boyd v. Benton County](#), 374 F.3d 773, 778 (9th Cir. 2004) (grant); [Lee v. Gregory](#), 363 F.3d 931, 932 (9th Cir. 2004) (deny); [Bingham v. City of Manhattan](#)

⁴²⁷ [Krug v. Lutz](#), 329 F.3d 692, 695 (9th Cir. 2003); [Grant v. City of Long Beach](#), 315 F.3d 1081, 1088 (9th Cir. 2002), *amended by* 334 F.3d 795 (9th Cir. 2003); [DiRuzza v. County of Tehama](#), 206 F.3d 1304, 1313 (9th Cir. 2000).

Beach, 341 F.3d 939, 945 (9th Cir. 2003) (deny).⁴²⁸ Whether governing law was clearly established at the time of the alleged violation is a question of law reviewed de novo. See Hydrick v. Hunter, 449 F.3d 978, 988 (9th Cir. 2006); Boyd, 374 F.3d at 778; Martinez v. Stanford, 323 F.3d 1178, 1183 (9th Cir. 2003); Mabe v. San Bernardino County, 237 F.3d 1101, 1106 (9th Cir. 2001). Whether specific facts constitute a violation of established law is a legal determination reviewed de novo. See Hydrick, 449 F.3d at 1183; Mabe, 237 F.3d at 1106.

The court's decision whether a party is immune from a § 1983 action is reviewed de novo. See Webb v. Sloan, 330 F.3d 1158, 1163 n.4 (9th Cir.), cert. denied, 540 U.S. 1141 (2003); Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2002).

Whether a plaintiff is a "policymaker" or "confidential employee" not entitled to bring a § 1983 based on First Amendment retaliation is a mixed question of law and fact reviewed de novo. See Walker v. City of Lakewood, 272 F.3d 1114, 1132 (9th Cir. 2001) (noting intercircuit conflict).

A probable cause determination in a false arrest claim is reviewed de novo. See Picray v. Sealock, 138 F.3d 767, 770 (9th Cir. 1998).

Standing to assert a claim under § 1983 presents a question of law reviewed de novo. See LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000); Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 369 (9th Cir. 1998).

A district court's decision whether to exercise supplemental jurisdiction in a § 1983 action is reviewed de novo. See Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001); 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).

⁴²⁸ See also Martinez v. Stanford, 323 F.3d 1178, 1183 (9th Cir. 2003) (reversing district court's decision granting summary judgment); Billington v. Smith, 292 F.3d 1177, 1183 (9th Cir. 2002) (reversing denial of summary judgment on grounds of qualified immunity); Case v. Kitsap County Sheriff's Dep't, 249 F.3d 921, 925 (9th Cir. 2001) (affirming grant of summary judgment).

A district court's decision to award or deny attorneys' fees in civil rights actions are reviewed for an abuse of discretion. See [Tutor-Saliba Corp. v. City of Hailey](#), 452 F.3d 1055, 1059 (9th Cir. 2006) (awarded fees); [Benton v. Oregon Student Assistance Comm'n](#), 421 F.3d 901, 904 (9th Cir. 2005) (reversing award of fees); [Richard S. v. Dep't of Developmental Servs.](#), 317 F.3d 1080, 1085 (9th Cir. 2003) (denied fees); [Webb v. Sloan](#), 330 F.3d 1158, 1167 n.6 (9th Cir.), *cert. denied*, 540 U.S. 1141 (2003).⁴²⁹ 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. See [Benton](#), 421 F.3d at 904; [Lytle v. Carl](#), 382 F.3d 978, 982 (9th Cir. 2004); [Barjon v. Dalton](#), 132 F.3d 496, 500 (9th Cir. 1997). Any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed de novo. See [Benton](#), 421 F.3d at 904; [Dannenberg v. Valadez](#), 338 F.3d 1070, 1073 (9th Cir. 2003) (PLRA); [Richard S.](#), 317 F.3d at 1086; [Armstrong v. Davis](#), 318 F.3d 965, 971 (9th Cir. 2003). Factual findings underlying the district court's decision are reviewed for clear error. See [Richard S.](#), 317 F.3d at 1086; [Corder v. Gates](#), 104 F.3d 247, 249 (9th Cir. 1996); [Stivers v. Pierce](#), 71 F.3d 732, 751 (9th Cir. 1995). The amount of a fee award is reviewed for an abuse of discretion. [Dannenberg](#), 338 F.3d at 1073 (PLRA). See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, e. Civil Rights.

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, e. *Bivens* Actions.

g. Constitutional Law

Constitutional issues are reviewed de novo. See [Berry v. Dept. of Social Services](#), 447 F.3d 642, 648 (9th Cir. 2006) (First Amendment); [Buono v. Norton](#), 371 F.3d 543, 548 (9th Cir. 2004) (Establishment Clause).⁴³⁰ A district court's determinations on mixed questions of law and

⁴²⁹ See also [Webb v. Ada County](#), 285 F.3d 829, 834 (9th Cir. 2002) (noting PLRA limits the amount of fees that can be awarded in actions brought on behalf of prisoners); [Gilbrook v. City of Westminster](#), 177 F.3d 839, 876 (9th Cir. 1999) (noting district court's fee award in civil rights cases is entitled to deference).

⁴³⁰ See, e.g., [San Remo Hotel v. San Francisco City](#), 364 F.3d 1088, 1094 (9th Cir. 2004); [Krug v. Lutz](#), 329 F.3d 692, 695 (9th Cir. 2003) (Due Process); [Taylor v. United States](#), 181 F.3d 1017, 1034 (9th Cir. 1999) (en

fact that implicate constitutional rights are reviewed de novo. See [Cogswell v. City of Seattle](#), 347 F.3d 809, 813 (9th Cir. 2003), cert. denied, 541 U.S. 1043 (2004); [Valeria v. Davis](#), 307 F.3d 1036, 1038 (9th Cir. 2002).

The constitutionality of a federal statute is also reviewed de novo. See [Doe v. Rumsfeld](#), 435 F.3d 980, 984 (9th Cir. 2006) (10 U.S.C. § 12305); [The Ecology Center v. Castaneda](#), 426 F.3d 1144, 1147 (9th Cir. 2005) (Flathead and Kootenai National Forest Rehabilitation Act).⁴³¹

The constitutionality of a state statute is also reviewed de novo. See [Caruso v. Yamhill County ex rel. County Com'r](#), 422 F.3d 848, 855 (9th Cir. 2005); [Planned Parenthood of Idaho, Inc. v. Wasden](#), 376 F.3d 908, 920 (9th Cir. 2004); [American Academy of Pain Mgmt. v. Joseph](#), 353 F.3d 1099, 1103 (9th Cir. 2004).⁴³² The severability of an unconstitutional provision of a state statute presents a question of law reviewed de novo. See [Arizona Libertarian Party, Inc. v. Bayless](#), 351 F.3d 1277, 1283 (9th Cir. 2003). Whether a state law is subject to a facial constitutional challenge is an issue of law reviewed de novo. See [Southern Oregon Barter Fair v. Jackson County, Oregon](#), 372 F.3d 1128, 1134 (9th Cir. 2004).

On First Amendment constitutional challenges, this court conducts an independent, de novo examination of the facts. See [Berry v. Dept. of Social Services](#), 447 F.3d 642, 648 (9th Cir. 2006) (First Amendment); [Suzuki Motor Corp. v. Consumers Union](#), 330 F.3d 1110, 1132 (9th Cir.), cert.

banc) (Separation of Powers); [Martinez v. City of Los Angeles](#), 141 F.3d 1373, 1382 (9th Cir. 1998) (*Bivens*).

⁴³¹ See, e.g. [Mayweathers v. Newland](#), 314 F.3d 1062, 1066 (9th Cir. 2002) (Religious Land Use and Institutionalized Persons Act), cert. denied, 540 U.S. 815 (2003); [SeaRiver Maritime Financial Holdings Inc. v. Mineta](#), 309 F.3d 662, 668 (9th Cir. 2002) (Oil Pollution Act); [Eunique v. Powell](#), 302 F.3d 971, 973 (9th Cir. 2002) (42 U.S.C. § 652(k)); [Taylor v. Delatoore](#), 281 F.3d 844, 847 (9th Cir. 2002) (PLRA).

⁴³² See also [Montana Right to Life Ass'n v. Eddleman](#), 343 F.3d 1085, 1090 (9th Cir. 2003); [Montana Chamber of Commerce v. Argenbright](#), 226 F.3d 1049, 1054 (9th Cir. 2000) (initiative); [Tri-State Dev., Ltd. v. Johnston](#), 160 F.3d 528, 529 (9th Cir. 1998) (facts underlying district court conclusion not in dispute); [Rui One Corp. v. City of Berkeley](#), 371 F.3d 1137, 1141 (9th Cir. 2004) (reviewing constitutionality of city ordinance).

denied, [540 U.S. 983](#) (2003); [Tucker v. California Dep't of Educ.](#), 97 F.3d 1204, 1209 n.9 (9th Cir. 1996).⁴³³

The constitutionality of a regulation is also reviewed de novo. See [Doe v. Rumsfeld](#), 435 F.3d 980, 984 (9th Cir. 2006); [Gonzalez v. Metropolitan Transp. Auth.](#), 174 F.3d 1016, 1018 (9th Cir. 1999).

h. Contracts

The district court's interpretation and meaning of contract provisions are questions of law reviewed de novo. See [Lamantia v. Voluntary Plan Administrators, Inc.](#), 401 F.3d 1114, 1118 (9th Cir. 2005); [United States v. 1.377 Acres of Land](#), 352 F.3d 1259, 1264 (9th Cir. 2003) (noting no deference accorded to decision of district court).⁴³⁴ The district court's interpretation of state contract law is also reviewed de novo. See [AmerisourceBergen Corp. v. Dialysist West, Inc.](#), 445 F.3d 1132, 1135 (9th Cir. 2006); [Jorgensen v. Cassidy](#), 320 F.3d 906, 914 (9th Cir. 2003). Note that federal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party. See [Tanadquisix Corp. v. Huber](#), 404 F.3d 1201, 1205 (9th Cir. 2005); [Chickallon-Moose Creek Native Ass'n v. Norton](#), 360 F.3d 972, 980 (9th Cir. 2004).

The court's decision to grant summary judgment on a contract claim is reviewed de novo. See [Altera Corp. v. Clear Logic, Inc.](#), 424 F.3d 1079, 1091 (9th Cir. 2005) (affirming denial of motion for summary judgment); [Southern Cal. Painters v. Best Interiors, Inc.](#), 359 F.3d 1127, 1130 (9th Cir. 2004) (noting summary judgment is inappropriate when there is a question regarding mutual intent).⁴³⁵

⁴³³ See also [Brown v. California Dep't of Transp.](#), 321 F.3d 1217, 1221 (9th Cir. 2003) (“we review the application of facts to law on free speech questions de novo”); [Planned Parenthood v. American Coalition of Life Activists](#), 290 F.3d 1058, 1069-70 (9th Cir. 2002) (en banc) (noting First Amendment questions of “constitutional fact” compel de novo review); [Nunez v. Davis](#), 169 F.3d 1222, 1226 (9th Cir. 1999) (“The determination whether speech involves a matter of public concern is a question of law.”).

⁴³⁴ See also [Milenbach v. Commissioner](#), 318 F.3d 924, 930 (9th Cir. 2003) (tax court); [In re Bennett](#), 298 F.3d 1059, 1064 (9th Cir. 2002) (bankruptcy court).

⁴³⁵ See also [Pension Trust Fund v. Federal Ins. Co.](#), 307 F.3d 944, 948-49 (9th Cir. 2002); [U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.](#), 281 F.3d

Whether reformation of a contract is permissible is a question of law reviewed de novo. See [Resolution Trust Corp. v. Midwest Fed. Sav. Bank](#), 36 F.3d 785, 793 (9th Cir. 1993). Whether contract language is ambiguous is a question of law reviewed de novo. See [Miller v. United States](#), 363 F.3d 999, 1004 (9th Cir. 2004); [Chickallon-Moose Creek Native Ass'n v. Norton](#), 360 F.3d 972, 980 (9th Cir. 2004).⁴³⁶ Whether a contract provision is unconscionable raises a question of law reviewed de novo. See [Ting v. AT&T](#), 319 F.3d 1126, 1135 (9th Cir.), cert. denied, 540 U.S. 811 (2003).

When a district court uses extrinsic evidence to interpret a contract, the findings of fact themselves are reviewed under the clearly erroneous standard, while the principles of contract law applied to those facts are reviewed de novo. See [DP Aviation v. Smiths Indus. Aerospace and Def. Sys., Ltd.](#), 268 F.3d 829, 836 (9th Cir. 2001); [United States ex rel. Lindenthal v. General Dynamics Corp.](#), 61 F.3d 1402, 1411 (9th Cir. 1995). When extrinsic evidence is not considered and the court limits its review to the four corners of the contract, review is de novo. See 1.377 [Acres of Land](#), 352 F.3d at 1264; [Shaw v. City of Sacramento](#), 250 F.3d 1289, 1293 (9th Cir. 2001).⁴³⁷

A district court's application of the parol evidence rule is reviewed de novo. See [Jinro America Inc. v. Secure Inv., Inc.](#), 266 F.3d 993, 998-99 (9th Cir.), amended by 272 F.3d 1289 (9th Cir. 2001); [Brinderson-Newberg v. Pacific Erectors, Inc.](#), 971 F.2d 272, 277 (9th Cir. 1992). The court's refusal to consider parol evidence is reviewed, however, for an abuse of

929, 933 (9th Cir. 2002); [Kassbaum v. Steppenwolf Prods., Inc.](#), 236 F.3d 487, 491 (9th Cir. 2000) (noting “[s]ummary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning”).

⁴³⁶ See also [U.S. Cellular Inv.](#), 281 F.3d at 934; [Klamath Water Users Protective Ass'n v. Patterson](#), 204 F.3d 1206, 1210 (9th Cir. 1999); [Northwest Env'tl. Advocates v. Portland](#), 56 F.3d 979, 982 (9th Cir. 1995) (treating NPDES permit as contract and applying appropriate standards of review).

⁴³⁷ See also [Bennett](#), 298 F.3d at 1064 (“Whether the written contract is reasonably susceptible of a proffered meaning is a matter of law that is reviewed de novo.”) (internal quotation omitted).

discretion. See [*U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 938 \(9th Cir. 2002\)](#).

The trial court's factual findings are reviewed for clear error. See [*Chickallon-Moose Creek*, 360 F.3d at 980](#); [*Cariaga v. Local No. 1184*, 154 F.3d 1072, 1074 \(9th Cir. 1998\)](#). Findings relating to offer, revocation, and rejection are also reviewed under the clearly erroneous standard. See [*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. See [*L.K. Comstock & Co. v. United Eng'rs & Constructors, Inc.*, 880 F.2d 219, 221 \(9th Cir. 1989\)](#); [*CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 \(9th Cir. 1983\)](#).

i. Copyright

Interpretations of the Copyright Act are reviewed de novo. See [*Rossi v. Motion Picture Ass'n of America Inc.*, 391 F.3d 1000, 1002 \(9th Cir. 2004\)](#); [*Ellison v. Robertson*, 357 F.3d 1072, 1076 \(9th Cir. 2004\)](#); [*Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 \(9th Cir. 2000\)](#). Dismissal of a copyright action for lack of standing is reviewed de novo. See [*Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 \(9th Cir. 2003\)](#).

Summary judgments are reviewed de novo. See [*Rossi*, 391 F.3d at 1002](#); [*Ellison*, 357 F.3d at 1075](#). In copyright cases, when the issue is “whether two works are substantially similar, summary judgment is appropriate if no reasonable juror could find substantial similarity of ideas and expression.” [*Funky Films, Inc. v. TimeWarner Entertainment Co.*, L.P.](#) 2006 WL 2493417, *3 (9th Cir. August 30, 2006) (internal quotation marks and citation omitted); [*Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 \(9th Cir. 1994\)](#). “Although summary judgment is not highly favored on the substantial similarity issue in copyright cases, substantial similarity may often be decided as a matter of law.” [*Funky Films, Inc.*, 2006 WL 2493417](#) at *3; [*Smith v. Jackson*, 84 F.3d 1213, 1218 \(9th Cir. 1996\)](#).

Whether something is “sufficiently original” to merit copyright protection is a question of law reviewed de novo. See [*CDN, Inc. v. Kapes*](#),

[197 F.3d 1256, 1259 n.1 \(9th Cir. 1999\)](#). Whether a given work is protected by copyright laws is a mixed question of law and fact reviewed de novo. See [Cavalier v. Random House, 297 F.3d 815, 822 \(9th Cir. 2002\)](#); [Ets-Hokin, 225 F.3d at 1073](#). Whether laches may be a defense to an action seeking a declaration of co-authorship of a copyrightable work and co-ownership of the copyright is a question of law reviewed de novo. [Jackson v. Axton, 25 F.3d 884, 886 \(9th Cir. 1994\) overruled on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 \(1994\)](#).

Issues of access and substantial similarity are findings of fact reviewable under the clearly erroneous standard. See [Data E. USA, Inc. v. Epyx, Inc., 862 F.2d 204, 206 \(9th Cir. 1988\)](#). The district court's finding on willful infringement is also reviewed for clear error. See [Dolman v. Agee, 157 F.3d 708, 715 \(9th Cir. 1998\)](#). Likewise, the district court's determination of when a party should have discovered the infringement is an issue of fact that should be upheld unless clearly erroneous. See [Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 707 \(9th Cir. 2004\)](#). Copying and improper appropriation are issues of fact. See [Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 \(9th Cir. 2000\)](#). Fair use is a mixed question of law and fact reviewed de novo. See [Wall Data Inc. v. Los Angeles County Sheriff's Dept., 447 F.3d 769, 777 \(9th Cir. 2006\)](#); [Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 \(9th Cir. 2003\)](#); [Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 993 \(9th Cir. 1998\)](#). The proper copyright classification of a given work is a question of fact. See [Leicester v. Warner Bros., 232 F.3d 1212, 1216 \(9th Cir. 2000\)](#).

District courts have wide discretion in setting the amount of statutory damages under the Copyright Act. See [Columbia Pictures Television v. Krypton Broad., Inc., 106 F.3d 284, 296 \(9th Cir. 1997\), rev'd on other grounds, 523 U.S. 340 \(1998\)](#); [Nintendo of Am., Inc. v. Dragon Pac. Int'l, 40 F.3d 1007, 1010 \(9th Cir. 1994\)](#); *but see* [Mackie v. Rieser, 296 F.3d 909, 916 \(9th Cir. 2002\)](#) (reviewing de novo legal standard used to determine damages). The trial court's decision to deny a new trial due to an allegedly excessive jury verdict is reviewed for an abuse of discretion. See [Columbia Pictures Indus., Inc. v. Krypton Broadcastings of Birmingham, Inc., 259 F.3d 1186, 1194 \(9th Cir. 2001\)](#).

The district court's decision whether to award attorneys' fees under the Copyright Act is reviewed for an abuse of discretion. See [Wall Data, 447 F.3d at 787](#); [Ets-Hokin, 323 at 766](#); [Columbia Pictures, 259 F.3d at 1197](#); [Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.,](#)

[122 F.3d 1211, 1216 \(9th Cir. 1997\)](#). The court’s findings of fact underlying the fee determination are reviewed for clear error. See [Smith, 84 F.3d at 1221](#). Any legal analysis and statutory interpretations are reviewed de novo. See [Entertainment Research, 122 F.3d at 1216](#). The court’s calculation of reasonable attorneys’ fees is reviewed for an abuse of discretion. *The Traditional Cat Ass’n, Inc. v. Gilbreath*, [340 F.3d 829, 833 \(9th Cir. 2003\)](#). See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys’ Fees, h. Copyright.

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, 1010 \(9th Cir. 1998\)](#).

Legal issues underlying a preliminary injunction are review de novo while the terms are reviewed for an abuse of discretion. See [A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1096 \(9th Cir. 2002\)](#) (copyright infringement); see also [Satava v. Lowry, 323 F.3d 805, 810 \(9th Cir.\)](#) (noting such relief cannot be reversed unless the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact), *cert. denied*, [540 U.S. 983](#) (2003). The scope of injunctive relief granted by the district court is reviewed for an abuse of discretion. See *Sony Computer Entm’t, Inc. v. Connectix Corp.*, [203 F.3d 596, 602 \(9th Cir. 2000\)](#).

j. Declaratory Judgment Act

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 23. Declaratory Relief.

k. Defamation

A district court’s ruling that a statement was not defamatory is a question of law review de novo. See [Knievel v. ESPN, 393 F.3d 1068, 1072 \(9th Cir. 2005\)](#). Appellate courts conduct “independent review” of a determination of actual malice in a defamation action. See [Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 \(9th Cir. 2001\)](#); [Newton v. National Broad. Co., 930 F.2d 662, 669-72 \(9th Cir. 1990\)](#).⁴³⁸ Under the

⁴³⁸ See also [Bose Corp. v. Consumers Union, 466 U.S. 485, 514 \(1984\)](#); [Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1067-68 \(9th Cir. 2002\)](#) (en banc) (explaining independent judgment

rule of independent review, the reviewing court exercises “independent judgment in evaluating the lower court’s opinion, rather than granting it any deference.” [*Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1132 \(9th Cir.\) \(internal quotation omitted\), cert. denied, 540 U.S. 983 \(2003\)](#). Whether an allegedly defamatory statement implies an assertion of objective facts is a question of law reviewed de novo. See [*Steam Press Holdings v. Hawaii Teamsters*, 302 F.3d 998, 1005 \(9th Cir. 2002\), cert. denied, 537 U.S. 1232 \(2003\)](#). 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 \(9th Cir. 1998\)](#).

I. Employment Discrimination

Legal questions in employment discrimination actions brought under Title VII and similar statutes are reviewed de novo, while a district court’s underlying findings of fact are subject to clearly erroneous review. See [*E.E.O.C. v. United Parcel Service, Inc.*, 424 F.3d 1060, 1068 \(9th Cir. 2005\)](#); [*Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 871 \(9th Cir. 2001\)](#) (noting findings based on credibility determinations are given “greater deference”); [*Star v. West*, 237 F.3d 1036, 1038 \(9th Cir. 2001\)](#); [*Gilligan v. Department of Labor*, 81 F.3d 835, 838 \(9th Cir. 1996\)](#).

Summary judgment is reviewed de novo. See [*McGinest v. GTE Serv., Corp.*, 360 F.3d 1103, 1112 \(9th Cir. 2004\)](#) (noting special factors in employment discrimination actions); [*Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 \(9th Cir. 1996\)](#) (same).

The district court’s grant of judgment as a matter of law is reviewed de novo. See [*Wallace v. City of San Diego*, 2006 WL 2457100 *5 \(9th Cir. 2006\)](#) (Uniformed Services Employment and Reemployment Rights Act). In reviewing the district court’s grant of judgment, the court of appeals applies the same substantial evidence standard used by the district court in evaluating the jury’s verdict. See [*id.*](#)

review); [*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”).

Whether a party has exhausted required administrative remedies required is reviewed de novo. See [Farrell v. Principi](#), 366 F.3d 1066, 1067 (9th Cir. 2004) (reviewing dismissal for failure to exhaust).⁴³⁹ Whether a Title VII action is barred by the applicable statute of limitations is a question of law reviewed de novo. See [EEOC v. Dinuba Medical Clinic](#), 222 F.3d 580, 584 (9th Cir. 2000). Whether a party can be compelled to arbitrate Title VII claims is reviewed de novo. See [Ferguson v. Countrywide Credit Indus., Inc.](#), 298 F.3d 778, 780 (9th Cir. 2002).

Whether an employer “took immediate and appropriate remedial action” is a mixed question of law and fact reviewed de novo. See [Star](#), 237 F.3d at 1038.

Venue in a Title VII action is reviewed de novo. See [Passantino v. Johnson & Johnson Consumer Products, Inc.](#), 212 F.3d 493, 504 (9th Cir. 2000).

A district court’s conclusion whether a plaintiff has satisfied the elements of a prima facie case is reviewed de novo, although the underlying findings of fact are reviewed for clear error. See [Paige v. California](#), 291 F.3d 1141, 1145 n.3 (9th Cir. 2002) (disparate impact); [Dinuba](#), 222 F.3d at 586 (unlawful retaliation); [Tiano v. Dillard Dep’t Stores, Inc.](#), 139 F.3d 679, 681 (9th Cir. 1998) (religious discrimination).

Whether an employment test was properly validated for purposes of Title VII presents primarily a factual question reviewed for clear error. See [Association of Mexican-American Educators v. California](#), 231 F.3d 572, 584-85 (9th Cir. 2000) (en banc).

Whether an employer’s proffered justification for differential treatment is pretextual (the third prong of a disparate treatment case) is reviewed under the clearly erroneous standard. See [St. Mary’s Honor Ctr. v. Hicks](#), 509 U.S. 502, 524 (1993); [Trent v. Valley Elec. Ass’n, Inc.](#), 195 F.3d 534, 537 (9th Cir. 1999).

⁴³⁹ See also [Jasch v. Potter](#), 302 F.3d 1092, 1094 (9th Cir. 2002) (reviewing dismissal for failure to exhaust); [Freeman v. Oakland Unified Sch. Dist.](#), 291 F.3d 632, 636 (9th Cir. 2002) (same); [Sommatino v. United States](#), 255 F.3d 704, 708 (9th Cir. 2001).

i. Jury Instructions

Whether the district court's jury instructions properly state the elements of a Title VII claim is reviewed de novo. See [Costa v. Desert Palace, Inc.](#), 299 F.3d 838, 858 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003); [Mockler v. Multnomah County](#), 140 F.3d 808, 812 (9th Cir. 1998). The court's formulation of Title VII jury instructions is reviewed for an abuse of discretion. See [Costa](#), 299 F.3d at 858; [Mockler](#), 140 F.3d at 812; [Crowe v. Witel Communications Sys.](#), 103 F.3d 897, 900 (9th Cir. 1996).

ii. Choice of Remedies

The district court's choice of remedies in a Title VII action is reviewed for an abuse of discretion. See [Caudle v. Bristow Optical Co.](#), 224 F.3d 1014, 1023 (9th Cir. 2000); [Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.](#), 94 F.3d 1366, 1369 (9th Cir. 1996). The constitutionality of a statutory cap on Title VII damages is reviewed de novo. See [Lansdale v. Hi-Health Supermart Corp.](#), 314 F.3d 355, 357 (9th Cir. 2002). Whether punitive damages are available in a Title VII action is a question of law reviewed de novo. See [EEOC v. Wal-Mart Stores, Inc.](#), 156 F.3d 989, 992 (9th Cir. 1998). The trial court's allocation of damages is normally reviewed for an abuse of discretion, but to the extent that allocation rests on an interpretation of Title VII, review is de novo. See [Caudle](#), 224 F.3d at 1023; [Passantino](#), 212 F.3d at 509.⁴⁴⁰

iii. Attorneys' Fees

The court's decision whether to award attorneys' fees is reviewed for an abuse of discretion. See [Hemmings v. Tidyman's, Inc.](#), 285 F.3d 1174, 1200 (9th Cir. 2002) (granting fees); [Shaw v. City of Sacramento](#), 250 F.3d 1289, 1293-94 (9th Cir. 2001) (denying fees); [Passantino](#), 212 F.3d at 517-18.

⁴⁴⁰ See also [Pavon v. Swift Transp. Co.](#), 192 F.3d 902, 910 (9th Cir. 1999) (noting court's application of Title VII's damages cap is subject to de novo review); [Gotthardt v. National R.R. Passenger Corp.](#), 191 F.3d 1148, 1153 (9th Cir. 1999) (same).

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, t. Title VII.

iv. Equal Pay Act

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. See [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).

v. Age Discrimination in Employment Act

The district court's interpretation of the Age Discrimination in Employment Act (ADEA) is reviewed de novo. See [Sanchez v. Pacific Powder Co.](#), 147 F.3d 1097, 1099 (9th Cir. 1998). Whether the ADEA requires exhaustion of administrative remedies is a question of law reviewed de novo. See [Bak v. U.S. Postal Serv.](#), 52 F.3d 241, 243 (9th Cir. 1995); see also [Bankston v. White](#), 345 F.3d 768, 770 (9th Cir. 2003) (reviewing de novo whether plaintiff exhausted administrative remedies).

The grant of summary judgment in an ADEA action is reviewed de novo. See [Pottenger v. Potlatch Corp.](#), 329 F.3d 740, 745 (9th Cir. 2003) (applying *McDonnell Douglas* analysis); see also [Coleman v. Quaker Oats Co.](#), 232 F.3d 1271, 1282 (9th Cir. 2000) (noting "summary judgment should be used prudently in ADEA cases"); [Schnidrig](#), 80 F.3d at 1411 (noting special factors).

The court's decision to enforce a settlement of an ADEA action is reviewed for an abuse of discretion. See [Doi v. Halekulani Corp.](#), 276 F.3d 1131, 1136 (9th Cir. 2002).

