

**THE MOTION FOR NEW TRIAL:
WHEN TO MAKE IT AND HOW TO WIN IT**
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The motion for new trial is a powerful tool for the unsuccessful litigant. It is the only vehicle for preserving evidence and rulings not captured in the trial court record so that it can be presented to the Court of Appeal. See CCP §657(4). And the motion for new trial is underutilized--many are unaware that the motion for new trial is proper after judgment without trial such as after the sustaining of a demurrer, judgment on the pleadings, and summary judgment. A party must make the motion because the trial court lacks the power to order a new trial on its own motion. CCP §657; *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162.

The motion for new trial contains so many traps for the unwary that one California Supreme Court justice has called it a "procedural minefield." *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892, 911 (Kaus, J., dissenting). For example, the time limits for filing the notice of intention to move for a new trial (15 days from service of the first notice of entry of judgment) and for deciding the motion (60 days from service of the first notice of entry of judgment) are jurisdictional; their violation cannot be cured. The failure to seek a new trial on the grounds of inadequate or excessive damages bars the assertion of such grounds on appeal. *Campbell v. McClure* (1986) 182 Cal.App.3d 806 (failure to challenge punitive damage award on new trial as unsupported bars appellate review).

This article discusses the (1) availability of the motion for new trial, (2) key reasons to bring a motion for new trial, (3) best practices for bringing the motion, and (4) tips for opposing the motion.

A. A new trial motion is proper after most judgments.

The motion for new trial is more widely available than many realize. A motion for new trial is available after:

- (1) summary judgment;
- (2) dismissal upon sustaining a demurrer;

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- (3) judgment on the pleadings,
- (4) a default judgment for failure to comply with discovery orders;
- (5) a judgment of nonsuit or a directed verdict;
- (6) a judgment on an agreed statement of ultimate facts; an order granting a motion to quash a writ of execution to set aside a levy, and
- (7) a judgment entered at the direction of the appellate court.

CCP § 656; 8 Witkin, *California Procedure Attack on Judgment* §§22-23 (4th ed 1997). *E.g.*, *Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858; *Green v. Del-Camp Investments, Inc.* (1961) 193 Cal.App.2d 479, 481. "[T]here may be a 'trial' and hence a situation proper for a new trial motion where only issues of law are determined." *Carney v. Simmonds* (1957) 49 Cal.2d 84, 90 (approving the new trial procedure after judgments without a conventional trial, including judgment of dismissal after demurrer sustained, judgment on the pleadings, and judgment of dismissal generally); *accord*, *Hendershot v. Superior Court (Southwest Investment)* (1993) 20 Cal.App.4th 860, 865.

B. Four reasons to file a motion for new trial.

When the jury returns an adverse verdict, there are four primary reasons to file a motion for new trial.

1. Complete the record.

The new trial motion is the only opportunity to strengthen the record on appeal by making the strongest possible showing with respect to evidence that was unavailable at trial, or was not fully presented, or was presented only through an offer of proof.

Newly discovered material evidence favorable to the moving party may be grounds for a new trial if the evidence could not have been discovered by the moving party with reasonable diligence and produced at trial. *Linhart v. Nelson* (1976) 18 Cal.3d 641; *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98. Pending discovery may generate "newly discovered evidence" supporting a new trial after summary judgment. *Scott v. Farrar* (1983) 139 Cal.App.3d 462.

2. Correct juror misconduct.

Attorneys and parties with knowledge of juror misconduct must come forward at the earliest opportunity, so that the court may take corrective measures and proceed with an error-free trial. *Weathers v. Kaiser Found.*

Hosps. (1971) 5 Cal.3d 98, 103. Where the misconduct is discovered only after the jury returns its verdict, the new trial motion is the earliest opportunity to raise it.

A moving party that asserts juror misconduct must submit declarations from the attorney and the client showing that each did not have knowledge of the asserted misconduct before the jury's verdict. *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 598. These declarations are necessary to dispel any inference that the moving party was guilty of waiver or gambled on the verdict.

A motion for new trial based on juror misconduct triggers a three-step inquiry by the court: (1) whether the supporting affidavits are admissible; (2) whether the facts, if admissible, establish misconduct; (3) whether any misconduct prejudiced the outcome of the trial. *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149.

