

Research Guide: Motion to Vacate a Default Judgment

As adapted from the San Diego County Public Law Library Research Guide
(<http://www.sdcpll.org/guides.htm>) (619) 531-3900

Law Library for San Bernardino County

Research Guide, www.sblawlibrary.org, (909) 885-3020.

Disclaimer

The information in this research guide is intended to assist patrons with their legal research and is in no way intended to replace the counsel of an Attorney. Any decisions about how to proceed must be determined by the patron. The library staff can recommend and refer you to print and web-based resources that will help you find answers to your law-related questions. The staff at the Law Library for San Bernardino County cannot explain or interpret the law itself and we are not permitted to give legal advice.

What is a Default Judgment?

A default judgment is usually obtained by the plaintiff when the defendant does not appear at a hearing or does not file an answer to the summons and complaint.

I received a default judgment against me, is there anything I can do?

Under certain circumstances you may be able to file a Motion to Vacate Default Judgment. (To understand what a motion is, please review our guide: [What is a Motion?](#))

Under what circumstances can I file a Motion to Vacate Default Judgment?

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

Generally, if you cannot actually claim one the above stated grounds than your motion will not be considered by the court.

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

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

Where do I get the forms to file the Motion to Vacate?

Motions are custom forms that you create/draft yourself on pleading paper (paper numbered down the left side, exactly like the paper this guide is printed on).

1 **So how do I draft a motion?**

2 Motions include several parts:

- 3 • The application or motion typically called a “Notice of Motion” (This tells the court what
4 you want to do);
- 5 • A Memorandum of Points and Authorities (The law that allows the court to grant your
6 application/motion);
- 7 • A Declaration (This is your statement of facts, a chance to tell your story);
- 8 • An Order for the Judge to sign if he grants your application/motion.

9 **Is there an example I can use to help me draft this motion?**

10 A sample of what this type of Motion might look like is provided below. But you will have to
11 decide whether the sample is the correct form for your situation. You may need to modify the
12 form so it fits your case.

13 Blank Pleading paper (paper numbered down the left side, exactly like the paper this guide is
14 printed on) is available at <http://www.sblawlibrary.org/forms.html>

15 **What do I do after I draft my forms?**

16 Once you have drafted the forms to your specifications you can file them with the court.
17 Typically, the clerk will assign a hearing date for your application/motion. You will most likely
18 need to serve the other party involved and file a **Proof of Service**. Some courts will serve the
19 papers for you.

20 **For information about service of papers and proof of service, please refer to one of the
21 following research guides:**

- 22 ➤ *Personal Service of Court Papers*, published by the Sacramento County Public Law
23 Library, <http://www.saclaw.org/Uploads/files/Step-by-Step/PersonalService.pdf>
- 24 ➤ *Proof of Service by Mail*, published by the Sacramento County Public Law Library,
25 <http://www.saclaw.org/pages/pos-mail.aspx>
- 26 ➤ *Service of Notice and Other Papers*, published by the San Diego County Public Law
27 Library,
28 http://www.sdcppl.org/resources/guides/Service_of_Notice_and_Other_Papers.pdf
- Proof of Service Forms, <http://courts.ca.gov/forms.htm?filter=POS>

For additional information please review the following resources at the law library:

California Civil Procedure Before Trial 4th ed., vol. 2, ch. 38, Relief From Default or Default
Judgment, §§ 38.75 - 38.109, Forms §§ 38.114 - 38.117.

California Forms of Pleading & Practice, vol 43, ch. 489, Relief From Judgments, Matthew
Bender.

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

3
4 *California Points & Authorities*, vol. 7, ch.70, Defaults, Default Judgments, and Relief from
Judgments and Orders, Matthew Bender. (includes sample forms)

5 *Motion to Vacate a Default Judgment or Set Aside a Dismissal*, [San Diego Law Library](http://sdcppl.org/resources/guides/Motion_to_Vacate_a_Default_Judgment.pdf),
6 http://sdcppl.org/resources/guides/Motion_to_Vacate_a_Default_Judgment.pdf.

7 8 **Can I stop the execution of the Judgment?**

9 In some situations you can file for a claim of exemption.

10 The list of exemptions can be located online: <http://courts.ca.gov/documents/ej155.pdf>

11 Sacramento County Law Library also provides a list of exemptions:

12 <http://www.saclaw.org/pages/exemptions.aspx>

13
14 **SCPLL has provided the following guide: Stop or Reduce a Wage Garnishment Step by
Step:** <http://www.saclaw.org/pages/claim-exemption.aspx>

15 or as a PDF <http://www.saclaw.org/uploads/files/Step-by-Step/SbS-claim-exemption.pdf>