The denial of sanctions is reviewed for an abuse of discretion. [Coleman](#), 232 F.3d at 1297. An award of costs is reviewed for an abuse of discretion. [EEOC v. Pape Lift, Inc.](#), 115 F.3d 676, 680 (9th Cir. 1997).

m. Environmental Law

i. National Environmental Policy Act (NEPA)

Judicial review of an agency's compliance with the National Environmental Policy Act (NEPA) is governed by the judicial review provisions of the Administrative Procedures Act, [5 U.S.C. § 701-06](#). See [Ocean Advocates v. U.S. Army Corps of Eng's](#), [402 F.3d 846](#), 858 (9th Cir. 2005).⁴⁴¹ This court must determine that the agency's decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See [Ocean Advocates](#), [361 F.3d at 858](#); [League of Wilderness Defenders v. Forsgren](#), [309 F.3d 1181](#), 1183 (9th Cir. 2002). Factual disputes implicating substantial agency expertise are reviewed under the arbitrary and capricious standard while legal issues are reviewed under the reasonableness standard. See [Idaho Sporting Congress, Inc. v. Rittenhouse](#), [305 F.3d 957](#), 965 (9th Cir. 2002).⁴⁴² Thus, an agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness. See [Kern v. U.S. Bureau of Land Mgmt.](#), [284 F.3d 1062](#), 1070 (9th Cir. 2002); but see [Kootenai Tribe of Idaho v. Veneman](#), [313 F.3d 1094](#), 1114 (9th Cir. 2002) (noting whether NEPA procedures applied to Forest Service Roadless Rule is reviewed de novo).

In reviewing the adequacy of an agency's environmental impact statement (EIS), this circuit applies a "rule of reason" standard. See [Center for Biological Diversity v. U.S. Forest Serv.](#), [349 F.3d 1157](#), 1166 (9th Cir. 2003).⁴⁴³ Whether an EIS satisfies the requirements of NEPA is a question

⁴⁴¹ See also [Center for Biological Diversity v. U.S. Forest Serv.](#), [349 F.3d 1157](#), 1165 (9th Cir. 2003); [League of Wilderness Defenders v. Forsgren](#), [309 F.3d 1181](#), 1183 (9th Cir. 2002).

⁴⁴² See also [Ka Makani 'O Kohala Ohana Inc. v. Water Supply](#), [295 F.3d 955](#), 959 (9th Cir. 2002); [Northcoast Env'tl. Ctr. v. Glickman](#), [136 F.3d 660](#), 666-67 (9th Cir. 1998).

⁴⁴³ See also [Friends of Yosemite Valley v. Norton](#), [348 F.3d 789](#), 800 n.2 (9th Cir. 2003); [Neighbors of Cuddy Mountain v. Alexander](#), [303 F.3d 1059](#), 1071 (9th Cir. 2002) (noting rule of reason "does not materially differ from 'arbitrary and capricious' review"); [Churchill County v. Norton](#), [276 F.3d 1060](#), 1071 (9th Cir. 2001), amended by [282 F.3d 1055](#) (9th Cir. 2002); [American Rivers v. FERC](#), [201 F.3d 1186](#), 1195 (9th Cir. 2000) (reciting and applying standard).

of law reviewed de novo. See *Westlands Water Dist. v. United States Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004).⁴⁴⁴

An agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard. See *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002) (clarifying when standard applies).⁴⁴⁵ 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. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997) (internal quotation omitted). The court must ensure that the agency has taken a "hard look" at the environmental consequences of its proposed action. See *National Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001); *Wetlands Action Network v. United States Army Corps of Eng'r*, 222 F.3d 1105, 1114 (9th Cir. 2000); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

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. See *Oregon Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). The court's decision not to allow extra-record evidence is reviewed for an abuse of discretion. See *Great Basin Mine Watch v. Hankins*, 456

⁴⁴⁴ See also *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 471 (9th Cir. 2000) (reviewing de novo and applying APA arbitrary and capricious standard); *Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997).

⁴⁴⁵ See also *Churchill County*, 276 F.3d at 1071; *Westlands Water Dist. v. United States Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004) (reviewing agency's decision not to issue a SEIS); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002) (noting decision is reviewed for abuse of discretion but will be set aside only if arbitrary and capricious); *Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001) (reviewing for abuse of discretion); *Wetlands Action Network v. United States Army Corps of Eng'r*, 222 F.3d 1105, 1114 (9th Cir. 2000) (reviewing agency's decision to prepare and EA rather than EIS); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 (9th Cir. 2000) (reviewing agency's decision not to prepare an SEIS).

[F.3d 955, 975 \(9th Cir. 2006\)](#); [Northcoast Env'tl. Ctr. v. Glickman](#), 136 F.3d 660, 665 (9th Cir. 1998); see also [San Francisco Baykeeper v. Whitman](#), 297 F.3d 877, 886 (9th Cir. 2002) (noting when district court may consider extra-record evidence).

ii. Endangered Species Act (ESA)

Review of agency decisions under the Endangered Species Act (ESA) is governed by the Administrative Procedures Act. See [Western Watersheds Project v. Matejko](#), 456 F.3d 922, 930 (9th Cir. 2006); [National Ass'n of Home Builders v. Norton](#), 340 F.3d 835, 8410-41 (9th Cir. 2003); [Selkirk Conservation Alliance v. Forsgren](#), 336 F.3d 944, 953 (9th Cir. 2003); [Native Ecosystems Council v. Dombeck](#), 304 F.3d 886, 901 (9th Cir. 2002). Such decisions can be overturned only when arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See [National Ass'n of Home Builders](#), 340 F.3d at 842; [Selkirk Conservation Alliance](#), 336 F.3d at 953 (noting “narrow review”); [Forest Guardians v. U.S. Forest Serv.](#), 329 F.3d 1089, 1096-97 (9th Cir. 2003); [Native Ecosystems Council](#), 304 F.3d at 901. The reviewing court must determine whether the decision was based on a consideration of relevant facts and whether there has been a clear error of judgment. See [Forest Guardians](#), 329 F.3d at 1097. The court cannot substitute its judgment for that of the agency. See [National Ass'n of Home Builders](#), 340 F.3d at 842; [Selkirk Conservation Alliance](#), 336 F.3d at 953; [Forest Guardians](#), 329 F.3d at 1097.

The district court's interpretation of the ESA is reviewed de novo. See [Forest Conservation Council v. Rosboro Lumber Co.](#), 50 F.3d 781, 783 (9th Cir. 1995).

Summary judgments are reviewed de novo. See [Biodiversity Legal Found. v. Badgley](#), 309 F.3d 1166, 1175 (9th Cir. 2002) (also noting deference owed to agency's interpretation of statute it administers). The district court's decision to grant a permanent injunction is reviewed for abuse of discretion. See [Western Watersheds Project](#), 456 F.3d at 929-30.

iii. Clean Air Act (CAA)

Review of agency decisions under the Clean Air Act (CAA) is governed by the Administrative Procedures Act. See [Alaska Dep't of Env't Conservation v. EPA](#), 540 U.S. 461, 496-97 (2004); [Sierra Club v. EPA](#), 346

[F.3d 955](#), 961 (9th Cir.), *amended by* [352 F.3d 1187](#) (9th Cir. 2003), *cert. denied*, [542 U.S. 919](#) (2004). The reviewing court must determine that the agency actions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Alaska Dep't of Env't Conservation*, [540 U.S. at 497](#); *Sierra Club*, [346 F.3d at 961](#); *Hall v. EPA*, [273 F.3d 1146](#), [1155](#) (9th Cir. 2002) (reviewing when deference is owed to agency's interpretation of the CAA). Jurisdictional issues are reviewed de novo. *See Hall v. Norton*, [266 F.3d 969](#), 974 ([9th Cir. 2001](#)).

iv. Clean Water Act (CWA)

A district court's interpretation of the Clean Water Act (CWA) is reviewed de novo. *See League of Wilderness Defenders v. Forsgren*, [309 F.3d 1181](#), 1183 ([9th Cir. 2002](#)). The court's conclusion that the CWA has been violated is also reviewed de novo, and findings of fact are reviewed for clear error. *See Community Ass'n for Restoration of the Env't v. Bosma Dairy*, [305 F.3d 943](#), 953 ([9th Cir. 2002](#)); *Borden Ranch P'ship v. U.S. Army Corps of Eng'r*, [261 F.3d 810](#), 816 ([9th Cir. 2001](#)) (reviewing "factual findings of violations" of CWA for clear error).

Summary judgments are reviewed de novo. *See Northern Plains Res. Council v. Fidelity Exploration and Dev. Co.*, [325 F.3d 1155](#), 1160 (9th Cir.), *cert. denied*, [540 U.S. 967](#) (2003); *League of Wilderness Defender*, [309 F.3d at 1183](#); *Association to Protect Hammersley v. Taylor Res., Inc.*, [299 F.3d 1007](#), 1009 (9th Cir. 2002).

The court's ruling on the sufficiency of notice required by the CWA is reviewed de novo. *See San Francisco Baykeeper, Inc. v. Tosco Corp.*, [309 F.3d 1153](#), 1157 (9th Cir. 2002), *cert. dismissed*, [539 U.S. 924](#) (2003); *Community Ass'n for Restoration*, [305 F.3d at 949](#). The adequacy of the pre-suit notice is also reviewed de novo. *See Waterkeepers of N. California v. AG Indus. Mfg. Inc.*, [375 F.3d 913](#), 917 (9th Cir. 2004).

Note that an agency's interpretation of the CWA is entitled to deference unless it is plainly erroneous or inconsistent with the statute. *See Pronsolino v. Nastri*, [291 F.3d 1123](#), 1131-32 ([9th Cir. 2002](#)) (reviewing deference owed to EPA's interpretation of the CWA); *League of Wilderness Defender*, [309 F.3d at 1183](#). No deference is owed, however, to an agency not charged with administering the CWA. *See California Trout, Inc. v. FERC*, [313 F.3d 1131](#), 1133 ([9th Cir. 2002](#)) (holding no deference is owed

to FERC's interpretation of the CWA), *cert. denied*, [540 U.S. 818](#) (2003); *see also* [Northern Plains Res. Council, 325 F.3d at 1164](#) n.4 (noting no deference is owed if agency acted outside of its authority).

v. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

The district court's interpretation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is reviewed de novo. *See* [Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 870](#) (9th Cir. 2001) (en banc); [Boeing Co. v. Cascade Corp. 207 F.3d 1177, 1182](#) (9th Cir. 2000); [California v. Montrose Chem Corp., 104 F.3d 1507, 1512](#) (9th Cir. 1997).

The district court's findings of fact can be reversed only if clearly erroneous and not merely because the appellate court "might have found otherwise on the same evidence." [Western Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 685](#) (9th Cir. 2004).

Summary judgments in CERCLA actions are reviewed de novo. *See* [California Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 665](#) (9th Cir. 2004) (denying); [California Dep't of Toxic Substances Control v. Campbell, 319 F.3d 1161, 1166](#) (9th Cir. 2003) (granting). Jurisdictional issues are also reviewed de novo. *See* [United States v. Shell Oil Co., 294 F.3d 1045, 1052](#) (9th Cir. 2002). The denial of a motion to intervene in a CERCLA action is reviewed de novo except that the court's determination of timeliness is reviewed for an abuse of discretion. *See* [California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc., 309 F.3d 1113, 1119](#) (9th Cir. 2002), *cert. dismissed*, [539 U.S. 911](#) (2003).

The district court's allocation of response costs under CERCLA is reviewed for an abuse of discretion and for clear error. *See* [Cadillac Fairview/California v. Dow Chem. Co., 299 F.3d 1019, 1025](#) (9th Cir. 2002); [Shell Oil, 294 F.3d at 1060](#).

vi. Attorneys' Fees Generally

Many environmental statutes permit an award of attorneys' fees. *See* [Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1094](#) (9th Cir. 1999) (listing

statutes). This court reviews such fee awards for an abuse of discretion. See [*Native Village of Quinhagak v. United States*, 307 F.3d 1075, 1079 \(9th Cir. 2002\)](#) (ANILCA); [*Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 956 \(9th Cir. 2002\)](#) (CWA); [*Marbled Murrelet*, 182 F.3d at 1096](#) (ESA). The denial of fees is also reviewed for an abuse of discretion. See [*ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1144 \(9th Cir. 2002\)](#) (CWA). Whether a particular environmental statute authorizes attorneys' fees is a question of law reviewed de novo. See [*Unocal Corp. v. United States*, 222 F.3d 528, 542 \(9th Cir. 2000\)](#) (Oil Pollution Act); [*United States v. Stone Container Corp.*, 196 F.3d 1066, 1068 \(9th Cir. 1999\)](#) (CWA). See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, i. Environmental Laws.

n. ERISA

The interpretation of ERISA is a question of law reviewed de novo. See [*Metropolitan Life Ins. Co. v. Parker*, 436 F.3d 1109, 1113 \(9th Cir. 2006\)](#); [*Mathews v. Chevron Corp.*, 362 F.3d 1172, 1178 \(9th Cir. 2004\)](#); [*Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 \(9th Cir. 2003\)](#). The applicability of other statutes to ERISA presents a question of law reviewed de novo. See [*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. See [*Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 \(9th Cir. 1995\)](#). The trial court's decision to apply an exception to the exhaustion requirements of ERISA is reviewed, however, for an abuse of discretion. See [*Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 984 \(9th Cir. 2001\)](#).

The denial of a motion to remand a removal case that allegedly implicates ERISA is reviewed de novo. See [*Abraham v. Norcal Waste Sys., Inc.*, 265 F.3d 811, 819 \(9th Cir. 2001\)](#).

The district court's choice and application of the appropriate standard is reviewed by this court de novo. See [*Gatti v. Reliance Standard Life Ins.*, 415 F.3d 978, 981 \(9th Cir. 2005\)](#); [*Lamantia v. Voluntary Plan Administrators*, 401 F.3d 1114, 1121 \(9th Cir. 2005\)](#); [*Johnson v. Buckley*, 356 F.3d 1067, 1071 \(9th Cir. 2004\)](#).

A challenge to an ERISA's plan's denial of benefits is reviewed de novo unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. See [Aetna Health Inc. v. Davila](#), 542 U.S. 200, 210 (2004); [Gatti](#), 415 F.3d at 981.⁴⁴⁶ “When the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits, that determination is reviewed for abuse of discretion.” [Gatti](#), 415 F.3d at 981. Note that procedural violations of ERISA do not alter the standard of review, unless the violations cause the beneficiary substantive harm. See [id.](#) at 985.

Where the district court conducts a de novo review, the district court's factual findings are reviewed only to determine whether they are clearly erroneous. See [Silver v. Executive Car Leasing Long-Term Disability Plan](#), 457 F.3d 982, 987 (9th Cir. 2006). This does not change even when the district court adopts “wholesale the findings of fact proposed by one party.” [Id.](#)

When such discretion exists, the district court reviews the administrator's determinations for an abuse of discretion. See [Nord v. Black & Decker Disability Plan](#), 356 F.3d 1008, 1010 (9th Cir. 2004).⁴⁴⁷ Note that the abuse of discretion standard may be “heightened” by the presence of a serious conflict of interest by the administrator of the plan. See [Alford v. DCH Foundation Group Long-Term Disability Plan](#), 311 F.3d 955, 957 (9th Cir. 2002); [Bergt v. Retirement Plan for Pilots Employed by Markair, Inc.](#), 293 F.3d 1139, 1142 (9th Cir. 2002).⁴⁴⁸ An ERISA plan administrator

⁴⁴⁶ See also [Firestone Tire & Rubber Co. v. Bruch](#), 489 U.S. 101, 115 (1989); [Johnson v. Buckley](#), 356 F.3d 1067, 1075 (9th Cir. 2004); [Jebian v. Hewlett Packard Co.](#), 349 F.3d 1098, 1102 (9th Cir. 2003); [Schikore v. Bankamerica Supplemental Retirement Plan](#), 269 F.3d 956, 960-61 (9th Cir. 2001); [Ingram v. Martin Marieta Long Term Disability Income Plan](#), 244 F.3d 1109, 1112 (9th Cir. 2001); [Thomas v. Oregon Fruit Products Co.](#), 228 F.3d 991, 993-94 (9th Cir. 2000); [Kearney v. Standard Ins. Co.](#), 175 F.3d 1084, 1087-90 (9th Cir. 1999) (en banc).

⁴⁴⁷ [Jebian](#), 349 F.3d at 1103 (noting standard is the same as “arbitrary and capricious”); [Alford v. DCH Group Long Term Disability Plan](#), 311 F.3d 955, 957 (9th Cir. 2002); [Schikore](#), 269 F.3d at 960; [Tremain v. Bell Indus., Inc.](#), 196 F.3d 970, 975 n.5 (9th Cir. 1999) (noting arbitrary and capricious standard is synonymous with abuse of discretion standard).

⁴⁴⁸ See also [Rush Prudential HMO, Inc. v. Moran](#), 536 U.S. 355, 384

abuses its discretion if it construes provisions of the plan in a way that conflicts with the plain language of the plan. See [Schikore v. Bankamerica Supplemental Retirement Plan](#), 269 F.3d 956, 960 (9th Cir. 2001); [Saffle v. Sierra Pac. Power Co.](#), 85 F.3d 455, 456 (9th Cir. 1996).

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. See [Patelco Credit Union v. Sahni](#), 262 F.3d 897, 912 (9th Cir. 2001); [Friedrich v. Intel Corp.](#), 181 F.3d 1105, 1110-11 (9th Cir. 1999). The court's decision to permit evidence that was not before the plan administrator is also reviewed for an abuse of discretion. See [Dishman](#), 269 F.3d at 985.

Whether ERISA preempts state law is a question of law reviewed de novo. See [Cleghorn v. Blue Shield of California](#), 408 F.3d 1222, 1225 (9th Cir. 2005); [Winterrowd v. American Gen. Annuity Ins. Co.](#), 321 F.3d 933, 937 (9th Cir. 2003); [Southern California IBEW-NECA Trust Funds v. Standard Indus. Elect. Co.](#), 247 F.3d 920, 924 (9th Cir. 2001). Whether a party has standing to assert preemption is a question of law reviewed de novo. See [S.D. Meyers, Inc. v. City and County of San Francisco](#), 253 F.3d 461, 474 (9th Cir. 2001).

An award of attorneys' fees is reviewed for an abuse of discretion. See [Plumber, Steamfitter and Shipfitter Indus. Pension Plan & Trust v. Siemens Building Technologies Inc.](#), 228 F.3d 964, 971 (9th Cir. 2000); [Trustees of Directors Guild of America-Producer Pension Benefits Plans](#), 234 F.3d 415, 426 (9th Cir. 2000) (interpleader), amended by, 255 F.3d 661 (9th Cir. 2001); [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). The denial of fees is also reviewed for an abuse of discretion. See [Honolulu Joint Apprenticeship and Training Comm. v. Foster](#), 332 F.3d 1234, 1240 (9th Cir. 2003); [McElwaine v. U.S. West](#), 176 F.3d 1167, 1171 (9th Cir. 1999). See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, k. ERISA.

Whether to award prejudgment interest to an ERISA plaintiff is reviewed for an abuse of discretion. See [Landwehr v. DuPree](#), 72 F.3d 726,

n.15 (2002) (noting but not resolving when "truly deferential review" applies); [Schikore](#), 269 F.3d at 961 (declining to decide whether "heightened" standard applies).

[739 \(9th Cir. 1995\)](#). The court’s calculation of prejudgment interest is also reviewed for an abuse of discretion. See [Dishman, 269 F.3d at 988](#); [Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1163-64 \(9th Cir. 2001\)](#). Whether to award costs is reviewed for an abuse of discretion. See [California Ironworkers Field Pension Trust v. Loomis Sayles, 259 F.3d 1036, 1042 \(9th Cir. 2001\)](#).

o. Fair Debt Collection Practices Act

A district court’s interpretation of the Fair Debt Collection Practices Act is reviewed de novo. See [Camacho v. Bridgeport Financial Inc., 430 F.3d 1078, 1079 \(9th Cir. 2005\)](#); [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. See [Camacho, 430 F.3d at 1079](#); [Terran v. Kaplan, 109 F.3d 1428, 1432-33 \(9th Cir. 1997\)](#). A grant of summary judgment under the Act is reviewed de novo, see [Slenk v. Transworld Sys., Inc., 236 F.3d 1072, 1074 \(9th Cir. 2001\)](#), as is the district court’s decision to grant or deny a motion to dismiss, see [Camacho, 430 F.3d at 1079](#). An award of attorneys’ fees is reviewed for an abuse of discretion. See [Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1148 \(9th Cir. 2001\)](#).

p. Fair Labor Standards Act

A district court’s interpretation of the FLSA is reviewed de novo. See [Gieg v. DDR, Inc., 407 F.3d 1038, 1044-45 \(9th Cir. 2005\)](#); [Mortensen v. County of Sacramento, 368 F.3d 1082, 1086 \(9th Cir. 2004\)](#).⁴⁴⁹ The district court’s interpretation of FLSA regulations is also reviewed de novo. See [Cleveland v. City of Los Angeles, 420 F.3d 981, 988 \(9th Cir. 2005\)](#); [Webster v. Public Sch. Employees of Washington, 247 F.3d 910, 914-15 \(9th Cir. 2001\)](#). Nonetheless, deference is owed to the DOL’s regulations interpreting the Act. See [Cleveland, 420 F.3d at 988](#); [Baldwin v. Trailer](#)

⁴⁴⁹ See also [Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115, 1117 \(9th Cir. 2001\)](#); [Collins v. Lobdell, 188 F.3d 1124, 1128 \(9th Cir. 1999\)](#) (addressing whether the FLSA prohibits an employer from compelling an employee to use comp time); [Berry v. County of Sonoma, 30 F.3d 1174, 1180 \(9th Cir. 1994\)](#) (addressing whether limitations on employee’s personal activities while on-call are such that on-call waiting time is compensable under the FLSA).

Inns, Inc., 266 F.3d 1104, 1112 n.4 (9th Cir. 2001); Webster, 247 F.3d at 914.⁴⁵⁰

Issues of law regarding application of the Act are also reviewed de novo. See Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 910 (9th Cir. 2004) (whether activity is excluded from hours worked under FLSA); Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 935 n.11 (9th Cir. 2004) (what constituted compensable working time).⁴⁵¹

Summary judgment is reviewed de novo. See Gieg, 407 F.3d at 1045 (reversing grant of summary judgment); Leever v. Carson City, 360 F.3d 1014, 1017 (9th Cir. 2004) (same).

A district court's decision regarding exemptions to the FLSA is also reviewed de novo. See Geig, 407 F.3d at 1045; Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1124 (9th Cir. 2002); Do v. Ocean Peace, Inc., 279 F.3d 688, 690-91 (9th Cir. 2002) ("first processing" exemption).

Findings of fact underlying a legal determination are reviewed for clear error. See Icicle Seafoods Inc. v. Worthington, 475 U.S. 709, 714 (1986); Ballaris, 370 F.3d at 910 (nature of employees' duties); Alvarez v. IBP, Inc., 339 F.3d 894, 908 (9th Cir. 2003); Bothell, 299 F.3d at 1124 (how employee spent his time); Berry, 30 F.3d at 1180 (whether employees are able to use on-call time for personal activities).

The court's decision to award liquidated damages under the FLSA is reviewed for an abuse of discretion. See Alvarez, 339 F.3d at 909.

q. False Claims Act

⁴⁵⁰ See also Klem v. County of Santa Clara, 208 F.3d 1085, 1089 (9th Cir. 2000) (noting deference is owed even when the interpretation comes to the court in the form of a legal brief).

⁴⁵¹ See also Alvarez v. IBP, Inc., 339 F.3d 894, 908 (9th Cir. 2003) (willful violation); Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000) (preemption); Collins, 188 F.3d at 1127 (exhaustion); Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997) (joint employer status).

A district court's interpretation of the FCA is reviewed de novo. See [*United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*](#), 151 F.3d 1139, 1143 (9th Cir. 1998); [*United States ex rel. Hyatt v. Northrop Corp.*](#), 91 F.3d 1211, 1213-14 (9th Cir. 1996); [*United States ex rel. Lujan v. Hughes Aircraft Co.*](#), 67 F.3d 242, 245 (9th Cir. 1995). Whether the FCA's qui tam provisions are constitutional is a question of law reviewed de novo. See [*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.

Jurisdictional issues are reviewed de novo. See [*United States v. Catholic Healthcare West*](#), 445 F.3d 1147, 1151 (9th Cir. 2006); [*A-1 Ambulance Serv., Inc. v. California*](#), 202 F.3d 1238, 1242-43 (9th Cir. 2000); [*United States ex rel. Newsham v. Lockheed Missiles & Space Co.*](#), 190 F.3d 963, 968 (9th Cir. 1999). Any finding pertaining to the district court's jurisdictional ruling is reviewed for clear error. See [*A-1 Ambulance*](#), 202 F.3d at 1243; [*Lockheed Missiles*](#), 190 F.3d at 968; [*United States ex rel. Lujan v. Hughes Aircraft Co.*](#), 162 F.3d 1027, 1030 (9th Cir. 1998). A decision regarding whether a particular disclosure triggers the jurisdictional bar of the Act is a mixed question of law and fact also reviewed de novo. See [*United States ex rel. Found. Aiding the Elderly v. Horizon West Inc.*](#), 265 F.3d 1011, 1013 (9th Cir.), *amended by* 275 F.3d 1189 (9th Cir. 2001); [*A-1 Ambulance*](#), 202 F.3d at 1243; [*United States v. Alcan Elec. and Eng'g, Inc.*](#), 197 F.3d 1014, 1017 (9th Cir. 1999).

The district court's determination of the applicable statute of limitations is reviewed de novo. See [*Lujan*](#), 162 F.3d at 1034. Whether a complaint states a cause of action under the FCA is reviewed de novo. See [*United States v. Smithkline Beecham, Inc.*](#), 245 F.3d 1048, 1051 (9th Cir. 2001); [*Byl-Magee v. California*](#), 236 F.3d 1014, 1017 (9th Cir. 2001).

Summary judgments are reviewed de novo. See [*United States v. Kitsap Physicians Serv.*](#), 314 F.3d 995, 1000 (9th Cir. 2002) (affirming grant of summary judgment); [*Moore v. California Inst. of Tech.*](#), 275 F.3d 838, 844 (9th Cir. 2002) (reversing grant of summary judgment).

A court's decision to modify the parties' settlement to conform with the requirements of the FCA is reviewed de novo. See [*United States ex rel. Sharma v. University of S. California*](#), 217 F.3d 1141, 1143 (9th Cir. 2000).

The denial of costs is reviewed for an abuse of discretion. See [Lockheed Missiles, 190 F.3d at 968](#). Whether the district court has the authority to award costs under the Act is reviewed de novo. See *id.*; [United States ex. rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1412 n.13 \(9th Cir. 1995\)](#). Note that an “award of fees under the False Claims Act is reserved for rare and special circumstances.” [Pfingston v. Ronan Eng’g Co., 284 F.3d 999, 1006-07 \(9th Cir. 2002\)](#).

r. Federal Employers Liability Act (FELA)

Questions relating to the district court’s subject matter jurisdiction under FELA are reviewed de novo. See [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 \(9th Cir. 1986\)](#). Summary judgments are reviewed de novo. See [Rivera v. National R.R. Passenger Corp., 331 F.3d 1074, 1078 \(9th Cir.\), amended by 340 F.3d 767 \(9th Cir. 2003\)](#).

s. Federal Tort Claims Act

Interpretation of the FTCA is reviewed de novo. See [Vacek v. United States Postal Service, 447 F.3d 1248, 1250 \(9th Cir. 2006\)](#); [Lehman v. United States, 154 F.3d 1010, 1013 \(9th Cir. 1998\)](#). Whether the United States is liable under the FTCA is also reviewed de novo. See [Anderson v. United States, 55 F.3d 1379, 1380 \(9th Cir. 1995\)](#). Whether the United States is immune from liability under the FTCA is a question of law reviewed de novo. See [Alfrey v. United States, 276 F.3d 557, 561 \(9th Cir. 2002\)](#); [Kelly v. United States, 241 F.3d 755, 759 \(9th Cir. 2001\)](#).⁴⁵²

Dismissal of an action under the Federal Torts Claims Act on a statute of limitations ground is reviewed de novo. See [Erilin v. United States, 364 F.3d 1127, 1130 \(9th Cir. 2004\)](#) (noting appropriate accrual date is reviewed de novo unless the choice of that date turns on what a reasonable person should have known, a fact reviewed for clear error). Additionally, the district court’s determination regarding subject matter jurisdiction under the Act is reviewed de novo. See [Vacek, 447 F.3d at 1250](#) (dismissal); [Bramwell v. United States Bureau of Prisons, 348 F.3d 804, 806 \(9th Cir.](#)

⁴⁵² 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).