When jury misconduct is observed by counsel or the parties, affidavits can document what they witnessed, such as the unauthorized observation of an exhibit, *Tunmore v. McLeish* (1919) 45 Cal.App. 266, 187 P. 443, or communications with parties. *Wright v. Eastlick* (1899) 125 Cal. 517, 58 P. 87. If the misconduct is observed only by the jurors, counsel must submit juror affidavits to prove overt acts of misconduct during deliberations, as opposed to proving a juror's state of mind. *People v. Hutchinson* (1969) 71 Cal.2d 342.

Juror affidavits must relate objective events such as "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." Evid C §1150. A juror is barred from impugning his own or fellow jurors' mental processes or reasons for assent or dissent. *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892 (juror claim that no vote was taken after she changed her mind on liability). Affidavits regarding the jurors' "mental processes" are inadmissible. See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108; *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 953.

Juror affidavits may show that the jurors improperly added plaintiff's attorney's fees to the verdict, *Krouse v. Graham* (1977) 19 Cal.3d 59, or that a juror in a medical malpractice case concealed the fact that he was a doctor, *Clemens v. Regents of Univ. of Cal.* (1970) 8 Cal.App.3d 1, or that one juror contradicted the plaintiff's testimony with a report of his own low back

problem, that another juror was biased against plaintiff for fear of raising insurance rates, and that some jurors believed a husband's marriage vows barred his claim for loss of consortium. *Smith v. Covell* (1980) 100 Cal.App.3d 947.

Types of juror misconduct provable through juror affidavits include: communications with the judge, bailiff, parties, counsel, or witnesses, soliciting an outside opinion or privately viewing the scene or an exhibit, improperly experimenting with an exhibit, obtaining information through the media, concealing bias on voir dire, or adopting a chance or quotient verdict. Cases involving these violations are collected in California Judges Benchbook, Civil Trials 451-459 (CJER 1981). See also *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149 (juror's presentation of new evidence to jury of Navy's boiler maintenance practices prejudiced plaintiff Navy boiler technician); *Andrews v. County of Orange, supra* (refusal to deliberate; assertion of facts not in evidence).

The party seeking the new trial usually has the burden of proving that the misconduct was prejudicial. *Grant v. F.P. Lathrop Constr. Co.* (1978) 81 Cal.App.3d 790, 804; *Deward v. Clough* (1966) 245 Cal.App.2d 439, 445. But some courts have taken the opposite position, requiring the party defending the verdict to show the misconduct was harmless. *Whitlock v. Foster Wheeler* (2008) 160 Cal.App.4th 149 (showing of misconduct creates presumption of prejudice); *Andrews v. County of Orange, supra*.

3. Correct juror bias.

Juror bias may be a ground for new trial under both CCP §657(1) and (2); see *Clemens v. Regents of Univ. of Cal.* (1971) 20 Cal.App.3d, 356, 361. Counsel asserting juror bias as a ground for a new trial can also rely on the constitutional guarantee of the right of trial by jury. Cal Const art I, §16. The right to unbiased and unprejudiced jurors is an "inseparable and inalienable part" of the right to jury trial. *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 953.

The trial court found juror bias in *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98. In *Weathers*, plaintiffs' wrongful death action against a hospital resulted in a nine-to-three defense verdict. Plaintiffs submitted affidavits from the three dissenting jurors reciting bias by the majority jurors. One white juror said a plaintiff was a "black woman" and that "where he

came from, they don't even let a black woman in a courtroom." 5 Cal.3d at 107.

Another juror expressed the fear that "if we voted for the plaintiffs in this case, the hospital rates at Kaiser Hospital would go up, and we would all have to pay more money for hospital rates." She also told the jury "how good Kaiser Hospital was" and that a verdict against Kaiser would be "attacking it and endangering the whole hospital system." 5 Cal.3d at 107.

A new trial for juror bias was granted and was affirmed by the Supreme Court. Although the majority of jurors filed declarations flatly denying the alleged statements, the trial court's determination of conflicting facts was not disturbed on appeal under the substantial evidence rule because the trial court was responsible for weighing the credibility of conflicting declarations. 5 Cal.3d at 108. *See also Tapia v. Barker* (1984) 160 Cal.App.3d 761 (bias against Mexican plaintiff).

To prevent juror bias (and to arm jurors to report the bias of their fellow jurors when it crops up), ask the judge to read CACI 100 at the beginning of trial and remind the jury of it during closing argument.

