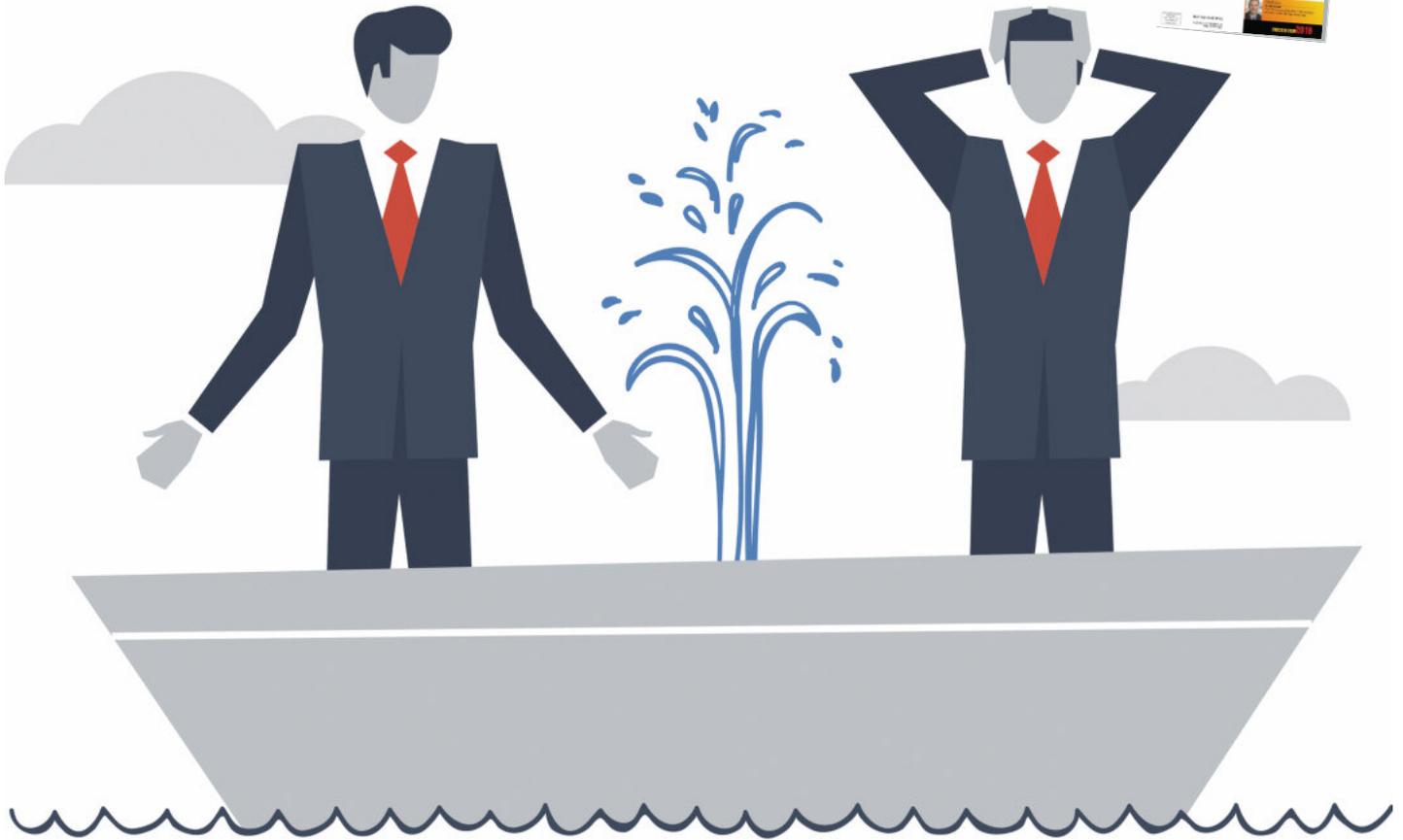




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Don't let your motion for new trial sink a potential for appeal

The motion for new trial can save tremendous time and expense, but some missteps can doom the appeal

BY JERRY CLAUSEN

A motion for new trial is essentially a method of review. If successful, it can save the litigant a tremendous amount of time and expense in obtaining a retrial versus through an appeal. If unsuccessful, the litigant can still seek review on appeal — unless a misstep in the new trial procedure precludes such review.

