The new trial motion: Your procedural and substantive lifeline

It's your "do over" if things didn't go quite right, and your chance to complete the record before going to the Court of Appeal

By Valerie T. McGinty

The new trial motion is a versatile and powerful tool for the winning and losing litigant at almost every stage of litigation. Yet many lawyers never consider the new trial motion or fail to appreciate its full potential. This article summarizes the advantages and challenges of this important tool.

The substantive reason: it's your do-over

Because a new trial motion is proper even when there has been no trial on the merits – including judgment on demurrer, summary judgment, and judgment on nonsuit (See Code Civ. Proc., § 656; *Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858), it should be considered after any dispositive motion is granted as well as after a full jury trial.

A new trial motion is your chance for a do-over and (surprise, surprise!) the court might actually grant it. If it does, then hopefully you've avoided the roughly two years it would have taken for the court of appeal to reverse it. And, even if you do have to undergo the appellate process (because the other side appeals from the court's order granting a new trial), you'll have the advantage of appearing in the Court of Appeal as the Respondent rather than the Appellant, which is significant given that roughly 80 percent of judgments are affirmed on appeal.

For example, a new trial motion was granted after summary judgment in *Hass v. Rhodyco* (2018) 26 Cal.App.5th 11. In that case the court of appeal upheld the denial of summary judgment and went even further than the new trial order went, ruling that triable issues on gross negligence also barred summary judgment.

A new trial motion was also granted after summary judgment in *Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500, 1504-1505. In *Doe*, the trial court granted summary judgment on the ground there was no triable issue that plaintiff had suffered any "bodily injury." Then, based on plaintiff's submission of a new clinical psychologist's declaration that the passenger was suffering post-traumatic stress disorder, the court granted a new trial. Ultimately, the appellate court reversed the new trial order in *Doe*, holding that the opinion was not newly discovered and was not produced with reasonable diligence.

But, as *Doe* acknowledged, "a party claiming the discovery of new evidence following summary judgment is held to a less demanding standard of reasonable diligence than a party asserting this claim after trial." (*Id*. at 1509.)

This point was illustrated in *Scott v. Farrar* (1983) 139 Cal.App.3d 462, 467. In *Scott*, the "party opposing summary judgment deposed a witness for the first time after the hearing on the summary judgment motion, and sought a new trial on the ground that the witness's testimony constituted newly discovered evidence." (*Doe, supra,* 160 Cal.App.4th at 1505.) When the trial court denied a new trial, the appellate court reversed, reasoning that the testimony was unknown to the moving party prior to the deposition, and the date of the deposition had been set shortly after the inception of the action in the regular course of discovery, which had been pursued "with reasonable diligence."(*Ibid*.)

A new trial motion was also granted after a jury trial where the trial court concluded "it had given the jury an inappropriate instruction on the workers' compensation exclusivity rule" in *Lee v. West Kern Water District*, (2016) 5 Cal.App.5th 606, 610. In *Lee*, the appellate court ultimately reversed this order, holding that the instruction was proper.

But an appellate court upheld a new trial on damages in *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887. In *Licudine*, the trial court granted a new trial on damages on the ground of insufficient evidence to support the jury's award for lost earnings. The Court of Appeal agreed, holding that the plaintiff "did not adduce any evidence to establish that it was 'reasonably probable' she could have obtained employment as an attorney or any evidence on the earnings of lawyers," warranting a new trial on damages. (*Licudine* at 881, 887.)

Thus, as shown above, a new trial motion can indeed be your chance for a do-over. Even if you do not win the new trial motion, bringing it may be a useful exercise in allowing you to

articulate that new strategy or re-frame your theory while it is still fresh in your mind.

The procedural reason: complete your record

The procedural reason to file a new trial motion is to complete the record before going to the Court of Appeal.

For example, after judgment on demurrer, a new trial motion may include an amended complaint that was not previously presented in opposition to the demurrer. Similarly, after summary judgment a new trial motion may include newly discovered evidence or a newly amended complaint. (*Scott v. Farrar* (1983) 139 Cal.App.3d 462.)

And, after a jury trial, you can use a new trial motion to complete the record on waiver and prejudice.

Specifically, any erroneous adverse rulings that were issued off the record should be documented in your new trial declaration to show that you did not waive your right to object. Also, the prejudice of any erroneous evidentiary or instructional rulings should be documented.