[2003](#)) (dismissal); [Moe v. United States, 326 F.3d 1065, 1067 \(9th Cir.\) \(reviewing refusal to dismiss\), cert. denied, 540 U.S. 877 \(2003\)](#).⁴⁵³ The district court's application of the discretionary function exception is also reviewed de novo. See [Bibeau v. Pacific Northwest Research Found. Inc., 339 F.3d 942, 944 \(9th Cir. 2003\)](#) (reviewing dismissal).⁴⁵⁴

This court reviews de novo whether a government employee was acting within the scope of employment. See [Kashin v. Kent, 457 F.3d 1033, 1036 \(9th Cir. 2006\)](#); [Clamor v. United States, 240 F.3d 1215, 1216-17 \(9th Cir. 2001\)](#); [Wilson v. Drake, 87 F.3d 1073, 1076 \(9th Cir. 1996\)](#). Whether the district court erred in substituting the United States for individual defendants is reviewed de novo. See [McLachlan v. Bell, 261 F.3d 908, 910 \(9th Cir. 2001\)](#) (reviewing de novo certification of government employment). The question of the existence of a duty is a matter of law subject to de novo review. See [Sutton v. Earles, 26 F.3d 903, 912 n.8 \(9th Cir. 1994\)](#); [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. See [USAir, 14 F.3d at 1412](#). The district court's determination of negligence is reviewed under the clearly erroneous standard. See [Sutton, 26 F.3d at 913](#). Finally, whether an activity is "inherently dangerous" is a question of fact reviewed under the clearly erroneous standard. See [McMillan v. United States, 112 F.3d 1040, 1043-44 \(9th Cir. 1997\)](#) (applying federal standard of review); *but see* [Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 \(9th Cir. 2001\)](#) (reviewing de novo summary judgment determination whether activity is inherently dangerous).

t. *Feres Doctrine*

⁴⁵³ See also [Blair v. United States, 304 F.3d 861, 864 \(9th Cir. 2002\)](#) (reviewing dismissal for lack of jurisdiction due to failure to present an adequate claim to the federal agency); [O'Toole v. United States, 295 F.3d 1029, 1032 \(9th Cir. 2002\)](#) (reversing dismissal); [Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 \(9th Cir. 2001\)](#); [Gager v. United States, 149 F.3d 918, 920 \(9th Cir. 1998\)](#) (postal matter exception and discretionary function exception).

⁴⁵⁴ See also [O'Toole, 295 F.3d at 1032](#); [Marlys Bear Medicine, 241 F.3d at 1213](#); [Sutton v. Earles, 26 F.3d 903, 907 \(9th Cir. 1994\)](#).

Whether the *Feres* doctrine is applicable to the facts of a given case is a question of law reviewed de novo. See [Wilkins v. United States](#), 279 F.3d 782, 785 (9th Cir. 2002); [Costo v. United States](#), 248 F.3d 863, 865-66 (9th Cir. 2001); [Bowen v. Oistead](#), 125 F.3d 800, 803 (9th Cir. 1997). A court's decision to dismiss an action pursuant to the *Feres* doctrine is also reviewed de novo. [Bowen](#), 125 F.3d at 803.

u. Freedom of Information Act (FOIA)

Interpretations of FOIA are reviewed de novo. See [TPS, Inc. v. United States Dep't of Def.](#), 330 F.3d 1191, 1194 (9th Cir. 2003) (reviewing meaning of "business as usual" standard). Whether an exemption applies is a question of law reviewed de novo. See [Environmental Protection Information Center v. United States Forest Service](#), 432 F.3d 945 (9th Cir. 2005); [Carter v. United States Dep't of Commerce](#), 307 F.3d 1084, 1088 (9th Cir. 2002);⁴⁵⁵ but see [Kamman v. IRS](#), 56 F.3d 46, 47 (9th Cir. 1995) (reviewing for clear error whether district court's finding that documents are exempt from mandatory disclosure); [Painting Indus. of Haw. Mkt. Recovery Fund v. United States Air Force](#), 26 F.3d 1479, 1482 (9th Cir. 1994) ("We determine whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt.").

Fee waiver decisions are reviewed de novo, with review limited to the record before the agency. See [Friends of the Coast Fork v. United States Dep't of Interior](#), 110 F.3d 53, 55 (9th Cir. 1997).

This circuit employs a special two-step standard to review the grant of summary judgment in a FOIA case. See [Lion Raisins Inc. v. United States Dep't of Agriculture](#), 354 F.3d 1072, 1078 (9th Cir. 2004); [TPS](#), 330 F.3d at 1194; [Lissner v. United States Custom Serv.](#), 241 F.3d 1220, 1222 (9th Cir.

⁴⁵⁵ See also [Southwest Ctr. for Biological Diversity v. United States Dep't of Agriculture](#), 314 F.3d 1060, 1061 (9th Cir. 2002) (reviewing de novo whether exemption can be applied retroactive); [Fiduccia v. United States Dep't of Justice](#), 185 F.3d 1035, 1040 (9th Cir. 1999); [Schiffer v. Federal Bureau of Investigation](#), 78 F.3d 1405, 1409 (9th Cir. 1996) ("[W]hile we review the underlying facts supporting the district court's decision for clear error, we review de novo its conclusion that [the documents are not exempt].").

[2001](#)).⁴⁵⁶ Instead of determining whether a genuine issue of material fact exists, the court employs the 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 [Environmental Protection Information Center, 432 F.3d at 947](#); [Lion Raisins, 354 F.3d at 1078](#) (explaining when de novo review is appropriate); [TPS, 330 F.3d at 1194](#) (noting some cases have applied different standards); [Lissner, 241 F.3d at 1222](#) (noting when parties do not dispute whether the court had an adequate basis for its decision, the court's conclusion that documents are exempt from disclosure is reviewed de novo).

A district court's decision whether to award attorneys' fees under FOIA is reviewed for an abuse of discretion. See [Lissner, 241 F.3d at 1224](#); [GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1116 \(9th Cir. 1994\)](#); [Long v. IRS, 932 F.2d 1309, 1313 \(9th Cir. 1991\)](#) (noting factors that district court should consider before exercising its discretion). Whether an interim fee award is permissible under FOIA is a question of law reviewed de novo. See [Rosenfeld v. United States, 859 F.2d 717, 723 \(9th Cir. 1988\)](#).

v. Immigration

Note that the REAL ID Act of 2005, [Pub. L. No. 109-13, 119 Stat. 231 \(2005\)](#) made several changes to the judicial review provisions of the INA, including eliminating statutory and non-statutory habeas jurisdiction over final orders of removal, deportation and exclusion, and making a petition for review filed with an appropriate court of appeals the sole and exclusive means for judicial review of such orders. See REAL ID Act § 106(a) (amending [8 U.S.C. § 1252](#)). The REAL ID Act also expanded the scope of direct judicial review of final orders of removal, deportation and exclusion. Additionally, the REAL ID Act provides that a petition for review filed under IIRIRA's transitional rules shall be treated as a petition for review under the permanent provisions of [8 U.S.C. § 1252](#). See REAL ID Act § 106(d). Note also that notwithstanding the IIRIRA permanent and transitional rules limiting judicial review over certain discretionary

⁴⁵⁶ See also [Carter v. United States Dep't of Commerce, 307 F.3d 1084, 1088 \(9th Cir. 2002\)](#); [Klamath Water Users Protective Ass'n v. United States Dep't of Interior, 189 F.3d 1034, 1036 \(9th Cir. 1999\)](#); [Frazee v. United States Forest Serv., 97 F.3d 367, 370 \(9th Cir. 1996\)](#).

decisions, the REAL [ID](#) Act explicitly provides for judicial review over constitutional claims or questions of law. See [8 U.S.C. § 1252\(a\)\(2\)\(D\)](#) (as amended by § 106(a)(1)(A)(iii) of the REAL [ID](#) Act); *see also* [Fernandez-Ruiz v. Gonzales](#), 410 F.3d 585, 587 (9th Cir. 2005).

For more detailed information on the REAL [ID](#) Act and immigration proceedings generally, *see* [Immigration Law in the Ninth Circuit](#).

i. Board of Immigration Appeals (BIA)

1. Generally

Appellate review is limited to the administrative record underlying the BIA's decision. See [Njuguna v. Ashcroft](#), 374 F.3d 765, 769 (9th Cir. 2004); [Silva-Calderon v. Ashcroft](#), 371 F.3d 1135, 1137 (9th Cir. 2004); [Chouchkov v. INS](#), 220 F.3d 1077, 1080 (9th Cir. 2000) (noting that record is considered in its entirety, "including evidence that contradicts the BIA's findings").

When the BIA does not perform an independent review of the immigration judge's ("IJ") decision and instead defers to the IJ, the court of appeals reviews the IJ's decision. See [Tapia v. Gonzales](#), 430 F.3d 997, 999 (9th Cir. 2005); [Tawadrus v. Ashcroft](#), 364 F.3d 1099, 1100 (9th Cir. 2004). 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 [Hernandez-Guadarrama v. Ashcroft](#), 394 F.3d 674, 679 (9th Cir. 2005); [Simeonov v. Ashcroft](#), 371 F.3d 532, 535 (9th Cir. 2004). Note that the BIA is limited to reviewing the IJ's factual findings, including credibility determinations, for clear error. See [Mendoza-Manimbao v. Ashcroft](#), 329 F.3d 655, 661 (9th Cir. 2003). This court reviews both the decisions of the BIA and IJ to the extent the BIA incorporates the IJ's decision as its own. See [Kalubi v. Ashcroft](#), 364 F.3d 1134, 1137 n.3 (9th Cir. 2004); *see also* [Gonzalez v. INS](#), 82 F.3d 903, 907 (9th Cir. 1996) (explaining where the BIA incorporates the IJ's decision into its own, the court treats the IJ's statements of reasons as the BIA's).

Note that under the BIA's streamlining procedures, a single member of the BIA may affirm the decision of the IJ, thus bypassing the traditional three-judge review. In such cases, the Board affirms without opinion and the IJ's opinion becomes the final agency action. See [Lopez-Alvarado v. Ashcroft](#), 381 F.3d 847, 851 (9th Cir. 2004); [Avendano-Ramirez v. Ashcroft](#),

[365 F.3d 813, 815 \(9th Cir. 2004\)](#); *see also* [Falcon Carriche v. Ashcroft, 350 F.3d 845, 853 \(9th Cir. 2003\)](#) (holding that streamlining does not violate due process).

This circuit has not clearly articulated the proper standard for reviewing the BIA's summary dismissals. *See* [Singh v. Ashcroft, 361 F.3d 1152, 1157 \(9th Cir. 2004\)](#). Instead, the court reviews a summary dismissal to determine if it was appropriate. *see id.*; [Garcia-Cortez v. Ashcroft, 366 F.3d 749, 752 \(9th Cir. 2004\)](#) (noting review limited to appropriateness); [Casas-Chavez v. INS, 300 F.3d 1088, 1089 \(9th Cir. 2002\)](#) (noting that circuit "reviews summary dismissals to determine whether they are appropriate").

2. De Novo Review

The BIA's determination of purely legal questions is reviewed de novo. *See* [De Martinez v. Ashcroft, 374 F.3d 759, 761 \(9th Cir. 2004\)](#); [Simeonov, 371 F.3d at 535](#); [Kankamalage v. INS, 335 F.3d 858, 861 \(9th Cir. 2003\)](#). The BIA's interpretation and application of the immigration laws are generally entitled to deference, unless the interpretation is contrary to the plain and sensible meaning of the statute. *See* [Almaghzar v. Gonzales, 457 F.3d 915, 920 \(9th Cir. 2006\)](#); [Simeonov, 371 F.3d at 535](#); [Kankamalage 335 F.3d at 862](#) (noting when deference is owed). No deference is owed to the BIA's interpretation of statutes that it does not administer. *See* [Garcia-Lopez v. Ashcroft, 334 F.3d 840, 843 \(9th Cir. 2003\)](#) (construing state law).

Examples of questions of law reviewed de novo include:

- Due process challenges. *See* [Khup v. Ashcroft, 376 F.3d 898, 902 \(9th Cir. 2004\)](#); [Simeonov, 371 F.3d at 535](#).
- Equal protection challenges. *See* [Chavez-Perez v. Ashcroft, 386 F.3d 1284, 1287 \(9th Cir. 2004\)](#).
- Whether petitioner was a "spouse" of U.S. citizen under [8 U.S.C. § 1151](#). *See* [Freeman v. Gonzales, 444 F.3d 1031, 1037 \(9th Cir. 2006\)](#).
- Whether an offense constitutes an aggravated felony. *See* [Rosales-Rosales v. Ashcroft, 347 F.3d 714, 717 \(9th Cir. 2003\)](#).
- Legal determination of whether petitioner's daughter was a qualifying "child." *See* [Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1145 \(9th Cir. 2002\)](#).

- The availability of a writ of audita querela for purposes of immigration. See [Beltran-Leon v. INS](#), 134 F.3d 1379, 1380 (9th Cir. 1998).
- Whether the BIA had jurisdiction to consider an untimely appeal. See [Da Cruz v. INS](#), 4 F.3d 721, 722 (9th Cir. 1993).

3. Substantial Evidence

Findings made by the BIA are reviewed under the deferential substantial evidence standard and will be upheld unless the evidence compels a contrary result. See [Tawadrus](#), 364 F.3d at 1102; [Azanor v. Ashcroft](#), 364 F.3d 1013, 1018 (9th Cir. 2004) (motion to reopen); [Monjaraz-Munoz v. INS](#), 327 F.3d 892, 895 (9th Cir.) (discussing substantial evidence standard), *amended by* [339 F.3d 1012](#) (9th Cir. 2003).

Similar deference is accorded to credibility determinations. See [Hoque v. Ashcroft](#), 367 F.3d 1190, 1194 (9th Cir. 2004) (granting petition in asylum case finding adverse credibility determination not supported by substantial evidence); [Alvarez-Santos v. INS](#), 332 F.3d 1245, 1254 (9th Cir. 2003) (noting adverse credibility determinations must be based on “specific, cogent reasons”). Nonetheless, “[w]e give ‘special deference’ to a credibility determination that is based on demeanor.” [Singh-Kaur v. INS](#), 183 F.3d 1147, 1151 (9th Cir. 1999); *see also* [Arulampalam v. Ashcroft](#), 353 F.3d 679, 685 (9th Cir. 2003). However, note that the “special deference” accorded to an IJ’s credibility determination that is based on firsthand observations of demeanor, does not apply to the BIA’s independent, adverse credibility determination. See [Abovian v. INS](#), 219 F.3d 972, 978 (9th Cir.), *amended by*, [228 F.3d 1127](#) (9th Cir. 2000). When neither the BIA or the IJ makes a finding that a petitioner’s testimony is not credible, the court is required to accept the petitioner’s testimony as true. See [Knezevic v. Ashcroft](#), 367 F.3d 1206, 1209 (9th Cir. 2004); [Damon v. Ashcroft](#), 360 F.3d 1084, 1086 n.2 (9th Cir. 2004); [Ruano v. Ashcroft](#), 301 F.3d 1155, 1159 (9th Cir. 2002).

4. Abuse of Discretion

The BIA’s discretionary decision to deny asylum to an eligible petitioner is reviewed for an abuse of discretion. See [Kalubi v. Ashcroft](#), 364 F.3d 1134, 1137 (9th Cir. 2004); *see also* [8 U.S.C. § 1254\(b\)\(4\)\(D\)](#)

(providing “the Attorney General’s discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and abuse of discretion”).

The BIA’s denial of a motion to reopen or reconsider is also reviewed for abuse of discretion. See [Salta v. INS, 314 F.3d 1076, 1078 \(9th Cir. 2002\)](#); [Cano-Merida v. INS, 311 F.3d 960, 964 \(9th Cir. 2002\)](#); see also [Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1011 \(9th Cir. 2006\)](#) (motion to remand reviewed for abuse of discretion) [Movsisian v. Ashcroft, 395 F.3d 1095, 1098 \(9th Cir. 2005\)](#) (same). Additionally, the BIA’s treatment of a motion to remand as a motion to reopen is reviewed for abuse of discretion. See [Guzman v. INS, 318 F.3d 911, 913 \(9th Cir. 2003\)](#). For information regarding where the court has jurisdiction to review a motion to reopen that implicates a discretionary determination of the BIA, see Immigration Law in the Ninth Circuit.

This court has stated that the denial of a motion for a continuance is reviewed for abuse of discretion. See [Nakamoto v. Ashcroft, 363 F.3d 874, 883 n.6 \(9th Cir. 2004\)](#). However, in *Nakamoto* the court did not address the merits of the petitioner’s argument concerning the denial of the petitioner’s motion to reopen. Furthermore, the court has not yet decided the issue of whether it has been stripped of jurisdiction under the REAL ID Act to review the denial of motion for a continuance because it is a discretionary decision.

The IJ’s decision not to issue a subpoena for the production of documents is reviewed for an abuse of discretion. See [Kaur v. INS, 237 F.3d 1098, 1099 \(9th Cir.\)](#), amended by, [249 F.3d 830 \(9th Cir. 2001\)](#). The IJ’s decision whether to take administrative notice, whether to allow rebuttal evidence of the noticed facts, and whether the parties must be notified that notice will be taken is also reviewed for an abuse of discretion. See [Castillo-Villagra v. INS, 972 F.2d 1017, 1028 \(9th Cir. 1992\)](#); see also [Getachew v. INS, 25 F.3d 841, 845 \(9th Cir. 1994\)](#) (administrative notice).

The BIA abuses its discretion if its decision is “arbitrary, irrational, or contrary to law.” [Velarde v. INS, 140 F.3d 1305, 1310 \(9th Cir. 1998\)](#);); see also [Chete Juarez v. Ashcroft, 376 F.3d 944, 947 \(9th Cir. 2004\)](#) (“An immigration judge abuses his discretion when he acts arbitrarily, irrationally, or contrary to law.”) (internal quotation omitted). The BIA also abuses its discretion when it fails to offer a reasoned explanation for its decision, or

distorts or disregards important aspects of the alien's claim. See [Movisian](#), 95 F.3d at 1098 (denied without explanation); [Singh v. Gonzales](#), 416 F.3d 1006, 1015 (9th Cir. 2005) (failure to address ineffective assistance of counsel claim). The BIA must provide an explanation showing that it has "heard, considered, and decided" the issue, and conclusory statements are insufficient. [Kalubi](#), 364 F.3d at 1141-42.

Furthermore, the BIA is not free to ignore arguments raised by a party. See [Sagaydak v. Gonzales](#), 405 F.3d 1035, 1040 (9th Cir. 2005). Rather, an IJ must indicate how he weighed the factors involved and how he arrived at his conclusion. See *id.*; see also [Chen v. Ashcroft](#), 362 F.3d 611, 620 (9th Cir. 2004) (IJ erred in failing to consider an explanation offered to explain a witness's failure to testify).

5. Asylum

The BIA's decision that an alien has not established eligibility for asylum is reviewed under the substantial evidence standard. See [Gu v. Gonzales](#), 454 F.3d 1014, 1018-19 (9th Cir. 2006) (discussing "strict standard"); [Njuguna v. Ashcroft](#), 374 F.3d 765, 769 (9th Cir. 2004); [Hoque v. Ashcroft](#), 367 F.3d 1190, 1194 (9th Cir. 2004); [Gonzalez-Hernandez v. Ashcroft](#), 336 F.3d 995, 998 (9th Cir. 2003) (review is quite narrow). The BIA's determination must be upheld if supported by reasonable, substantial, and probative evidence in the record. See [INS v. Elias-Zacarias](#), 502 U.S. 478, 481 (1992); [Gu](#), 454 F.3d at 1018 (denying petition for review); [Lopez v. Ashcroft](#), 366 F.3d 799, 802 (9th Cir. 2004) (granting petition for review). Thus, factual findings underlying the denial of asylum are reviewed for substantial evidence. See [Padash v. INS](#), 358 F.3d 1161, 1165 (9th Cir. 2004); [Li v. Ashcroft](#), 356 F.3d 1153, 1157 (9th Cir. 2004) (en banc).

6. Convention Against Torture

The BIA's findings underlying its determination that an applicant is not eligible for relief under the Convention Against Torture are reviewed for substantial evidence. See [Bellout v. Ashcroft](#), 363 F.3d 975, 979 (9th Cir. 2004); [Zheng v. Ashcroft](#), 332 F.3d 1186, 1193 (9th Cir. 2003); [Kamalthas v. INS](#), 251 F.3d 1279, 1281 (9th Cir. 2001). The BIA's interpretation of purely legal questions is reviewed de novo. See [Zheng](#), 332 F.3d at 1193. The BIA's refusal to reopen proceedings to permit an application for relief

under the Convention Against Torture is reviewed for an abuse of discretion. See [Azanor v. Ashcroft](#), 364 F.3d 1013, 1018 (9th Cir. 2004); [Cano-Merida v. INS](#), 311 F.3d 960, 964 (9th Cir. 2002); [Kamalthas](#), 251 F.3d at 1281.

7. Cancellation of Removal

The IJ's factual determination of continuous physical presence is reviewed for substantial evidence. See [Lopez-Alvarado v. Ashcroft](#), 381 F.3d 847, 850-51 (9th Cir. 2004). Likewise, the court reviews for substantial evidence an adverse statutory or "per se" moral character determination. See [Moran v. Ashcroft](#), 395 F.3d 1089, 1091 (9th Cir. 2005). The court lacks jurisdiction to review a moral character finding based on discretionary factors. See [Kalaw v. INS](#), 133 F.3d 1147, 1151 (9th Cir. 1997). The court also lacks jurisdiction to review whether the petitioner demonstrated "exceptional and extremely unusual hardship." See [Martinez-Rosas v. Gonzales](#), 424 F.3d 926, 929 (9th Cir. 2005). Note that the court retains jurisdiction to review a due process challenge, and reviews such claims de novo. See [id.](#)

ii. District Court Appeals

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), [Pub. L. No. 104-208](#), [110 Stat. 3009](#), a petition for a writ of habeas corpus could be brought in federal district court pursuant to the Immigration and Nationality Act, [8 U.S.C. § 1105a\(b\)](#). The grant or denial of habeas relief under § 1105a(b) was reviewed de novo. See [Singh v. Reno](#), 113 F.3d 1512, 1514 (9th Cir. 1997); [Mosa v. Rogers](#), 89 F.3d 601, 603 (9th Cir. 1996). Section 1105a was repealed by IIRIRA. See [Hose v. INS](#), 180 F.3d 992, 994 & n.1 (9th Cir. 1999) (en banc) (noting IIRIRA merged deportation and exclusion proceedings into a broader category called "removal proceedings"). IIRIRA did not repeal, however, the statutory habeas corpus remedy provided by [28 U.S.C. § 2241](#). See [INS v. St. Cyr](#), 533 U.S. 289, 310 (2001); [Nunes v. Ashcroft](#), 375 F.3d 805, 810 (9th Cir. 2004); [Laing v. Ashcroft](#), 370 F.3d 994, 997 n.4 (9th Cir. 2004). Similarly, "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." [Zadvydas v. Davis](#), 533 U.S. 678, 688 (2001); see also [Laing](#), 370 F.3d at 1000 (noting that "jurisdiction under 28 U.S.C. § 2241 is ordinarily reserved for instances in which no other judicial remedy is available").

However, Section 106 of the REAL ID Act eliminated habeas review over final orders of exclusion, removal or deportation. *See* [8 U.S.C. 1252\(a\)\(2\)](#) (as amended); *see also* [Almaghzar v. Gonzales, 457 F.3d 915, 918 n.1 \(9th Cir. 2006\)](#). Thus, effective May 11, 2005, the exclusive means of judicial review of such decisions is a petition for review filed with the appropriate court of appeals. Moreover, all pending habeas petitions in district courts on May 11, 2005 were transferred to the appropriate court of appeals, and shall be treated as if they were filed pursuant to a petition for review under [8 U.S.C. § 1252](#).

This court has held that appeals of the denial of habeas relief that were already pending in this court upon enactment of the REAL ID Act shall be treated as timely filed petitions for review. *See, e.g.,* [Almaghzar, 457 F.3d at 918 n.1](#); [Alvarez-Barajas v. Gonzales, 418 F.3d 1050, 1053 \(9th Cir. 2005\)](#).

The REAL ID Act does not appear to have eliminated habeas review where a petitioner does not challenge or seek review of a final order of removal, deportation, or exclusion. *See* [Nadarajah v. Gonzales, 443 F.3d 1069 \(9th Cir. 2006\)](#); [Ali v. Gonzales, 421 F.3d 795, 796 n.1 \(9th Cir. 2005\)](#) (order) (noting that the transfer provisions of the REAL ID Act do not apply where petitioner does not challenge a final order of removal).

The district court's decision to grant or denial of habeas relief is reviewed de novo. *See* [Nadarajah, 443 F.3d at 1075](#); [Tuan Thai v. Ashcroft, 366 F.3d 790, 793 \(9th Cir. 2004\)](#). The district court's determinations regarding jurisdiction are reviewed de novo. *See* [Taniguchi v. Schultz, 303 F.3d 950, 955 \(9th Cir. 2002\)](#); [Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 \(9th Cir. 2000\)](#); [Barapind v. Reno, 225 F.3d 1100, 1109-10 \(9th Cir. 2000\)](#). A dismissal based on procedural default is also reviewed de novo. *See* [Jaramillo v. Stewart, 340 F.3d 877, 880 \(9th Cir. 2003\)](#); [Nakaranurack v. United States, 231 F.3d 568, 570 \(9th Cir. 2000\)](#). A dismissal based on mootness is reviewed de novo. *See* [Zegarra-Gomez v. INS, 314 F.3d 1124, 1126 \(9th Cir. 2003\)](#). The district court's decision to dismiss an alien's habeas petition under the federal comity doctrine is reviewed, however, for an abuse of discretion. *See* [Barapind, 225 at 1109](#).

The decision whether to grant a continuance is left to the sound discretion of the trial judge and will not be overturned except upon a showing of clear abuse. *See* [Gonzalez v. INS, 82 F.3d 903, 908 \(9th Cir.](#)

1996). The district court's decision to stay habeas proceedings is also reviewed for an abuse of discretion. See [Yong v. INS](#), 208 F.3d 1116, 1119 (9th Cir. 2000); see also [Andrieu v. Ashcroft](#), 253 F.3d 477, 483 (9th Cir. 2001) (en banc) (defining standard when this court grants stay).

The denial of a motion to dismiss an [8 U.S.C. § 1326](#) indictment for illegal reentry when the motion is based on alleged due process defects in the underlying deportation proceedings is reviewed de novo. See [United States v. Ubaldo-Figueroa](#), 364 F.3d 1042, 1047 (9th Cir. 2004); [United States v. Pallares-Galan](#), 359 F.3d 1088, 1094 (9th Cir. 2004); [United States v. Muro-Inclan](#), 249 F.3d 1180, 1182 (9th Cir. 2001).

w. Individuals with Disabilities Education Act (IDEA)

Judicial review in IDEA cases differs from judicial review of other agency actions because the standard is established by the Act itself. See generally [Amanda J. v. Clark County Sch. Dist.](#), 267 F.3d 877, 887-88 (9th Cir. 2001); [Ojai Unified Sch. Dist. v. Jackson](#), 4 F.3d 1467, 1471-72 (9th Cir. 1993). The district court reviews de novo administrative decisions under the IDEA. See [Seattle Sch. Dist., No. 1 v. B.S.](#), 82 F.3d 1493, 1499 (9th Cir. 1996); [Livingston Sch. Dist. Nos. 4 & 1 v. Keenan](#), 82 F.3d 912, 915 (9th Cir. 1996). Deference is owed, however, to the hearings officer's administrative findings and to the policy decisions of school administrators. [Seattle Sch.](#), 82 F.3d at 1499, [Livingston Sch.](#), 82 F.3d at 915.

The district court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. See [Amanda J.](#), 267 F.3d at 887; [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); see also [M.L. v. Federal Way Sch. Dis.](#), 394 F.3d 634, 644 (9th Cir. 2005) (factual findings regarding whether a school district has complied with the IDEA are reviewed for clear error). Whether a school district's proposed individual education plan provides a "free appropriate public education" is a question of law reviewed de novo. See [Amanda J.](#), 267 F.3d at 887. The ultimate appropriateness of an educational program is reviewed de novo. See [M.L.](#), 394 F.3d at 644; [Adams v. Oregon](#), 195 F.3d 1141, 1145 (9th Cir. 1999); [County of San Diego v. California Special Educ.](#)

[Hearing Office](#), 93 F.3d 1458, 1466 (9th Cir. 1996); [Seattle Sch.](#), 82 F.3d at 1499; [Clyde K.](#), 35 F.3d at 1401.

The application of the IDEA’s exhaustion requirements is a question of law reviewed de novo. See [Porter v. Board of Trustees of Manhattan Beach Unified Sch. Dist.](#), 307 F.3d 1064, 1069 (9th Cir. 2002), *cert. denied*, 537 U.S. 1194 (2003); [Witte v. Clark County School Dist.](#), 197 F.3d 1271, 1274 (9th Cir. 1999); see also [Robb v. Bethel Sch. Dist.](#), 308 F.3d 1047, 1048 (9th Cir. 2002) (holding that IDEA’s exhaustion requirement is jurisdictional). Whether an IDEA action is barred by a statute of limitations is reviewed de novo. See [S.V. v. Sherwood Sch. Dist.](#), 254 F.3d 877, 879 (9th Cir. 2001).