To help litigants avoid such missteps, this article reviews two of the ways in which a motion for new trial may impact the availability and scope of a subsequent

appeal: First, it examines the issues required to be raised in a motion for new trial in order to preserve them for appeal. Second, it explains the complex rules under which the deadline to file a notice of appeal will be extended by an unsuccessful motion for new trial, so that counsel can ensure a deadline is not inadvertently missed.

Issues that must be raised

There are two issues that must be raised by motion for new trial to preserve them for appeal. “A motion for a new

trial is not, generally, a condition precedent to an appeal. Generally speaking, any error of law can be raised on an appeal even though a motion for a new trial has not been made.” (*Schmidt v. Macco Construction Co.* (1953) 119 Cal.App.2d 717, 721; see 9 Witkin, Cal. Procedure (2016 Supp.) Appeal, § 405, p. 463 [“Generally speaking, (a motion for new trial) is an alternative method of review, and an error may be raised on appeal although it could have been made the basis of a motion for a new trial”].) There are, however, two caveats to this



rule – and there are additional caveats to each of the two caveats.

•**Jury misconduct.** The first caveat concerns a claim of jury misconduct. (CCP § 657, subd. 2.) A motion for new trial based on a claim of jury misconduct must be made upon affidavits. (CCP § 658; *Markaway v. Keesling* (1963) 211 Cal.App.2d 607, 610.) The affidavits must be presented to the trial court on a motion for new trial; they cannot be presented to the court of appeal in the first instance. (*Markaway, supra.*) In *Markaway*, the plaintiff made a motion for new trial based on jury misconduct supported by an affidavit, but the trial court dismissed the motion because it was untimely. The appellate court held (1) because the motion was untimely, the affidavit supporting it was a nullity; (2) because the trial court never passed on the merits of the motion there was no ruling for the appellate court to review on appeal; and (3) an appellate court cannot take cognizance of such an affidavit as evidence to be considered in the first instance. (*Ibid.*)

Thus, as a practical matter, a claim of jury misconduct required to take on a motion for new trial will not be available for review on appeal if it was not first raised by affidavit on such a motion.

However, it is important to note that a party is required to raise juror misconduct on a motion for new trial only if the party was unaware of the misconduct prior to rendition of the verdict. In fact, a litigant seeking a new trial on this ground *must* aver in the supporting affidavits that neither it nor its attorney was aware of the misbehavior until after the verdict was returned. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103.) The purpose of this rule “is to prevent a party who, personally or through counsel, has discovered some jury misconduct during the course of the proceedings from gambling on the outcome of the jury’s deliberations while secretly preserving the error to be raised on a motion for a new trial in the event of an unfavorable verdict.” (*Ibid.*)

If a party becomes aware of juror misconduct *prior* to rendition of the verdict, it must preserve it by immediately objecting and seeking an appropriate remedy (such as removal of the juror or a mistrial). (See *People v. Stanley* (2006) 39 Cal.4th 913, 950 [failure to object to juror’s continued service or request mistrial waived claim of juror misconduct occurring at outset of trial].) In such a case, the misconduct need not be raised again on a motion for new trial in order to preserve it for appeal.

•**Inadequate or excessive damages.** The second caveat concerns a claim of inadequate or excessive damages. (CCP § 657, subd. 5.) Failure to move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dec. Co.* (1977) 66 Cal.App.3d 101, 122; *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.) The rationale for this is twofold. First, the trial court is in a better position than a reviewing court to determine whether a jury verdict was influenced by passion or prejudice. Second, the power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. (*Glendale Fed. Sav. & Loan Assn., supra.*)

But this requirement applies only where the ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on the credibility of witnesses. The failure to move for a new trial does not preclude a party from urging *legal error* in the trial of the damage issue, such as erroneous rulings on admissibility of evidence, errors in jury instructions, or a failure to apply the proper legal measure of damages – even though such error resulted in an improper reduction of damages. (*Schmidt v. Macco Construction Co., supra*, 119 Cal.App.2d 717, 721; *Glendale Fed. Sav. & Loan Assn., supra*, 66 Cal.App.3d at p. 122; *Jamison, supra*, 164 Cal.App.4th at p. 721.)