To show the prejudice of erroneous evidentiary rulings, describe or attach the wrongfully excluded evidence to show what the jury would have learned if it had been admitted. Also, newly discovered evidence may be grounds for a new trial if the evidence could not have been discovered and produced at trial and the moving party acted with reasonable diligence. (*Linhart v. Nelson* (1976) 18 Cal.3d.) And if the newly discovered evidence was concealed by the opposing party, request sanctions in addition to a new trial. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152; [reversing denial of a new trial motion because additional reports of incidents involving the product that defendant withheld were material].)

Juror declarations can also be very effective in demonstrating the prejudice of trial court error. For example, a juror declaration showed the prejudicial effect of excluding evidence in *Pantoja v. Anton*. (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, fn. 1.)

In *Pantoja*, a juror declared that it 'would have greatly helped us to find for Ms. Pantoja' if the jury had heard evidence that Mr. Anton had sexually harassed others besides Pantoja." (*Ibid*.) The Court of Appeal held the exclusionary ruling was error and reversed the judgment.

Also, where juror declarations were submitted showing the prejudice of instructional error, an appellate court can rely on those juror declarations to reverse the judgment, as the Fifth District did in *Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 623-624. In *Harb*, juror declarations were submitted in support of a new trial motion. There, the trial court struck certain portions of the declarations but ruled admissible the declarations' statements that "the jurors discussed the police immunity instruction" and "I verbally agreed that this instruction did not permit us to find negligence on the part of defendants." (*Id*. at 624.)

A new trial motion may also be a prerequisite to preserving an argument for appeal. For example, 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 on new trial to challenge punitive damage award on new trial as unsupported bars appellate review].)

Accordingly, a new trial motion is a great tool to complete the record before appeal.

Five tips to oppose a new trial motion

If you were not the party who filed the motion, you still want to take full advantage of your opposition to present the most persuasive picture for the trial court and to complete the record for the court of appeal. This means doing five things.

First, obtain juror declarations where applicable, even if none were obtained for the motion. Juror declarations are especially useful to show lack of prejudice on any claim of instructional or verdict form error. And they can help combat claims of juror misconduct and bias. If the moving party did submit declarations, try to obtain more than were submitted in support of the motion. For example, one declaration in support of new trial was effectively countered by eight juror declarations in *Barboni v. Tuomi*, (2012) 210 Cal.App.4th 340.

Second, be sure to preserve the record of any errors committed against you. It may well be that you prevailed despite an erroneous ruling against you. If so, be sure to document (with declarations, supporting evidence, and argument) any such errors so you can raise them in any cross-appeal or simply in response to their appeal (even in the absence of any cross-appeal) under Code of Civil Procedure Section 906, which allows the court of appeal to review rulings against Respondent "for the purpose of determining whether or not the appellant was prejudiced" by the errors asserted on appeal. This will also put you in the best position to negotiate settlement before an appeal.

Third, object and proclaim their failure to object (waiver) where applicable. If the moving declarations contain hearsay or other inadmissible material, file objections requesting that those portions of the declarations or other material be stricken. You should also look for the waiver of any arguments in the new trial motion. For example, a claim that evidence was improperly admitted is waived where the party failed to object to their introduction at trial. (*Mosesian v. Pennwalt Corp.*, 191 Cal.App.3d 851 (1987) (overruled on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250.) And a claim that jury voting was defective is waived by a failure to request further deliberations. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892.)

Fourth, seize on any failure by the moving party to demonstrate the prejudice of any asserted errors. (Cal. Const.

Art. VI, § 13; *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 567.)

Fifth, opposing counsel should carefully examine the timeliness and sufficiency of the notice of intent to move for new trial and seek denial of the motion for any failure to comply with the statutory requirements.

Beware the challenges of filing a new trial motion

Because the right to a new trial is "purely statutory," the procedural requirements must be followed. (See, *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463.)

If you don't file new trial motions regularly, this is a good time to consult with an appellate specialist or other lawyer who is familiar with the process and so can help you maximize your chances of success.

Specifically, two of these deadlines are jurisdictional – failure to comply with them is fatal and cannot be cured.

First, satisfy the jurisdictional requirement of filing a *timely* notice of intention to move for new trial. The notice is *timely* if filed within 15 days of service of the judgment. (Code Civ. Proc., § 659; *Ehrler v. Ehrler*, (1981) 126 Cal.App.3d 147.) And, because the judgment is often served more than once (either by the clerk or by parties or both), the most conservative approach is to calendar the deadline from the date judgment was *entered*, not served.