The district court’s discretion to award attorneys’ fees is narrow. See [Kletzelman v. Capistrano Unified Sch. Dist.](#), 91 F.3d 68, 70 (9th Cir. 1996) (defining standard); see also [Lucht v. Molalla River School Dist.](#), 225 F.3d 1023, 1026-27 (9th Cir. 2000) (discussing when fees are available). Review is for an abuse of discretion. See [Shapiro v. Paradise Valley Unified Sch. Dist. No. 69](#), 374 F.3d 857, 861 (9th Cir. 2004) See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys’ Fees, m. IDEA.

x. Labor Law

i. Arbitration

A labor arbitrator’s award is entitled to “nearly unparalleled deference.” See [Grammar v. Artists Agency](#), 287 F.3d 886, 890 (9th Cir. 2002) (internal quotation omitted); [Teamsters Local Union 58 v. BOC Gases](#), 249 F.3d 1089, 1093 (9th Cir. 2001) (same). Courts must defer “as long as the arbitrator even arguably construed or applied the contract.” See [Teamsters Local Union 58](#), 249 F.3d at 1093 (quoting [United Paperworkers Int’l Union v. Misco, Inc.](#), 484 U.S. 29, 38 (1987)).⁴⁵⁷

⁴⁵⁷ See also [Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.](#), 241 F.3d 1177, 1180-81 (9th Cir. 2001) (“extremely deferential”); [Association of Western Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc.](#), 221 F.3d 1085, 1089 (9th Cir. 2000) (“broad deference”).

A district court's decision to compel arbitration is reviewed de novo. See [Circuit City Stores, Inc. v. Adams](#), 279 F.3d 889, 892 n.2 (9th Cir. 2002); [Harden v. Roadway Package Sys., Inc.](#), 249 F.3d 1137, 1140 (9th Cir. 2001). The denial of a motion to compel arbitration is also reviewed de novo. See [Brown v. Dillard's, Inc.](#), 430 F.3d 1004, 1009 (9th Cir. 2005); [Ingle v. Circuit City Stores, Inc.](#), 328 F.3d 1165, 1169 (9th Cir.), *cert. denied*, 540 U.S. 1160 (2003). Furthermore, the validity and scope of an arbitration clause is reviewed de novo. See [Moore v. Local 569 of Int'l Bhd. of Elec. Workers](#), 53 F.3d 1054, 1055 (9th Cir. 1995); [Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. General Bldg. Contractor, Inc.](#), 952 F.2d 1073, 1076 (9th Cir. 1991).

Confirmation or vacation of an arbitration award is also reviewed de novo. See [Grammar](#), 287 F.3d at 890 (confirming); [Teamsters Local Union 58](#), 249 F.3d at 1093 (vacating); [Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.](#), 241 F.3d 1177, 1180 (9th Cir. 2001) (confirming).⁴⁵⁸

ii. Collective Bargaining Agreement

The construction and interpretation of a collective bargaining agreement is reviewed de novo. See [Carpenters Health & Welfare Trust Fund v. Bla-Delco Constr., Inc.](#), 8 F.3d 1365, 1367 (9th Cir. 1993). Whether a plaintiff is required to exhaust remedies provided by the collective bargaining agreement prior to filing an action in federal court is a question of law reviewed de novo. See [Sidhu v. Flecto Co.](#), 279 F.3d 896, 898 (9th Cir. 2002).

iii. Labor Management Relations Act

Whether a district court has jurisdiction under § 301 of the Labor Management Relations Act is reviewed de novo. See [Garvey v. Roberts](#), 203 F.3d 580, 587 (9th Cir. 2000). Whether claims fall within § 301(a) jurisdiction or the primary jurisdiction of the NLRB is a question of law reviewed de novo. See [Pace v. Honolulu Disposal Serv., Inc.](#), 227 F.3d

⁴⁵⁸ See also [Kyocera Corp. v. Prudential-Bache](#), 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding that review of arbitral decisions is limited to enumerated statutory grounds), *cert. dismissed*, 540 U.S. 1098 (2004).

[1150, 1155 \(9th Cir. 2000\)](#); [International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co., 50 F.3d 770, 773 \(9th Cir. 1995\)](#).⁴⁵⁹ Whether state claims are preempted by § 301 is reviewed de novo. See [Humble v. Boeing Co., 305 F.3d 1004, 1008 \(9th Cir. 2002\)](#); [Cramer v. Consolidated Freightways Inc., 255 F.3d 683, 689 \(9th Cir. 2001\) \(en banc\)](#).

The court's decision to require a party to exhaust intra-union remedies prior to filing an action under the LMRDA is reviewed for an abuse of discretion. See [Kofoed v. International Bro. of Elec., Local 48, 237 F.3d 1001, 1004 \(9th Cir. 2001\)](#).

iv. National Labor Relations Board (NLRB)

Decisions of the NLRB will be upheld on appeal if its findings of fact are supported by substantial evidence and if the agency correctly applied the law. See [Healthcare Employees Union v. NLRB, 441 F.3d 670, 679 \(9th Cir. 2006\)](#); [Glendale Assocs., Ltd. v. NLRB, 347 F.3d 1145, 1151 \(9th Cir. 2003\)](#); [California Pac. Med. Ctr. V. NLRB, 87 F.3d 304, 307 \(9th Cir. 1996\)](#).⁴⁶⁰ Substantial evidence is more than a mere scintilla, but less than a preponderance. See [NLRB v. International Bhd. of Elec. Workers, Local 48, 345 F.3d 1049, 1053-54 \(9th Cir. 2003\)](#). The test is essentially a case-by-case analysis requiring review of the whole record. See [Healthcare Employees Union, 441 F.3d at 679](#); [NLRB v. Iron Workers of Cal., 124 F.3d 1094, 1098 \(9th Cir. 1997\)](#); [California Pac., 87 F.3d at 307](#). “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 Honda Assocs. 2, Inc. v. NLRB, 89 F.3d 645, 648 \(9th Cir. 1996\)](#) (internal quotation omitted); see also [Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 \(9th Cir. 1995\)](#). The Supreme Court noted that under the substantial evidence standard, the reviewing court “must decide whether on this record it would have been possible for a reasonable jury to reach the Board’s conclusion.” [Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366 \(1998\)](#).

⁴⁵⁹ See also [Service Employees Union v. St. Vincent Med. Ctr., 344 F.3d 977, 983 \(9th Cir. 2003\)](#) (explaining primary jurisdiction doctrine), *cert. denied*, [541 U.S. 973](#) (2004).

⁴⁶⁰ 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.”).

Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect. See [Healthcare Employees Union, 441 F.3d at 675 n.9](#); [Underwriter's Lab., Inc. v. NLRB., 147 F.3d 1048, 1051 \(9th Cir. 1998\)](#).⁴⁶¹

The court of appeals should defer to the NLRB's reasonable interpretation and application of the National Labor Relations Act. See [Allentown Mack, 522 U.S. at 364](#) (noting deference is owed if Board's "explication is not inadequate, irrational or arbitrary"); [Glendale Assocs., 347 F.3d at 1151](#) (noting "considerable deference"); [International Bhd. of Elec. Workers, Local 48, 345 F.3d at 1054](#) (noting deference when NLRB's decision is "reasonably defensible").⁴⁶² 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., Inc. v. NLRB, 115 F.3d 636, 640 \(9th Cir. 1997\)](#) (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. See [NLRB v. The Bakersfield Californian, 128 F.3d 1339, 1341 \(9th Cir. 1997\)](#). The denial of § 10(j) injunction will be reversed only if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." See [Scott ex. rel. NLRB v. Stephen Dunn & Assocs., 241 F.3d 652, 659 \(9th Cir. 2001\)](#) (internal quotation omitted).

⁴⁶¹ See also [California Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1099 \(9th Cir. 1998\)](#) ("We must accord substantial deference to the ALJ's evaluation of the testimonial evidence."); [Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 \(9th Cir. 1995\)](#) ("Credibility determinations by the ALJ are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.") (internal quotation omitted).

⁴⁶² [Lucas v. NLRB, 333 F.3d 927, 931 \(9th Cir. 2003\)](#); (noting deference unless Board rests its decision on a misinterpretation of Supreme Court precedent); [NLRB v. Calkins, 187 F.3d 1080, 1085 \(9th Cir. 1999\)](#) (noting the Board's interpretation of the NLRA is accorded deference as long as it is "rational and consistent" with the statute).

v. Federal Labor Relations Authority

Review of decisions issued by the Federal Labor Relations Authority is governed by [5 U.S.C. § 706](#), which directs that agency action can be set aside only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See [Nat’l Treasury Employees Union v. FLRA](#), 418 F.3d 1068, 1071 n.5 (9th Cir. 2005); [Department of Veterans Affairs Med. Ctr. v. FLRA](#), 16 F.3d 1526, 1529 (9th Cir. 1994). Deference is owed to the FLRA’s interpretation of the statute that it administers. See [Nat’l Treasury](#), 418 F.3d at 1071 n.5; [U.S. Dep’t of Interior v. FLRA](#), 279 F.3d 762, 765 (9th Cir. 2002); [Eisinger v. FLRA](#), 218 F.3d 1097, 1100 (9th Cir. 2000) (noting “considerable discretion”). No deference is owed, however, to the FLRA’s interpretation of statutes that it does not administer. See [Nat’l Treasury](#), 418 F.3d at 1071 n.5; [Dep’t of Interior](#), 279 F.3d at 765.⁴⁶³

vi. Longshore and Harbor Workers’ Compensation Act (LHWCA)

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 [Kalama v. Director, OWCP](#), 354 F.3d 1085, 1090 (9th Cir. 2004); [Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.](#), 339 F.3d 1102, 1105 (9th Cir. 2003).⁴⁶⁴ The Board must accept the ALJ’s findings of fact unless they are contrary to law, irrational, or unsupported by substantial evidence in the record considered as a whole. See [Stevedoring Servs. of America v. Price](#), 382 F.3d 878, 884 (9th Cir. 2004); [Kalama](#), 354 F.3d at 1090.⁴⁶⁵

⁴⁶³ See also [American Fed. of Gov. Employees v. FLRA](#), 204 F.3d 1272, 1275 (9th Cir. 2000) (noting no deference to FLRA’s interpretation of executive orders that it does not administer).

⁴⁶⁴ See also [Richardson v. Continental Grain Co.](#), 336 F.3d 1103, 1105 (9th Cir. 2003) (denial of attorneys’ fees); [Stevedoring Servs. v. Director, OWCP](#), 297 F.3d 797, 801 (9th Cir. 2002); [Matson Terminals, Inc. v. Berg](#), 279 F.3d 694, 696 (9th Cir. 2002); [Marine Power & Equipment v. Department of Labor](#), 203 F.3d 664, 667 (9th Cir. 2000);

⁴⁶⁵ See also [Stevedoring Servs.](#), 297 F.3d at 801; [Sestich v. Long Beach Container Terminal](#), 289 F.3d 1157, 1159 (9th Cir. 2002); [Matson Terminals](#), 279 F.3d at 696; [Marine Power & Equipment](#), 203 F.3d at 667.

The Board's interpretation of the LHWCA is a question of law reviewed de novo. See [Stevedoring Servs.](#), 382 F.3d at 884; [O'Neil v. Bunge Corp.](#), 365 F.3d 820, 822 (9th Cir. 2004); [Metropolitan Stevedore](#), 339 F.3d at 1105. No special deference is owed to the Board's interpretation of the Act. See [Stevedoring Servs.](#), 382 F.3d at 878; [O'Neil](#), 365 F.3d at 822; [Stevedoring Servs. v. Director, OWCP](#), 297 F.3d 797, 801 (9th Cir. 2002).⁴⁶⁶ Rather, this court accords "considerable weight" to the construction of the statute urged by the Director, charged with its administration. See [Stevedoring Servs.](#), 297 F.3d at 801-02; [Matson Terminals, Inc. v. Berg](#), 279 F.3d 694, 696 (9th Cir. 2002); but see [O'Neil](#), 365 F.3d at 822 (noting court must respect the BRB's interpretation "where such interpretation is reasonable and reflects the policy underlying 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). 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. See [Moyle v. Director, OWCP](#), 147 F.3d 1116, 1119 (9th Cir. 1998); [Mallott & Peterson](#), 98 F.3d at 1172; see also [Transbay Container Terminal v. United States Dep't of Labor Benefits Review Bd.](#), 141 F.3d 907, 910 (9th Cir. 1998) (deference is owed to Director's litigation positions). Note, however, that whatever deference is owed, the Director's interpretation cannot contravene plain statutory language. See [Ramey v. Stevedoring Servs. of Amer.](#), 134 F.3d 954, 959 (9th Cir. 1998).

When the Board's affirmance is mandated by Public Law No. 104-134 rather than by deliberate adjudication, this court reviews the ALJ's decision directly under the substantial evidence standard. See [Matulic v. Director, OWCP](#), 154 F.3d 1052, 1055 (9th Cir. 1998); [Transbay](#), 141 F.3d at 910; [Jones Stevedoring Co. v. Director, OWCP](#), 133 F.3d 683, 687 (9th Cir. 1997).

⁴⁶⁶ See also [Matson Terminals](#), 279 F.3d at 696; [A-Z Int'l v. Phillips](#), 179 F.3d 1187, 1190 (9th Cir. 1999).

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 \(9th Cir. 1998\)](#). Whether a district court has subject matter jurisdiction to enforce orders issued by an ALJ pursuant to the LHWCA is a question of law reviewed de novo. See [A-Z Int'l v. Phillips, 323 F.3d 1141, 1145 \(9th Cir. 2003\)](#).

vii. Jones Act

Whether a claim has been stated under the Jones Act is a question of law subject to de novo review. See [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 [Martinez v. Signature Seafoods Inc., 303 F.3d 1132, 1134 \(9th Cir. 2002\)](#); [DeLange v. Dutra Const. Co., 183 F.3d 916, 919 \(9th Cir. 1999\)](#); [Boy Scouts v. Graham, 86 F.3d 861, 864 \(9th Cir. 1996\)](#). If reasonable persons, applying proper legal standards, could differ as to whether an employee was a seaman, it is a question for the jury. See [DeLange, 183 F.3d at 916](#); [Heise v. Fishing Co., 79 F.3d 903, 905 \(9th Cir. 1996\)](#). Whether the doctrine of maintenance and cure applies to a given set of facts is reviewed de novo. See [Sana v. Hawaiian Cruises, Inc., 181 F.3d 1041, 1044 \(9th Cir. 1999\)](#). The district court's computation of damages in a Jones Act action is reviewed for clear error. See [Simeonoff v. Hiner, 249 F.3d 883, 893 \(9th Cir. 2001\)](#). The grant of denial of prejudgment interest is reviewed for an abuse of discretion. See [id. at 894](#).

viii. Railway Labor Act

Statutory questions regarding the Railway Labor Act are reviewed de novo. See [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, 743 \(9th Cir. 1994\)](#) (internal quotation omitted). The RLA allows courts to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *Id.* Similarly, review of decisions of the National Mediation Board, acting pursuant to its authority under the RLA, is "extraordinarily limited." See [Horizon Air Indus. v. National Mediation Bd., 232 F.3d 1126, 1131 \(9th Cir. 2000\)](#). Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. See [Association of](#)

[*Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904 \(9th Cir. 2002\)](#)).

ix. Miscellaneous

Whether an employer should be considered a “joint employer” presents a question of law reviewed de novo. See [*Moreau v. Air France*, 356 F.3d 942, 945 \(9th Cir. 2004\)](#) (FMLA and CFRA); [*Torres-Lopez v. May*, 111 F.3d 633, 639 \(9th Cir. 1997\)](#) (FLSA and AWP). See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, x. Labor Law, iv. National Labor Relations Board.

y. 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 \(9th Cir. 1998\)](#). Note that this standard of review is an exception to the general rule that mixed questions of law and fact are reviewed de novo. See [*Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 \(9th Cir. 1995\)](#), *aff’d*, [*517 U.S. 830*](#) (1996); [*Vollendorff v. United States*, 951 F.2d 215, 217 \(9th Cir. 1991\)](#). “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](#);⁴⁶⁷ *but see* [*In re Catalina Cruises, Inc.*, 137 F.3d 1422, 1425 \(9th Cir. 1998\)](#) (standard of care is a question of law reviewed de novo).

z. Securities

This court reviews de novo a district court’s Rule 12(b)(6) dismissal of a federal securities claim. See [*Seinfeld v. Bartz*, 322 F.3d 693, 696 \(9th Cir.\)](#), *cert. denied*, [*540 U.S. 939*](#) (2003).⁴⁶⁸ Issues of personal jurisdiction

⁴⁶⁷ See also [*Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1196-97 \(9th Cir. 2001\)](#) (noting existence of duty to use due care is a question of law); [*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 783 \(9th Cir. 2000\)](#) (noting findings of proximate cause and causation-in-fact are reviewed for clear error), *aff’d*, [*535 U.S. 302*](#) (2002); [*Exxon*, 54 F.3d at 576](#) (findings regarding proximate cause are reviewed for clear error);

⁴⁶⁸ See, e.g., [*No. 84 Employer-Teamster Joint Council Pension Trust v. American West Holding Corp.*, 320 F.3d 920, 931 \(9th Cir.\)](#) (reversing

are reviewed de novo. See [*Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 \(9th Cir. 2000\)](#). Dismissals pursuant to Rule 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 reviewed de novo. See [*SEC v. Colello*, 139 F.3d 674, 675 \(9th Cir. 1998\)](#).

Summary judgments are reviewed de novo. See [*SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855 \(9th Cir. 2001\)](#). The trial court's refusal to remand a securities action to state court is reviewed de novo. See [*Patenaude v. Equitable Life Assurance*, 290 F.3d 1020, 1023 \(9th Cir. 2002\)](#); [*Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1211 \(9th Cir. 1998\)](#).

Whether a securities statute may be applied retroactively is a question of law reviewed de novo. See [*Scott v. Boos*, 215 F.3d 940, 942 \(9th Cir. 2000\)](#). Decisions regarding the validity and scope of arbitration clauses in securities actions are also reviewed de novo. [*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 \(9th Cir. 1990\)](#). Whether federal securities law voids choice of law and forum selection clauses present questions of law reviewed de novo. See [*Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 \(9th Cir. 1998\)](#) (en banc).

The court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. See [*Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 \(9th Cir. 2003\)](#); [*Gompper v. Visx, Inc.*, 298 F.3d 893, 898 \(9th Cir. 2002\)](#). 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 Inc. Securities Litigation*, 183 F.3d 970, 983 \(9th Cir. 1999\)](#).

"Class definitions" in securities litigation present questions of law reviewed de novo. See [*In re American Continental Corp./Lincoln Sav. &*](#)

district court's order granting motion to dismiss), *cert. denied*, [*540 U.S. 966*](#) (2003); [*DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 388 \(9th Cir. 2002\)](#) (affirming district court's order granting motion to dismiss).

[Loan Sec. Litig.](#), 49 F.3d 541, 543 (9th Cir. 1995). The dismissal of class action state securities fraud claims is reviewed for an abuse of discretion. See [Binder v. Gillespie](#), 184 F.3d 1059, 1066 (9th Cir. 1999). The court’s decision to certify a class is “very limited” and will be reversed “only upon a strong showing that the district court’s decision was a clear abuse of discretion.” [In re Mego Financial Corp. Securities Litigation](#), 213 F.3d 454, 461 (9th Cir. 2000) (internal quotation omitted). The court’s approval of an allocation plan for a settlement in a class action is also reviewed for an abuse of discretion. See [id.](#) at 460.

The district court’s decision to freeze assets to enforce a contempt order arising from the failure to disgorge is reviewed for an abuse of discretion. See [SEC v. Hickey](#), 322 F.3d 1123, 1128 (9th Cir.), *amended by* [335 F.3d 834](#) (9th Cir. 2003). The district court’s decision regarding an escrow order is reviewed for an abuse of discretion. See [SEC v. Gemstar TV Guide Int’l, Inc.](#), 367 F.3d 1087, 1091 (9th Cir. 2004).

The court’s decision whether to award attorneys’ fees in a securities action is reviewed for an abuse of discretion. See [Wininger v. SI Mgmt.](#), 301 F.3d 1115, 1123 (9th Cir. 2002); [Powers v. Eichen](#), 229 F.3d 1249, 1256 (9th Cir. 2000).

See also IV. Review of Agency Decisions, B. Specific Agency Review, 17. Securities Exchange Commission.

aa. Social Security

See IV. Review of Agency Decisions, B. Specific Agency Review, 18 Social Security Administration.

bb. 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); see also [Kesel v. United Parcel Serv., Inc.](#), 339 F.3d 849, 852 (9th Cir. 2003) (reviewing terms of waybill de novo).

cc. Tax

Decisions of the United States Tax Court are reviewed on the same basis as decisions in civil bench trials in the United States District Court. See [*Fargo v. Commissioner*, 447 F.3d 706, 709 \(9th Cir. 2006\)](#); [*Milenbach v. Commissioner*, 318 F.3d 924, 930 \(9th Cir. 2003\)](#); [*Baizer v. Commissioner*, 204 F.3d 1231, 1233 \(9th Cir. 2000\)](#). Thus, the tax court's conclusions of law are reviewed de novo. See [*Westpac Pacific Food v. Commissioner*, 451 F.3d 970, 974 \(9th Cir. 2006\)](#); [*Biehl v. Commissioner*, 351 F.3d 982, 985 \(9th Cir. 2003\)](#); [*Smith v. Commissioner*, 300 F.3d 1023, 1028 \(9th Cir. 2002\)](#).

The tax court's rulings on jurisdictional issues are reviewed de novo. See [*Gorospe v. Commissioner*, 451 F.3d 966, 968 \(9th Cir. 2006\)](#) (reviewing dismissal for lack of subject matter jurisdiction); [*Elings v. Commissioner*, 324 F.3d 1110, 1111 \(9th Cir. 2003\)](#) (reviewing denial of motion to dismiss for lack of jurisdiction); [*Estate of Branson v. Commissioner*, 264 F.3d 904, 908 \(9th Cir. 2001\)](#) (equitable recoupment).

The tax court's interpretation of the tax code is reviewed de novo. See [*Polone v. Commissioner*, 449 F.3d 1041, 1044 \(9th Cir. 2006\)](#); [*Biehl*, 351 F.3d at 985](#); [*Microsoft Corp. v. Commissioner*, 311 F.3d 1178, 1183 \(9th Cir. 2002\)](#). 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 interpretation of regulations is also reviewed de novo. See [*UnionBanCal Corp. v. Commissioner*, 305 F.3d 976, 981 \(9th Cir. 2002\)](#); [*Dykstra v. Commissioner*, 260 F.3d 1181, 1182 \(9th Cir. 2001\)](#).

The tax court's grant of summary judgment is reviewed de novo. See [*Miller v. Commissioner*, 310 F.3d 640, 642 \(9th Cir. 2002\)](#); [*Gladden v. Commissioner*, 262 F.3d 851, 853 \(9th Cir. 2001\)](#). The determination of time limitations applicable to a cause of action is reviewed de novo. See [*Bresson v. Commissioner*, 213 F.3d 1173, 1174 \(9th Cir. 2000\)](#). Whether taxes violate 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 \(9th Cir. 1999\)](#).

Although a presumption exists that the tax court correctly applied the law, no special deference is given to the tax court's decisions. See [*Custom*](#)

[*Chrome, Inc. v. Commissioner*, 217 F.3d 1117, 1121 \(9th Cir. 2000\)](#); [*Baizer*, 204 F.3d at 1233](#); *see also* [*Milenbach*, 318 F.3d at 930](#) (noting no deference on issues of state law).

The tax court's findings of fact are reviewed for clear error.⁴⁶⁹ *See* [*Metro Leasing and Dev. Corp. v. Commissioner*, 376 F.3d 1015, 1018-19 \(9th Cir. 2004\)](#) (reasonableness of executive officer's compensation). The tax court's finding of negligence is also reviewed for clear error. *See* [*Henry v. Commissioner*, 170 F.3d 1217, 1219 \(9th Cir. 1999\)](#); [*Little*, 106 F.3d at 1449](#); [*Sacks v. Commissioner*, 82 F.3d 918, 920 \(9th Cir. 1996\)](#). A tax court's finding that understatement of tax liability was due to negligence is also reviewed for clear error. *See* [*O.S.C. & Assocs, Inc. v. Commissioner*, 187 F.3d 1116, 1121 \(9th Cir. 1999\)](#); [*Little*, 106 F.3d at 1449](#); [*Sacks*, 82 F.3d at 920](#). This court reviews for clear error the imposition of tax penalties for intentional disregard of rules and regulations. *See* [*Cramer v. Commissioner*, 64 F.3d 1406, 1414 \(9th Cir. 1995\)](#).

Discretionary decisions are reviewed for abuse of discretion. *See* [*Dixon v. Commissioner*, 316 F.3d 1041, 1046 \(9th Cir. 2003\)](#) (refusal to vacate judgment based on alleged fraud); [*Jim Turin & Sons, Inc. v. Commissioner*, 219 F.3d 1103, 1105 & n.3 \(9th Cir. 2000\)](#) (clarifying standard); *but see* [*Bob Wondries Motors, Inc. v. Commissioner*, 268 F.3d 1156, 1160 \(9th Cir. 2001\)](#) (declining to decide whether de novo or abuse of discretion standard applies to choice of accounting method). Thus, the tax court's exclusion of evidence is reviewed for an abuse of discretion. *See* [*Little*, 106 F.3d at 1449](#).

A decision whether to award attorneys' fees is reviewed for an abuse of discretion. *See* [*Liti v. Commissioner*, 289 F.3d 1103, 1104-05 \(9th Cir. 2002\)](#); [*Bertolino v. Commissioner*, 930 F.2d 759, 761 \(9th Cir. 1991\)](#). The

⁴⁶⁹ *See, e.g.*, [*Milenbach v. Commissioner*, 318 F.3d 924, 930 \(9th Cir. 2003\)](#) (nature of settlement payment/timing of discharge of indebtedness); [*Estate of Trompeter v. Commissioner*, 279 F.3d 767, 770 \(9th Cir. 2002\)](#) (valuation of assets/fraudulent behavior); [*Suzy's Zoo v. Commissioner*, 273 F.3d 875, 878 \(9th Cir. 2001\)](#) ("producer"); [*Emert v. Commissioner*, 249 F.3d 1130, 1131-32 \(9th Cir. 2001\)](#) (notice of deficiency); [*Baizer v. Commissioner*, 204 F.3d 1231, 1233-34 \(9th Cir. 2000\)](#) (recission); [*Boyd Gaming*, 177 F.3d at 1098](#) (deduction); [*Henderson v. Commissioner*, 143 F.3d 497, 500 \(9th Cir. 1998\)](#) (location of "tax home").

denial of attorneys' fees sought pursuant to [26 U.S.C. § 7430](#) is also reviewed for an abuse of discretion. See [United States v. Ayres](#), 166 F.3d 991, 997 (9th Cir. 1999); [Awmiller v. United States](#), 1 F.3d 930, 930 (9th Cir. 1993). See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, s. Tax.

The tax court's decision whether to impose sanctions is reviewed for an abuse of discretion. See [Liti](#), 289 F.3d at 1105.

A district court's interpretation of the tax code is reviewed de novo. See [Brown v. United States](#), 329 F.3d 664, 671 (9th Cir.) (marital expense deduction), *cert. denied*, 540 U.S. 878 (2003); [Boise Cascade Corp. v. United States](#), 329 F.3d 751, 754 (9th Cir. 2003) (dividend deduction). Findings of fact are reviewed for clear error. See [Brown](#), 329 F.3d at 670 (step transaction doctrine). A district court's determination of the appropriate interest rate to be applied to unpaid taxes is a legal issue reviewed de novo. See [Oregon Short Line R.R. v. Dep't of Revenue Or.](#), 139 F.3d 1259, 1263 (9th Cir. 1998).

A district court's decision to quash an IRS summons is reviewed for clear error. See [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. See [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. See [United States v. Jose](#), 131 F.3d 1325, 1327 (Cir. 1997) (*en banc*).

dd. Title VII

The district court's rulings on legal issues in Title VII actions are reviewed de novo, while underlying findings of fact are subject to clearly erroneous review. See [Nichols v. Azteca Restaurant Enter., Inc.](#), 256 F.3d 864, 871 (9th Cir. 2001) (noting findings based on credibility determinations are given "greater deference"); [Star v. West](#), 237 F.3d 1036, 1038 (9th Cir. 2001) (Title VII).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, 1. Employment Discrimination.

ee. Trademark

Whether a district court has subject matter jurisdiction over a trademark dispute is a question of law reviewed de novo. See *Stuhbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 836 (9th Cir. 2001).