4. A prerequisite for appellate review on inadequate or excessive damages.

A motion for new trial is a prerequisite to appellate review when damages are excessive or inadequate. CCP §657(5). The trial court has the power to increase or reduce the damage award. CCP §662.5. But this power cannot be exercised to correct the jury's mistaken appointment of fault, for which the proper remedy is a limited retrial on apportionment. *Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442.

A new trial on damages may be granted conditionally unless the nonmoving party agrees to an increase or a reduction in damages to an amount set by the court. CCP §662.5. The time period for acceptance of the conditional remittitur or additur must be reasonable, and may extend beyond the 60-day period for granting a new trial. *Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442, 454 n. 6 (three weeks is reasonable).

C. Best practices for filing the motion.

Because the right to a new trial is "purely statutory," the procedural steps prescribed by law are mandatory and must be strictly followed. *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463; *Wall Street Network, Ltd. v.*

New York Times Co. (2008) 164 Cal.App.4th 1171; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624.

The best approach is to calendar each item including the date the court's jurisdiction expires. If possible, a stipulated briefing schedule will provide certainty and eliminate the need to bring or oppose motions to extend the time on the supporting points and authorities and the opposition.

1. File a timely notice--untimely notice can doom both the new trial motion and the appeal.

The first step in obtaining a new trial order is to file and serve a notice of intention to move for a new trial within 15 days of the mailing of the first notice of entry of judgment by the clerk, or service by any party. CCP § 659; *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147. The 15-day period for filing the notice of intention to move for new trial is jurisdictional, so that failure to comply with it is fatal. *Ehrler v. Ehrler, supra*.

The notice may be filed before the entry of judgment, or before the earlier of (1) 15 days of the date of mailing notice of entry of judgment by the clerk or service by any party, or (2) 180 days after the entry of judgment. CCP § 659. However, in a court trial if the notice is filed before the court signs and files the findings, conclusions, and judgment, the notice is premature and of no effect. *Ehrler v. Ehrler, supra*. Any notice filed before all issues in the action have been decided is premature and ineffectual. *Tabor v. Superior Court* (1946) 28 Cal.2d 505.

Then, within ten days after service of the notice, counsel must file and serve supporting affidavits and memorandum of points and authorities. CCP §659a. For good cause, the time of filing affidavits may be extended up to 20 days. CCP § 659a.

2. Put all possibly applicable grounds in the notice to avoid foreclosing a basis the court may want to rely on.

Because the notice of intention to move for new trial is jurisdictional, it is prudent to list all statutory grounds in the notice. On appeal an order granting a new trial may be affirmed on any ground stated in the notice of intention (except insufficiency of the evidence and excessive or inadequate damages, which must be stated in the order). CCP § 657.

The grounds for a motion for new trial are found in CCP §657: irregularity in the proceedings or abuse of discretion (§657(1)); misconduct,

including bias, prejudice, or prejudgment of the jury (§657(2)); accident or surprise that ordinary prudence could not have guarded against (§657(3)); newly discovered material evidence that could not, with reasonable diligence, have been produced at trial (§657(4)); excessive or inadequate damages (§657(5)); insufficiency of the evidence or a decision against law (§657(6)); and errors in law occurring at trial and excepted to by the moving party (§657(7)).

As the last ground suggests, the waiver doctrine applies, so that errors that could have been cured by a timely objection from counsel cannot support a new trial. *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892 (waiver of defect in jury voting by failure to request further deliberations).

3. Put the date that jurisdiction expires on the first page of the notice.

Counsel seeking a new trial should, in the notice of intention to move for new trial and in the memorandum of points and authorities, notify the trial judgment of these statutory requirements. Such a notice might read as follows:

The attention of this Honorable Court is directed to the requirements of CCP §§ 657 and 660 that the order granting the new trial and stating grounds for granting the motion must be entered in the permanent minutes of the court or be signed and filed by the judge within sixty (60) days of service of the notice of entry of judgment, which occurred on _____. The expiration of this 60-day period will occur on _____.

Moreover, within ten (10) days of the order granting the new trial, the court must prepare in writing and file with the clerk a specification of reasons in support of the order. The specification of grounds and reasons must recite and analyze the testimony of particular witnesses to show why a new trial was proper. *E.g. Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706; *Kolar v. County of Los Angeles* (1976) 54 Cal.App.3d 873. Conclusory statements of grounds and reasons may lead to reversal. *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452; *Smith v. Moffat* (1977) 73 Cal.App.3d 86, 92.