16 17 **The Judicial Council Forms for Exemption Claims:**

18 Claim of Exemption: [EJ – 160](#), Financial Statement: [EJ – 165/WG – 007](#),

19 Notice of Hearing on Claim of Exemption: [EJ – 175/WG-010](#).

20 21 **Wage Garnishment Claim of Exemption:**

22 Claim of Exemption Wage Garnishment: [WG – 006](#), Financial Statement: [WG – 007](#),

23 Notice of Filing of Claim of Exemption: [WG – 008](#), Notice of Hearing: [WG - 010](#),

24 Order Determining Claim of Exemption: [WG – 011](#),

25 Notice of Termination or Modification of Earnings Withholding Order: [WG - 012](#).

26 See all WG Forms: <http://courts.ca.gov/forms.htm?filter=WG>

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28 ***Defendant in [Pro Per](#) is a person who handles his/her case without an attorney. It is
typical for you to alert the court of your [Pro Per](#) status on pleadings you file with the court.**

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Defendant in Pro Per

IN THE SAN BERNARDINO SUPERIOR COURT
STATE OF CALIFORNIA

_____,
Plaintiff,
vs.
_____,
Defendant.

) Case No.: _____
) NOTICE OF MOTION AND MOTION FOR
) ORDER VACATING AND SETTING ASIDE
) DEFAULT (AND DEFAULT JUDGMENT)],
) SUPPORTING DECLARATION, AND
) MEMORANDUM OF POINTS
) AND AUTHORITIES
) Date: _____
) Time: _____
) Dept: _____

NOTICE OF MOTION TO VACATE DEFAULT JUDGMENT

To plaintiff _____ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [date], at
_____ [time], or as soon thereafter as the matter may be heard, in
[_____ (Department or Division) _____ of] this court,
located at _____ [address], _____ [city], defendant will, and
hereby does, move to vacate and set aside default judgment entered against defendant on
_____ [date]. The motion will be made on the ground(s) that the default
judgment was taken _____ [by or against] defendant through his/her _____
_____ [mistake or inadvertence or surprise or excusable neglect or all or any combination of
these].

The motion will be based on this notice of motion, the accompanying _____
declaration(s) of _____ [name(s)], and the memorandum of points and
authorities served and filed herewith, on the records and file herein, and on such evidence as may
be presented at the hearing of the motion.

Dated: _____
Respectfully Submitted,
By: _____

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2 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO**
3 **VACATE DEFAULT JUDGMENT**

4 **THE COURT SHOULD GRANT THE MOTION TO SET ASIDE THE DEFAULT AND**
5 **DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b)**
6 **BECAUSE THE DEFAULT JUDGMENT WAS TAKEN AGAINST DEFENDANT**
7 **THROUGH HIS/HER _____ [MISTAKE *and/or* INADVERTENCE**
8 ***and/or* SURPRISE *and/or* EXCUSABLE NEGLIGENCE], AND JUSTICE REQUIRES**
9 **DETERMINATION OF THE ISSUES AFTER A HEARING ON THE MERITS OF THE**
10 **CASE.**

11 **A. Grounds for Relief From Judgment, Order, or Other Proceeding.** On application, the
12 court may, on any terms as may be just, relieve a party or his or her legal representative from a
13 judgment, dismissal, order, or other proceeding taken against him or her through his or her
14 mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 473(b)).

15 **B. Policy of Law Favors Trial on Merits.** The policy of the law is that controversies should be
16 heard and disposed of on their merits (Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681,
17 694-703, 84 Cal. Rptr. 3d 351 ; Berman v. Klassman (1971) 17 Cal. App. 3d 900, 909, 95 Cal.
18 Rptr. 417).

19 **C. Court Has Wide Discretion in Granting Relief.** A trial court has wide discretion to grant
20 relief under Code of Civil Procedure Section 473 (Berman v. Klassman (1971) 17 Cal. App. 3d
21 900, 909, 95 Cal. Rptr. 417).

22 **D. Liberal Construction of Statute.** Code of Civil Procedure Section 473(b) is a remedial
23 measure to be liberally construed, and any doubts existing as to the propriety of setting aside a
24 default thereunder will be resolved in favor of a hearing on the merits (Berman v. Klassman
25 (1971) 17 Cal. App. 3d 900, 910, 95 Cal. Rptr. 417).

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27 Dated: _____.

28 Respectfully Submitted,

By: _____

Defendant in Pro Per

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Defendant in Pro Per

IN THE SAN BERNARDINO SUPERIOR COURT
STATE OF CALIFORNIA

_____) Case No.: _____
Plaintiff,)
) ORDER
)
vs.)
)
)
_____,)
)
Defendant.)
_____)

ORDER OF COURT

The motion of _____ [*identify party, e.g., defendant*] for an order
_____ [*specify, e.g., setting aside and vacating the default (and default
judgment) heretofore entered*] came on regularly for hearing by the court on
_____ [*date*]. Plaintiff appeared by counsel _____ [*name*];
defendant appeared by counsel _____ [*name*].

IT IS HEREBY ORDERED that the default Judgment heretofore entered in this action
_____ [defendant][, this judgment having been _____
entered on _____ [*date*] in Volume _____, Page
_____, of the Judgment Book be hereby set aside and vacated.

Dated: _____.

Judge of the Superior Court