Summary judgments are reviewed de novo. See *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 926 (9th Cir. 2005); *Brother Records, Inc. v. Jardine*, 318 F.3d 900, 903 (9th Cir.) (noting summary judgment is “generally disfavored” in trademark cases), cert. denied, 540 U.S. 824 (2003); *Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 901 (9th Cir. 2002). The standard of review for a grant of summary judgment based on laches is “something of a hybrid.” *Grupo Gigante SA De CV v. Dallo & Co.*, 391 F.3d 1088, 1101 (9th Cir. 2004). The district court’s determinations as to whether there were any disputed material issues of facts and whether laches was a valid defense is reviewed de novo. See *id.*; but see *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1138 (9th Cir. 2006) (applying abuse of discretion standard in reviewing whether laches applies in a particular case). However, the district court’s application of laches factors is entitled to more deferential review. See *id.* The court of appeals has not yet decided whether the district court’s application of the laches factors is reviewed under the clearly erroneous or abuse of discretion standard. See *id.*

The court of appeals reviews a determination of likelihood of confusion for clear error. See *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1135 (9th Cir. 2006) (discussing factors of likelihood of confusion); *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002); *Dreamwerks Prod., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 & n.1 (9th Cir. 1998) (noting 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).⁴⁷⁰ Findings on the elements of nonfunctionality and secondary

⁴⁷⁰ See also *Walter v. Mattel, Inc.*, 210 F.3d 1108, 1111 (9th Cir. 2000); *Goto.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000); *Brookfield Comm., Inc. v. West Coast Entm’t*, 174 F.3d 1036, 1061 (9th Cir.

meaning are also reviewed for clear error. See [Committee for Idaho's High Desert, Inc. v. Yost](#), 92 F.3d 814, 822 (9th Cir. 1996); [Qualitex Co. v. Jacobson Prods. Co.](#), 13 F.3d 1297, 1304 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 159 (1995).

The decision whether to award fees under the Lanham Act is reviewed for an abuse of discretion. See [Earthquake Sound Corp. v. Bumper Indus.](#), 352 F.3d 1210, 1216 (9th Cir. 2003) (noting requirement of “exceptional case” is a question of law reviewed de novo).⁴⁷¹ However, the district court’s determination that a trademark case is “exceptional” is a question of law subject to de novo review. See [Watec Co., Ltd. V. Liu](#), 403 F.3d 645, 656 n.13 (9th Cir. 2005); [Earthquake Sound Corp.](#), 352 F.3d at 1216. See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys’ Fees, u. Trademark.

Legal issues underlying a preliminary injunction are review de novo while the terms are reviewed for an abuse of discretion. See [El Pollo Loco, Inc. v. Hahim](#), 316 F.3d 1032, 1038 (9th Cir. 2003) (trademark infringement). The scope of injunctive relief granted by the district court is reviewed for an abuse of discretion. See [Rolex Watch, U.S.A., Inc v. Michel Co.](#), 179 F.3d 704, 708 (9th Cir. 1999) (permanent injunction).

ff. Warsaw Convention

Interpretations of the Warsaw Convention are reviewed de novo. See [Caman v. Continental Airlines, Inc.](#), 455 F.3d 1087, 1089 (9th Cir. 2006); [Rodriguez v. Ansett Australia Ltd.](#), 383 F.3d 914, 916 (9th Cir. 2004); [Hosaka v. United Airlines, Inc.](#), 305 F.3d 989, 993 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003).

1999); [Levi Strauss & Co. v. Blue Bell, Inc.](#), 778 F.2d 1352, 1357-58 (9th Cir. 1985) (en banc).

⁴⁷¹ See also [Horphag Research Ltd. v. Pellegrini](#), 337 F.3d 1036, 1040 (9th Cir. 2003) (noting limitations on discretion), *cert. denied*, 540 U.S. 1111 (2004); [Cairns v. Franklin Mint Co.](#), 292 F.3d 1139, 1156 (9th Cir. 2002) (noting “exceptional cases” requirement); [Rolex Watch, U.S.A., Inc. v. Michel Co.](#), 179 F.3d 704, 711 (9th Cir. 1999) (discussing when attorneys’ fees are appropriate).

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 “willful misconduct” is reviewed for clear error. See [*Husain v. Olympic Airways*, 316 F.3d 829, 835 \(9th Cir. 2002\)](#), *aff’d*, [540 U.S. 644 \(2004\)](#); [*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. [*Koirala*, 126 F.3d at 1213](#). Summary judgments are reviewed de novo. See [*Camen*, 455 F.3d at 1089](#); [*Carey v. United Airlines*, 255 F.3d 1044, 1047 \(9th Cir. 2001\)](#). Dismissals for failure to state a claim are also reviewed de novo. See [*Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934, 937 \(9th Cir. 2002\)](#).

28. Supervising Trials

“Federal judges are granted broad discretion in supervising trials, and a judge’s behavior during trial justifies reversal only if he abuses that discretion. A judge’s participation during trial warrants reversal only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality.” See [*Price v. Kramer*, 200 F.3d 1237, 1252 \(9th Cir. 2000\)](#) (internal citation and quotation omitted); *see also* [*Jorgensen v. Cassidy*, 320 F.3d 906, 913 \(9th Cir. 2003\)](#) (noting “district court has broad discretion in supervising . . . litigation”); [*Medical Lab. Mgmt. Consultants v. American Broad. Cos.*, 306 F.3d 806, 826 \(9th Cir. 2002\)](#) (noting district court has “ample discretion” to control its dockets).

29. Supplemental Jury Instructions

A trial court’s decision to give a supplemental jury instruction is reviewed for an abuse of discretion. See [*Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 982 \(9th Cir. 2002\)](#). The formulation of such an instruction is also reviewed for an abuse of discretion. See *id.* However, the question of whether the jury instruction misstates the law is reviewed de novo. See *id.*

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 18. Jury Instructions.

30. Territorial Laws

a. Guam

This court reviews by direct appeal decisions of the district court of Guam and by writ of certiorari final decisions of the Guam Supreme Court. See [48 U.S.C. §§ 1424-2](#); [1424-3\(c\)\(d\)](#). This court has adopted a deferential standard of review of Guam Supreme Court decisions that interpret laws enacted by the Guam legislature or develop Guam's common law. See [Gutierrez v. Pangleinan, 276 F.3d 539, 546 \(9th Cir. 2002\)](#); see also [Haeuser v. Department of Law, 368 F.3d 1091, 1097 \(9th Cir. 2004\)](#) (noting deferential standard of review). This court will affirm when the Guam Supreme Court “reasonably and fairly” interprets the law. See [Gutierrez, 276 F.3d at 546](#); see also [Haeuser, 368 F.3d at 1099](#) (noting court will not reverse the Guam Supreme Court's decisions on local law “unless clear or manifest error is shown”). Review of the Guam Organic Act is, however, de novo after “we consider fully the Guam Supreme Court's explication of legal issues of unique concern to Guam.” [Gutierrez, 276 F.3d at 546-47](#). Review of the Guam Supreme Court's interpretation of a federal criminal statute is de novo. See [Guam v. Guerrero, 290 F.3d 1210, 1213-14 \(9th Cir. 2002\)](#).

b. Northern Mariana Islands

This court also has jurisdiction over appeals from the district court for the Northern Mariana Islands and over appeals from the Supreme Court of the Commonwealth of the Northern Mariana Islands “involving the Constitution, treaties or laws of the United States or any other authority exercised thereunder.” See [48 U.S.C. §§ 1823\(c\)](#); [1824\(a\)](#); see also [In re Estate of Dela Cruz, 279 F.3d 1098, 1101 \(9th Cir. 2002\)](#) (explaining limited review); [Sonoda v. Cabrera, 189 F.3d 1047, 1049-51 \(9th Cir. 1999\)](#) (same). Whether the CNMI Supreme Court possessed jurisdiction to decide a case is a question of law reviewed de novo. See [Aldan-Pierce v. Mafnas, 31 F.3d 756, 758 \(9th Cir. 1994\)](#). Whether a particular federal law applies to the CNMI is a question of law reviewed de novo. See [Saipan Stevedore Co. v. Director, OWCP, 133 F.3d 717, 719 \(9th Cir. 1998\)](#); [A & E Pac. Constr. Co. v. Saipan Stevedore Co., 888 F.2d 68, 70 \(9th Cir. 1989\)](#). The applicable statute of limitations is a question of law reviewed de novo. See [Northwest Airlines, Inc. v. Camacho, 296 F.3d 787, 789 \(9th Cir. 2002\)](#) (noting in absence of CNMI case law, courts should look to California law).

31. Treaties

The interpretation of a treaty or related executive order requires de novo review. See [Continental Ins. Co. v. Federal Express Corp.](#), 454 F.3d 951, 954 (9th Cir. 2006); [Motorola, Inc. v. Federal Express Corp.](#), 308 F.3d 995, 999 n.5 (9th Cir. 2002), cert. denied, 538 U.S. 1068 (2003).⁴⁷² “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 [United States v. Idaho](#), 210 F.3d 1067, 1072 (9th Cir. 2000), aff’d, 533 U.S. 262 (2001); [Cree v. Flores](#), 157 F.3d 762, 768 (9th Cir. 1998); [United States v. Washington](#), 157 F.3d 630, 642 (9th Cir. 1998). A court’s ruling that non-Indians may exercise treaty rights is reviewed for an abuse of discretion. See [Cree](#), 157 F.3d at 769.

Whether a constitutionally valid extradition treaty exists is a question of law reviewed de novo. See [Wang v. Masaitis](#), 416 F.3d 992, 996 (9th Cir. 2005); [Then v. Melendez](#), 92 F.3d 851, 853 (9th Cir. 1996). A trial court’s interpretation of an extradition treaty is reviewed de novo. See [Vo v. Benov](#), 447 F.3d 1235, 1240 (9th Cir. 2006); [In re Requested Extradition of Kevin Artt](#), 158 F.3d 462, 465 (9th Cir. 1998); [United States v. Lazarevich](#), 147 F.3d 1061, 1063 (9th Cir. 1998); [Clarey v. Gregg](#), 138 F.3d 764, 765 (9th Cir. 1998). An extradition tribunal’s factual determinations are reviewed for clear error. See [Vo](#), 447 F.3d at 465; [Artt](#), 158 F.3d at 465.

32. Tribal Courts

Whether a tribal court properly exercised its jurisdiction is a question of law reviewed de novo. See [Ford Motor Co. v. Todecheene](#), 394 F.3d 1170, 1173 (9th Cir. 2005); [AT&T v. Coeur D’Alene Tribe](#), 295 F.3d 899,

⁴⁷² See, e.g., [Hosaka v. United Airlines, Inc.](#), 305 F.3d 989, 993 (9th Cir. 2002) (Warsaw Convention), cert. denied, 537 U.S. 1227 (2003); [Ramsey v. United States](#), 302 F.3d 1074, 1077 (9th Cir. 2002) (Yakama Treaty), cert. denied, 540 U.S. 812 (2003); [Confederated Tribes of Chehalis Indian Reservation v. Washington](#), 96 F.3d 334, 340 (9th Cir. 1996) (Treaty of Olympia); [Freedom to Travel Campaign v. Newcomb](#), 82 F.3d 1431, 1441 (9th Cir. 1996) (International Covenant on Civil and Political Rights); [Bank Melli Iran v. Pahlavi](#), 58 F.3d 1406, 1408 (9th Cir. 1995) (Algerian Accords and Foreign Money-Judgments Act).

904 (9th Cir. 2002) (clarifying circuit law). Thus, a tribal court's exercise of jurisdiction over non-Indians is a question of federal law reviewed de novo. See *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000); *Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998).⁴⁷³ Decisions regarding the scope of tribal court jurisdiction are also reviewed de novo. See *Big Horn*, 219 F.3d at 949. Facts found by a tribal court are given deference unless they are clearly erroneous. See *Ford Motor Co.*, 394 F.3d at 1173; *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1206 n.1 (9th Cir. 2001) (en banc).

Whether a district court has diversity jurisdiction over a tribal entity is a question of law reviewed de novo. See *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 (9th Cir. 2002). 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 *Ford Motor Co.*, 394 F.3d at 1173; *El Paso Nat'l Gas Co. v. Neztosie*, 136 F.3d 610, 613 (9th Cir. 1998), *rev'd on other grounds*, 526 U.S. 473 (1999). Whether a federal district court should abstain in favor of exhaustion of tribal court remedies is reviewed de novo. *Burlington N. R.R. v. Red Wolf*, 106 F.3d 868, 869-70 (9th Cir.) (en banc), *vacated*, 522 U.S. 801 (1997); see also *United States v. Plainbull*, 957 F.2d 724, 725-28 (9th Cir. 1992) (discussing deference owed to tribal courts). Whether a tribal court's denial of compulsory process violated rights of an accused under the Indian Civil Rights Act (ICRA) is reviewed de novo. See *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 951 (9th Cir. 1998). Whether a denial of due process precludes a district court's grant of comity to the tribal court's judgment presents questions of law reviewed de novo. See *Bird v. Glacier Elect. Coop., Inc.*, 255 F.3d 1136, 1140-41 (9th Cir. 2001).

Whether a state has complied with the requirements of the Indian Gaming Regulatory Act (IGRA) presents a mixed question of law and fact reviewed de novo. See *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1107 (9th Cir.), *cert. denied*, 540 U.S. 1179 (2003). A state court's determination of domicile for purposes of the Indian Child Welfare Act

⁴⁷³ See also *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1209 (9th Cir. 2001) (en banc) (noting district court's decision regarding the scope of a tribe's authority to regulate matters affecting non-Indians is reviewed de novo).

(ICWA) is reviewed by federal courts for clear error. See [Navajo Nation v. Norris](#), 331 F.3d 1041, 1044 (9th Cir. 2003). The district court's interpretation of the Indian Self-Determination and Education Assistance Act (ISDEAA) is reviewed de novo. See [Navajo Nation v. Department of Health & Human Servs.](#), 325 F.3d 1133, 1136 & n.4 (9th Cir. 2003) (en banc) (rejecting presumption of interpretation in favor of tribe based on conclusion that ISDEAA is not ambiguous); see also [Quinault Indian Nation v. Grays Harbor County](#), 310 F.3d 645, 647 (9th Cir. 2002) (noting “[s]tatutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit”) (internal quotations omitted).

The district court's ruling that a tribe is not an indispensable party to a federal action is reviewed for an abuse of discretion unless the court's determination that the tribe's interests would not be impaired decides an issue of law, in which case review is de novo. See [American Greyhound Racing, Inc. v. Hull](#), 305 F.3d 1015, 1022 (9th Cir. 2002). The court's denial of a tribe's request for intervention as a matter of right is reviewed de novo. See [McDonald v. Means](#), 309 F.3d 530, 541 n.11 (9th Cir. 2002). The denial of permissive intervention is reviewed for an abuse of discretion. See [id.](#)

33. Verdict Forms

The district court has broad discretion in deciding whether to use a special or general verdict. See [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.

Note that a general verdict will be upheld “only if there is substantial evidence to support each and every theory of liability submitted to the jury.” [Webb v. Sloan](#), 330 F.3d 1158, 1166 (9th Cir. 2003) (noting exception) (internal quotation omitted), *cert. denied*, 540 U.S. 1141 (2004).

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). A party's failure to object to the verdict form, however, waives the right of appellate review. See [Ayuyu v. Tagabuel](#), [284 F.3d 1023](#), 1026 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, [259 F.3d 1101](#), 1109-10 (9th Cir. 2001). Note that the district court has discretion to resubmit a special verdict form to a jury that has rendered an inconsistent verdict. See [Duk v. MGM Grand Hotel, Inc.](#), [320 F.3d 1052](#), 1056-58 (9th Cir. 2003).

D. Post-Trial Decisions in Civil Cases

1. Appeals

A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. See [Pincay v. Andrews](#), [389 F.3d 853](#), 860 (9th Cir. 2004); [Marx v. Loral Corp.](#), [87 F.3d 1049](#), [1053](#) (9th Cir. 1996). The court's grant or denial of relief under FRAP 4(a)(6) is also reviewed for an abuse of discretion. See [Arai v. Leff](#), [316 F.3d 1066](#), [1068](#) (9th Cir. 2003); [Nguyen v. Southwest Leasing and Rental, Inc.](#), [282 F.3d 1061](#), [1064](#) (9th Cir. 2002); [In re Stein](#), [197 F.3d 421](#), [424](#) (9th Cir. 1999). See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 11. Excusable Neglect.

2. Attorneys' fees

Attorneys' fees awards are generally reviewed for an abuse of discretion. See [Childress v. Darby Lumber, Inc.](#), [357 F.3d 1000](#), [1011](#) (9th Cir. 2004). Likewise, the court's decision to deny attorneys' fees is also reviewed for an abuse of discretion. See [Lane v. Residential Funding Corp.](#), [323 F.3d 739](#), [742](#) (9th Cir. 2003) (RESPA). Refer to specific subject area section for examples.

Supporting findings of fact are reviewed for clear error. See [Native Village of Quinhagak v. United States](#), [307 F.3d 1075](#), [1079](#) (9th Cir. 2002); [Fischel v. Equitable Life Assurance Soc'y](#), [307 F.3d 997](#), [1005](#) (9th Cir. 2002).

Whether the district court applied the correct legal standard is reviewed de novo. See [Lovell v. Chandler](#), 303 F.3d 1039, 1058 (9th Cir. 2002) (ADA), cert. denied, [537 U.S. 1105](#) (2003); [Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc.](#), 260 F.3d 1054, 1058 (9th Cir. 2001). Whether a party has standing to assert a claim for attorneys' fees is reviewed de novo. See [Churchill Village v. General Electric](#), 361 F.3d 566, 578 n.10 (9th Cir. 2004). Thus, any element of legal analysis and statutory interpretation that figures into the district court's decision whether to award fees is reviewed de novo. See [Childress](#), 357 F.3d at 1011; [Clausen v. M/V New Carissa](#), 339 F.3d 1049, 1061-62 (9th Cir. 2003) (reviewing de novo whether statute permits an award of fees); [Native Village of Quinhagak](#), 307 F.3d at 1079 (reviewing de novo "statutory interpretation" underlying fee award). Note that a court's methodology in calculating a fee award is reviewed for an abuse of discretion. See [Fischel](#), 307 F.3d at 1007 (lodestar method).

A district court's departure from the American rule limiting awards of attorneys' fees is reviewed de novo. See [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. See [Anderson v. United States](#), 127 F.3d 1190, 1191 (9th Cir. 1997) (FTCA action).

a. Admiralty

An admiralty court's decision to award attorneys' fees is reviewed for an abuse of discretion. See [Madeja v. Olympic Packers](#), 310 F.3d 628, 635 (9th Cir. 2002); [B.P. N. Am. Trading, Inc. v. Vessel Panamax Nova](#), 784 F.2d 975, 976-77 (9th Cir. 1986).

b. Americans With Disabilities Act

The ADA, [42 U.S.C. § 12205](#) authorizes a court to award attorneys' fees. See [Lovell v. Chandler](#), 303 F.3d 1039, 1058 (9th Cir. 2002), cert. denied, [537 U.S. 1105](#) (2003). Such fee awards are reviewed for an abuse of discretion. See [Armstrong v. Davis](#), 318 F.3d 965, 970 (9th Cir. 2003);

[Lovell](#), 303 F.3d at 1058; [Fischer v. SJB-P.D., Inc.](#) 214 F.3d 1115, 1118 (9th Cir. 2000).

The denial of fees is also reviewed for an abuse of discretion. See [Richard S. v. Dep't of Developmental Servs.](#), 317 F.3d 1080, 1085 (9th Cir. 2003); [Barrios v. California Interscholastic Fed.](#), 277 F.3d 1128, 1133 (9th Cir. 2002).

c. Antitrust

Although the award of attorney's 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. See [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. See [Smith v. Ricks](#), 31 F.3d 1478, 1487 (9th Cir. 1994).

d. Bankruptcy

A bankruptcy court's award of attorneys' fees should not be reversed absent an abuse of discretion or an erroneous application of the law. See [In re Smith](#), 317 F.3d 918, 923 (9th Cir. 2002), cert. denied, 538 U.S. 1032 (2003); [In re Bennett](#), 298 F.3d 1059, 1063 (9th Cir. 2002); [In re Jastrem](#), 253 F.3d 438, 442 (9th Cir. 2001). The amount of the fee award is also reviewed for an abuse of discretion. See [In re Lewis](#), 113 F.3d 1040, 1043 (9th Cir. 1997). The bankruptcy court's decision whether to award fees under 11 U.S.C. § 523(d) is also reviewed for an abuse of discretion. See [In re Hunt](#), 238 F.3d 1098, 1101 (9th Cir. 2001). Note that there is no general right to recover attorneys' fees under the Bankruptcy Code. See [Renfrow v. Draper](#), 232 F.3d 688, 693 (9th Cir. 2000).

e. Civil Rights

Attorney fee awards made pursuant to 42 U.S.C. § 1988 are reviewed for an abuse of discretion. See [Tutor-Saliba Corp. v. City of Hailey](#), 452 F.3d 1055, 1059 (9th Cir. 2006); [Benton v. Oregon Student Assistance](#)

Comm'n, 421 F.3d 901, 904 (9th Cir. 2005) (where plaintiff received nominal damage award, district court abused discretion in awarding fees and costs); Webb v. Sloan, 330 F.3d 1158, 1167 n.6 (9th Cir.), *cert. denied*, 540 U.S. 1141 (2003) (reversing where district court used an incurred legal standard); Webb v. Ada County, 285 F.3d 829, 837 (9th Cir. 2002); Gilbrook v. City of Westminster, 177 F.3d 839, 875 (9th Cir. 1999) (noting district court's fee award in civil rights cases is entitled to deference). The district court's denial of fees is also reviewed for abuse of discretion. See Richard S. v. Dep't of Developmental Servs., 317 F.3d 1080, 1085-86 (9th Cir. 2003) (denying fees).

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. See Benton, 421 F.3d at 904 (reversing order granting fees); Lytle v. Carl, 382 F.3d 978, 982 (9th Cir. 2004); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997).

Any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed de novo. See Benton, 421 F.3d at 904; Dannenberg v. Valadez, 338 F.3d 1070, 1073 (9th Cir. 2003) (PLRA); Richard S., 317 F.3d at 1086; Armstrong v. Davis, 318 F.3d 965, 971 (9th Cir. 2003). Factual findings underlying the district court's decision are reviewed for clear error. See Richard S., 317 F.3d at 1086; Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996); Stivers v. Pierce, 71 F.3d 732, 751 (9th Cir. 1995).

The amount of a fee award is reviewed for an abuse of discretion. Dannenberg, 338 F.3d at 1073 (PLRA).

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. See 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. See 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).

f. Class Actions

An award of attorneys' fees in a class action is reviewed for an abuse of discretion. See Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000); In

re FPI/Agretech Sec. Litig., 105 F.3d 469, 472 (9th Cir. 1997) (“In class actions, the district court has broad authority over awards of attorneys’ fees; therefore, our review is for an abuse of discretion.”). The trial court’s choice of method for determining fees is also reviewed for an abuse of discretion. See *Powers*, 229 F.3d at 1256; *FPI/Agretech*, 105 F.3d at 472.

g. Contracts

An award of fees made in a contract case 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). Any element of legal analysis, however, that figures in the district court’s decision to award fees is reviewed de novo. See *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 *Berkla v. Corel Corp.*, 302 F.3d 909, 919-20 (9th Cir. 2002); *Anderson v. Melwani*, 179 F.3d 763, 767 (9th Cir. 1999). A court can decline to award fees whenever such an award would be “inequitable and unreasonable.” See *Anderson*, 179 F.3d at 767.

h. Copyright

“The Copyright Act provides for an award of reasonable attorneys’ fees ‘to the prevailing party as part of the costs.’” *Wall Data Inc. v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 787 (9th Cir. 2006) (quoting 17 U.S.C. § 505). The district court’s decision whether to award attorneys’ fees under the Copyright Act is reviewed for an abuse of discretion. See *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (refusal to award fees); *Columbia Pictures Indus., Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186, 1197 (9th Cir. 2001) (awarding fees); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1216 (9th Cir. 1997). The district court’s findings of fact underlying the award are reviewed for clear error. *Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996). Any legal analysis or statutory interpretations are reviewed de novo. See *Entertainment Research*, 122 F.3d at 1216. The court’s calculation of reasonable attorneys’ fees is reviewed for an abuse of discretion. *The Traditional Cat Ass’n, Inc. v. Gilbreath*, 340 F.3d 829, 833 (9th Cir. 2003).

i. Environmental Laws

Many environmental statutes permit an award of attorneys' fees. See *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094 (9th Cir. 1999) (listing statutes). Review of an award of fees in environmental litigation is for an abuse of discretion. See e.g., *Native Village of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002) (ANILCA); *Community Ass'n for Restoration of the Env'tl. v. Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002) (Clean Water Act); *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 953 (9th Cir. 2002) (CERCLA), *cert. denied*, 538 U.S. 961 (2003). Whether a particular statute authorizes attorneys' fees is a question of law reviewed de novo. See *Unocal Corp. v. United States*, 222 F.3d 528, 542 (9th Cir. 2000) (Oil Pollution Act); *United States v. Stone Container Corp.*, 196 F.3d 1066, 1068 (9th Cir. 1999) (Clean Air Act).

The denial of fees is also reviewed for an abuse of discretion. See *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1144 (9th Cir. 2002) (Clean Water Act).

j. Equal Access to Justice Act (EAJA)

The decision whether to award fees under the EAJA is reviewed for an abuse of discretion. See *Carbonell v. INS*, 429 F.3d 894, 897 (9th Cir. 2005) (denied fees); *United States v. Real Property at 2659 Roundhill Dr.*, 283 F.3d 1146, 1151 n.6 (9th Cir. 2002) (awarded fees); *see also* *Mendenhall v. NTSB*, 213 F.3d 464, 470 (9th Cir. 2000) (agency's award of attorney's fees). In particular, this court reviews for an abuse of discretion the district court's conclusion that the government's position is substantially justified. See *United States v. Marolf*, 277 F.3d 1156, 1160 (9th Cir. 2002); *Meinhold v. United States Dep't of Def.*, 123 F.3d 1275, 1278 (9th Cir.), amended by 131 F.3d 842 (9th Cir. 1997); *Flores v. Shalala*, 49 F.3d 562, 567 (9th Cir. 1995). The amount of fees is also reviewed for an abuse of discretion. See *Mendenhall v. NTSB*, 213 F.3d 464, 470 (9th Cir. 2000); *Atkins v. Apfel*, 154 F.3d 986, 987 (9th Cir. 1998); *Meinhold*, 123 F.3d at 1280.

Issues involving the interpretation of the EAJA are reviewed de novo. See *Zambrano v. INS*, 282 F.3d 1145, 1149 (9th Cir.), amended by 302 F.3d 909 (9th Cir. 2002); *Marolf*, 277 F.3d at 1160. 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 \(9th Cir. 1987\)](#); *see also* [*United States v. Rubin*, 97 F.3d 373, 375 \(9th Cir. 1996\)](#) (noting “prevailing party” is a finding by the district court).

k. ERISA

In an ERISA action, the court in its discretion may allow a reasonable attorneys’ fee and costs of action to either party. *See* [*Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1148 \(9th Cir.\)](#), *cert. denied*, [540 U.S. 1090](#) (2003); [*Plumber, Steamfitter and Shipfitter Indus. Pension Plan & Trust v. Siemens Building Tech. Inc.*, 228 F.3d 964, 971 \(9th Cir. 2000\)](#); [*McBride v. PLM Int’l*, 179 F.3d 737, 746 \(9th Cir. 1999\)](#). *see also* [*Cline v. Industrial Maintenance Eng’g & Contracting Co.*, 200 F.3d 1223, 1235 \(9th Cir. 2000\)](#) (noting factors for court to consider). Accordingly, review of the district court’s decision to award attorneys’ fees in an ERISA action is for an abuse of discretion. *See* [*Elliot*, 337 F.3d at 1148](#); [*Fischel v. Equitable Life Assurance Soc’y*, 307 F.3d 997, 1005 \(9th Cir. 2002\)](#); [*Cline*, 200 F.3d at 1235](#). Moreover, the amount of reasonable fees is reviewed for an abuse of discretion. *See* [*Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 \(9th Cir. 2000\)](#).

The district court’s denial of fees is also reviewed under the abuse of discretion standard. *See* [*Honolulu Joint Apprenticeship and Training Comm. v. Foster*, 332 F.3d 1234, 1240 \(9th Cir. 2003\)](#); [*McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1171 \(9th Cir. 1999\)](#).