Also, ensure your notice is *sufficient* by including all statutory grounds in the notice. (Code Civ.Proc., § 657.) The statute lists seven grounds for granting a new trial motion:

- Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
- Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.
- Accident or surprise, which ordinary prudence could not have guarded against.
- Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.
- Excessive or inadequate damages. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.
- Error in law, occurring at the trial and excepted to by the party making the application.

Because an order granting new trial may not be affirmed on any ground that is not stated in the notice, preserve every chance of success by stating all seven grounds in the notice. (Code Civ. Proc., § 657.)

Next, the supporting points and authorities and all declarations must be filed within 10 days after the notice is served. (Code Civ. Proc., § 659a.) But this deadline may be extended up to 20 days for good cause. (Code Civ. Proc., § 659a.)

The second jurisdictional requirement is that you obtain a ruling within 60 days of service of the judgment, because that is when the court's jurisdiction expires. (Code Civ. Proc., § 660.) After the 60-day period has expired, a court has no jurisdiction to grant the motion and it is denied by operation of law. This means that an order granting your new trial motion will do no good if it is untimely. (Code Civ. Proc., § 660; *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892.)

You can help ensure a timely order by putting the deadline right in the caption of your notice, your supporting papers, and your reply, if you file one (and you should), and by reminding the court of the deadline at oral argument.

Finally, to comply with section 660, the court must prepare the order and it must include a statement of grounds and reasons in support of the order, including analyzing the evidence that shows why a new trial was proper. (*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.) However, an order that fails to state grounds may be affirmed on any grounds stated in the motion. (*Bell v. Bayerische Motoren Weke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108.)

Juror declarations utilize this motion to its fullest

Juror declarations help utilize this motion to the procedural and substantive fullest, both making your record for the court of appeal and telling the most compelling story. Juror declarations are especially critical to show juror bias, juror misconduct, or prejudice from instructional or verdict form error.

Although statements on the jurors' "mental processes" are inadmissible, juror declarations may report "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. Code, § 1150.)

Juror declarations proving juror misconduct may show that jurors improperly added plaintiff's attorney's fees to the verdict[1], or that a juror in a medical malpractice case concealed that he was a doctor[2], or that one juror contradicted the plaintiff's testimony with a report of his own low back pain.[3]

In addition, for claims of juror misconduct, the attorney and client should submit declarations showing that neither had 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 dispel any inference that the moving party was guilty of waiver or gambled on the verdict.

Juror declarations proving juror bias may show that jurors improperly

considered the race of the plaintiff or the financial consequence to jurors of rendering a verdict against the defendant. (See, *Weathers v. Kaiser Found. Hosp.* (1971) 5 Cal.3d 98; *Tapia v. Barker* (1984) 160 Cal.App.3d 761.)

Juror declarations proving prejudice from instructional error may report statements about the instructions to show that jurors were confused or interpreted a faulty instruction, as the moving party claims.

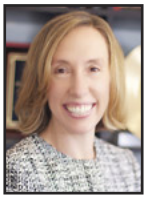
When drafting juror declarations, put each key statement in a separate paragraph so that a court ruling on objections may easily strike one paragraph while allowing another to stand.

Also, be sure to comply with section 1150(a) of the Evidence Code, which provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to 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. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Also, where "neither party attacks the admissibility of any of the declarations," there is "no abuse of discretion in deeming the declarations admissible." (*Barboni v. Tuomi*, *supra*, 210 Cal.App.4th at 349.)

Valerie is a certified appellate specialist who represents plaintiffs exclusively. She has affirmed jury verdicts on appeal without defeat. She also handles appeals from summary judgments, obtaining reversals at triple the average rate. Valerie was Consumer Attorneys of California's 2016 Marvin E. Lewis recipient and a final nominee for CAOC's 2015 Consumer Attorney of the Year for her work on



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appeal that led to the successful resolution of elder abuse case Boice v. Emeritus. *In 2014, she received CAOC's Street Fighter of the Year award for her work as lead appellate counsel in the published case of* Young v. Horizon West, *(2013) 220 Cal.App.4th 1122. Valerie is a Super Lawyer and is rated AV Preeminent by Martindale Hubbell. Email her at valerie@plaintiffsappeals.com or, for tort and trial case updates, follow her on Twitter @4Appeals. To learn about her PAC that helped elect California's first woman Lieutenant Governor and a record-breaking ten new progressive women to legislature, go to www.fundher.org.*

Endnotes

[1] *Krouse v. Graham*, 19 Cal.3d 59 (1977).
[2] *Clemens v. Regents of Univ. of Cal.*, 8 Cal.App.3d 1 (1970).
[3] *Smith v. Covell*, 100 Cal.App.3d 947 (1980).