Determining the deadline for appeal

An unsuccessful motion for new trial will never shorten the time for filing a notice of appeal and will usually extend it. But in order to extend the deadline, the new trial motion must be “valid.” Furthermore, the rules for calculating the extension are complicated and depend on a number of contingencies that may vary from one case to the next.

Extending the deadline

To extend the deadline to appeal, the motion for new trial must be valid. A motion for new trial will extend the time to file an appeal only if it is valid. (CRC rule 8.108(b) [“If any party serves and files a valid notice of intention to move for new trial, the following extensions of time apply”].) This means that, at a minimum, (1) the motion for new trial must be timely and (2) the underlying decision must be one as to which a new trial may properly be granted.

Timeliness. A motion for new trial is made by filing a notice of intention to move for new trial. (See CCP § 659(b) [the notice of intention “shall be deemed to be a motion for new trial”].) The notice must be filed within 15 days of service of notice of entry of the judgment or order. (CCP § 659, subd. (a)(2).) This time limit is jurisdictional; the trial judge has no power to act on a late-filed motion. (8 Witkin Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 54, pp. 639-640.) A late-filed notice of intent thus does not extend the time to file a notice of appeal. (*Reber v. Superior Court* (1961) 189 Cal.App.2d 622, 625.)

Appropriateness. A motion for new trial which is not authorized by the new trial statute does not extend the deadline to appeal. (*Hall v. Hall* (1954) 42 Cal.2d 435, 437, overruled on another point in *Carney v. Simmonds* (1957) 49 Cal.2d 84, 89, 90-91.)



Consequently, in order for a motion for new trial to extend the time to appeal from the underlying judgment or order, it must be an appropriate device for attacking that judgment or order.

At one time it was held that a motion for new trial could not be used to attack a decision where no issue of fact was tried. (See 8 Witkin, *supra*, § 23, p. 605.) This rule was repudiated in *Carney, supra*. In *Carney* the Supreme Court held that the new trial procedure could also be used to review judgments based solely on an issue of law. (49 Cal.2d at p. 90.) The court concluded that a motion for new trial is proper, for example, following a judgment of dismissal after the sustaining of a demurrer, a judgment on the pleadings, a judgment of dismissal generally, a judgment on an agreed statement of ultimate facts, and a summary judgment. (*Ibid.*)

Subsequently, the First District Court of Appeal, relying on *Carney*, stated that “a prerequisite for a motion for a new trial is a trial court proceeding which results in a judgment or appealable order.” (*Gilbert v. AC Transit* (1995) 32 Cal.App.4th 1494, 1501.) This rule would sanction a motion for new trial to attack a wide variety of appealable orders, such as an order granting or denying attorney fees, an order quashing service of summons, or an order staying an action on the ground of inconvenient forum. (See CCP § 904.1, subd. (a)(2) & (3).)

The formal rules

There are formal rules governing the effect of a motion for new trial on the deadline to file an appeal:

CRC 8.104: the “normal” deadlines to appeal. The “normal time” for filing a notice of appeal is stated in CRC 8.104(a)(1). Under this rule, a notice of appeal must be filed by the earlier of:

- (A) 60 days after service of notice of entry of judgment or of a filed-endorsed copy of the judgment *or*
- (B) 180 days of entry of the judgment.

CRC 8.108: the extended deadlines to appeal when a motion for new trial is denied. CRC 8.108 provides for extensions of the time to appeal if a valid motion for new trial is filed. Rule 8.108 expressly provides that it operates only to *extend* the time to appeal otherwise stated in CRC 8.104(a). In other words, if the normal time to appeal stated in rule 8.104(a) is longer than the time provided in rule 8.108, rule 8.104(a) governs. (CRC 8.108(a).)

Under CRC 8.108(b)(1), if a valid motion for new trial is made and denied¹, then the notice of appeal must be filed by the earliest of:

- (B) 30 days after denial of the motion by operation of law (CRC 8.108(b)(1)(B)), or
- (C) 180 days after notice of entry of judgment. (CRC 8.108(b)(1)(C).)

Illustrations of the extended deadlines

As the provisions of rule 8.108(a)(1) suggest, calculation of the deadline to appeal when a motion for new trial is denied is subject to a great many contingencies, as the following hypotheticals illustrate:

- (a) On the 59th day after notice of entry of judgment was served, Judge X hears argument on a motion for new trial and takes it under submission. Two days later she signs an order denying the motion. The moving party files a notice of appeal 30 days after that (i.e., on the 91st day after service of notice of entry of judgment).