The court’s interpretation of ERISA’s attorneys’ fees provision is de novo. *See* [*Associated Gen. Contractors v. Smith*, 74 F.3d 926, 931 \(9th Cir. 1996\)](#), *abrogated on other grounds by* [*California Division of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316](#) (9th Cir. 1997). Whether interim attorneys’ fees awards are available under ERISA is a question of law reviewed de novo. *See* [*Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 \(9th Cir. 1995\)](#).

l. FOIA

A district court’s decision whether to award attorneys’ fees under FOIA is reviewed for an abuse of discretion. *See* [*Lissner*, 241 F.3d at 1224](#); [*GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1116 \(9th Cir. 1994\)](#); [*Long v. IRS*, 932 F.2d 1309, 1313 \(9th Cir. 1991\)](#) (noting factors that

district court should consider before exercising its discretion). Whether an interim fee award is permissible under FOIA is a question of law reviewed de novo. *See Rosenfeld v. United States*, 859 F.2d 717, 723 ([9th Cir. 1988](#)).

m. IDEA

Individuals with Disabilities Education Act (IDEA) permits an award of attorneys' fees to the prevailing party "in the discretion of the court." *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1275 ([9th Cir. 1999](#)); *see also Park v. Anaheim Union High School Dist.*, 444 F.3d 1149, 1157 ([9th Cir. 2006](#)). The district court's discretion to award attorneys' fees under the IDEA is narrow. *See Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 70 ([9th Cir. 1996](#)) (defining standard); *see also Lucht v. Molalla River School Dist.*, 225 F.3d 1023, 1026-27 ([9th Cir. 2000](#)) (discussing when fees are available). Review is for an abuse of discretion. *See Park*, 444 F.3d at 1157; *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 861 ([9th Cir. 2004](#)).

n. Inherent Powers

Courts have inherent power to award attorneys' fees as sanctions. *See Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1220 ([9th Cir. 2003](#)) (bad faith); *Federal Election Comm'n v. Toledano*, 317 F.3d 939, 953 ([9th Cir. 2002](#)) (bad faith conduct and abuse of judicial process); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1134 ([9th Cir. 1995](#)) (abusive litigation practices). A trial court's decision to award attorneys' fees pursuant to its inherent powers is reviewed for an abuse of discretion. *See Snake River Valley Elec. Ass'n v. Pacificorp*, 357 F.3d 1042, 1054 n.12 ([9th Cir. 2004](#)).

o. Removal

An award of fees and costs associated with removal or remand under 28 U.S.C. § 1447(c) is reviewed for an abuse of discretion. *See Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 861 ([9th Cir. 2003](#)); *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 ([9th Cir. 2003](#)); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1105 ([9th Cir. 2000](#)). Note, however, that review of a fee award under § 1447(c) must include a de novo examination of whether the remand order was legally correct. *Dahl*, 316

[F.3d at 1077](#); [Ansley v. Ameriquest Mortg. Co.](#), 340 F.3d 858, 861 (9th Cir. 2003); [Gibson v. Chrysler Corp.](#), 261 F.3d 927, 932 (9th Cir. 2001).

p. 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. *See* [Herrington v. County of Sonoma](#), 12 F.3d 901, 907 (9th Cir. 1993). Whether Rule 68 authorizes an award of attorneys' fees is a question of law reviewed de novo. *See* [Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc.](#), 260 F.3d 1054, 1058 (9th Cir. 2001) (affirming denial of fees); [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. *See* [Champion Produce, Inc. v. Ruby Robinson Co.](#), 342 F.3d 1016, 1020 (9th Cir. 2003); [Herrington](#), 12 F.3d at 906.

q. Social Security

Fee awards made pursuant to the Social Security Act, [42 U.S.C. § 406\(b\)\(1\)](#), are reviewed for an abuse of discretion. *See* [Gisbrecht v. Apfel](#), 238 F.3d 1196, 1197 (9th Cir. 2000), *rev'd on other grounds*, [535 U.S. 789](#), 808-08 (2002) (noting § 406(b) fee awards must also be reviewed for "reasonableness"); [Widrig v. Apfel](#), 140 F.3d 1207, 1209 (9th Cir. 1998); [Allen v. Shalala](#), 48 F.3d 456, 457 (9th Cir. 1995), *abrogated on other grounds by* [Gisbrecht v. Barnhart](#), [535 U.S. 789](#) (2002). 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. *See* [Allen](#), 48 F.3d at 457 (noting also that a district court's interpretation of the Social Security Act's attorneys' fees provision is reviewed de novo).

r. State Law

An award of attorneys' fees made pursuant to state law is reviewed for an abuse of discretion. *See* [Johnson v. Columbia Properties Anchorage, LP](#), 437 F.3d 894, 898 (9th Cir. 2006) (finding no abuse of discretion in declining to award attorneys' fees); [Vess v. Ciba-Geigy Corp.](#), 317 F.3d

[1097, 1102 \(9th Cir. 2003\)](#); [Kona Enter. Inc. v. Estate of Bishop, 229 F.3d 877, 883 \(9th Cir. 2000\)](#). Whether a state statute permits attorneys' fees is reviewed de novo. See [Kona Enter., 229 F.3d at 883](#); [O'Hara v. Teamsters Union Local No. 856, 151 F.3d 1152, 1157 \(9th Cir. 1998\)](#). The denial of fees requested under state law is reviewed for an abuse of discretion. See [Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016, 1020 \(9th Cir. 2003\)](#); [Barrios v. California Interscholastic Fed., 277 F.3d 1128, 1133 \(9th Cir. 2002\)](#).

s. Tax

The tax court's decision to grant or deny attorneys' fees is reviewed for an abuse of discretion. See [Liti v. Commissioner, 289 F.3d 1103, 1104-05 \(9th Cir. 2002\)](#); [Bertolino v. Commissioner, 930 F.2d 759, 761 \(9th Cir. 1991\)](#). A district court's decision whether to award fees is also reviewed for abuse of discretion. See [Estate of Merchant v. Commissioner, 947 F.2d 1390, 1392 \(9th Cir. 1991\)](#); [Bertolino, 930 F.2d at 761](#). The denial of attorneys' fees sought pursuant to [26 U.S.C. § 7430](#) is reviewed for an abuse of discretion. See [United States v. Ayres, 166 F.3d 991, 997 \(9th Cir. 1999\)](#); [Awmiller v. United States, 1 F.3d 930, 930 \(9th Cir. 1993\)](#).

t. Title VII

The decision whether to award attorneys' fees under Title VII is reviewed for an abuse of discretion. See [Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1200 \(9th Cir. 2002\)](#) (granting fees); [Shaw v. City of Sacramento, 250 F.3d 1289, 1293-94 \(9th Cir. 2001\)](#) (denying fees); [Passantino v. Johnson & Johnson Consumer Products, 212 F.3d 493, 517-18 \(9th Cir. 2000\)](#). 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. See [Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 \(9th Cir. 1996\)](#).

u. Trademark

The decision whether to award fees under the Lanham Act is also reviewed for an abuse of discretion. See [Earthquake Sound Corp. v. Bumper Indus., 352 F.3d 1210, 1216 \(9th Cir. 2003\)](#) (noting requirement of "exceptional case" is a question of law reviewed de novo); [Horphag Research Ltd. v. Pellegrini, 337 F.3d 1036, 1040 \(9th Cir. 2003\)](#) (noting

limitations on discretion), *cert. denied*, [540 U.S. 1111](#) (2004); [Cairns v. Franklin Mint Co.](#), [292 F.3d 1139](#), 1156 (9th Cir. 2002) (noting “exceptional cases” requirement); [Rolex Watch, U.S.A., Inc. v. Michel Co.](#), [179 F.3d 704](#), 711 (9th Cir. 1999) (discussing when attorneys’ fees are appropriate).

Note that the district court discretion to award attorneys’ fees is limited to “exceptional cases.” See [Earthquake Sound](#), [352 F.3d at 1216](#) (noting requirement of “exceptional case” is a question of law reviewed de novo); [Horphag Research](#), [337 F.3d at 1040](#) (noting exceptional cases are “groundless, unreasonable, vexatious or pursued in bad faith”); [Rio Properties, Inc. v. Rio Int’l Interlink](#), [284 F.3d 1007](#), 1023 (9th Cir. 2002) (noting exceptional cases include those where the infringement is “malicious, fraudulent, deliberate, or willful”). The district court’s determination that a trademark case is “exceptional” is a question of law subject to de novo review. See [Watec Co., Ltd. V. Liu](#), [403 F.3d 645](#), 656 n.13 (9th Cir. 2005); [Earthquake Sound Corp.](#), [352 F.3d at 1216](#).

3. Bonds

The district court’s decision to require a bond pursuant to [Federal Rule Civil Procedure 65\(c\)](#) is reviewed for an abuse of discretion. See [Save Our Sonoran, Inc. v. Flowers](#), [408 F.3d 1113](#), 1126 (9th Cir. 2005); [Jorgensen v. Cassidy](#), [320 F.3d 906](#), 919-20 (9th Cir. 2003); see also [Catholic Social Servs., Inc. v. INS](#), [232 F.3d 1139](#), 1151 (9th Cir. 2000) (en banc) (finding no abuse of discretion in district court’s continuation of a bond). The amount of the bond is also reviewed for an abuse of discretion. See [Connecticut Gen. Life Ins. Co. v. New Images](#), [321 F.3d 878](#), 882 (9th Cir. 2003); [A&M Records, Inc. v. Napster, Inc.](#), [239 F.3d 1004](#), 1028 (9th Cir. 2001).

A district court’s order setting a supersedeas bond is reviewed for an abuse of discretion. See [American Ass’n of Naturopathic Physicians v. Hayhurst](#), [227 F.3d 1104](#), 1109 (9th Cir. 2000); [Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.](#), [935 F.2d 1019](#), 1027 (9th Cir. 1991).

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). 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. See [Matek v. Murat](#), [862 F.2d](#)

[720, 733 \(9th Cir. 1988\)](#) abrogated on other grounds by [Holden v. Hagopian, 978 F.2d 1115 \(9th Cir. 1992\)](#). 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. See [Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 \(9th Cir. 1994\)](#).

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

4. Certified Appeals

The district court's decision to enter judgment pursuant to [Federal Rule of Civil Procedure 54\(b\)](#) is reviewed for an abuse of discretion. See [Bingham v. City of Manhattan Beach, 341 F.3d 939, 942 n.1 \(9th Cir. 2003\)](#); [In re First T.D. & Inv., Inc., 253 F.3d 520, 531-32 \(9th Cir. 2001\)](#). Great deference is given to the district court's decision to enter final judgment under Rule 54(b). See [Franklin v. Fox, 312 F.3d 423, 429 n.2 \(9th Cir. 2002\)](#) (noting "great deference"); [James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1067 n.6 \(9th Cir. 2002\)](#) (noting "great deference" standard and explaining why use of the term "certification" for Rule 54(b) judgments is a misnomer). A district judge's decision to reconsider an interlocutory order by another judge of the same court is reviewed for an abuse of discretion. See [Delta Savings Bank v. United States, 265 F.3d 1017, 1027 \(9th Cir. 2001\)](#); [Amarel v. Connell, 102 F.3d 1494, 1515 \(9th Cir. 1996\)](#).

5. Choice of Remedies

A court's choice of remedies is reviewed for an abuse of discretion. See [United States v. Alisal Water Corp., 431 F.3d 643, 654 \(9th Cir. 2005\)](#) (permanent injunction); [In re Lopez, 345 F.3d 701, 705 \(9th Cir. 2003\)](#) (bankruptcy court), *cert. denied*, [541 U.S. 987](#) (2004); [Stone v. City and County of San Francisco, 968 F.2d 850, 861 \(9th Cir. 1992\)](#); *see also* [Teamsters Cannery, Local 670 v. NLRB, 856 F.2d 1250, 1259 \(NLRB\)](#).

6. Consent Decrees

Interpretation of a consent decree is a question of law reviewed de novo. See [Nehmer v. Veterans' Admin.](#), 284 F.3d 1158, 1160 (9th Cir. 2002); [California v. Randtron](#), 284 F.3d 969, 974 (9th Cir. 2002); [Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth.](#), 263 F.3d 1041, 1048 (9th Cir. 2001); [Gates v. Gomez](#), 60 F.3d 525, 530 (9th Cir. 1995). Although review of the district court's interpretation of a consent decree is de novo, the court of appeals will defer to the district court's factual findings unless they are clearly erroneous. See [Labor/Community Strategy Ctr.](#), 263 F.3d at 1048; [Gates](#), 60 F.3d at 530; see also [Nehmer](#), 284 F.3d at 1160 (noting deference owed to district court's interpretation).

The district court's decision to approve a consent decree is reviewed for an abuse of discretion. See [Molski v. Gleich](#), 318 F.3d 937, 953 (9th Cir. 2003); [United States v. Montrose Chem. Corp.](#), 50 F.3d 741, 746 (9th Cir. 1995). Modification of a consent decree is also reviewed for abuse of discretion. See [Labor/Community Strategy Ctr.](#), 263 F.3d at 1048; [Hook v. Arizona Dep't of Corrections](#), 107 F.3d 1397, 1402 (9th Cir. 1997); see also [Taylor v. United States](#), 181 F.3d 1017, 1024 (9th Cir. 1999) (en banc) (noting a court may "decide in its discretion to reopen and set aside a consent decree"). A district court's refusal to enter a proposed consent judgment is also reviewed for abuse of discretion. See [Sierra Club, Inc. v. Electronic Controls Design, Inc.](#), 909 F.2d 1350, 1356 (9th Cir. 1990) (finding abuse of discretion in failing to enter proposed consent judgment).

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).

7. Costs

The district court's award of costs is reviewed for an abuse of discretion. See [Dawson v. City of Seattle](#), 435 F.3d 1054, 1070 (9th Cir. 2006); [Miles v. California](#), 320 F.3d 986, 988 (9th Cir. 2003); [Evanow v. M/V NEPTUNE](#), 163 F.3d 1108, 1113 (9th Cir. 1998). Under [Fed. R. Civ. Proc. 54\(d\)](#) "there is a presumption that the prevailing party will be awarded its taxable costs." [Dawson](#), 435 F.3d at 1074. The court's decision to award law clerk costs to a prevailing civil rights litigant is also reviewed for an abuse of discretion. See [Barjon v. Dalton](#), 132 F.3d 496, 500 (9th Cir. 1997). Whether the district court has the authority to award costs, however, is a question of law reviewed de novo. See [United States ex rel. Newsham v.](#)

Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999); *Evanow*, 163 F.3d at 1113; *Russian River Watershed Protection Comm. v. Santa Rosa*, 142 F.3d 1136, 1144 (9th Cir. 1998).

Denial of costs is also reviewed for an abuse of discretion. See *Carbonell v. INS*, 429 F.3d 894, 897 (9th Cir. 2005) (EAJA); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003); *Association of Mexican-American Educators v. California*, 231 F.3d 572, 591-92 (9th Cir. 2000) (en banc) (noting court must “specify reasons” for denying costs); see also *Liti v. Commissioner*, 289 F.3d 1103, 1104 (9th Cir. 2002) (tax court).

8. Damages

The district court’s award of damages is reviewed for an abuse of discretion. See *McLean v. Runyon*, 222 F.3d 1150, 1155 (9th Cir. 2000) (Rehabilitation Act); *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712 (9th Cir. 1999) (Lanham Act). The district court’s findings of fact in support of an award for damages are reviewed for clear error. See *Koirala v. Thai Airways Int’l, Ltd.*, 126 F.3d 1205, 1213 (9th Cir. 1997) (Warsaw Convention).

The trial court’s computation of damages is a finding of fact reviewed for clear error. See *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004) (bench trial); *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); *Amantea Cabrera v. Potter*, 279 F.3d 746, 750 (9th Cir. 2002).

The district court’s legal conclusion that damages are available is reviewed de novo. See *Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998). Whether the district court selected the correct legal standard in computing damages is also reviewed de novo. See *Mackie v. Rieser*, 296 F.3d 909, 916 (9th Cir. 2002); *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Ry Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000); *Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1113-14 (9th Cir. 1998).

The constitutionality of the statutory cap on Title VII damages is reviewed de novo. See *Lansdale v. Hi-Health Supermart Corp.*, 314 F.3d 355, 357 (9th Cir. 2002). A district court’s allocation of damages for

purposes of Title VII's statutory cap is reviewed de novo when it involves an interpretation of the Act. See [Hemmings](#), 285 F.3d at 1195; [Passantino v. Johnson & Johnson Consumer Products, Inc.](#), 212 F.3d 493, 509 (9th Cir. 2000); [Pavon v. Swift Transp. Co.](#), 192 F.3d 902, 909 (9th Cir. 1999). Otherwise, review of a district court's allocation of Title VII damages is reviewed for an abuse of discretion. See [Caudle v. Bristow Optical Co.](#), 224 F.3d 1014, 1023 (9th Cir. 2000).

A jury's verdict of compensatory damages is reviewed for substantial evidence. See [In re Exxon Valdez](#), 270 F.3d 1215, 1247-48 (9th Cir. 2001); [Yeti by Molly, Ltd. v. Deckers Outdoor Corp.](#), 259 F.3d 1101, 1108 (9th Cir. 2001). A reviewing court must uphold the jury's finding of the amount of damages unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. See [Lambert v. Ackerley](#), 180 F.3d 997, 1017 (9th Cir. 1999) (en banc); see also [Duk v. MGM Grand Hotel, Inc.](#), 320 F.3d 1052, 1060 (9th Cir. 2003) ("We will disturb a damage award only when it is clear that the evidence does not support it."). But in antitrust cases, the plaintiff need only provide sufficient evidence to permit a just and reasonable estimate of the damages. See [Los Angeles Mem'l Coliseum Comm'n v. NFL](#), 791 F.2d 1356, 1360 (9th Cir. 1986). Under the Lanham Act, the district court has discretion to fashion relief, including monetary relief, based on the totality of circumstances, even if the plaintiff cannot show actual damages. See [Southland Sod Farms v. Stover Seed Co.](#), 108 F.3d 1134, 1146 (9th Cir. 1997); see also [Los Angeles News Serv. v. Reuters Television Int'l, Ltd.](#), 149 F.3d 987, 996 (9th Cir. 1998) (court has "wide discretion" in copyright case).

a. Liquidated

The district court's decision to award liquidated damages is reviewed for an abuse of discretion. See [Alvarez v. IBP, Inc.](#), 339 F.3d 894, 909 (9th Cir. 2003) (FSLA); [Los Angeles News Serv. v. Reuters Television Int'l, Ltd.](#), 149 F.3d 987, 996 (9th Cir. 1998) (noting court has wide discretion). Note that review is de novo when the availability of liquidated damages is decided on summary judgment. See [Chao v. A-One Med. Servs., Inc.](#), 346 F.3d 908, 920 (9th Cir. 2003), cert. denied, 541 U.S. 1030 (2004).

b. Punitive

An award of punitive damages is reviewed for an abuse of discretion; the sufficiency of the evidence to support such an award is reviewed for substantial evidence. See [Fair Housing of Marin v. Combs](#), 285 F.3d 899, 906-07 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1111 (9th Cir. 2001). The court's allocation of punitive damages is reviewed for an abuse of discretion. See [In re Exxon Valdez](#), 229 F.3d 790, 795 (9th Cir. 2000). A trial court's decision to strike a plaintiff's prayer for punitive damages is also reviewed for an abuse of discretion. See [Nurse v. United States](#), 226 F.3d 996, 1003 (9th Cir. 2000).

The availability of punitive damages is reviewed de novo. See [Hangarter v. Provident Life and Accident Ins. Co.](#), 373 F.3d 998, 1013 (9th Cir. 2004). Whether an award of punitive damages is constitutionally excessive, however, is reviewed de novo. See [Cooper Indus. v. Leatherman Tool Group, Inc.](#), 532 U.S. 424, 435-36 (2001) (rejecting abuse of discretion standard); see also [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 418 (2003) (explaining why de novo review is required); [Zhang v. American Gem Seafoods, Inc.](#), 339 F.3d 1020, 1042 (9th Cir. 2003) (reviewing denial of request for remittitur based on claim of excessive punitive damages), *cert. denied*, 541 U.S. 902 (2004); [Swinton v. Potomac Corp.](#), 270 F.3d 794, 802 (9th Cir. 2001) (“We review de novo a due process challenge to the punitive damages award.”).

c. Remittitur

A trial court's decision not to allow remittitur should be reversed only upon a showing of “clear abuse of discretion.” See [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); see also [Silver Sage Partners v. City of Desert Hot Springs](#), 251 F.3d 814, 818-19 (9th Cir. 2001) (holding that order forcing either remittitur or new trial is reviewed for an abuse of discretion). The court's calculation of remittitur is reviewed for an abuse of discretion. See [Kern v. Levolor Lorentzen, Inc.](#), 899 F.2d 772, 778 (9th Cir. 1990).

The district court's determination whether a jury verdict is excessive and therefore requires remittitur or a new trial is reviewed under an abuse of discretion standard. See [Gasperini v. Center for Humanities, Inc.](#), 518 U.S.

[415, 417 \(1996\)](#); *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 for abuse of discretion), *aff'd*, [526 U.S. 687 \(1999\)](#). Note that review of the claim of excessiveness is de novo. *See* [Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1042 \(9th Cir. 2003\)](#), *cert. denied*, [541 U.S. 902 \(2004\)](#). The court's decision whether to order remittitur or a new trial is reviewed for an abuse of discretion. *See* [Pavon v. Swift Transp. Co., 192 F.3d 902, 909 \(9th Cir. 1999\)](#); [Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1126 \(9th Cir. 1994\)](#).

9. Default

A motion to set aside an entry of default is reviewed for an abuse of discretion. *See* [Franchise Holding II v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925 \(9th Cir. 2004\)](#) (noting underlying factual findings are reviewed for clear error); [Brady v. United States, 211 F.3d 499, 502 \(9th Cir. 2000\)](#); [O'Connor v. Nevada, 27 F.3d 357, 364 \(9th Cir. 1994\)](#).⁴⁷⁴ Note that the trial court's discretion is "especially broad where . . . it is entry of default that is being set aside, rather than a default judgment." [O'Connor, 27 F.3d at 364](#). Thus, the appellate court will not find an abuse of discretion in the trial court's decision to set aside an entry of default unless the trial court was "'clearly wrong' in its determination of good cause." *Id.*

The court's decision to order default judgment is reviewed for an abuse of discretion. *See* [Estrada v. Speno & Cohen, 244 F.3d 1050, 1056 \(9th Cir. 2001\)](#). A decision to impose a default judgment as a sanction is reviewed for an abuse of discretion. *See* [Fair Housing of Marin v. Combs, 285 F.3d 899, 905 \(9th Cir. 2002\)](#) (discovery violations); [Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 \(9th Cir. 1997\)](#) (failure to submit to court order and pay court-ordered sanctions). The entry of a default judgment inconsistent with prior rulings is also reviewed for an abuse of discretion. *See* [In re First T.D. & Inv., Inc., 253 F.3d 520, 532-33 \(9th Cir. 2001\)](#).

Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. *See* [FDIC v. Aaronian, 93 F.3d 636, 639 \(9th Cir. 1996\)](#); [Electrical Specialty Co. v. Road & Ranch Supply, Inc.,](#)

⁴⁷⁴ *See also* [Speiser, Kruase & Madole v. Ortiz, 271 F.3d 884, 886 \(9th Cir. 2001\)](#) (reviewing district court's decision to enter default judgment).

[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. See *United States v. \$277,000 U.S. Currency*, [69 F.3d 1491](#), 1493 (9th Cir. 1995); *Export Group v. Reef Indus., Inc.*, [54 F.3d 1466](#), 1487 (9th Cir. 1995).⁴⁷⁵

This court reviews a trial court's decision to grant or deny a Rule 60(b) motion to vacate a default judgment for an abuse of discretion. See *Jeff. D. v. Kempthorne*, [365 F.3d 844](#), 850 (9th Cir. 2004) (affirming denial of motion to vacate); *Community Dental Servs. v. Tani*, [282 F.3d 1164](#), 1167 n.7 (9th Cir. 2002) (reversing denial of motion to set aside default).⁴⁷⁶ Thus, the denial of a motion to set aside a default judgment is reviewed for a clear showing of abuse of discretion. See *American Ass'n of Naturopathic Physicians v. Hayhurst*, [227 F.3d 1104](#), 1109 (9th Cir. 2000); *United States v. Real Property*, [135 F.3d 1312](#), 1314 (9th Cir. 1998).

10. Equitable Relief

A federal court's choice of equitable relief is reviewed for an abuse of discretion. See *Park v. Anaheim Union High Sch. Dist.*, [444 F.3d 1149](#), 1156 (9th Cir. 2006); *Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth.*, [263 F.3d 1041](#), 1048 (9th Cir. 2001). The court's decision to deny equitable relief is also reviewed for an abuse of discretion. See *Rabkin v. Oregon Health Sciences Univ.*, [350 F.3d 967](#), 977 (9th Cir. 2003) (equitable reinstatement); *Bird v. Lewis & Clark College*, [303 F.3d 1015](#), 1020 (9th Cir. 2002) (ADA/Rehabilitation Act), *cert. denied*, [538 U.S. 923](#) (2003). A court's equitable order is reviewed also for an abuse of discretion. See *Grosz-Salomon v. Paul Revere Life Ins. Co.*, [237 F.3d 1154](#),

⁴⁷⁵ See also *In re Sasson*, [424 F.3d 864](#), 867 (9th Cir. 2005) (bankruptcy court); *Virtual Vision, Inc. v. Praegitzer Indus., Inc.*, [124 F.3d 1140](#), 1143 (9th Cir. 1997) (bankruptcy court).

⁴⁷⁶ See also *Laurino v. Syringa General Hosp.*, [279 F.3d 750](#), 753 (9th Cir. 2002) (reversing denial of motion); *TCI Group Life Ins. Plan v. Knoebber*, [244 F.3d 691](#), 695 (9th Cir. 2001) (default judgment); *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 v. Tenorio*, [856 F.2d 1412](#), 1415 (9th Cir. 1988) (evaluating motion under a three-factor test, concerning which the moving party's factual allegations are accepted as true).

[1163 \(9th Cir. 2001\)](#); [United States v. Washington, 157 F.3d 630, 642 \(9th Cir. 1998\)](#).

11. Excusable Neglect

A district court may in its discretion extend the time allowed for filing a notice of appeal if it finds excusable neglect. See [Pincay v. Andrews, 389 F.3d 853, 854 \(9th Cir. 2004\)](#). As such, review is for abuse of discretion. See *id.* at 860; [Marx v. Loral Corp., 87 F.3d 1049, 1053 \(9th Cir. 1996\)](#). Note that a district court's decision whether to reopen the time to file an appeal under [FRAP 4\(a\)\(6\)](#) is also reviewed for an abuse of discretion. See [Arai v. Leff, 316 F.3d 1066, 1068 \(9th Cir. 2003\)](#); [Nguyen v. Southwest Leasing and Rental, Inc., 282 F.3d 1061, 1064 \(9th Cir. 2002\)](#); [In re Stein, 197 F.3d 421, 424 \(9th Cir. 1999\)](#).

A bankruptcy court has discretion to extend any time period upon a showing of excusable neglect. See [In re Sheehan, 253 F.3d 507, 512 \(9th Cir. 2001\)](#); see also [In re Zilog, Inc., 450 F.3d 926, 1003-06 \(9th Cir. 2006\)](#) (discussing excusable neglect)

12. Fines

Whether a fine is constitutionally excessive is a question of law reviewed de novo. See [United States v. \\$100,348.00 in U.S. Currency, 354 F.3d 1110, 1121 \(9th Cir. 2004\)](#); see also [Balice v. United States Dep't of Agric., 203 F.3d 684, 698 \(9th Cir. 2000\)](#) (reviewing constitutionality of fine imposed by federal agency). The dismissal of an excessive claims claim is also reviewed de novo. See [Wright v. Riveland, 219 F.3d 905, 912 \(9th Cir. 2000\)](#). A fine imposed as a result of contempt finding is reviewed for an abuse of discretion. See [Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 515 \(9th Cir. 1992\)](#).

13. Interest

The grant or denial of prejudgment interest is reviewed for an abuse of discretion. See [Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016, 1020 \(9th Cir. 2003\)](#) (reviewing denial); [Webb v. Ada County, 285 F.3d 829, 841 \(9th Cir. 2002\)](#) (reviewing award of interest).⁴⁷⁷

⁴⁷⁷ See also [Middle Mountain Land & Produce Inc. v. Sound](#)

Whether interest is permitted as a matter of law is reviewed de novo. See [*Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700](#), 716 (9th Cir. 2004) (deciding whether prejudgment interest available under Copyright Act); [*McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128](#), 1129 (9th Cir. 2004) (deciding whether state or federal law applies). The court’s selection of an appropriate rate of interest, however, is reviewed for an abuse of discretion. See [*Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974](#), 988 (9th Cir. 2001) (reversing rate that amounted to penalty rather than compensation); [*Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154](#), 1163-64 (9th Cir. 2001); [*Saavedra v. Korean Air Lines Co.*, 93 F.3d 547](#), 555 (9th Cir. 1996).

Awards of post-judgment interest are also reviewed for an abuse of discretion. See [*Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097](#), 1107 (9th Cir. 1998); [*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. See [*Air Separation, Inc. v. Underwriters at Lloyd’s*, 45 F.3d 288](#), 290 (9th Cir. 1994).

