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Limiting a defendant to a single new trial motion

California courts attempt to limit new trial motions to prevent interminable trials from clogging the courtrooms

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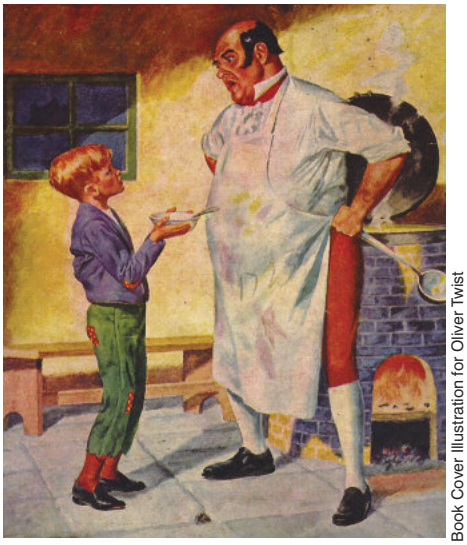
A motion for new trial usually follows a great jury verdict. Less common – but no less distressing – is a second new trial motion from the same defendant. A single defendant may desire to bring multiple new trial motions where it obtains new evidence or juror affidavits after filing the first. This happened recently where a defendant used *sub rosa* video gathered after the denial of its first new trial motion to support a second motion on the grounds of "newly discovered evidence."

While fully addressing the substantive merits of the second new trial motion, plaintiffs' counsel should dispute the defendant's right to file the second motion at all. The Code of Civil Procedure neither expressly authorizes nor precludes a second motion. (Code Civ. Proc., §§ 656-663.2.) However, California's policy against interminable litigation and the strict jurisdictional limits on new trial motions will support counsels' efforts in limiting each defendant to a single new trial motion.

Policy against multiple new trial motions

California has long recognized that allowing multiple new trial motions would lead to the unfavorable consequence of interminable litigation. The Supreme Court in *Coombs v. Hibberd* (1872) 43 Cal. 452, 453 precluded attempts to vacate a new trial order because "[t]here must be some point where litigation in the lower Court terminates" because otherwise "[t]he proceedings after judgment would be interminable." (see also *People v. Martin*



Book Cover Illustration for Oliver Twist

"Please, sir. Can I have some more?"

(1926) 199 Cal. 240 (citing the *Coombs* Court's concern as reason to disallow multiple new trial motions); see also *People v. Taylor* (1993) 19 Cal.App.4th 836 (Johnson, J., dissenting: "Considerations of fairness and judicial economy weigh heavily against allowing a defendant to raise 'interminable' new trial motions.")).

In *Dorland v. Cunningham* (1885) 66 Cal. 484, 485, the parties made several motions in the trial court to vacate the granting of a new trial. Although the Supreme Court in *Dorland* addressed the parties' attempts to revisit a prior ruling, in doing so the Court used broad language helpful to this article's subject: "The statute authorizes but one motion for a new trial, and makes the ruling thereon final, so far as the Superior Court is concerned." (*Ibid.*)

More recently, the Court disapproved of a party filing multiple motions for new trial in dictum. In *Wenzoski v. Central Banking System, Inc.* (1987) 43 Cal.3d 539, 542, the plaintiffs filed two motions for new trial, both of which were denied. The issue presented on appeal was whether the plaintiff could calculate the deadline to file Notice of Appeal from the denial of the second motion. (*Id.* at 541.) In reaching its answer, the Court noted that plaintiffs were under "a misapprehension (as they apparently were) that the court could properly consider a second motion for new trial." (*Id.* at 542.) Thus a century after *Dorland*, the Court again used needlessly broad language to disapprove of a party's attempt to file more than one new trial motion.

Both the *Coombs* and *Wenzoski* Courts noted that the successive attempts at new trials in those cases were on identical grounds so it is unclear whether the Court would disapprove equally of a second new trial motion were it based on new grounds. (See *Wenzoski, supra,* 43 Cal.3d at 541, fn. 1; *Coombs, supra,* 43 Cal. at 453) ("It will hardly be contended that under our form of practice a Court could entertain two successive motions for a new trial in the same case, upon identical grounds.") Regardless, California courts have clearly shown at least a strong distaste for multiple new trial motions by a single party.

Trial courts' loss of jurisdiction after denial of new trial motion

Counsel opposing successive new trial motions will benefit if the trial court denies the first motion before hearing the second. A court has no jurisdiction to consider a second new trial motion having already denied the first. (*Wenzoski, supra,* 43

Cal.3d at 542.) The *Wenzoski* Court found that an appeal filed on a date calculated from the second motion for new trial was untimely because "[o]nce the minute order [for the first new trial motion] issued, the trial court lost jurisdiction to rule on plaintiffs' second motion for new trial" and plaintiffs' remedy was an appeal from the judgment. (*Ibid.*)

The Supreme Court's earlier ruling in *Taormino v. Denny* (1970) 1 Cal.3d 679 is inapposite. In *Taormino*, the trial court, upon consideration of a first new trial motion, vacated judgment and reopened the case to further proceedings pursuant to Code of Civil Procedure section 662. (*Id.* at 683.) The Court explained that this procedure "turned back the clock" and returned the case to its posture before entry of judgment. (*Ibid.)* The *Taormino/ Wenzoski* distinction is also the rule in criminal cases. (*People v. DeLouize* (2004) 32 Cal.4th 1223 (criminal courts retain jurisdiction to hear a second new trial motion after granting a first motion but not after a denial.)

Plaintiff's counsel may, in certain circumstances, desire to continue the hearing on defendant's first new trial motion and consolidate it with a hearing on the second. Continuance may be appropriate or necessary to obtain an extension of time to prepare counter-affidavits. (Code Civ. Proc., §659a.) In seeking continuance though, counsel should be aware that consolidation of the hearings might endanger the jurisdictional benefit that *Wenzoski* bestows where the first new trial motion is denied on an earlier date.