4. Complete the record by including additional evidence not introduced or admitted at trial.

Use the new trial motion to complete the record for appeal. This is particularly important for excluded evidence, concealed evidence, and evidence showing that a cause of action exists (if dismissed on demurrer).

First, if the judge improperly and prejudicially excluded evidence, attach that evidence to your declaration (if documentary) or, if testimonial, include a summary of what the evidence would be. Also, summarize in your declaration any sidebar discussions that were not reported, so the appellate court will know what the judge considered in making the ruling.

Second, if the opposing party concealed evidence or there is newly discovered evidence, use the new trial motion to present that evidence, asking for a new trial (and seek sanctions for the opposing party if evidence was concealed). *See Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152 (reversing the denial of a new trial motion because additional reports of incidents involving the product withheld by the defendant were material).

Third, if moving for a new trial after a demurrer, submit any evidence you have from experts and percipient witnesses that show a valid cause of action existed.

5. Get a ruling before the court's jurisdiction expires.

The procedure to set the hearing date is handled differently in various counties and by various judges. The important consideration for the moving party is to set a hearing date that allows the judge sufficient time after the hearing to review the papers and prepare an order granting the motion before expiration of the 60-day period triggered by service of the first notice of entry of judgment. The clerk must give five days' notice by mail to all parties. CCP § 661.

If the motion is heard by a judge other than the trial judge, then the hearing must be set not later than ten days before the expiration of the 60-day period. CCP § 661. If the reporter's notes have not been transcribed, the reporter must attend the hearing at the request of the judge or either party and read his or her notes as required. CCP § 660.

Once a party notices an intention to move for a new trial, the other parties have 15 days after service of the notice to file and serve a similar notice. CCP § 659.

Counsel for the moving party should ensure that the trial judge complies with the procedural requirements stated above for a valid order granting a new trial.

First, the court's jurisdiction expires 60 days after mailing of notice of entry of judgment by the clerk or 60 days after service on the moving party by any party of written notice of entry of judgment, whichever is earlier, or, if notice of entry is not previously served, the 60 days after filing of the first notice of intention to move for a new trial. CCP § 660. The 60-day period is not extended by the five days provided in CCP §1013. *Meskill v. Culver City Unified Dist.* (1970) 12 Cal.App.3d 815. If no determination is made within the 60-day period, the motion is deemed denied. *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892. If the motion is granted but the order is defective, nunc pro tunc orders to cure defects in the order are ineffective. *La Manna v. Stewart* (1975) 13 Cal.3d 413.

Second, an order stating grounds for granting the motion must be filed before the court's 60-day jurisdiction expires. CCP §§ 657; 660. An order that fails to state grounds is defective but not void and may be affirmed on any grounds stated in the motion. *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892.

Third, if the order granting the motion did not contain reasons as well as grounds, the court must, within ten days after filing the order, prepare, sign, and file written specifications of reasons for granting the order, referring specifically to the evidence.

An order granting a new trial for insufficiency of the evidence or for the excessive or inadequate damages cannot be affirmed unless those grounds are stated both in the motion and in the order. CCP §657. However, the trial court's failure to adequately specify other grounds and reasons may be overcome on appeal if those grounds are stated in the motion. See *Treber v. Superior Court* (1968) 68 Cal.2d 128, 133; *Don v. Cruz* (1982) 131 Cal.App.3d 695, 705.

The party seeking the new trial may not prepare the order specifying grounds and reasons for the grant of a new trial. CCP §657. But counsel can take other steps to assist the busy trial judge in preparing such an order. The motion should contain a detailed statement of facts, quoting as nearly as possible the relevant testimony of witnesses. This statement of facts should be supported by the declaration of counsel that that testimony recited in the

statement of facts is accurate according to his notes and recollections. And counsel should supply the trial court with a transcript of testimony supporting the motion for new trial.

D. Tips on opposing the motion.

Opposing counsel should file counter-affidavits and a memorandum in opposition within ten days after the moving party serves the supporting affidavits. The judge may extend this time for an additional period not exceeding 20 days on a showing of good cause. CCP § 659a.