14. Judgment Notwithstanding the Verdict (JNOV)

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 20. Renewed Motion for Judgment as a Matter of Law

15. Judgments

Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound discretion of the district court and will not be reversed absent an abuse of discretion. See [*Casey v. Albertson’s Inc.*, 362 F.3d 1254](#), 1257 (9th Cir. 2004); [*SEC v. Coldicutt*, 258 F.3d 939](#), 942 (9th Cir. 2001) (discussing Rule 60(b) requirements); [*American Ironworks & Erectors Inc. v. North American Constr. Corp.*, 248 F.3d 892](#), 899 (9th Cir. 2001).⁴⁷⁸

[*Commodities Inc.*, 307 F.3d 1220](#), 1225-26 (9th Cir. 2002) (noting district court “has board discretion to award prejudgment interest”).

⁴⁷⁸ 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

This court reviews de novo the district court's assertion of jurisdiction over Rule 60(b) motions. See [Williams v. Woodford](#), 384 F.3d 567, 586 (9th Cir. 2004); [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. See [Thompson v. Calderon](#), 151 F.3d 918, 921 (9th Cir. 1998) (en banc).

A decision whether to vacate a judgment pursuant to Rule 60(b) is reviewable for an abuse of discretion. See [Jeff. D. v. Kempthorne](#), 365 F.3d 844, 850 (9th Cir. 2004) (affirming denial of motion to vacate); [Community Dental Servs. v. Tani](#), 282 F.3d 1164, 1167 n.7 (9th Cir. 2002) (reversing denial of motion to set aside default).⁴⁷⁹ The appellate court reviews de novo, however, the denial of a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one. See [FDIC v. Aaronian](#), 93 F.3d 636, 639 (9th Cir. 1996); [United States v. \\$277,000 U.S. Currency](#), 69 F.3d 1491, 1493 (9th Cir. 1995); [Export Group v. Reef Indus., Inc.](#), 54 F.3d 1466, 1469 (9th Cir. 1995). Thus, whether a judgment is void is a legal issue subject to de novo review. See [Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc.](#), 938 F.2d 136, 137 (9th Cir. 1991). Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. See [Aaronian](#), 93 F.3d at 639; [Electrical Specialty Co. v. Road & Ranch Supply, Inc.](#), 967 F.2d 309, 311 (9th Cir. 1992).

A decision on a motion to amend a judgment filed pursuant to Rule 59(e) is reviewed for an abuse of discretion. See [McQuillion v. Duncan](#), 342 F.3d 1012, 1014 & n.9 (9th Cir. 2003); [Turner v. Burlington N. Santa Fe](#)

sustained.”).

⁴⁷⁹ See also [Laurino v. Syringa General Hosp.](#), 279 F.3d 750, 753 (9th Cir. 2002) (reversing denial of motion); [TCI Group Life Ins. Plan v. Knoebber](#), 244 F.3d 691, 695 (9th Cir. 2001) (default judgment); [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 v. Tenorio](#), 856 F.2d 1412, 1415 (9th Cir. 1988) (evaluating motion under a three-factor test, concerning which the moving party's factual allegations are accepted as true).

[R.R. Co.](#), 338 F.3d 1058, 1061 (9th Cir. 2003) (discussing grounds upon which Rule 59(e) motion may be granted).

The trial court decision whether to reopen a judgment is also reviewed for an abuse of discretion. See [Weeks v. Bayer](#), 246 F.3d 1231, 1234 (9th Cir. 2001); [Defenders of Wildlife v. Bernal](#), 204 F.3d 920, 928-29 (9th Cir. 2000).

16. Mandates

The court of appeals “review[s] de novo a district court’s compliance with the mandate of an appellate court.” [United States v. Kellington](#), 217 F.3d 1084, 1092 (9th Cir. 2000). Note that courts of appeals have inherent power to recall their mandates subject to review by the Supreme Court for an abuse of discretion. See [Thompson v. Calderon](#), 523 U.S. 538, 549 (1998) (reversing recall of mandate); see also [Thompson v. Calderon](#), 120 F.3d 1045, 1048 (9th Cir. 1997) (en banc) (noting decision whether to recall a mandate “is entirely discretionary with the court”), *rev’d*, [523 U.S. 538](#) (1998).

17. New Trials

A district court’s ruling on a motion for new trial pursuant to Rule 59(a) is reviewed for an abuse of discretion. See [Dorn v. Burlington N. Santa Fe R.R.](#), 397 F.3d 1183, 1189 (9th Cir. 2005); [McEuin v. Crown Equip. Corp.](#), 328 F.3d 1028, 1032 (9th Cir.), *cert. denied*, [540 U.S. 1160](#) (2003); [Jorgensen v. Cassidy](#), 320 F.3d 906, 918 (9th Cir. 2003) (noting district court’s “consideration discretion”).⁴⁸⁰

The district court’s decision whether to reopen for additional testimony pursuant to Rule 59(a) is reviewed for an abuse of discretion. See [Defenders of Wildlife v. Bernal](#), 204 F.3d 920, 928-29 (9th Cir. 2000). The denial of a motion for new trial based on alleged juror partiality or bias is

⁴⁸⁰ See also [Hemmings v. Tidyman’s, Inc.](#), 285 F.3d 1174, 1189 (9th Cir. 2002); [Far Out Prod., Inc. v. Oskar](#), 247 F.3d 986, 992 (9th Cir. 2001) (listing factors); [De Saracho v. Custom Food Machinery, Inc.](#), 206 F.3d 874, 880 (9th Cir. 2000); [United States v. 4.0 Acres of Land](#), 175 F.3d 1133, 1139 (9th Cir. 1999) (discussing factors).

reviewed for an abuse of discretion. See [Image Tech. Servs., Inc. v. Eastman Kodak Co.](#), 125 F.3d 1195, 1220-21 (9th Cir. 1997).

A conditional grant of a new trial is also reviewed for an abuse of discretion. See [Union Oil Co. v. Terrible Herbst, Inc.](#), 331 F.3d 735, 742 (9th Cir.), cert. denied, 540 U.S. 1107 (2003); [Johnson v. Paradise Valley Unified Sch. Dist.](#), 251 F.3d 1222, 1229 (9th Cir. 2001) (noting “stringent standard” when motion is based on sufficiency of the evidence).

The district court’s determination in a diversity action that a jury verdict does not violate state law for excessiveness and therefore does not warrant remittitur or a new trial is reviewed under an abuse of discretion standard. See [Gasperini v. Center for Humanities, Inc.](#), 518 U.S. 415, 438-39 (1996).

18. Permanent Injunctions

The district court’s decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See [Fortyune v. American Multi-Cinema, Inc.](#), 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment).⁴⁸¹ The denial of a request for a permanent injunction is also reviewed for an abuse of discretion. See [Cummings v. Connell](#), 316 F.3d 886, 897 (9th Cir.), cert. denied, 539 U.S. 927 (2003). When the court’s decision to grant injunctive relief rests on an interpretation of a state statute, review is de novo. See [A-1 Ambulance Serv., Inc. v. County of Monterey](#), 90 F.3d 333, 335 (9th Cir. 1996).

Whether a district court possesses the authority to issue an injunction is a question of law reviewed de novo. See [United States v. Hovsepian](#), 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).⁴⁸²

⁴⁸¹ [Planned Parenthood Federation of Am., Inc. v. Gonzales](#), 435 F.3d 1163, 1171 (9th Cir. 2006); [Ting v. AT&T](#), 319 F.3d 1126, 1134-35 (9th Cir.) (noting underlying facts are reviewed for clear error and conclusion of law is reviewed de novo), cert. denied, 540 U.S. 811 (2003); [Gomez v. Vernon](#), 255 F.3d 1118, 1128 (9th Cir. 2001).

⁴⁸² [Krug v. Lutz](#), 329 F.3d 692, 695 (9th Cir. 2003); [Idaho Watersheds Project v. Hahn](#), 307 F.3d 815, 823 (9th Cir. 2002); see also [Burlington Northern Santa Fe Ry. Co. v. International Bhd. of Teamsters, Local 174](#),

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. [*G.C. & K.B. Inv. v. Wilson*, 326 F.3d 1096](#), 1106 (9th Cir. 2003).⁴⁸³ The decision whether to issue an injunction that does not violate the Act, however, is reviewed for an abuse of discretion [*California v. Randtron*, 284 F.3d 969](#), 974 (9th Cir. 2002); [*Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372](#), 1377 (9th Cir. 1997).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. See [*Idaho Watersheds Project v. Hahn*, 307 F.3d 815](#), 823 (9th Cir. 2002); [*Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704](#), 708 (9th Cir. 1999) (finding the scope of injunctive relief granted was inadequate); [*Viceroy Gold Corp. v. Aubry*, 75 F.3d 482](#), 488 (9th Cir. 1996).

19. Reconsideration

The district court's denial of a motion for reconsideration is reviewed for an abuse of discretion. See [*MacDonald v. Grace Church Seattle*, 457 F.3d 1079](#), 1081 (9th Cir. 2006); [*Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097](#), 1100 (9th Cir. 2004); [*Carroll v. Nakatani*, 342 F.3d 934](#), 940 (9th Cir. 2003).⁴⁸⁴ Note that the denial of a motion for reconsideration under Rule 59(e) may be construed as one denying relief under Rule 60(b) and will not be reversed absent an abuse of discretion. See [*Pasatiempo v. Aizawa*, 103 F.3d 796](#), 801 (9th Cir. 1996); see also [*McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128](#), 1129 (9th Cir. 2004) (reviewing de novo whether a motion was filed under Rule 59 or Rule 60); [*School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255](#), 1263 (9th Cir. 1993) (listing factors for court to consider).

[*203 F.3d 703*, 707 \(9th Cir. 2000\)](#) (en banc) (noting existence of “labor dispute” for purposes of applying anti-injunction provisions of the Norris-LaGuardia Act is a question of law reviewed de novo).

⁴⁸³ [*California v. Randtron*, 284 F.3d 969](#), 974 (9th Cir. 2002); [*Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867](#), 879 (9th Cir. 2000); [*Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372](#), 1377 (9th Cir. 1997).

⁴⁸⁴ See also [*Herbst v. Cook*, 260 F.3d 1039](#), 1044 (9th Cir. 2001) (habeas); [*Lucky Stores, Inc. v. Commissioner*, 153 F.3d 964](#), 967 (9th Cir. 1998) (tax court).

A district court has discretion to decline to consider an issue raised for the first time in a motion for reconsideration. See [Novato Fire Protection Dist. v. United States](#), 181 F.3d 1135, 1141 n.6 (9th Cir. 1999); [Columbia Pictures Television v. Krypton Broad.](#), 106 F.3d 284, 290 (9th Cir. 1997), *rev'd on other grounds*, [523 U.S. 340](#) (1998).

A motion to reconsider a Bankruptcy Appellate Panel's decision is reviewed for an abuse of discretion. See [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. See [In re Kaypro](#), 218 F.3d 1070, 1073 (9th Cir. 2000); [In re Weiner](#), 161 F.3d 1216, 1217 (9th Cir. 1998).

20. Renewed Motion 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. See [Josephs v. Pacific Bell](#), 443 F.3d 1050, 1062 (9th Cir. 2006) (reviewing denial of motion); [White v. Ford Motor Co.](#), 312 F.3d 998, 1010 (9th Cir. 2002), *amended by* [335 F.3d 833](#) (9th Cir. 2003); [Johnson v. Paradise Valley Unified Sch. Dist.](#), 251 F.3d 1222, 1226 (9th Cir. 2001) (reviewing grant of motion). The test applied is whether 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 [Pavao v. Pagay](#), 307 F.3d 915, 918 (9th Cir. 2002); [McLean v. Runyon](#), 222 F.3d 1150, 1153 (9th Cir. 2000); [Gilbrook v. City of Westminster](#), 177 F.3d 839, 864 (9th Cir. 1999).

When a party fails to move for judgment as a matter of law pursuant to [Federal Rule of Civil Procedure 50\(a\)](#), a challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. See [Janes v. Wal-Mart Stores, Inc.](#), 279 F.3d 883, 888 (9th Cir. 2002); [Image Tech. Servs., Inc. v. Eastman Kodak Co.](#), 125 F.3d 1195, 1203 (9th Cir. 1997); *see also* [Freund v. Nycomed Amersham](#), 347 F.3d 752, 761 (9th Cir. 2003) (noting party cannot raise arguments in its post-trial Rule 50(b) motion that it did not raise in its pre-verdict Rule 50(a) motion). Reversal under the plain error standard is proper only for a "manifest miscarriage of justice," [Janes](#), 279 F.3d at 888, or if "there is an absolute absence of

evidence to support the jury's verdict," [Image Tech.](#), 125 F.3d at 1212 (internal quotation omitted). Note that 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).

21. Reopening or Supplementing Record

A decision on a motion to reopen a case or to supplement the record is reviewed for an abuse of discretion. See [Fishing Co. of Alaska, Inc. v. United States](#), 333 F.3d 1045, 1046 (9th Cir. 2003) (administrative record); [In re Staffer](#), 306 F.3d 967, 971 (9th Cir. 2002) (bankruptcy court); [Defenders of Wildlife v. Bernal](#), 204 F.3d 920, 928-29 (9th Cir. 2000) (Rule 59(a) motion). The district court's denial of a motion to reopen discovery is also reviewed for an abuse of discretion. See [Cornwell v. Electra Cent. Credit Union](#), 439 F.3d 1018, 1026 (9th Cir. 2006); [Panatronic USA v. AT&T Corp.](#), 287 F.3d 840, 846 (9th Cir. 2002).

22. Sanctions

a. Generally

A court's decision to impose sanctions is reviewed for an abuse of discretion. See [Cooter & Gell v. Hartmarx Corp.](#), 496 U.S. 384, 405 (1990); [Jorgensen v. Cassidy](#), 320 F.3d 906, 912 (9th Cir. 2003). A 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 v. International Bhd. of Teamsters](#), 124 F.3d 999, 1016 (9th Cir. 1997). A court's refusal to impose sanctions is also reviewed for an abuse of discretion. See [Avery Dennison Corp. v. Allendale Mut. Ins. Co.](#), 310 F.3d 1114, 1117 (9th Cir. 2002); [Smith v. Lenches](#), 263 F.3d 972, 978 (9th Cir. 2001).

The district court's choice of sanctions is reviewed for an abuse of discretion. See [United States v. Wunsch](#), 84 F.3d 1110, 1114 (9th Cir. 1996). For example, the district court's dismissal of a complaint with prejudice for failure to comply with the court's order to amend the complaint to comply with [Federal Rule of Civil Procedure 8](#) is reviewed for an abuse of discretion. See [McHenry v. Renne](#), 84 F.3d 1172, 1177 (9th Cir. 1996).

b. Rule 11

Rule 11 sanctions are reviewed for an abuse of discretion. See Cooter, 496 U.S. at 405; see also Retail Flooring Dealers, Inc. v. Beaulieu of America, 339 F.3d 1146, 1150 (9th Cir. 2003).⁴⁸⁵ 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 Retail Flooring Dealers, 339 F.3d at 1150; Patelco Credit Union v. Sahni, 262 F.3d 897, 913 (9th Cir. 2001).⁴⁸⁶

c. Local Rules

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. See Mabe v. San Bernardino County, 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); Big Bear Lodging Assoc. v. Snow Summit, Inc., 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); but see United States v. Wunsch, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

d. Supervision of Attorneys

Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. See Erickson v. Newmar Corp., 87 F.3d 298, 300 (9th Cir. 1996).

The district court's findings as to whether an attorney acted recklessly or in bad faith are reviewed for clear error. Pacific Harbor Capital Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1117 (9th Cir. 2000).

⁴⁸⁵ G.C. & K.B. Inv., Inc. v. Wilson, 326 F.3d 1096, 1109 (9th Cir. 2003); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1109 (9th Cir. 2002) (reversing sanction); Christian v. Mattel, Inc., 286 F.3d 1118, 1126 (9th Cir. 2002); Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1016 (9th Cir. 1997) (no abuse of discretion).

⁴⁸⁶ Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1198 (9th Cir. 1999); Security Farms, 124 F.3d at 1016.

e. Inherent Powers

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 \(1991\)](#).⁴⁸⁷

f. Contempt

A district court's civil contempt order that includes imposition of sanctions is reviewed for an abuse of discretion. See [Irwin v. Mascott, 370 F.3d 924, 931 \(9th Cir. 2004\)](#).⁴⁸⁸

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 20. Contempt.

g. Discovery Sanctions

The imposition of or refusal to impose discovery sanctions is reviewed for an abuse of discretion. See [Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1010 \(9th Cir. 2004\)](#); [Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1164-65 \(9th Cir. 2003\)](#). For more detail see also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 24. Discover, a. Discovery Sanctions.

h. [28 U.S.C. § 1927](#)

Sanctions imposed pursuant to [28 U.S.C. § 1927](#) are reviewed for an abuse of discretion. See [Gomez v. Vernon, 255 F.3d 1118, 1135 \(9th Cir. 2001\)](#); [GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 \(9th](#)

⁴⁸⁷ See also [Doi v. Halekulani Corp., 276 F.3d 1131, 1140 \(9th Cir. 2002\)](#) (sanction imposed for refusal to sign settlement agreement); [Gomez v. Vernon, 255 F.3d 1118, 1134 \(9th Cir. 2001\)](#); [F.J. Hanshaw Enter. v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 \(9th Cir. 2001\)](#); [Hernandez v. City of El Monte, 138 F.3d 393, 398 \(9th Cir. 1998\)](#) (dismissing for “judge-shopping”).

⁴⁸⁸ [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 \(9th Cir. 1997\)](#); see also [In re Dyer, 322 F.3d 1178, 1191 \(9th Cir. 2003\)](#) (bankruptcy court).

[Cir. 1994](#)); *see also* [Goehring v. Brophy](#), 94 F.3d 1294, 1305 (9th Cir. 1996) (stating that appropriateness of sanction imposed under § 1927 is reviewed for an abuse of discretion, but findings underlying decision are reviewed for clear error and legal determinations are reviewed de novo).

The denial of sanctions sought under § 1927 is reviewed for an abuse of discretion. *See* [Barber v. Miller](#), 146 F.3d 707, 709 (9th Cir. 1998).

23. Settlements

A court's decision whether to enforce a settlement is reviewed for an abuse of discretion. *See* [Kirkland v. Legion Ins. Co.](#), 343 F.3d 1135, 1140 (9th Cir. 2003); [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1026 (9th Cir. 1998) (explaining standard); *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). Whether a district court has subject matter jurisdiction to enforce a settlement is a question of law reviewed de novo. *See* [Kirkland](#), 343 F.3d at 1140; [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). The court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *See* [Callie v. Near](#), 829 F.2d 888, 890 (9th Cir. 1987); *see also* [Doi v. Halekulani Corp.](#), 276 F.3d 1131, 1138-39 (9th Cir. 2002) (explaining *Callie*).

The district court's decision to approve or reject a proposed settlement in a class action is reviewed for an abuse of discretion, and such review is extremely limited. *See* [Molski v. Gleich](#), 318 F.3d 937, 953 (9th Cir. 2003); [In re Mego Financial Corp. Sec. Lit. \(Dunleavy v. Nadler\)](#), 213 F.3d 454, 458 (9th Cir. 2000).⁴⁸⁹

The district court's approval of an allocation plan for a settlement in a class action is also reviewed for an abuse of discretion. *See* [In re Exxon Valdez](#), 229 F.3d 790, 795 (9th Cir. 2000); [In re Mego Financial Corp.](#), 213 F.3d at 460. Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo. *See* [Molski](#), 318

⁴⁸⁹ *See also* [Linney v. Cellular Alaska Part.](#), 151 F.3d 1234, 1238 (9th Cir. 1998) (explaining the court will reverse "only upon a strong showing that the district court's decision was a clear abuse of discretion." (internal quotation marks and citation omitted)).

[F.3d at 951](#); [Torrise v. Tucson Elec. Power Co.](#), 8 F.3d 1370, 1374 (9th Cir. 1993). Whether the court has jurisdiction to enforce a class settlement is a question of law reviewed de novo. See [Arata](#), 96 F.3d at 1268.

This court exercises considerable restraint in reviewing a district court's approval of a CERCLA settlement. See [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. See [id.](#)

The interpretation of a settlement agreement is reviewed de novo. See [Congregation ETZ Chaim v. City of Los Angeles](#), 371 F.3d 1122, 1124 (9th Cir. 2004) (noting "due respect" may be due to district court's "superior perspective"); [In re Bennett](#), 298 F.3d 1059, 1064 (9th Cir. 2002) (applying state law). 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. See [Ahern v. Central Pac. Freight Lines](#), 846 F.2d 47, 48 (9th Cir. 1988).

24. Supersedeas Bonds

See III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 3. Bonds.

25. Surety Bonds

See III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 3. Bonds.

26. Vacatur

A district court's grant of vacatur is reviewed for an abuse of discretion. See [American Games, Inc. v. Trade Prods., Inc.](#), 142 F.3d 1164, 1166 (9th Cir. 1998). In the context of arbitration awards, however, the court's decision to deny vacatur and thereby affirm the award is reviewed de novo. See [Fidelity Federal Bank, FSB v. Durga Ma Corp.](#), 386 F.3d 1306, 1311 (9th Cir. 2004); [Woods v. Saturn Distrib. Co.](#), 78 F.3d 424, 427 (9th Cir. 1996); see also [Kyocera Corp. v. Prudential-Bache](#), 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding that review of arbitral decisions is limited to enumerated statutory grounds), *cert. dismissed*, [540 U.S. 1098](#) (2004).

27. Void Judgments

Whether a judgment is void is a legal issue subject to de novo review. See [Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc.](#), 938 F.2d 136, 137 (9th Cir. 1991). Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. See [FDIC v. Aaronian](#), 93 F.3d 636, 639 (9th Cir. 1996); [Electrical Specialty Co. v. Road & Ranch Supply, Inc.](#), 967 F.2d 309, 311 (9th Cir. 1992). A district court's ruling on a Rule 60(b)(4) motion to set aside a judgment as void is a question of law reviewed de novo. See [United States v. \\$277,000 U.S. Currency](#), 69 F.3d 1491, 1493 (9th Cir. 1995); [Export Group v. Reef Indus., Inc.](#), 54 F.3d 1466, 1487 (9th Cir. 1995).⁴⁹⁰

IV. REVIEW OF AGENCY DECISIONS

A. Introduction

1. Arbitrary and Capricious

The Administrative Procedures Act (APA) sets forth standards governing judicial review of decisions made by federal administrative agencies. See [Dickinson v. Zurko](#), 527 U.S. 150, 152 (1999); [High Sierra Hikers Ass'n v. Blackwell](#), 390 F.3d 630, 638 (9th Cir. 2004); [Public Util. Dist. No. 1 v. Federal Emergency Mgmt. Agency](#), 371 F.3d 701, 706 (9th Cir. 2004). Pursuant to the APA, agency decisions may be set aside only if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); [United States v. Bean](#), 537 U.S. 71, 77 (2002); [High Sierra, Hikers Ass'n](#), 390 F.3d at 638; [Public Util. Dist. No. 1](#), 371 F.3d at 706.⁴⁹¹ The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. See [Marsh v. Oregon Natural Res. Council](#), 490 U.S. 360, 376 (1989); [Safari](#)

⁴⁹⁰ See also [In re Sasson](#), 424 F.3d 864, 867 (9th Cir. 2005) (bankruptcy court); [Virtual Vision, Inc. v. Praegitzer Indus., Inc.](#), 124 F.3d 1140, 1143 (9th Cir. 1997) (bankruptcy court).

⁴⁹¹ See [Environmental Def. Ctr., Inc. v. EPA](#), 344 F.3d 832, 858 n.36 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004); [Forest Guardians v. U.S. Forest Serv.](#), 329 F.3d 1089, 1097 (9th Cir. 2003); [Arizona Cattle Growers' Ass'n](#), 273 F.3d at 1236; [Brower v. Evans](#), 257 F.3d 1058, 1065 (9th Cir. 2001); [United States v. Snoring Relief Lab Inc.](#), 210 F.3d 1081, 1085 (9th Cir. 2000).

Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir. 2002), cert. denied, 538 U.S. 946 (2003); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000).

Review under the standard is narrow and the reviewing court may not substitute its judgment for that of the agency. See *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh*, 490 U.S. at 378; *Ocean Advocates v. U.S. Army Corps of Eng's*, 402 F.3d 846, 858 (9th Cir. 2005); *Public Util. Dist. No. 1*, 371 F.3d at 706.⁴⁹² The agency, however, must articulate a rational connection between the facts found and the conclusions made. See *Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004); *Midwater Trawlers Co-op v. Department of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

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. See *Marsh*, 490 U.S. at 378; *Ocean Advocates*, 402 F.3d at 859; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36.

The inquiry, though narrow, must be searching and careful. *Marsh*, 490 U.S. at 378; *Ocean Advocates*, 402 F.3d at 858-59; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *Ninilchik Traditional Council*, 227 F.3d at 1194.

This court may reverse under the arbitrary and capricious standard only if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir.) (noting standard), amended by 352 F.3d 1187 (9th Cir. 2003), cert. denied, 542 u.s. 919 (2004); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36; *Brower*, 257 F.3d at 1065. Finally, an agency's

⁴⁹² *Fry v. DEA*, 353 F.3d 1041, 1043 (9th Cir. 2003); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36; *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1235 (9th Cir. 2001) (noting "narrow scope" of review); *Hells Canyon Alliance*, 227 F.3d at 1177; *Ninilchik Traditional Council*, 227 F.3d at 1194; *Snoring Relief Lab Inc.*, 210 F.3d at 1085.

decision can be upheld only on the basis of the reasoning in that decision. See [Anaheim Mem'l Hosp. v. Shalala](#), 130 F.3d 845, 849 (9th Cir. 1997); [French Hosp. Med. Ctr. v. Shalala](#), 89 F.3d 1411, 1416 (9th Cir. 1996).

2. Constitutional Review

A court may refuse to defer to an agency's interpretation of a statute that raises serious constitutional concerns. See [Ma v. Reno](#), 208 F.3d 815, 821 n.13 (9th Cir. 2000) (noting *Chevron* deference is not owed where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe), *vacated on other grounds by* [Zadvydas v. Davis](#), 533 U.S. 678 (2001); [Williams v. Babbitt](#), 115 F.3d 657, 661-62 (9th Cir. 1997).

Whether an agency's procedures comport with due process requirements presents a question of law reviewed de novo. See [Ramirez-Alejandre v. Ashcroft](#), 319 F.3d 365, 377 (9th Cir. 2003) (en banc) (noting no deference is owed to agency); [Chowdhury v. INS](#), 249 F.3d 970, 972 (9th Cir. 2001) (BIA); [Gilbert v. National Transp. Safety Bd.](#), 80 F.3d 364, 367 (9th Cir. 1996) (FAA); cf. [Adkins v. Trans-Alaska Pipeline Liability Fund](#), 101 F.3d 86, 89 (9th Cir. 1996) (noting courts should usually defer to agency's fashioning of hearing procedures). The constitutionality of an agency's regulation is reviewed de novo. See [Gonzalez v. Metropolitan Transp. Auth.](#), 174 F.3d 1016, 1018 (9th Cir. 1999).

3. Regulatory Interpretations

This court generally defers to an agency's interpretation of its own regulations. See [Public Util. Dist. No. 1 v. Federal Emergency Mgmt. Agency](#), 371 F.3d 701, 706 (9th Cir. 2004); [Forest Guardians v. U.S. Forest Serv.](#), 329 F.3d 1089, 1097 (9th Cir. 2003) (noting "substantial deference"). Deference is owed unless the interpretation is plainly erroneous or inconsistent with regulation. See [League of Wilderness Defenders v. Forsgren](#), 309 F.3d 1181, 1183 (9th Cir. 2002). Note that in some instances, little or no deference is owed to an agency's interpretation of regulations. See e.g., [United States v. Mead Corp.](#), 533 U.S. 218, 226-28 (2001) (explaining continuum of deference owed); [Pronsolino v. Nastri](#), 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference).⁴⁹³

⁴⁹³ See also [Community Hosp. of Monterey Peninsula v. Thompson](#), 323

Finally, note that interpretative regulations are entitled to less deference than legislative regulations. See [*Community Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 791 \(9th Cir. 2003\)](#); [*Lynch v. Dawson*, 820 F.2d 1014, 1020 \(9th Cir. 1987\)](#) (noting “various degrees of deference” owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a question of law reviewed de novo. See [*Erringer v. Thompson*, 371 F.3d 625, 629 \(9th Cir. 2004\)](#); [*Hemp Indus. Ass’n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1086 \(9th Cir. 2003\)](#); [*Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1330 \(9th Cir. 1997\)](#).

4. Sanctions

An agency’s imposition of sanctions is reviewed for an abuse of discretion. See [*Ponce v. SEC*, 345 F.3d 722, 728-29 \(9th Cir. 2003\)](#); [*Vernazza v. SEC*, 327 F.3d 851, 858 \(9th Cir. 2003\)](#) (noting limited scope of review), *amended by* [*335 F.3d 1096 \(9th Cir. 2003\)*](#); [*Atlanta-One, Inc. v. SEC*, 100 F.3d 105, 107 \(9th Cir. 1996\)](#). Thus, a penalty imposed should not be overturned unless it is unwarranted in law or unjustified in fact. See [*Balice v. Department of Agriculture*, 203 F.3d 684, 689 \(9th Cir. 2000\)](#); [*Potato Sales Co. v. Department of Agriculture*, 92 F.3d 800, 804 \(9th Cir. 1996\)](#); [*Hateley v. SEC*, 8 F.3d 653, 655 \(9th Cir. 1993\)](#).