The notice of appeal is untimely. A judge’s power to rule on a motion for new trial expires on the 60th day after service of notice of entry of judgment. (CCP § 660, 3d par.) Thus, if the motion is not “determined” by the court within that time, it is deemed denied by operation of law on the 60th day. Judge X’s signed order on the 61st day was therefore a nullity, and, under CRC

8.108(b)(1)(B), the last day to appeal was 30 days after the motion was deemed denied by operation of law on Day 60 – or, in other words, on the 90th day after service of notice of entry of judgment. The notice of appeal was a day late.

- (b) Same facts as in a), except that the order denying the motion is signed and filed on the 60th day and the next day the clerk serves a copy of it on the parties. The moving party files a notice of appeal 30 days after that (i.e., on the 91st day after service of entry of notice of judgment).

The appeal is timely. A motion for new trial is considered to be “determined” when an order on it is either entered in the permanent minutes or signed by the judge and filed with the clerk. (CCP § 660, 3d par.) Thus, the motion was *not* denied by operation of law – it was determined by the judge when her signed order was filed (on the 60th day). The deadline to file a notice of appeal was therefore extended until 30 days after the clerk served a copy of the order – which occurred on the 61st day. Consequently, the notice of appeal filed on the 91st day was timely.

- (c) Same facts as in a), except that the order denying the motion is entered in the minutes on the 60th day. However, the clerk never serves a copy of the minute order or notice of its entry. The moving party files a notice of appeal on the 91st day after service of entry of notice of judgment.

The appeal is timely. Entry in the minutes of the order denying the motion constituted a “determination” of it. (CCP § 660, 3d par.) Consequently, the motion was *not* denied by operation of law, so CRC 8.108(b)(1)(B) does not apply. The 30-day deadline under CRC 8.108(b)(1)(A) is triggered by *service* of the order or notice of its entry, not by mere entry of the order itself.



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Here, there was no such service. Consequently, the deadline to file the notice of appeal was 180 days after service of notice of entry of the judgment under CRC 8.108(b)(1)(C). The notice of appeal was filed well within that time.

Four guidelines to determine the extended deadlines

The manner in which the deadline to appeal will be extended by a motion for new trial under CRC 8.108(b)(1) can be summarized in the following four guidelines.

- Measuring from the date notice of entry of judgment was served, the deadline to file a notice of appeal will be:
 - no earlier* than the 60th day and *no later* than the 180th day. *Earlier* than the 90th day only if:
 - an order or notice of its entry is served prior to the 60th day.
 - on the 90th day only if either:
 - (a) an order or notice of its entry is served on the 60th day or
 - (b) the court fails to determine the motion by the 60th day (and hence it is denied by operation of law.)

- Later* than the 90th day only if:
- the motion is determined on or before the 60th day, but a copy of the order or notice of its entry is either
 - (a) served on or after the 61st day or
 - (b) not served at all.

When In doubt, appeal early

For any number of reasons, doubt can arise as to the precise deadline for filing the notice of appeal. The penalty for being wrong is high, because the time to file the notice of appeal is jurisdictional; a late notice is void and cannot be saved. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 614, p. 689.) Thus, in case of doubt, the safest route is to file the notice by a date as to which there is no doubt, even if it is earlier than a different date that *might* apply.

For example, an issue may arise as to the validity of the notice of intention to move for new trial, thus casting doubt over whether the normal time to appeal under CRC 8.104(a) will be extended at all. In that case, the safest approach would be to assume CRC 8.108 will not apply and to file the notice of appeal within the time specified under CRC

8.104(a). Even if the notice of appeal is filed before the motion for new trial has been decided, the trial court still retains jurisdiction to determine it. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 191.)



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Endnote

¹ The rules stated in CRC (8.108(b)(1) for extending the time to appeal apply only when a motion for new trial is denied. If the trial court finds the damages were excessive or inadequate and grants a new trial conditioned on a remittitur or additur, the time to appeal is extended as stated in CRC 8.108(b)(2) rather than (b)(1). An order unconditionally granting a motion for new trial is itself appealable (CCP 904.1); thus, the time for filing a notice of appeal from such an order begins to run anew and is governed by CRC 8.104.