If the moving party has failed to comply with applicable time limits, opposing counsel should seek denial of the motion on that basis. If the moving party's affidavits contain hearsay or other incompetent material, opposing counsel should move that those portions of the declarations be stricken.

Opposing counsel should look for the waiver of any arguments in the new trial motion that evidence was improperly admitted where the moving party failed to object to the introduction of that evidence at trial. *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851 (overruled on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250).

Opposing counsel should urge that the moving party has failed to demonstrate that the asserted grounds for a new trial resulted in a "miscarriage of justice." Cal Const art VI, §13. The "miscarriage of justice" concept is virtually synonymous with the requirement discussed above that the party seeking a new trial must demonstrate prejudice. *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d, 555, 567.

(a) Opposing a claim of juror bias.

First, opposing counsel can show that jurors did not conceal bias because the questions asked on voir dire were too general. To establish concealed bias, voir dire questions must be "sufficiently specific to elicit the information" that assertedly was not disclosed. *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929. A juror does not "conceal" information on voir dire if the questions asked do not request that information in a "direct and unambiguous" manner. *People v. Kelly* (1986) 185 Cal.App.3d 118, 126. For example, a defense attorney's questions whether jurors could "put aside natural sympathy, listen to the evidence objectively," and not apply "passion or prejudice" were held to be too general to elicit bias from the jurors'

experiences with pain and suffering. *Moore v. Preventive Medicine Medical Group*, (1986) 178 Cal.App.3d 728. In a child molestation case, questions whether jurors or anyone they knew had ever been accused of molestation or involved in a molestation case were held to be too general to elicit a juror's experience of molestation as a child. *People v. Kelly* (1986) 185 Cal.App.3d 118. And in a drug possession case, a defense attorney's question whether "anything" in the jurors' "background" had "come to mind" as a "skeleton in the closet" was held to be too general to elicit the death of a juror's nephew from a drug overdose. *People v. Jackson* (1985) 168 Cal.App.3d 700.

Second, because courts are wary of attempts by jurors to impeach their own verdict, appellate courts apply a stringent test for bias. Thus, bias is not shown by such statements as "if we found for the plaintiff, our taxes would be raised a lot," *Rogers v. County of Los Angeles* (1974) 39 Cal.App.3d 857, or by a juror's statement that he would not buy a car manufactured by the defendant "because the gas tank was in the fender and I knew it." *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1. See also *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115 (no prejudicial misconduct where juror referenced a television program and another juror appealed to "moral necessity" of saving children's lives because conduct was not repeated after judge's instruction) (overruled on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250).

A noteworthy example of a stringent test for impermissible bias is *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983. The appellate court reversed the trial court's finding of concealed juror bias, based on the following rulings:

1. Testimony by jurors on voir dire while under oath is presumptively truthful, Evid Code §520, so that the burden of proof is on the party making the charge of concealed bias. 78 Cal.App.3d at 990.

2. The party attacking the verdict must establish by a preponderance of the evidence that the controverted statements were made and that the jurors who made them had committed perjury on voir dire, citing Evid. C §§ 115, 500 and 520. 78 Cal.App.3d at 991.

3. Where the evidence is presented only by affidavit, the trier of fact does not have the unfettered right to accept the averments of one affidavit as against eleven to the contrary without articulating "some cogent reason for doing so." 78 Cal.App.3d at 993. The trial judge's failure to demonstrate a reason for trusting the statements of some jurors but not others renders his

specification of reasons invalid because it deprives the appellate court of a record "susceptible of 'meaningful review.'" 78 Cal.App.3d at 998.

4. The trial judge's comments on the hearing of the motion for new trial were devoted to one juror's criticism of him and his instructions, an issue that bore no relevancy to bias against the plaintiffs. 78 Cal.App.3d at 995.

5. The alleged juror bias did not rise to the level of an "irrevocable commitment" to vote against the losing party. 78 Cal.App.3d at 996.

Counsel opposing the claim of juror bias should offer exculpatory declarations by the majority jurors to rebut any contention that the juror answered untruthfully on voir dire. Moreover, the transcript of the voir dire questioning could show that the jurors' answers were honest to the best of their ability and that any concealment of bias was unintentional. The Supreme Court in *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98, acknowledged that "unintentional concealment" of bias on voir dire was a separate issue, not decided in *Weathers*.