5. Statutory Interpretations

An agency’s interpretation or application of a statute is a question of law reviewed de novo. See [*Schneider v. Chertoff*, 450 F.3d 944, 952 \(9th Cir. 2006\)](#); [*Vernazza v. SEC*, 327 F.3d 851, 858 \(9th Cir.\)](#), *amended by* [*335 F.3d 1096 \(9th Cir. 2003\)*](#). An agency’s interpretation of its statutory mandate is also de novo. See [*Bear Lake Watch, Inc. v. FEC.*, 324 F.3d 1071, 1073 \(9th Cir. 2003\)](#); [*Friends of the Cowitz and CPR-Fish v. FEC.*, 253 F.3d 1161, 1166 \(9th Cir. 2001\)](#), *amended by* [*282 F.3d 609 \(9th Cir. 2002\)*](#); [*American Rivers v. FEC.*, 201 F.3d 1186, 1194 \(9th Cir. 2000\)](#).

[*F.3d 782, 792 \(9th Cir. 2003\)*](#) (“considerable less deference” is owed to agency’s interpretation that conflicts with prior interpretation); [*Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 n.7 \(9th Cir. 1996\)](#) (no deference owed to interpretation that is contrary to plain and sensible meaning of regulation); [*United States v. Trident Seafoods, Inc.*, 60 F.3d 556, 559 \(9th Cir. 1995\)](#) (no deference owed to interpretation offered by counsel where the agency has not established a position).

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 Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 \(1984\)](#) (establishing two-part test for reviewing an agency's interpretation of a statute); [*Schneider*, 450 F.3d at 952](#); [*Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 \(9th Cir. 2003\) \(en banc\) \(explaining two-step test\), amended by 360 F.3d 1374 \(9th Cir. 2004\)](#); [*California Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 847 \(9th Cir. 2003\)](#) (applying *Chevron*). When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. See [*Chevron*, 467 U.S. at 843](#); [*Schneider*, 450 F.3d at 952](#); [*Bear Lake Watch*, 324 F.3d at 1073](#); [*Espejo v. INS*, 311 F.3d 976, 978 \(9th Cir. 2002\)](#). Review is limited to whether the agency's conclusion is based on a permissible construction of the statute. See [*Chevron*, 467 U.S. at 843](#); [*Espejo*, 311 F.3d at 978](#); [*McLean v. Crabtree*, 173 F.3d 1176, 1181 \(9th Cir. 1999\)](#).

Thus, a federal agency's interpretation of a statutory provision it is charged with administering may be entitled to deference. See [*Bear Lake Watch*, 324 F.3d at 1073](#) (noting "deference to an agency's reasonable interpretation of a statutory provision where Congress has left open the question of the agency's discretion"); [*Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 \(9th Cir. 2002\)](#) (noting deference unless agency's interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); [*Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 \(9th Cir. 2000\)](#) (noting under the two-part *Chevron* analysis, deference is due the agency's interpretation of a statute unless the plain language is unambiguous "with regard to the precise matter at issue").⁴⁹⁴

Note that no deference is owed to an agency when "Congress has directly spoken to the precise question at issue." [*Chevron*, 467 U.S. at 842](#); [*Community Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789](#)

⁴⁹⁴ See also [*Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 \(9th Cir.\)](#) (describing two-step *Chevron* review, and noting when Congress leaves a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute), amended by [*197 F.3d 1035*](#) (9th Cir. 1999).

(9th Cir. 2003). Courts are also not obligated to defer to an agency's interpretations that are contrary to the plain and sensible meaning of the statute. See [Kankamalage v. INS](#), 335 F.3d 858, 862 (9th Cir. 2003). No deference is given to an agency's interpretation of a statute that it does not administer or is outside of its expertise. See [Garcia-Lopez v. Ashcroft](#), 334 F.3d 840, 843 (9th Cir. 2003) (interpreting state law).⁴⁹⁵ Moreover, “[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action.” [Pfaff v. United States Dep’t of Housing & Urban Dev.](#), 88 F.3d 739, 748 (9th Cir. 1996). Thus, “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” [Young v. Reno](#), 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987)); cf. [Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala](#), 65 F.3d 1472, 1480 (9th Cir. 1995) (noting an agency “is not disqualified from changing its mind”). Similarly, no deference is owed when an agency has not formulated an official interpretation, but is merely advancing a litigation position. See [United States v. Trident Seafoods Corp.](#), 60 F.3d 556, 559 (9th Cir. 1995).⁴⁹⁶ 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. See [Orthopaedic Hosp. v. Belshe](#), 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo).

6. Substantial Evidence

Agency's factual findings are reviewed under the substantial evidence standard. See [Dickinson v. Zurko](#), 527 U.S. 150, 153-61 (1999) (rejecting

⁴⁹⁵ See also [American Fed. of Government Employees v. FLRA](#), 204 F.3d 1272, 1275 (9th Cir. 2000) (noting agency's interpretation of a statute outside of its administration is reviewed de novo).

⁴⁹⁶ 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).

“clearly erroneous” review and reaffirming substantial evidence); [Alaska Dept. of Health and Soc. Servs. v. Centers for Medicare and Medicaid Servs.](#), 424 F.3d 931, 938 (9th Cir. 2005); [Lucas v. NLRB](#), 333 F.3d 927, 931 (9th Cir. 2003). Substantial evidence means more than a mere scintilla but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See [NLRB v. International Bhd. of Elec. Workers, Local 48](#), 345 F.3d 1049, 1054 (9th Cir. 2003); [De la Fuente II v. FDIC](#), 332 F.3d 1208, 1220 (9th Cir. 2003). The standard, however, is “extremely deferential” and a reviewing court must uphold the agency’s findings “unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result.” See [Monjaraz-Munoz v. INS](#), 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003).⁴⁹⁷ If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency. See [Bear Lake Watch, Inc. v. FEC.](#), 324 F.3d 1071, 1076 (9th Cir. 2003); [McCartey v. Massanari](#), 298 F.3d 1072, 1075 (9th Cir. 2002).

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. See [De la Fuente](#), 332 F.3d at 1220 (reviewing the record as a whole); [Mayes v. Massanari](#), 276 F.3d 453, 458-59 (9th Cir. 2001); [Smolen v. Chater](#), 80 F.3d 1273, 1279 (9th Cir. 1996).

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); see also [Bear Lake Watch](#), 324 F.3d at 1077 n.8 (declining to review extra-record evidence).

Note that when an agency and a hearings officer disagree, the court reviews the decision of the agency, not the hearings officer. See [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

⁴⁹⁷ See also [Krull v. SEC](#), 248 F.3d 907, 911 (9th Cir. 2001) (noting court must “weigh pros and cons in the whole record with a deferential eye”); [Alderman v. SEC](#), 104 F.3d 285, 288 (9th Cir. 1997) (same).

[1570, 1573 \(9th Cir. 1990\)](#).⁴⁹⁸ Thus, the standard of review is not modified when such a disagreement occurs. See [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. See [Maka, 904 F.2d at 1355](#); [Howard v. Heckler, 782 F.2d 1484, 1487 \(9th Cir. 1986\)](#).

This court defers to credibility determinations made by hearings officers. See [Manimbao v. Ashcroft, 329 F.3d 655, 658 \(9th Cir. 2003\)](#); [Paramasamy v. Ashcroft, 295 F.3d 1047, 1050 \(9th Cir. 2002\)](#); [Underwriters Lab., Inc. v. NLRB, 147 F.3d 1048, 1051 \(9th Cir. 1998\)](#). 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 deference is given, a hearings officer must give specific, cogent reasons for adverse credibility findings. See [Manimbao, 329 F.3d at 658](#); [Gui v. INS, 280 F.3d 1217, 1225 \(9th Cir. 2002\)](#); [Reddick v. Chater, 157 F.3d 715, 722 \(9th Cir. 1998\)](#).

B. Specific Agency Review

1. Bonneville Power Administration (BPA)

BPA’s decisions are reviewed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980. See [Public Power Council, Inc. v Bonneville Power Admin., 442 F.3d 1204, 1209-10 \(9th Cir. 2006\)](#); [Puget Sound Energy, Inc. v. United States, 310 F.3d 613, 617 \(9th Cir. 2002\)](#). Review is under the Administrative Procedures Act. See [Public Power Council, 442 F.3d at 1209-10](#); [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 [Public Power Council, 442 F.3d at 1210](#); [Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin., 342 F.3d 924, 928 \(9th Cir. 2003\)](#); [M-S-R Public Power Agency, 297 F.3d 833, 841 \(9th Cir. 2002\)](#) (noting “review of final

⁴⁹⁸ See also [Northern Montana Health Care Ctr. v. NLRB, 178 F.3d 1089, 1093 \(9th Cir. 1999\)](#) (“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).

BPA actions is extremely limited”); [Vulcan Power](#), 89 F.3d at 550. 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. See [Public Power Council](#), 442 F.3d at 1210; [Aluminum Co. of Amer. v. Administrator, Bonneville Power Admin.](#), 175 F.3d 1156, 1160 (9th Cir. 1999); [Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council](#), 35 F.3d 1371, 1383 (9th Cir. 1994) (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. See [Public Power Council](#), 442 F.3d at 1210; [Confederated Tribes](#), 342 F.3d at 928. Thus, to uphold the BPA’s interpretation of the Act, “we need only conclude that it is a reasonable interpretation of the relevant provisions.” See [Northwest Env’tl. Def. Ctr. v. Bonneville Power Admin.](#), 117 F.3d 1520, 1530 (9th Cir. 1997).⁴⁹⁹

Whether a district court has subject matter jurisdiction under the Northwest Power Planning Act to hear challenges to final agency action by the BPA is a question of law reviewed de novo. See [Transmission Agency of California v. Sierra Pacific Power Co.](#), 295 F.3d 918, 925 (9th Cir. 2002).

2. Department of Energy

A decision by the Secretary of Energy will be set aside only if it is arbitrary, capricious, or otherwise not in accordance with law. See [Nevada v. United States Dep’t of Energy](#), 133 F.3d 1201, 1204 (9th Cir. 1998). Statutory interpretations are reviewed de novo. See *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. See [County of Esmeralda v. United States Dep’t of Energy](#), 925 F.2d 1216, 1219 (9th Cir. 1991).

⁴⁹⁹ See also [Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.](#), 342 F.3d 924, 928-29 (9th Cir. 2003) (stating standard); [Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.](#), 261 F.3d 843, 848-49 (9th Cir. 2001) (noting court may reject a construction inconsistent with statutory mandates or that frustrate the statutory policies that Congress sought to implement).

3. Environmental Protection Agency

Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act. See [Ober v. Whitman](#), 243 F.3d 1190, 193 (9th Cir. 2001); [Defenders of Wildlife v. Browner](#), 191 F.3d 1159, 1162 (9th Cir.), amended by 197 F.3d 1035 (9th Cir. 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de novo. See [City of San Diego v. Whitman](#), 242 F.3d 1097, 1101 (9th Cir. 2001).

The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See [Defenders of Wildlife v. United States Env't Prot. Agency](#), 420 F.3d 946, 958-59 (9th Cir. 2005) (discussing what is "arbitrary and capricious"); [Ober](#), 243 F.3d at 1193; [Exxon Mobil Corp. v. EPA](#), 217 F.3d 1246, 1248 (9th Cir. 2000). Deference is owed to the EPA's interpretation of its own regulations if those regulations are not unreasonable. See [Western States Petroleum Ass'n v. EPA](#), 87 F.3d 280, 283 (9th Cir. 1996); see also [Pronsolino v. Nastri](#), 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

4. Federal Communications Commission

FCC decisions may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See [California v. FCC](#), 75 F.3d 1350, 1358 (9th Cir. 1996); [California v. FCC](#), 39 F.3d 919, 925 (9th Cir. 1994). Under that standard, this court must determine whether the FCC's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. See [California](#), 75 F.3d at 1358; [California](#), 39 F.3d at 925. "The scope of judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference." [California](#), 39 F.3d at 925; see also [Howard v. American Online Inc.](#), 208 F.3d 741, 752-53 (9th Cir. 2000) (upholding FCC's "reasonable" interpretation of the Communications Act).

Whether a district court has subject matter jurisdiction to enforce orders of the FCC is a question of law reviewed de novo. See [United States v. Peninsula Communications, Inc.](#), 287 F.3d 832, 836 (9th Cir. 2002) (reviewing district court's refusal to dismiss for lack of jurisdiction). The

district court's decision whether to stay enforcement proceedings is reviewed for an abuse of discretion. See *id.* at 838.

5. Federal Energy Regulatory Commission

FERC's findings of fact are conclusive if supported by substantial evidence. See [*Public Utilities Com'n of California v. F.E.R.C.*, 2006 WL 2567443 *11 \(9th Cir. 2006\)](#); [*Bear Lake Watch, Inc. v. FEC.*, 324 F.3d 1071, 1073 \(9th Cir. 2003\)](#); [*American Rivers v. FEC.*, 201 F.3d 1186, 1194 \(9th Cir. 2000\)](#). Review of the agency's decision is limited to the arbitrary, capricious, abuse of discretion standard. See [*Public Utilities Com'n*, 2006 WL 2567443 at *11](#); [*California Dep't of Water Res. v. FEC.*, 341 F.3d 906, 910 \(9th Cir. 2003\)](#); [*Friends of the Cowlitz and CPR-Fish v. FEC.*, 253 F.3d 1161, 1166 \(9th Cir. 2000\), amended by 282 F.3d 609 \(9th Cir. 2002\)](#).

Deference is owed to FERC's interpretation of its own regulations unless plainly erroneous. See [*Friends of the Cowlitz*, 253 F.3d at 1166](#); [*Skokomish Indian Tribe v. FEC.*, 121 F.3d 1303, 1306 \(9th Cir. 1997\)](#); [*Rainsong Co. v. FEC.*, 106 F.3d 269, 272 \(9th Cir. 1997\)](#). Deference is also owed to FERC's interpretation of the law it is charged with administering. See [*California Trout, Inc. v. FEC.*, 313 F.3d 1131, 1134 \(9th Cir. 2002\)](#) (noting *Chevron* deference), *cert. denied*, 540 U.S. 818 (2003); [*American Rivers*, 201 F.3d at 1194](#) (same); [*Friends of the Cowlitz*, 253 F.3d at 1166](#). Note, however, that FERC's interpretation of its statutory mandate is reviewed de novo. See [*City of Fremont v. FEC.*, 336 F.3d 910, 914 \(9th Cir. 2003\)](#); [*Bear Lake Watch*, 324 at 1073](#); [*California Trout*, 313 F.3d at 1134](#); [*American Rivers*, 201 F.3d at 1194](#).

6. Federal Labor Relations Authority

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, v. Federal Labor Relations Authority.

7. Federal Trade Commission

The FTC's factual findings are conclusive if supported by evidence sufficient to permit a reasonable mind to accept the Commission's conclusions. See [*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. See [California Dental Ass’n v. FTC, 128 F.3d 720, 725 \(9th Cir. 1997\)](#), [vacated on other grounds, 526 U.S. 756 \(1999\)](#); [Olin Corp. v. FTC, 986 F.2d 1295, 1297 \(9th Cir. 1993\)](#). Under that standard, the Commission’s findings of fact will be upheld if they are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” [California Dental Ass’n, 128 F.3d at 725](#); [Olin, 986 F.2d at 1297](#).

Legal issues are for the courts to resolve, although even in considering such issues the court is to give deference to the Commission’s informed judgments. See [California Dental Ass’n, 128 F.3d at 725](#); [Olin, 986 F.2d at 1297](#); see also [United States v. Louisiana-Pac. Corp., 754 F.2d 1445, 1447 \(9th Cir. 1985\)](#) (great deference should be given to the FTC’s interpretation of the Federal Trade Commission Act). Whether a district court has given the FTC’s findings of fact and conclusions of law appropriate weight is reviewed de novo. See [Pool Water Products v. Olin Corp., 258 F.3d 1024, 1030 \(9th Cir. 2001\)](#).

8. Immigration and Naturalization Service

Note the INS was abolished by the Homeland Security Act of 2002, [Pub. L. No. 107-296, 116 Stat. 2135](#), and the majority of its immigration enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement, a part of the Department of Homeland Security. See [Hernandez v. Ashcroft, 345 F.3d 824, 828 n.2 \(9th Cir. 2003\)](#); [Armentero v. INS, 340 F.3d 1058, 1061 \(9th Cir. 2003\)](#).

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

9. Interior Board of Land Appeals (IBLA)

Decisions of the IBLA are reversed only if “arbitrary, capricious, not supported by substantial evidence, or contrary to law.” [Akootchook v. United States, 271 F.3d 1160, 1164 \(9th Cir. 2001\)](#); [Hjelvik v. Babbitt, 198 F.3d 1072, 1074-75 \(9th Cir. 1999\)](#) (noting limited standard of review); [Hoefler v. Babbitt, 139 F.3d 726, 727 \(9th Cir. 1998\)](#) (noting review is under the APA). To make that determination, “[t]his court carefully search[es] the entire record to determine whether it contains such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of relevant factors.” [Akootchook, 271 F.3d at 1164](#) (quoting *Hjelvik*, 198 F.3d at 1074).

10. Labor Benefits Review Board (BRB)

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas Labor Law, x. Labor Law.

11. Federal Mine Safety and Health Review Commission

The Mine Safety and Health Administration’s decisions are reviewed under the arbitrary and capricious standard. See [Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm’n, 142 F.3d 1179, 1182 \(9th Cir. 1998\)](#). Findings of fact are reviewed for substantial evidence. See *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 interpretations must be “reasonable” and “conform” to the purpose and wording of the regulations).

12. National Labor Relations Board (NLRB)

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, iv. National Labor Relations Board.

13. National Transportation Safety Board (NTSB)

Review of an order of the NTSB is “narrowly circumscribed.” See [Olsen v. NTSB, 14 F.3d 471, 474 \(9th Cir. 1994\)](#). Review is conducted in accordance with the APA; this court must affirm unless the NTSB’s order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See [Gilbert v. NTSB, 80 F.3d 364, 368 \(9th Cir. 1996\)](#); [Borregard v. NTSB, 46 F.3d 944, 945 \(9th Cir. 1995\)](#). The NTSB’s decision must be based on the relevant factors and may not constitute a clear error of judgment. See [Gilbert, 80 F.3d at 368](#). The Board’s factual findings are conclusive if supported by substantial evidence. See [Borregard, 46 F.3d at 945](#); [Olsen, 14 F.3d at 474](#). Pure legal questions are reviewed de novo. See

Wagner v. NTSB, 86 F.3d 928, 930 (9th Cir. 1996); Borregard, 46 F.3d at 945. The agency’s interpretations of its own organic statute and regulations, however, are accorded deference, unless the administrative construction is clearly contrary to the plain and sensible meaning of the statute or regulation. Borregard, 46 F.3d at 945; Reno v. National Transp. Safety Bd., 45 F.3d 1375, 1378 (9th Cir. 1995). The Board’s award of attorneys’ fees is reviewed for an abuse of discretion. See Mendenhall v. NTSB, 213 F.3d 464, 470 (9th Cir. 2000).

14. Occupational Safety and Health Review Commission

The appellate court 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....[T]he Commission’s factual findings [are reviewed] under the substantial evidence standard; and [the court] accept[s] reasonable factual inferences drawn by the Commission.” Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 941 (9th Cir. 1994) (citations omitted). The court “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.” *Id.* Thus, the Commission’s findings must be affirmed “if supported by substantial evidence on the record considered as a whole.” See Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (internal quotation omitted).

“While the proper interpretation of a statute is a question of law reviewed de novo, the court must give deference to [OSHRC’s] interpretation of statutes that it administers.” Herman v. Tidewater Pac., Inc., 160 F.3d 1239, 1241 (9th Cir. 1998) (citations omitted). Note, however, that where interpretations of the Secretary of Labor and the Commission are in conflict, this court must defer to the Secretary’s reasonable interpretation. See Chao, 242 F.3d at 897; Herman, 160 F.3d at 1241. When the meaning of regulatory language is ambiguous, the Secretary’s interpretation controls “so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations.” Crown Pacific v. OSHRC, 197 F.3d 1036, 1038 (9th Cir. 1999) (internal quotation omitted); see also Chao, 242 F.3d at 897 (noting deference is owed only if the Secretary’s interpretation is reasonable).

15. Railroad Retirement Board

The RRB's findings of fact are conclusive "if supported by evidence and in the absence of fraud." [45 U.S.C. § 355\(f\)](#). This circuit has construed this standard to be a "substantial evidence" test. See [Calderon v. Railroad Retirement Bd.](#), 780 F.2d 812, 813 (9th Cir. 1986); [Estes v. Railroad Retirement Bd.](#), 776 F.2d 1436, 1437 (9th Cir. 1985). The Board's application of a regulation will be upheld if it is a permissible construction of the Railroad Retirement Act. See [Capovilla v. Railroad Retirement Bd.](#), 924 F.2d 885, 887 (9th Cir. 1991).

16. Railway Adjustment Board

The scope of review of Railway 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, 743 (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. See [Fennessy](#), 91 F.3d at 1361; [English](#), 18 F.3d at 743-44. Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. See [Association of Flight Attendants v. Horizon Air Indus., Inc.](#), 280 F.3d 901, 904 (9th Cir. 2002).

17. Securities Exchange Commission

The Securities Exchange Commission's factual findings are reviewed for substantial evidence. See [Ponce v. SEC](#), 345 F.3d 722, 728 (9th Cir. 2003); [Krull v. SEC](#), 248 F.3d 907, 911 (9th Cir. 2001); [Alderman v. SEC](#), 104 F.3d 285, 288 (9th Cir. 1997). Deference is owed to the agency's construction of its own regulations unless its interpretation is "unreasonable" or "plainly erroneous." See [Ponce](#), 345 F.3d at 728; [Alderman](#) 104 F.3d at 288; see also [Vernazza v. SEC](#), 327 F.3d 851, 858 (9th Cir. 2003), [amended by](#) 335 F.3d 1096 (9th Cir. 2003) (noting when deference is owed).

The district court's interpretation of the Securities Exchange Act is reviewed de novo. See [SEC v. McCarthy](#), 322 F.3d 650, 655 (9th Cir. 2003); [McNabb v. SEC](#), 298 F.3d 1126, 1130 (9th Cir. 2002). The court's determination that a transaction is a security for purposes of the Act is

reviewed de novo. See [SEC v. Rubera, 350 F.3d 1084, 1089 \(9th Cir. 2003\)](#). Whether the court's decision to enforce a SEC order violates due process is a question of law reviewed de novo. See [McCarthy, 322 F.3d at 655](#). The district court's decision to issue an injunction to enforce an SEC order is reviewed for an abuse of discretion. See [SEC v. Wallenbrock, 313 F.3d 532, 536 \(9th Cir. 2002\)](#).

The SEC's imposition of sanctions is reviewed for an abuse of discretion. See [Ponce, 345 F.3d at 728-29](#); [Vernazza, 327 F.3d at 858](#); [Krull, 248 F.3d at 912](#). A disgorgement order is reviewed for an abuse of discretion. See [SEC v. First Pac. Bancorp, 142 F.3d 1186, 1190 \(9th Cir. 1998\)](#); [SEC v. Colello, 139 F.3d 674, 675 \(9th Cir. 1998\)](#). The district court's decision to freeze assets to enforce a contempt order arising from the failure to disgorge is reviewed for an abuse of discretion. See [SEC v. Hickey, 322 F.3d 1123, 1128 \(9th Cir.\), amended by 335 F.3d 834 \(9th Cir. 2003\)](#).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, z. Securities.

18. Social Security Administration

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. See [Gillett-Netting v. Barnhart, 371 F.3d 593, 595 \(9th Cir. 2004\)](#); [Batson v. Commissioner of Soc. Sec. Admin., 359 F.3d 1190, 1193 \(9th Cir. 2004\)](#); [Benton v. Barnhart, 331 F.3d 1030, 1035 \(9th Cir. 2003\)](#). "Our review of the Commissioner's decision is 'essentially the same as that undertaken by the district court.'" [Tidwell v. Apfel, 161 F.3d 599, 601 \(9th Cir. 1999\)](#) (quoting [Stone v. Heckler, 761 F.2d 530, 532 \(9th Cir. 1985\)](#)).

The decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. See [Batson, 359 F.3d at 1193](#); [Benton, 331 F.3d at 1035](#); [Connett v. Barnhart, 340 F.3d 871, 873 \(9th Cir. 2003\)](#). When reviewing factual determinations by the Commissioner, acting through the administrative law judge, this court affirms if substantial evidence supports the determinations. See [Celaya v. Halter, 332 F.3d 1177, 1180 \(9th Cir. 2003\)](#); [Saelee v. Chater, 94 F.3d 520, 521 \(9th Cir. 1996\)](#).

Substantial evidence is more than a mere scintilla, but less than a preponderance. See [Howard ex rel. Wolff v. Barnhart](#), 341 F.3d 1006, 1011 (9th Cir. 2003); [Connett](#), 340 F.3d at 873; [Mayes v. Massanari](#), 276 F.3d 453, 459 (9th Cir. 2001). Substantial evidence, considering the entire record, is relevant evidence which a reasonable person might accept as adequate to support a conclusion. [Howard](#), 341 F.3d at 1011; [Morgan v. Commissioner of the Soc. Sec. Admin.](#), 169 F.3d 595, 599 (9th Cir. 1999); [Reddick v. Chater](#), 157 F.3d 715, 720 (9th Cir. 1998). If the evidence can reasonably support either affirming or reversing the Commissioner's conclusion, the court may not substitute its judgment for that of the Commissioner. See [Batson](#), 359 F.3d at 119; [McCartey v. Massanari](#), 298 F.3d 1072, 1075 (9th Cir. 2002).⁵⁰⁰

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. See [Benton](#), 331 F.3d at 1040; [Edlund v. Massanari](#), 253 F.3d 1152, 1156 (9th Cir. 2001). The ALJ, however, cannot discount a claim of excess pain without making specific findings justifying that decision. See [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. See *id.* The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. See [Edlund](#), 253 F.3d at 1156; [McNatt v. Apfel](#), 201 F.3d 1084, 1087 (9th Cir. 2000).

The Commissioner's interpretation of social security statutes or regulations is entitled to deference. See [Campbell ex rel. Campbell v. Apfel](#), 177 F.3d 890, 893 (9th Cir. 1999) (regulation and statute); [Jamerson v. Chater](#), 112 F.3d 1064, 1066 (9th Cir. 1997) (statute); [Esselstrom v. Chater](#), 67 F.3d 869, 872 (9th Cir. 1995) (regulations).⁵⁰¹ A court need not accept an agency's interpretation of its own regulations if that interpretation is

⁵⁰⁰ See, e.g., [Edlund v. Massanari](#), 253 F.3d 1152, 1156 (9th Cir. 2001) (reversing for lack of substantial evidence to support ALJ rejection of examining psychologist's findings); [Holohan v. Massanari](#), 246 F.3d 1195, 1201 (9th Cir. 2001) (reversing for lack of substantial evidence).

⁵⁰¹ See also [Pagter v. Massanari](#), 250 F.3d 1255, 1262 (9th Cir. 2001) (determining SSA interpretation was not erroneous or inconsistent with the regulation).

inconsistent with the wording of the regulations or statute under which the regulations were promulgated. [Esselstrom, 67 F.3d at 872.](#)

Whether new evidence justifies a remand to the Commissioner is reviewed de novo. See [Mayes v. Massanari, 276 F.3d 453, 461-62 \(9th Cir. 2001\)](#) (clarifying standard); [Harman, 211 F.3d at 1174.](#) Whether the claimant has shown good cause is reviewed, however, for an abuse of discretion. See [Mayes, 276 F.3d at 462.](#) The district court's decision whether to remand for further proceedings or for immediate payment of benefits is reviewed for an abuse of discretion. See [Bunnell v. Barnhart, 336 F.3d 1112, 1114 \(9th Cir. 2003\); Harman, 211 F.3d at 1175-78.](#)

Fee awards made pursuant to the Social Security Act, [42 U.S.C. § 406\(b\)\(1\)](#), are reviewed for an abuse of discretion. See [Gisbrecht v. Apfel, 238 F.3d 1196, 1197 \(9th Cir. 2000\), rev'd on other grounds, 535 U.S. 789, 808-08 \(2002\)](#) (noting § 406(b) fee awards must also be reviewed for "reasonableness"); [Widrig v. Apfel, 140 F.3d 1207, 1209 \(9th Cir. 1998\); Allen v. Shalala, 48 F.3d 456, 457 \(9th Cir. 1995\), abrogated on other grounds by Gisbrecht v. Barnhart, 535 U.S. 789 \(2002\).](#) 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. See [Allen, 48 F.3d at 457](#) (noting also that a district court's interpretation of the Social Security Act's attorneys' fees provision is reviewed de novo).