Trial courts' single 60-day jurisdictional time limit

The trial court's 60-day jurisdiction to rule on new trial motions provides another procedural tool to limit the number of defense new trial motions. Code of Civil Procedure section 660 limits the trial court's jurisdiction to hear all new trial motions within a single 60-day period. The court has no power to rule on any new trial motion after the expiration of this 60-day period. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 150.)

Identifying when the 60-day period commences depends upon when the trial court enters judgment. Normally, "mailing of notice of entry of judgment by the clerk of the court" or "service on the moving party by any party of written notice of the entry of judgment, whichever is earlier" starts the countdown for this 60-day period. (Code Civ. Proc., § 660.)

However, a Notice of Intention to Move for New Trial will trigger the 60-day limit earlier if served before entry of judgment. In such cases the trial court's jurisdiction expires "60 days after filing of the **first** notice of intention to move for new trial." (Code Civ. Proc., § 660 (emphasis added).) Thus any party may trigger the court's 60-day window to rule on all new trial motions by filing a Notice of Intention. Counsel who anticipates a delay between Verdict and Entry of Judgment might consider filing a Notice of Intention to Move for New Trial seeking *additur* (on the grounds of insufficient damages) shortly after the Verdict. Service of this notice would limit the time defendant has to file its own new trial notices and motions.

Even though the code identifies different triggers for starting the 60-day countdown, there can only be one trigger and one 60-day period in each case. Service of the Notice of Entry of Judgment after the service of Notice of Intention, for example, will not reset or create a new 60-day jurisdictional time limit. (*In re Marriage of Liu, supra,* 197 Cal.App.3d at 149-150.) It is service of either the "first" Notice of Intention or Notice of Entry of Judgment, whichever is earlier, that starts the 60-day period.

The need to timely prepare counter-affidavits is another timing consideration raised by the trial court's 60-day jurisdictional window. The statute provides a minimum of 10 days to file counter-affidavits to the New Trial Motion. (Code Civ. Proc., § 659a.) If defendant serves the second Notice too close to the 60-day deadline, plaintiff could be deprived of this minimum time provided by statute. This prejudice would further support objection to the second motion.

"Renewed" Motion does not extend the 60-day limit

A party cannot extend the 60-day jurisdiction of the trial court by characterizing a second new trial motion as a "Renewed" Motion or "Motion for Reconsideration." In *Jones v. Sieve* (1988) 203 Cal.App.3d 359 the defendant sought reconsideration of the court's ruling on a new trial motion seven days after the expiration of the court's 60-day jurisdiction. The *Jones* court held that "the power of a trial court to rule on a motion for a new trial is constrained by the jurisdictional 60-day limitation period of section 660, which is a specific statute, and cannot be extended or expanded by the procedural device of moving under section 1008, a general statute, for reconsideration of an order granting or denying a new trial motion, which necessarily involves a request to correct a judicial error." (*Id.* at 370.)

The *Jones* analysis is equally applicable to either a Motion to Reconsider under Code of Civil Procedure section 1008 subdivision (a) or a "Renewed" Motion under Code of Civil Procedure section 1008 subdivision (b). (See *Stephen v. Enterprise Rent-a-Car* (1991) 235 Cal.App.3d 806, 818 ("If jurisdictional considerations compel implying time limits on motions under subdivision (a) of section 1008, they must in some cases
also limit subdivision (b).").) The term "motion to reconsider" is often used collectively to describe a motion for reconsideration or a renewed motion. (See, *e.g. Stewart v. Superior Court* (1985) 163 Cal.App.3d 915, 916 (court describing Code Civ.Proc., § 1008(b) motion as a motion for reconsideration); and *Graham v. Hansen* (1982) 128 Cal.App.3d 965, 969-970 (renewed motion entitled motion for reconsideration); see also *Kerns v. CSE, Ins. Group* (2003) 106 Cal.App.4th 368, 381 ("Although the two subdivisions differ in certain minor details, each sets out the same essential requirements."))

The *Jones* court's reasoning echoes the Supreme Court's oft-expressed concern about interminable litigation: "if

a trial court could reconsider a motion for new trial after the expiration of the 60-day limitation mandated by section 660, the purpose and effect of section 660 would be nullified and the power of the court to rule on a motion for a new trial would be extended indefinitely." (*Jones, supra,* 203 Cal.App.3d at 370.)

10-day deadline to file supporting affidavits

Counsel should also object to the second new trial motion to the extent that it acts as an unauthorized extension of time to file supporting affidavits. A Notice of Intention must "designat[e] the grounds upon which the motion will be made." (Code Civ. Proc., § 659.) Some of these grounds must be supported by affidavit filed within 10 days of the Notice. (Code Civ. Proc., §§ 658, 659a.) This time may be extended only by stipulation or by affidavit showing good cause. (Code Civ. Proc., § 659a.)

Defendant may seek to enlarge the time in which to file affidavits supporting grounds in the first Notice by filing a second Notice of Intention. This practice would constitute a unilateral resetting of the time limits proscribed by Code of Civil Procedure section 659a and prejudice plaintiff's right to fair notice of the supporting affidavits and ability to timely obtain counter-affidavits. Plaintiff's counsel should point out how defendant could have obtained the new evidence sooner through the use of reasonable diligence.

Conclusion

Years of work culminating in a verdict are at stake on a new trial motion. Opposition requires the preparation of briefs and evidence for counter-affidavits in a few weeks' time. With the above points and authorities in hand, plaintiffs' counsel can procedurally limit each defendant to one new trial motion and focus time and resources on the substantive merits of the opposition.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